Humanitarian Visas and Extraterritorial *Non-Refoulement* Obligations at Embassies

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Abstract

The immigration control systems of most developed states today seek to prevent asylum seekers and other migrants from reaching their territories, as states presume that non-refoulement and other human rights and refugee protection obligations only apply to individuals within their territory. This has forced refugees to travel irregularly with devastating consequences, and as a response to the escalating humanitarian crisis of large irregular migration flows, the idea of humanitarian visas emerged as a way of enabling legal pathways for asylum seekers and refugees, while allowing states to maintain extraterritorial migration control mechanisms.

How the principle of non-refoulement relate to the processing of such visas is the main focus of this thesis. It aims to answer the question of to what extent international refugee and human rights law infer non-refoulement obligations of states when an individual applies for a humanitarian visa at diplomatic or consular offices located in other states.

It uses a classical analytical legal method in interpreting the extraterritorial scope of the principle of non-refoulement as laid down in international treaties. The thesis concludes that non-refoulement obligations stemming from several treaties under international refugee and human rights apply when, and wherever, a state is exercising jurisdiction – and that the processing of humanitarian visas can be considered as such an exercise of jurisdiction that trigger these obligations. Finally, it concludes that the non-refoulement principle may prevent states and their diplomatic missions from denying access to an applicant or from removing it to the territorial state.
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1. Introduction

1.1 Scene Setter

The immigration control systems of most developed states are today characterized by ‘extraterritorial’ mechanisms that control the movement of refugees and migrants before they reach the territory of the destination state.¹ With the emergence of modern systems of social organization and regulation of large parts of economic and social life, governments began to safeguard critical entitlements for the benefit of their own citizens. The idea of the nation state and the importance of boundaries between insiders and outsiders is seen most clearly in the development of comprehensive systems of migration control.² States are within their rights to decide over the admittance of aliens to their territory – it is among the most defining prerogatives of the nation state.³ However, although this sovereign right is well established, states’ discretion in the adoption and enforcement of migration policies is limited by their obligations under international and regional human rights and refugee law. Treaties on human rights and rights of refugees give at hand that in certain circumstances an alien may enjoy the protection of treaties even in relation to entry or residence. Of great importance is the fundamental principle of non-refoulement that places a limitation on the right of states to control who remains on their territory, and when an individual makes a refugee claim it obliges states to consider the merits of that claim before removing the individual. Resting on the premise that non-refoulement and other human rights obligations only apply once the asylum seeker has reached the territory of a state, denial of access to territory has become the objective of many states wishing to avoid the requirement to abide by certain peremptory obligations, such as non-refoulement.⁴ The various extraterritorial migration control mechanisms that states have developed thus seek to prevent asylum seekers from entering their territory, where they could assert their entitlement to the benefits of international refugee and human rights law.⁵ Examples of such mechanisms are visa requirements imposed on nationals of refugee-producing countries, identity controls, sanctions against any carrier that agrees to transport a

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¹ This is especially true for European countries, but also for the US, Canada, Australia and other developed countries, J. C. Hathaway, The Rights of Refugees under International Law (Cambridge University Press, 2005), p. 293.
² Ibid., p. 83.
person without a visa or identity documents, immigration officials in foreign airports, as well as interception of asylum seekers and other migrants on the high seas.\textsuperscript{6}

At the same time, the world has seen an unprecedented number of people fleeing their countries due to conflict, violence, human rights abuses, extremism, and poor governance. According to the United Nations High Commissioner for Refugees (UNHCR), over 60 million people are currently displaced.\textsuperscript{7} Due to the extraterritorial migration control policies employed by large parts of the developed world, there are few legal ways to reach countries that could offer protection. Refugees and asylum seekers are forced to take to desperate measures, resorting to the services of people smugglers, the use of false documents and dangerous means of transportation. They are often obliged to travel in inhumane conditions where they may be exposed to exploitation and abuse, as well as placing their lives at risk. Looking at the European situation for instance, every year thousands of men, women and children drown trying to reach Europe and refugees and other migrants spend over a billion euro per year to reach the European Union (EU), while the cost of deportations from the EU is, equivalent, close to a billion euro per year.\textsuperscript{8}

In search of solutions to the humanitarian crisis of large irregular migration flows and the lack of legal pathways for the admission of refugees and asylum seekers, the idea of “humanitarian visas” has made its way to agenda. For example, in 2016, during a high-level conference on Syrian refugees organised by UNHCR, several Latin American and European countries announced new humanitarian visa programmes as well as the expansion of existing ones, and in September the General Assembly adopted the New York Declaration for Migrants and Refugees, where the commitment to consider the expansion of various humanitarian admission programmes was made.\textsuperscript{9} It is becoming clear that humanitarian visas are seen as way of avoiding dangerous and expensive irregular journeys of refugees while allowing states to maintain extraterritorial migration control mechanisms. There is no standard model of humanitarian visas, but they are characterised by procedures that allow the individual to approach the potential host state abroad at em-


\textsuperscript{7} UNHCR Global Trends: Forced Displacement in 2015 (Report, 20 June 2016) \textit{<http://www.unhcr.org/576408cd7>}


bassies and consulates and apply for asylum or some form of protection, and that the state grants an entry permit in case of a positive response, either preliminary or final.

In light of the discussions on humanitarian visas, embassies and consulates may be faced with individuals in search of refuge. Questions of how these situations are related to the obligations of states, notably the principle of non-refoulement, under international refugee and human rights law are of interest for this study. States usually perceive these obligations as essentially territorial. This idea implicates that individuals need to enter a state to successfully claim protection, and as long as they have not succeeded in doing so, the approached state is discharged of its protection obligations under international law. That states can rely on the sovereign prerogative to control entry into its territory without constraints ordinarily posed by refugee and human rights law is disturbing. However, the perception that protection obligations follow territorial borders might be changing as the general development in international human rights law is moving towards an extension of obligations of states beyond territorial borders. The principle of non-refoulement may apply to activities of states beyond their sovereign territory, especially as the concept of jurisdiction in human rights law develops. This raises the question of whether humanitarian visas are discretionary acts of states wishing to facilitate the journey towards protection, or if they infer obligations on states under international refugee and human rights law. In the event that an asylum seeker makes a claim for protection at an embassy or consulate, is that state prevented from removing that individual due to the prohibition against refoulement?

1.2 Purpose and Research Question

In situations where an individual approaches a state on foreign territory demanding protection, it is critical to determine whether international obligations protecting against refoulement have equal bearing in territorial and extraterritorial situations, and what the nature of the relationship between the approached state and the individual must be to trigger these obligations. Questions of the extraterritorial application of human rights treaties and international refugee law will be at the centre of the inquiry, as well as the concept of jurisdiction. The thesis will touch upon the classic collision between the concept of state sovereignty, including jurisdiction seen as primarily territorial, and the universal aspirations of human rights law.

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The aim of the study is to investigate humanitarian visas with reference to non-refoulement obligations in the Convention Relating to the Status of Refugees (Refugee Convention),\textsuperscript{11} the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{12} the Convention against Torture (CAT),\textsuperscript{13} the Convention on the Rights of the Child (CRC)\textsuperscript{14} and the European Convention on Human Rights (ECHR).\textsuperscript{15} In 2005, Gregor Noll wrote that the Refugee Convention, CAT, and ICCPR did not impose a legal obligation to process an asylum claim at an embassy or consulate, but that the ECHR and the CRC indeed did so under certain – although exceptional – circumstances.\textsuperscript{16} Since then there have been important developments in jurisprudence on the extraterritorial reach of international human rights law, and the principle of non-refoulement has been strengthened. This might have altered the position on whether states are prevented from removing or refusing entry to an individual demanding protection at an embassy or consulate.

The research question is as follows:

To what extent do international refugee and human rights law infer non-refoulement obligations of states when an individual applies for a humanitarian visa in order to claim asylum at diplomatic or consular offices located in other states? The question can be divided into three sub questions:

1. What obligations do states have under international refugee and human rights law beyond their territorial borders? More specifically, do the non-refoulement obligation operate extraterritorialy?
2. What amounts to an exercise of jurisdiction for the purpose of human rights instruments? Can the issuing of humanitarian visas be regarded as such an exercise of jurisdiction?
3. Does the principle of non-refoulement prevent states from removing, or refusing entry to individuals with a well-founded fear of persecution or that could be exposed to serious human rights violations?

\textsuperscript{12} International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
\textsuperscript{13} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
\textsuperscript{15} Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended.
1.3 Method and Material

This thesis will use a classic analytical legal method to examine the accepted sources of international law. The three formal sources of international law are listed in article 38 of the Statute of the International Court of Justice and consist of international conventions (treaties), customary international law and general principles of law. Norms of human rights, refugee law and diplomatic relations, as well as the concept of jurisdiction and territorial sovereignty, stem from international law and can all be derived from these sources. While human rights law expand the scope of international law in obliging state parties as to their treatment of people, they form part of the general system of international law. Consequently, the legal analysis will be based on the sources and interpretative methodology normally applicable within international law.

International refugee law is generally seen as separate from human rights law, although the two regimes are related to one another. Conventions on human rights form an overlapping pattern of provisions. Most states are parties to most of the international treaties, in addition there are regional treaties that are widely ratified within their regions. This thesis will not account for regional instruments apart from the ECHR and the case law of the European Court of Human Rights (ECtHR), which has the statutory competence to interpret the Convention. This European focus is justified by the comprehensive jurisprudence of the Court and its influence on the development of international human rights law in general. Comparisons will be made to other regional systems and supervising organs when appropriate.

A major source of development in international law in general, and human rights law in particular, is that of secondary norms and non-binding instruments. Case law from international, regional and national courts and committees as well as resolutions, general comments and publications of United Nation (UN) bodies and international organisations will be used to interpret the primary sources. UN treaty committees such as the Human Rights Committee (HRC) and the Committee Against Torture (CAT Committee) have individual complaint mechanisms in which they communicate ‘views’. These views are not binding per se, but are often influential in bringing about internal legislative or administrative changes. An important part of all of the treaty committees’ work is their interpretative statements called ‘general comments’ that serve to clarify the

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17 Statute of the International Court of Justice, article 38(1).
19 Ibid., p. 638.
22 Crawford, supra note 18, p. 640.
application of specific provisions or issues relating to the treaties. Neither these are binding, but are nevertheless of significant normative value. The International Court of Justice (ICJ) stated that when considering issues arising in relation to human rights treaties, it will ascribe “great weight” to the interpretation of the treaty adopted by relevant court or committee. The UNHCR has the supervisory responsibility of the Refugee Convention by Statue, although it is less clear what normative value their standards have. When their views are not formally codified through the authoritative process of Executive Committee decision-making they are only considered to be part of a general assessment of the current state of refugee law obligations, as opposed to having strong normative or political value. This thesis will also present views of some of the leading scholars on the subject in order to problematize different stand-points and interpretations of the extraterritorial applicability of the principle of non-refoulement.

1.3.1 A Final Word on Interpretation

In accordance with the classical legal method, the interpretation of the relevant treaties will adhere to the Vienna Convention on the Law of Treaties (VCLT). This means interpreting the treaty in good faith in accordance with the ordinary meaning of the terms in their context, and in the light of the object and purpose of the treaty. Supplementary means of interpretation, such as the preparatory works (travaux préparatoires) or other relevant rules of international law applicable between the parties, can be resorted to when the general rule of interpretation leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

It will become clear in this study that the preliminary choices of interpretation of refugee and human rights treaties are decisive when analysing the extraterritorial reach of the principle of non-refoulement. Those in favour of a restrictive or territorial reading tend to rely on principles of national sovereignty and claim that the scope of international law is determined entirely by the will of states at the moment of conception. The consequence of this, is that the permissible interpre-

23 Crawford, supra note 18, p. 640.
26 Hathaway, supra note 1, pp. 113-115.
28 Ibid., article 31.
29 Ibid., article 32.
tation involves the minimum of obligations for the state party, a maxim named in dubio mitius.\textsuperscript{31} On the other side, there is the interpretative position that view international law as constraining the sovereignty of states. Lauterpacht and Bethlehem have argued that the object and purpose of the Refugee Convention, like other treaties of a ‘humanitarian character’, do not conform to the restrictive mode of reasoning, which they find to be relevant only between states, “in international law of coexistence”.\textsuperscript{32} The critique against in dubio mitius in treaty interpretation, and especially with regard to human rights instruments, has found support from a number of scholars.\textsuperscript{33} Supporting this view further is the Advisory Opinion of the International Court of Justice on Reservations to the Genocide Convention in which the ICJ contended that “[i]n such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those higher purposes which are the raison d’être of the convention”.\textsuperscript{34}

Aware of this preliminary conflict, the study will try to present arguments based on the two different positions to not reach a biased conclusion, and when one position is chosen over the other, this will be indicated.

\subsection{1.4 Limitations}

As this thesis does not primarily focus on developments in state practice, within an area where policies often are designed to avoid legal obligations, it might result in a conclusion that is overly optimistic in terms of human rights and refugee laws’ ability to constrain state behaviour. The system of human rights depend for its efficacy upon domestic legal system of states and thus fails when states obstruct or neglect to adhere to the provisions.\textsuperscript{35} For example, the decisions of the ECtHR in the series of judgment related to Turkey’s occupation of northern Cyprus were not implemented by Turkey. The reader should bear this in mind when following the reasoning in the study, as it will first and foremost be based on developments within legal structures.


\textsuperscript{35} Although ICJ pointed out that contrary practice does not undermine the formation of customary international law if the practice is condemned or the state in question does not claim to be acting as a matter of right, \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgement)} [1986] ICJ Rep 14.
The question of whether denying a humanitarian visa to an asylum seeker amounts to *refoulement* lie close, in practical terms, to the discussion on whether there is a ‘right to asylum’. This study will briefly touch upon this right, as it is laid down in the Universal Declaration of Human Rights (UDHR),\(^3^6\) but will not account for theories around the existence of such a legal obligation. Similarly, the “the right to leave any country” as embodied by article 12(2) of the ICCPR could potentially be of relevance to the research question. However, it is commonly disregarded that this provision can constrain immigration policies of states. It is viewed as firmly set apart, and subject to different principles of international law, from the right of entry and will not be included in this study.\(^3^7\)

As the research question has relevance for asylum seekers who have not yet left their country of origin or habitual residence, it would seem that instruments regarding internally displaced people should be taken into account. However, the main instrument specifically dealing with internally displaced people, the “Guiding Principles on Internal Displacement”, is not legally binding and to large extent restate and compile human rights and humanitarian law relevant for this category of people, and will therefore not be part of the study.\(^3^8\)

### 1.5 Outline

After this introduction, chapter 2 will present concepts that constitute the basis for the following study. These include the notions of state sovereignty, the principle of *non-refoulement* and the concept of humanitarian visas as well as examples of how they can be processed in practice. Also of relevance for the research question is what place embassies and consulates have in international law, why basic concepts of the law of diplomatic relations will be explained. Chapter 3 aims to answer the first sub question on what obligations states have outside of their territorial borders under international refugee and human rights law, in order to see whether the principle of *non-refoulement* operates extraterritorially. It will reach the conclusion that it has extraterritorial application when a state is exercising jurisdiction abroad. The following chapter 4 will continue with the second sub question by defining what extraterritorial jurisdiction under international human rights treaties entail and how this relates to jurisdiction in international law. Examples will be given of extraterritorial actions that courts and UN treaty-body committees has found as amounting to exercises of jurisdiction for the purpose of human rights obligations in general. It will also

look closer at case law where the acts of diplomatic and consular agents have been challenged, as well as cases concerning extraterritorial migration control, to examine whether states can assume jurisdiction over individuals who apply for humanitarian visas at diplomatic premises. If this can be answered in the affirmative, as this thesis will hold, the question remains if the non-refoulement obligation can prevent a state from removing, or refusing entry to an individual with a well-founded fear of persecution or that risk serious human rights violations. Chapter 5 will accordingly occupy itself with definitions and interpretations of the principle in this context, in order to answer the third sub question. The thesis will end with a conclusion and a final commentary of the issues at hand.
2. Background

2.1 State Sovereignty, Jurisdiction and Territory

The sovereignty and equality of states represents the basic constitutional doctrine of public international law, which governs a community consisting primarily of states having, in principle, a uniform legal personality.\(^{39}\) States that are considered as sovereign are equal in this respect and the concept can be compared with that of independence which refers to, \textit{inter alia}, the capacity to enter into relations with other states as well as the liberty of action inside its borders.\(^{40}\) In general, sovereignty characterises powers and privileges resting on customary law which are independent of the particular consent of another state.\(^{41}\) The notion of jurisdiction is closely linked to the concept of sovereignty as a state’s “title to exercise jurisdiction rests in its sovereignty”.\(^{42}\) Whereas sovereignty is shorthand for legal personality of statehood, jurisdiction refers to particular aspects of that substance and is characterised by the exercise of authority.\(^{43}\) It describes states’ competence and capacity under international law to regulate the conduct of natural and juridical persons as well as the consequences of events.\(^{44}\) It includes the activity of all branches of government, meaning the legislative, executive and judicial.\(^{45}\) The power to make laws, decisions and rules is usually named as \textit{prescriptive-} or \textit{legislative} jurisdiction and the power to take executive or judicial action is referred to as \textit{enforcement-}, \textit{executive-} or \textit{adjudicative} jurisdiction.\(^{46}\)

Sovereignty and jurisdiction are closely linked to territory, which have always had a central place in international law.\(^{47}\) As noted by Oppenheim, “a State without a territory is not possible . . . it is the space within which the State exercises its supreme, and normally exclusive, authority”.\(^{48}\) Sovereign territory principally extends over land territory and the territorial sea, including the airspace above.\(^{49}\)

\(^{39}\) Crawford, \textit{supra} note 18, p. 447 and Shaw, \textit{supra} note 3, p. 143.
\(^{41}\) Crawford, \textit{supra} note 18, p. 448.
\(^{42}\) Jennings and Watts, \textit{supra} note 3, p. 457.
\(^{43}\) Crawford, \textit{supra} note 18, p. 204 and Shaw, \textit{supra} note 3, p. 469.
\(^{44}\) Crawford, \textit{supra} note 18, p. 204 and Jennings and Watts, \textit{supra} note 3, p. 456.
\(^{45}\) Shaw, \textit{supra} note 3, p. 472.
\(^{47}\) Shaw, \textit{supra} note 3, p. 352 and Crawford, \textit{supra} note 18, p. 203.
\(^{48}\) Jennings and Watts, \textit{supra} note 3, pp. 563–564.
2.2 The Law of Diplomatic Relations

The law of diplomatic relations provide the basis for the extraterritorial jurisdiction exercised by states through their diplomatic and consular missions. As humanitarian visas will presumably be processed by diplomatic and consular agents, this section aim to investigate what jurisdictional freedom a state has to grant protection to aliens outside of their territory. The rules of international law governing diplomatic relations are a product of long-established state practice which has been substantially codified in the Vienna Convention on Diplomatic Relations (VCDR). Diplomatic relations normally involves the exchange of permanent diplomatic missions, which are established by mutual consent. The Vienna Convention on Consular Relations (VCCR) states that “[t]he consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations”.

Inviolability is an important aspect of the rules regulating diplomatic and consular relations and is a status accorded to premises, persons or property that are present in the territory of a state but not subject to its jurisdiction in the ordinary way. The receiving state is under a duty to abstain from exercising any sovereign rights, in particular enforcement rights, in respect of inviolability of the diplomatic mission from the sending state. Article 22 of the VCDR that provides for inviolability of the premises was established without any general exception and has remained central. The rationale behind these privileges and immunities was earlier on described by Grotius as a legal fiction where ambassadors were understood to be outside the territory of the receiving state. This idea led to the view during the middle of the eighteenth century, that diplomatic missions were portions of territory of the sending state under the doctrine of extraterritoriality. However, during the nineteenth century, reliance on extraterritoriality declined and there were numerous decisions of national courts to the same effect. It can be concluded that the theory of extraterritoriality is out-dated.

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53 Denza, supra note 51, p. 135.
54 Consular agents are somewhat different from diplomatic agents in that they are not afforded the same extent of immunity, Crawford supra note 18, pp. 411-413.
57 Denza, supra note 51, p. 136.
58 Ibid., pp. 136-137.
2.2.1 Functions of Diplomatic and Consular Missions

The functions of a diplomatic mission are specified in article 3 of the VCDR and involves the representation and protection of interest and nationals of the sending state “within the limits permitted by international law”, as well as the promotion of information and friendly relations. Additionally, paragraph 2 of the article states that “[n]othing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission”. Consular functions consist, amongst other things, of the issuing of passports and travel documents to nationals of the sending state, and visas or appropriate documents to persons wishing to travel to the sending state. Article 3 of the VCCR provides that these functions are exercised by consular posts and by diplomatic missions.

2.2.2 Limitations on Jurisdictional Competence

Article 3 provides that the function of diplomatic missions may only be exercised “within the limits permitted by international law” and article 41 of the VCDR emphasises the sovereignty of the territorial state by obliging diplomatic missions to not interfere with the internal affairs of that state, and that its laws and regulations must be respected. There are numerous examples of diplomats being declared persona non grata due to disregard, although some receiving states regard improper what other states view as encouragement of democratic freedom.

Only the ‘premises’ of a diplomatic mission are inviolable and ‘premises’ are in turn defined by reference to the function of diplomatic missions. Additionally, article 41(3) stipulate that they must not be used “in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State”. Article 55 of the VCCR mirrors article 41 of the VCDR while article 5 (m) indirectly limits the competence of consular agents by providing that consular functions are those “entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State”.

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60 Shaw, supra note 3, p. 547.
61 Article 5(d) of the VCCR.
62 Denza, supra note 51, p. 464 and Shaw, supra note 3, p. 547.
63 Denza, supra note 51, pp. 464-466.
64 Article 1(i) of the VCDR. See also Denza, supra note 51, p. 22.
The VCDR contains no express provision on diplomatic asylum. That article 41 refers to “special agreements” and “other rules of general international law” was intended to allow for bilateral recognition of the right to give asylum to political refugees within a mission, a custom practiced in Latin American states. In the absence of special agreements, the question of diplomatic asylum depend on the joint application of inviolability of the premises, the limitations imposed by article 41 and the definition of ‘functions’ of diplomatic missions. The Vienna conventions on diplomatic and consular relations do not categorize asylum as a recognised diplomatic or consular function, however, once an individual seeking protection has been accepted onto embassy property the receiving state cannot retrieve them due to inviolability. Thereto, the preamble of the VCDR states that “rules of customary law should continue to govern questions not expressly regulated by the provisions of the present Convention”, although whether there is a customary right of diplomatic asylum in international law is uncertain.

The notion of diplomatic asylum creates a conflict between the territorial jurisdiction of the state in which the embassy is physically located and the extraterritorial jurisdiction of the sending state. Goodwin-Gill and McAdam cite DP O’Connell: “an exception to the rule that the local jurisdiction covers persons, events and things, whether foreign or national within the territory of the acting State”, stating that whether diplomatic asylum forms part of international law is disputed for this reason. Denza claims that the sending state has a limited and temporary right to grant diplomatic asylum under customary law “at least when there is immediate danger to the life and safety of a refugee”. Brownlie argues that it is doubtful if a right of diplomatic asylum for either political or other offenders is recognized by international law. Satow is more circumspect, suggesting that the question remains an open one. ICJ recognized that there could be instances where the grant of asylum on diplomatic premises is sanctioned by international law, although it emphasizes the exceptional character of the proposition as it withdraws the individual from the jurisdiction of the territorial state and constitutes an intervention in matters which are exclusively

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65 Denza, supra note 51, p. 141.
66 Ibid., p. 472 and Crawford supra note 18, p. 404.
67 Crawford supra note 18, p. 404.
68 Ibid., p. 404
69 Shaw supra note 3, p. 551.
70 Goodwin-Gill and McAdam, supra note 6, p. 251.
71 Ibid., with reference to Jennings and Watts, supra note 3, p. 495.
72 Denza, supra note 51, p. 142.
73 Crawford, supra note 18, p. 403.
within the competence of that state.\textsuperscript{75} In the Asylum case, which concerned an individual accused of criminal activity, the ICJ stated that:

[\textit{In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.}]\textsuperscript{76}

Diplomatic missions remain in the territory of the receiving state, although the activities of diplomatic missions are to a large extent withdrawn from the territorial state’s jurisdiction due to inviolability. At the same time, the jurisdictional competence of the sending state is limited to diplomatic and consular ‘functions’. To issue travel documents and visas to foreigners is clearly a sanctioned function of missions. However, the position of diplomatic asylum is informative in terms of what freedom a state has to grant protection to aliens through its diplomatic missions. No general rule can be established that allow sending states to grant protection to non-nationals when this impedes the jurisdiction of the receiving state. However, there are circumstances where to offer protection, even to fugitives, may be allowed under customary law. Although definitions of these circumstances are vague, they appear to stem from humanitarian concern and the rights of individuals.

2.3 The Principle of Non-Refoulement

The principle of non-refoulement is often referred to as the cornerstone of the international refugee protection scheme.\textsuperscript{77} The principle prohibits, in general terms, the forced removal of an individual to a territory where he, or she, runs a risk of being subjected to persecution or flagrant human rights violations. There is no right to be granted asylum although article 14(1) of the UDHR provides that “everyone has the right to seek and enjoy in other countries asylum from persecution”. However, as article 14 of the UDHR is not considered to have customary status, it is not legally binding upon states.\textsuperscript{78} Consequently, the guarantee that no refugee will be sent back to a place where he or she is likely to face persecution or severe human rights violations constitutes the strongest protection that international law offer.

\textsuperscript{75} Asylum (Colombia v Perú) (Judgement) [1950] ICJ Rep 266, para. 10.
\textsuperscript{76} Ibid., para. 35.
\textsuperscript{78} Goodwin-Gill and McAdam, supra note 6, p. 175, with further references.
The principle is either explicitly provided for, as in the Refugee Convention, or can be derived from different human rights norms such as the prohibition against torture or the right to life. Additionally, the principle of *non-refoulement* can arguably be said to have the status of customary law. ICJ has concluded that consistency and general recognition is required for a principle to become a customary rule.\(^7\) Furthermore, the practice has to be conjured by duties of international law. Goodwin-Gill and McAdam argue that the principle of *non-refoulement* has by general consensus, as well as by having been enshrined in different international instruments, attained the status of customary international law.\(^8\) Lauterpacht and Bethlehem underline the nearly universal recognition of the *non-refoulement* principle, given that around 90 per cent of the UN states are party to one or more conventions that include the principle.\(^9\) Hathaway, on the other hand, argues differently and considers that the prohibition against *refoulement* is not part of customary international law, since state practice gives continuous violations at hand.\(^10\) This section will account for the protection of the principle that can be derived from the Refugee Convention and international and regional human rights law.

### 2.3.1 The Refugee Convention

The rights typically associated with the international protection of persons who flee their country are those set out in the Refugee Convention. The *non-refoulement* provision contained in article 33(1) of the Convention provides that “[n]o contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion”. Article 33(2) of the Refugee Convention provides exceptions to this rule, either where there exist reasonable grounds for regarding a refugee as “a danger to the security of the country” or the refugee “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.

The principle of *non-refoulement* applies to refugees within the meaning of article 1A(2) of the Refugee Convention, which requires the person to be outside his or her country of origin or habitual

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\(^9\) Lauterpacht and Bethlehem, *supra* note 32, p. 147.

\(^10\) Hathaway, *supra* note 1, pp. 36-39 and 363.
residence.\textsuperscript{83} It is important to underline that refugee status is declaratory and not constitutive. This means that the principle of \textit{non-refoulement} applies regardless of the formal recognition as a refugee by a state, why the principle in practice extends to asylum seekers as it require states to consider a claim for asylum before returning a person. It does not matter how the asylum seeker comes within the territory or jurisdiction of the state, what counts is what results from the actions of state agents once he or she does – if the asylum seeker is forcibly returned to a place in which he or she has a well-founded fear of persecution then that is \textit{refoulement} contrary to international law.\textsuperscript{84} Consequently, although the Refugee Convention lack a positive and express right to asylum, the principle of \textit{non-refoulement} has operated to prevent states from returning asylum seekers before they have had the opportunity to outline their protection claims.\textsuperscript{85} Noll has describes this right as a right of admittance, although “in a minimalist form of non-removal”.\textsuperscript{86}

\subsubsection*{2.3.2 Human Rights Instruments}

The protection of the rights of refugees stemming from the Refugee Convention is supplemented by international human rights law, which in some ways widens the scope of the \textit{non-refoulement} principle.\textsuperscript{87} For example, the prohibitions against \textit{refoulement} stemming from human rights law apply to all individuals, regardless of whether they have left their country of origin and there are generally no exception to the prohibitions.

Article 3 of the CAT expressly prohibits states from expelling, returning, \textit{refouler} or extradite an individual to another state where there are substantial grounds for believing that doing so would expose him or her to a danger of being subjected to torture. The CAT Committee has consistently affirmed that article 3 protects individuals from removal irrespective of their conduct.\textsuperscript{88} Furthermore, the prohibition against torture is part of international customary law and has attained the rank of a peremptory norm (\textit{jus cogens}), meaning that it is an absolute provision which does

\begin{flushleft}
\textsuperscript{83} A person is a refugee if he or she has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”, article 1A(2) of the Refugee Convention.
\textsuperscript{84} Goodwin-Gill and McAdam, supra note 6, pp. 232-233.
\textsuperscript{85} Ibid., pp. 244 and 383–384. See also Lauterpacht and Bethlehem, supra note 32, pp. 109-111 and Ogg, supra note 6, p. 85.
\textsuperscript{86} Noll, supra note 16, p. 548.
\textsuperscript{87} Goodwin-Gill and McAdam, supra note 6, p. 285 and Hathaway, supra note 1, p. 154.
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not permit any exceptions. The principle of non-refoulement inherits aspects of the absolute prohibition of torture, arguably also to some extent the *jus cogens* character.

Article 7 of the ICCPR provides that “[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment”. Although the provision does not explicitly proscribe *refoulement* to such ill-treatment, it is non-derogable and has been interpreted by the HRC as precluding the removal of people to places where they would face a real risk of such treatment. Furthermore, the HRC has accepted that removing an individual to face a real risk of a violation of other rights of the ICCPR could constitute *refoulement*.

The CRC obliges states to put the children’s best at primary consideration in all actions concerning them and article 22(1) obliges states to actively take measures to ensure that a child seeking refuge shall “receive appropriate protection and humanitarian assistance in their enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties”. The Committee on the Rights of the Child (CRC Committee) has affirmed that

> states shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.

Article 37 contains a prohibition against torture and ill-treatment while article 6 stipulates the obligation to recognize every child’s right to life and to ensure, to the maximum extent possible, the survival and development of the child.

The ECHR does not contain an express obligation to refrain from *refoulement*, although the jurisprudence of the ECtHR have interpreted it to offer a substantial protection for refugees and asylum seekers. Similarly to the international treaties, the prohibition against torture has been con-

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89 Shaw, *supra* note 3, p. 201 and Goodwin-Gill and McAdam, *supra* note 6, p. 301.
sidered to reflect the principle of non-refoulement.\textsuperscript{94} Additionally, the non-refoulement obligation can be triggered by a breach, or the risk of a breach, of the essence of several Convention rights,\textsuperscript{95} such as, the right to life,\textsuperscript{96} the flagrant violation of the right to a fair trial,\textsuperscript{97} the right to liberty,\textsuperscript{98} or the right to privacy.\textsuperscript{99} The most developed case law of the ECtHR on non-refoulement, however, concern article 3 and the prohibition against torture and other forms of ill-treatment it describes.\textsuperscript{100} The important case of Soering, emphasised the absolute nature of article 3, and that it applied irrespective of the applicant’s conduct.\textsuperscript{101}

Additionally, there are other regional human rights law instruments that prohibit refoulement; the American Convention on Human Rights, the African Charter of Human Rights and People’s Rights, the Inter-American Convention to Prevent and Punish Torture and the EU Charter of Fundamental Rights.\textsuperscript{102}

\textit{2.3.3 Chain Refoulement and Risk of Further Delivery}

Normally, refoulement involves refugees or asylum seekers being returned directly to a territory where they face a risk of persecution or human rights violations. However, it is widely accepted that the principle of non-refoulement includes protection from return to a place where the individual although not directly at risk of persecution or flagrant human rights violations, faces a danger of being subsequently returned to other territories where such risks exist.\textsuperscript{103} This is commonly re-

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\textsuperscript{94} This interpretation dates back to the 1960’s, see Goodwin-Gill and McAdam, \textit{supra} note 6, p. 210.
\textsuperscript{96} \textit{M.A.R v The United Kingdom} [1989] 161 Eur Court HR (ser A), para. 113, \textit{Einhorn v France} (European Court of Human Rights, Third section, Application No 71555/01, 16 October 2001), para. 32 and \textit{Al-Saadoon and Mufidi v The United Kingdom} [2009] 49 Eur Court HR 95, para. 149.
\textsuperscript{97} \textit{Othman (Abu Qatada) v The United Kingdom} [2012] 1 Eur Court HR 159, para. 233.
\textsuperscript{100} \textit{Soering v The United Kingdom}, \textit{supra} note 97.
\textsuperscript{102} Goodwin-Gill and McAdam, \textit{supra} note 6, p. 252, with further references. See also Committee against Torture, \textit{Annex IX: General Comment No. 01: Implementation of Article 3 of the Convention in the Context of Article 22}, UN Doc A/53/44 (16 September 1998), para. 2, Human Rights Committee, \textit{General Comment No. 31 (80): The Nature of the
ferred to as “chain” or “indirect” refoulement. For example the ECtHR case of T.I. v the UK made it clear that the ECHR forbids expulsion to states which do not have the necessary guarantees to protect individuals from onward expulsion to situations where they will be at risk.  

2.4 Humanitarian Visas

The right to enter the territory of a state is primarily reserved to nationals of that state. Non-nationals are generally required to obtain permission, usually in the form of a visa, to enter a foreign country. Visa policies allow a state to individually assess each person seeking entry, and permit a fairly wide discretion in admitting or refusing applicants. The common practice is to not issue visas for protection reasons. However, there are states that employ refugee specific admission regimes – such as humanitarian visas – that allow individuals to approach their diplomatic and consular missions to ask for asylum in the sending state. Humanitarian visas have recently been put forward as one possible solution to the global crisis of irregular migration and has been endorsed by the UNHCR and academia.

This section will explain the concept of humanitarian visas and show examples of how they can be processed at embassies and consulates in order to understand to what extent the potential host-state engages with an asylum seeker, as this has relevance when deciding whether this could trigger non-refoulement obligations of states.

2.4.1 Humanitarian Visas – Concept and Purpose

There is no standard model for humanitarian visas and they are often discussed in a cluster with other so called ‘protected entry procedures’. In the study “Safe Avenues to Asylum”, Noll describes the grant of a humanitarian visa as a practice by which destination states authorise their diplomatic representations in third countries, or countries of origin, to grant an entry visa on pro-

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General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 12 and, CRC Committee, General Comment No. 6 (2005), supra note 93, para. 27.

104 T.I. v The United Kingdom [2000] III Eur Court HR 435.

105 Jennings and Watts, supra note 3, pp. 897-898. Furthermore, article 12 of the ICCPR stipulates a right to enter one’s “own country” and the UDHR, in article 13, a right of return to one’s country.


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tection related grounds, but where the determination procedure is carried out in the territory of the destination state.

When analysing different humanitarian visa procedures, Noll could identify different types of models, although each country had developed its own criteria for procedure. While some countries allowed for an application to be submitted in the applicant’s country of origin as well as in a third country, others, only allowed requests for asylum to be submitted in a third country. Next section will look closer at two examples of how the processing of a humanitarian visa can be executed. It is important for the study as it indicates the level of contact established between the potential host state and the applicant.

2.4.2 Examples of State Practice

France issues “asylum visas” to individuals in need of international protection who have lodged a request with French consulates, in their country of origin as well as in third countries. There are no provisions in the French law regulating the procedure and the French representations have been given a broad margin of appreciation in the visa field. The request is pre-assessed during an interview by the diplomatic or consular agents based on, amongst other, the criteria laid down in the Refugee Convention, taking into account the applicants’ vulnerability and their risk of being subjected to *refoulement.* A negative initial visa decision may also be appealed.

The Netherlands offer the possibility of applying for an entry at Dutch diplomatic or consular representations to be admitted to the Netherlands as a refugee although such applications can only be submitted in third countries and not in countries of origin. After the application is lodged, representation staff will conduct an interview with the applicant, although the procedure differs from the one applied in the territorial asylum procedure within the Netherlands. The decision will be based on the Refugee Convention, as well as all other relevant international conventions to which the Netherlands is a party. Where the application is rejected, the applicant has the possibility to appeal the decision.

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111 Additionally, the individual’s connections with France and her or his integration perspectives are considered as positive elements.


114 The interview is conducted in Dutch as the official language, and the Dutch representation will not pay for an interpreter. Nor will legal assistance be provided for the applicant, *ibid.*, p. 51.
2.4.3 Relationship Between the Applicant and the Potential Host State

The idea of humanitarian visas are not to relocate the asylum procedure to the territories of other states or to diplomatic or consular premises but to grant an entry visa on protection related grounds for the purpose of seeking asylum in the destination state. In practical terms, however, when handling such visa applications the embassy and consular staff will encounter asylum seekers wishing to obtain an entry permit on protection related grounds. Each applicant will arguably be individually assessed before a decision is taken. This might involve interviews at the premises, the submission of documents to support identity and protection needs, the collection of personal information such as photos or DNA as well as the evaluation of vulnerabilities and risks of persecution or other human rights violations, that could be relevant for an asylum-application. Additionally, a majority of the states examined in “Safe Avenues to Asylum” allow negative decisions to be appealed, although reliable procedural information, interpretation and legal aid remain difficult to access. In any case, it seems rather safe to say that embassy and consular staff will interact quite extensively with any applicant and that they will become aware of potential risks that an individual could face if denied an entry visa or removed from the premises.

2.5 The Point of Departure

Humanitarian visas are processed in diplomatic and consular premises, which remain the territory of the receiving state although they are not subject to the jurisdiction of the territorial state in the ordinary way, due to inviolability. Issuing visas is a recognised function of diplomatic and consular missions, why it would seem that humanitarian visa policies are sanctioned exercises of jurisdiction in international law. Lawful exercises of jurisdiction ultimately depend on limitations posed by international law to not intervene in matters which are exclusively within the competence of the territorial state. From theories on diplomatic asylum it can be drawn that there is no general rule that allow sending states to grant protection to non-nationals, when this interferes with the jurisdiction of the receiving state. However, it has been accepted that some circumstances allow for an exception to the duty of non-intervention in the exclusive jurisdiction of other states, due to humanitarian concern, such as, the “danger to the life and safety” of an individual or when “arbitrary action is substituted for the rule of law”. The focus of diplomatic asylum is the conflict between states while the focus of this study is the relationship between the sending state processing humanitarian visas and the individual applicant. Recalling the principle of non-refoulement, it prohibits the forced removal of an individual to a territory where he, or she, runs a risk of being subjected to persecution or flagrant human rights violations. It also includes protec-

115 Ibid., pp. 19-20.
tion from return to territories where he or she faces a danger of being subsequently returned to other territories where such risks exists. As the cornerstone of the international refugee protection scheme it could have substantial relevance for a protection-seeker applying for a humanitarian visa if the principle of non-refoulement were to have extraterritorial application. In order to answer whether humanitarian visas infer non-refoulement obligations of states, the question of whether the principle can be applied to extraterritorial acts of states at all needs to be resolved. Next chapter will therefore examine what obligations states have outside of their territorial borders under international refugee and human rights law in general, to answer the first sub question of this thesis.
3. The Reach of the Principle of Non-Refoulement

With a procedure of humanitarian visas, asylum claims can be presented at embassies and consulates and allow asylum seekers to travel to the potential host state regularly. In the initial encounter between the refugee and the authorities of a potential asylum state, the protection against refoulement is the first and most important consideration. If states are bound by the principle of non-refoulement in relation to applicants for humanitarian visas, this could entail a legal obligation to not remove or deny that individual protection. To be able to establish a legal obligation for diplomatic or consular missions to refrain from refoulement in relation to individuals applying for humanitarian visas, two questions must be answered: (i) can non-refoulement obligations attach to extraterritorial actions of states and therefore potentially apply in relation to individuals applying for humanitarian visas and (ii) could states be in breach of the principle by denying access or entry or by removing an applicant? This chapter will focus on the first of these concerns and begin by presenting theories and case law relating to the extraterritorial application of article 33(1) in the Refugee Convention and the extraterritorial reach of several human rights instruments containing a prohibition against refoulement, as a first and crucial step in determining states’ international obligations to protection-seekers in diplomatic and consular offices on foreign territory. It will reach the conclusion that the principle of non-refoulement operates extraterritorially whenever a state is exercising jurisdiction.

3.1 The Refugee Convention

The Refugee Convention does not contain a general provision outlining its geographical applicability, rather, it defines the personal scope of various rights based on the level of attachment between the state and the individual. While a majority of rights contained in the Refugee Convention specifically refer to the required level of attachment, some core rights apply to all refugees, regardless of their legal or physical relationship to the asylum state. This is the case for the prohibition against refoulement laid down in article 33(1). As outlined above, the non-refoulement obligation in the Refugee Convention only applies to refugees within the meaning of article 1A(2), and therefore only to individuals outside of their country of origin or country of habitual residence. As embassies and consulates remain the sovereign territory of the receiving state, a person cannot be regarded as a refugee when seeking protection at premises in their country of origin. However, an asylum seeker can always cross an international border and claim asylum in an embassy once

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116 Hathaway, supra note 1, pp. 156-192.
117 See also articles 3, 13, 16(1), 20, 22 and 29.
outside his or her country of origin, and thus be regarded as a refugee within the meaning of the Refugee Convention.

Whether the prohibition of *refoulement* in article 33(1) has extraterritorial application is a question that has an inconsistent litigation history.¹¹¹ Many scholars and courts, as well as the UNHCR, states and other entities have occupied themselves with the interpretation of the geographical scope (*ratione loci*) of this provision. The answer as to what the correct understanding must be is still ambiguous and depend highly on what methods of interpretation that are given weight. This section will present the views of two contrary streams: those in favour of a restrictive interpretation, meaning that the provision is bound by state territory, and those in favour of an inclusive reading and the extraterritorial application of the provision. Those who argue for a territorial reading rely on the maxim *in dubio mitius*, while those who support an inclusive reading emphasise the special object and purpose of the Refugee Convention. Whether international human rights law and subsequent notions of jurisdiction should inform how the *ratione loci* of article 33(1) is to be understood is vital for the outcome of such an analyse.¹¹²

### 3.1.1 Territorial Application

One of the first superior courts to consider whether the principle of *non-refoulement* was applicable extraterritorially was the United States (US) Supreme Court in the case of *Sale v Haitian Centre’s Council*.¹²⁰ The case concerned the interception and return by American coastguards of a boat with asylum seekers from Haiti. The US Supreme Court concluded that article 33(1) was not applicable under the circumstances. The majority of the justices arrived at this conclusion by a literal interpretation of the wording of article 33(1) and held that the use of the words “expel” and “return” as well as the French term “*refouler*” had similar meanings to “deport”.¹²¹ The Court concluded that this indicated that article 33 only applied to asylum seekers and refugees already within the territory of a state because a state could not return, expel or deport a person without that person first being within its territory. Furthermore, the Court held that article 33(1) could not operate extraterritorially because it would render the exclusion clause in article 33(2) redundant, referring to the phrase “security of the country in which he is [ed]”. The Court acknowledged that an interpretation that excluded extraterritorial situations may “violate the spirit of Article 33”, but that “general humanitarian intent cannot impose contemplated obligations on treaty signato-

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¹¹¹ Ogg, *supra* note 6, p. 92.
¹¹² Other relevant factors are whether the principle is to be regarded as having customary status, to what extent the exception in article 33(2) and the law of state responsibility should be used as interpretive data.
ries”. Thus, the prohibition against *refoulement* was determined to apply only to persons “on the threshold of initial entry”, as the Court acknowledged that the negotiating history of the Convention warranted for application at the borders. The US and Australian courts still maintain a restrictive interpretation of the principle of *non-refoulement*.

There has been certain legal controversy around the conclusion of the US Supreme Court in *Sale v Haitian Centre’s Council*, and those in favour of a more inclusive reading of the *non-refoulement* principle often draw on the dissenting opinion of Justice Blackmun. In disagreeing with the majority, he argued that in interpretation, courts must give words their plain and ordinary meaning in light of the context and purpose of the legal instrument as a whole. In his view, article 33(1) did have extraterritorial application because of the purpose of the Refugee Convention, which was to prevent the return of refugees to a place of persecution. Therefore, Justice Blackmun held that, when interpreting the word “return” in light of the purpose of the Convention, there was no requirement for the refugee to first be in the state’s territory. When a case similar to *Sale v Haitian Centre’s Council* — concerning the same interdiction practices — came before the Inter-American Commission of Human Rights, it expressly disagreed with the US Supreme Court’s interpretation of article 33, and endorsed the view of the UNHCR, that article 33(1) “had no geographical limitation”.

### 3.1.2 Frontiers of States, High Seas or Beyond Any Geographical Limitation?

It is widely accepted that the principle of *non-refoulement* is applicable to the frontiers of a state’s territory. This is supported by the plain and ordinary meaning of *refouler* together with the phrase “in any manner whatsoever”, as well as the *travaux préparatoires*. Regarding interception or *refoulement* on the high seas, there appears today, in contrast to the US Supreme Court’s findings in *Sale*, to be ample support to extend the reach of the principle of *non-refoulement* also to such situations. Aware of the particularities of the circumstances of interception on the high seas, this study will not elaborate further on this discussion. Rather, it will examine whether the principle of *non-refoulement* can be extended beyond any geographical limitation.

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122 Ibid., para. 2550.
123 Ibid., paras. 181-182 and 187.
124 Costello, supra note 10, p. 294.
125 *Sale v Haitian Centre’s Council*, supra note 120, para. 2569.
127 Costello, supra note 10, p. 292, Lauterpacht and Bethlehem, supra note 32, p. 113, Noll, supra note 16, p. 549, with further references and Hathaway, supra note 1, p. 315.
128 Hathaway, supra note 1, p. 315.
In 2007, UNHCR issued an advisory opinion on the matter concluding that article 33(1) operates extraterritorially. It argues that the purpose, intent and meaning of article 33(1) is unambiguous and applies “wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State”.\(^\text{130}\) Of great importance for the interpretation of the UNHCR is not only the humanitarian object and purpose of the convention, but the evolving concept of jurisdiction in international human rights law and the extraterritorial application of such instruments.\(^\text{131}\) UNHCR also stress the customary status of the non-refoulement principle.\(^\text{132}\)

Hathaway and Den Heijer underline the choice of the drafters to use the phrase “in any matter whatsoever” which Hathaway argues was said to mean “various methods by which refugees could be expelled, refused admittance or removed”.\(^\text{133}\) They both emphasise the purpose of the Refugee Convention which, in Hathaway’s words, is “to provide rights to seriously at-risk persons able to escape from their own countries – a goal which would clearly be fundamentally undermined by an approach to Art. 33 which effectively authorized governments to deny them all rights by forcing them back home, so long as the repulsion occurred before the refugees reached a state party’s territory”.\(^\text{134}\) Hathaway states that the lack of any direct historical precedent for extraterritorial interception mechanisms may excuse article 33 for not explicitly emphasising an extraterritorial scope.\(^\text{135}\) Relying on the extraterritorial interpretation of human rights treaties he holds that the duty to respect international rights, including article 33(1) “inheres wherever a state exercises effective or de facto jurisdiction outside its own territory”.\(^\text{136}\) However, Den Heijer and Hathaway clearly exempts deterrence measures in countries of origin with reference to the definition of a refugee in article 1A(2).\(^\text{137}\)

Gammeltoft-Hansen reasons that it is not possible to extend the application further than to the border of states on the basis of a literal interpretation.\(^\text{138}\) Although by adding a contextual, historical and teleological interpretation, he concludes that the uncertainty regarding the scope ratione loci of the principle can be resolved. He states “[a] systematic analysis, consideration of subsequent developments [in soft law, state practice and instruments of human rights law] and the

\(^\text{130}\) UNHCR Advisory Opinion (2007), supra note 90, para. 24
\(^\text{131}\) Ibid., paras. 33 and 42-43.
\(^\text{132}\) Ibid., para 15.
\(^\text{134}\) Hathaway, supra note 1, p. 318.
\(^\text{135}\) Ibid., p. 337.
\(^\text{136}\) Ibid., p. 339.
\(^\text{137}\) Hathaway, supra note 1, p. 367 and Den Heijer, supra note 133, p. 141.
introduction of a principle of effectiveness yield a clear result that extends application ratione loci
to the jurisdiction of the acting state”. However, this is drawing heavily on the development in
international human rights law to extend protection beyond territorial borders to the extraterrito-
rial jurisdiction of states.

Lauterpacht and Bethlehem go the furthest in promoting an inclusive reading of the principle of
non-refoulement. They argue that it applies regardless of whether the relevant action of refoulement
occurs “beyond the national territory of the state in question, at border posts or other points of
entry, in international zones, at transit points”, to name a few. They state that the use of the
word “territories”, as opposed to “countries”, implicates that the important issue is whether it is a
place where the person concerned will be at risk and that the legal status of the place is irrele-
vant. This is why protection can be extended to include individuals in their country of origin
who are under the protection of another state. They continue: “[t]his may arise, for example, in
circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of an-
other state” and that “[i]n principle, in such circumstances, the protecting state will be subject to
the prohibition on refoulement to territory where the person concerned would be at risk”. This
suggests that the duty under article 33 is to avoid certain consequences, namely, return to the risk
of being persecuted, whatever the nature of the actions which lead to that result.

Goodwin-Gill and McAdam argue that the scope of the principle of non-refoulement as customary
law, is determined by the essential purpose of the principle and that it “regulates state action wherever it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction”. They submit that this is confirmed in instruments subsequent to the Refugee Convention, such as, successive resolutions in the UN General Assembly or the Executive Committee of the UNHCR Programme and in laws and practice of states. Despite this rather extensive inter-
pretation, they reserve themselves to the argument of Lauterpacht and Bethlehem concerning
individuals seeking protection at embassies. They state that to interpret “outside”, referring to
article 1A(2), in a jurisdictional sense rather than physical or territorial, is neither supported by
state practice or opinio juris.

139 Ibid., pp. 98-99.
140 Lauterpacht and Bethlehem, supra note 32, p. 122.
141 Ibid.
142 Ibid.
143 Ibid., pp. 112-113.
144 Goodwin-Gill and McAdam, supra note 6, p. 248.
145 Ibid.
146 Ibid., p. 250, with further references.
Noll points out that Lauterpacht and Bethlehem, as well as Goodwin-Gill and McAdam, interpret the applicability \textit{ratiōne loci} of article 33 by drawing analogies to human rights instruments and that they hence “bypass the wording, context and \textit{telos} of the treaty norm”.\footnote{Noll, \textit{supra} note 16, p. 552.} After confirming that article 33 could never be applicable in a country of origin of an individual, Noll, however, recognises that the provision could still be of relevance to individuals seeking protection in third countries. In terms of the wording of the provision, he acknowledges that the emphasis is on the final destination rather than the starting point, and that the term “in any manner whatsoever” implies that a wide array of practices were intended to be included in article 33.\footnote{\textit{Ibid.}, p. 553.} However, Noll does not find this sufficiently convincing to support an extraterritorial reading, why he turns to contextual and teleological arguments.\footnote{\textit{Ibid.}, p. 554.} In order to understand the term “\textit{refouler}”, Noll resorts to the same method as the US Supreme Court in \textit{Sale}, regarding the exception in article 33(2), and applies their argument on the situation of individuals seeking protection in embassies. He concludes that article 33(1) does not apply to the relevant situation, due to the “logical contortions” that such an application would have for article 33(2).\footnote{\textit{Ibid.}} Noll argues that his second contextual argument, drawing on state responsibility, is strong as article 33(1) “cannot be interpreted in isolation from the norms regulating the exercise of power among nation states in the international system” and that the conception of state sovereignty and responsibility in this doctrine must inform the context of article 33(1).\footnote{\textit{Ibid.}, p. 555.} He concludes that the law of state responsibility places great emphasis on the degree of control that a state has over a certain conduct, and that the situation require the removing agent to be a territorial sovereign. Noll is therefore satisfied that article 33(1) does not allow for “deducing a right to entry for protection seekers at diplomatic representations”.\footnote{\textit{Ibid.}, p. 556.} Noteworthy is that the argumentation of the US Supreme Court surrounding article 33(2) has been heavily criticised by scholars who state that the two paragraphs address different concerns. They mean that it is indeed perfectly logical for the, very limited, exception to the \textit{non-refoulement} obligation to only apply in situations where the asylum seeker could actually pose a critical risk to the asylum state, which would arguably be once present on state territory.\footnote{Hathaway, \textit{supra} note 1, pp. 336-337. Same analysis is made by UNHCR: “the clear wording of Article 33(1) and 33(2), respectively, which address different concerns, as well as the fact that the territorial scope of a number of other provisions of the 1951 Convention is made explicit”, \textit{UNHCR Advisory Opinion} (2007), \textit{supra} note 90, para. 28.}
3.1.3 International Human Rights Standards Informing the Interpretation of Article 33(1)

There is far from a consensus on the applicability *ratione loci* of article 33 of the Refugee Convention, and the reasoning of the above mentioned scholars are an example of how preliminary choices in interpretation are decisive. It is evident that it is insufficient to rely on “the plain and ordinary meaning” of article 33(1) and on contextual arguments, not the least as this has led prominent scholars on the subject to different conclusions. Article 31(3)(c) of the VCLT stipulates that interpretation must consider any relevant rules of international law applicable in the relation between the parties, thus allowing for an interpretation of the principle within its contemporary international legal context.\(^{154}\) As stated by the ICJ in the *Namibia* case; “interpretation cannot remain unaffected by subsequent development of law... an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”.\(^{155}\) The wider normative context gives at hand that the principle of *non-refoulement* has customary status, and that it is enshrined in several international and regional human rights instruments that overlap the protection provided for by international refugee law. UNHCR have clearly stated that international refugee law and international human rights law are complementary and mutually reinforcing legal regimes why article 33 must be interpreted in a manner which is consistent with developments in international human rights law. UNHCR also hold that is especially important as this is particularly pertinent to the question of the extraterritorial applicability of the prohibition of *refoulement*.\(^{156}\) As outlined above, this view is supported by the majority of scholars who argue for an extensive reading.\(^{157}\) Furthermore, state parties to the Refugee Convention expressly acknowledged that the Refugee Convention must be interpreted in conformity with international human rights treaties in a declaration adopted in 2001.\(^{158}\)

This author is of the view that developments in international human rights law, as an important element in the wider normative context, should inform the interpretation of the *ratione loci* of article 33(1) of the Refugee Convention. It will consequently conclude that the principle of *non-refoulement* can be applied to the extraterritorial acts of states, in line with the extraterritorial application of international and regional human rights treaties, that will be examined in next section. It

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\(^{154}\) Jennings and Watts, supra note 3, p. 1282.


\(^{156}\) UNHCR concludes that any restriction on the extraterritorial application of article 33 of the Refugee Convention “would be inconsistent with the relevant rules on international human rights law”, *UNHCR Advisory Opinion (2007)*, *supra* note 90, para. 43, *see also* para. 34.

\(^{157}\) Hathaway, *supra* note 1, p. 119.

will study when states are bound by human rights norms when acting abroad, by examining how the extraterritorial application of international human rights treaties have been developed by courts and treaty-bodies, as well as by state practice and in academia. The study will show that the broader field of international human rights law has undergone exceptional change in terms of extraterritorial application and that central for this development is the notion of jurisdiction.\footnote{Hathaway, \textit{supra} note 1, p. 119.}

### 3.2 Human Rights Treaties

The suggestion that the principle of \textit{non-refoulement}, as enshrined in international refugee law, operate beyond the territory of a state draw on the extraterritorial applicability of human rights treaties. Human rights treaties typically do not define the precise territorial or personal scope of the protection they contain and developments in international human rights law have made the notion of jurisdiction central in defining to whom and in what situations states are bound by their treaty-obligations. This section seeks to illustrate how the general reach of these treaties have developed in case law, academia and state practice to include extraterritorial acts of states. It is argued that jurisdiction has become the standard threshold criterion for human rights obligations to be triggered and that, from this, it can be drawn that obligations under human rights treaties, including the \textit{non-refoulement} principle, apply to all extraterritorial acts of states provided that these acts amount to exercises of jurisdiction. The ultimate question is whether the processing of humanitarian visas at embassies and consulates involves such an exercise of jurisdiction, as to infer obligations on states in relation to individuals seeking protection at the premises. To answer this questions, this section will first consider the extraterritorial application of the ICCPR, CAT, CRC, and the ECHR before turning to the question of humanitarian visas at embassies and consulates as a possible exercise of jurisdiction in the following chapter 4.

#### 3.2.1 International Covenant on Civil and Political Rights

Article 2(1) of the ICCPR defines the scope of the legal obligations of state parties to the Covenant. It provides that each state party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”. Some disagreement exists as to the scope \textit{ratione loci} of the ICCPR, and if the wording of article 2(1) can be read disjunctively – setting jurisdiction \textit{as well as} territory as the regional scope of the instrument. On the other side are those who argue for a cumulative reading which implicates that the Covenant applies within those parts of the territory where the state also has jurisdiction. Based on this cumulative reading some scholars have entirely rejected an extraterritorial application of...
the Covenant.\textsuperscript{160} It has been put forward by legal scholars, and to some extent also been acknowledged by the HRC, that a pure literal reading of the provision can only infer that “territory” and “jurisdiction” are cumulative requirements for a state’s obligations under the Covenant to be triggered.\textsuperscript{161} However, the HRC has despite this discarded this ordinary grammatical meaning of the words, as “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State Party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory”.\textsuperscript{162} In General Comment No. 31 it therefore concludes that states parties are required: “to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”.\textsuperscript{163}

The position of the HRC has received criticism as unconvincing in dogmatic terms, and that the wording of the provision does not allow for such an extensive interpretation.\textsuperscript{164} Furthermore, the US, Australia and Israel, among a few other states, oppose this interpretation by emphasising the negotiating history of the ICCPR, as well as the ordinary meaning of the words, in order to promote a territorial understanding.\textsuperscript{165} The US, who in particular rely on a restrictive interpretation of article 2(1) in relation to their detention facility in Guantanamo, additionally reject the competence of the HRC to issue authoritative interpretations of the text.\textsuperscript{166} However, there are numerous states who adopt and support the position of the HRC.\textsuperscript{167} More importantly, the HRC understanding of article 2(1) has been confirmed by the ICJ in the \textit{Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory},\textsuperscript{168} and the later case \textit{Democratic Republic of the Congo v Uganda}.\textsuperscript{169} In the aforementioned situation, the ICJ had to assess whether the international human rights conventions to which Israel is a party apply when Israel is operating outside

\textsuperscript{160} Noll, \textit{supra} note 16, p. 557.
\textsuperscript{161} Ibid., and Da Costa, \textit{supra} note 92, p. 89.
\textsuperscript{162} Human Rights Committee, \textit{Views: Communication No} 52/1979, 13\textsuperscript{th} sess, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) (\textit{Lopez Burgos v Uruguay}), para. 12.3.
\textsuperscript{163} HRC, \textit{General Comment No. 31} (2004), \textit{supra} note 103, para. 10.
\textsuperscript{164} Noll, \textit{supra} note 16, pp. 557-563.
\textsuperscript{165} Da Costa, \textit{supra} note 92, p. 90.
\textsuperscript{166} Milanovic, \textit{supra} note 46, p. 58 and Da Costa, \textit{supra} note 92, pp. 66-76. This position is maintained by the US although the US Supreme Court has recognized the constitutional right of \textit{habeas corpus} to be applicable at the facility, see Human Rights Committee, \textit{Concluding Observations on the Fourth Periodic Report of the United States of America}, 110\textsuperscript{th} sess, UN Doc CCPR/C/USA/CO/4 (23 April 2014), paras. 3.b and 4.a.
\textsuperscript{167} Da Costa, \textit{supra} note 92, p. 90.
\textsuperscript{168} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, [2004] \textit{Advisory Opinion}, ICJ Rep 136, paras. 108-111.
of its territory, in the Occupied Palestinian Territory (OPT). The Court concluded that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory” by adopting a purposive interpretation of the ICCPR.\(^{170}\) It held that “while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [ICCPR], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions”.\(^{171}\) With respect to the word “and” in article 2(1) the Court concluded that the travaux préparatoires show that “the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence”.\(^{172}\)

In *Democratic Republic of the Congo v Uganda* the ICJ found Uganda to be in violation of human rights obligations under articles 6 and 7 of the ICCPR in relation to areas, not only under military occupation, but also violations committed by its troops elsewhere in the territory of the Democratic Republic of the Congo.\(^{173}\) In both instances the Court largely endorsed the practice of the HRC on the issue, thus adopting the disjunctive interpretation of article 2(1). This jurisprudence from the ICJ, which is the principal judicial body of the international system, provides rather strong authority for an extraterritorial application of the Covenant.

Although perhaps not the case at its inception and although there is still some disagreement as to the *ratione loci* of the ICCPR, the overall conclusion speaks in favour of regarding the extraterritorial application of the Covenant to have been established successively. This also seem to be the predominant opinion of legal scholars.\(^{174}\) Obligations under the Covenant can therefore be triggered in cases where a state exercises jurisdiction, even when this is abroad.\(^{175}\)

### 3.2.2 The Convention Against Torture

Like the Refugee Convention, the Convention Against Torture does not set out the *ratione loci* of the instrument in one single provision, but differing scopes pertain to the respective articles. While article 3, concerning *non-refoulement*, does not contain any geographical scope, a number of

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\(^{171}\) Ibid., para. 109.

\(^{172}\) Ibid., paras. 108-109.


\(^{174}\) Goodwin-Gill and McAdam, supra note 6, p. 245, Hathaway, supra note 1, p. 169, Da Costa, supra note 92, p. 89, Gammeltoft-Hansen, supra note 31, p. 102, Costello, supra note 10, p. 293, Den Heijer, supra note 133 (in general) and Milanovic, supra note 46, p. 222.

\(^{175}\) Da Costa, supra note 92, p. 91, Den Heijer, supra note 133, p. 146, Goodwin-Gill and McAdam, supra note 6, pp. 244-245 and Gammeltoft-Hansen, supra note 31, p. 85.
articles specify “any territory under its jurisdiction”.\textsuperscript{176} Article 2(1) provides that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” and is considered as an ‘umbrella’ provision, providing the overarching structure for the entire treaty.\textsuperscript{177} The article has been interpreted by the CAT Committee along the lines of the HRC. In their General Comment No. 2 it stated that article 2(1) infer obligations on a state not only in its sovereign territory but also “in any territory under its jurisdiction”.\textsuperscript{178} Furthermore, “any territory” was stated to include “all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law” and that it referred to “prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control”.\textsuperscript{179}

The CAT Committee is thus rather explicit on the ratione loci of the Convention, extending it to situations where a state exercises jurisdiction de jure as well as de facto, while implicating that this does not only refer to situations of occupation but also jurisdiction exercised over individuals on foreign territory or at embassies and consulates.\textsuperscript{180} It has confirmed this proposition in several instances, for example in its periodical review of the US, the United Kingdom (UK) and Israel. Noteworthy is that the US, in their latest periodic review, withdrew their earlier position and acknowledged that they exercised jurisdiction at Guantánamo, and elsewhere where they controlled detention facilities.\textsuperscript{181} This was welcomed by the Committee who underlined that the prohibition applies “at all times and in all places”.\textsuperscript{182} The UK however, has yet to acknowledge this application of the Convention and is repeatedly urged to do so by the Committee.\textsuperscript{183} Furthermore, in the concluding observations concerning the periodic review of Israel, the Committee urged Israel to “acknowledge that the Convention applies to all individuals who are subject to its

\begin{footnotesize}
\begin{enumerate}
\item[176] Articles 2(1), 5(1)(a), 5(2), 11, 12, 13, and 16, and “territory under whose jurisdiction” in article 7(1).
\item[177] Da Costa, supra note 92, pp. 299-300.
\item[179] Ibid.
\item[181] Committee against Torture, Concluding Observations on the Combined Third to Fifth Periodic Report of the United States of America, 53\textsuperscript{rd} sess, UN Doc CAT/C/USA/CO/3-5 (19 December 2014), para. 10.
\item[182] Ibid.
\item[183] Committee against Torture, Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, 50\textsuperscript{th} session, UN Doc CAT/C/GBR/CO/5 (24 June 2013).
\end{enumerate}
\end{footnotesize}
jurisdiction”, recalling its General Comment No. 2 and the position of other UN treaty bodies as well as the ICJ.184

The Committee has stated that the understanding of the Convention, as devoid of any territorial limitation, is applicable in respect of all provisions of the Convention, thus including the prohibition against refoulement.185 This is evident in J.H.A v Spain, where Spain was held to exercise jurisdiction over refugees rescued at sea with the result of triggering their non-refoulement obligation.186 Furthermore, the Committee asserted in its periodic review of Australia that it must ensure its non-refoulement obligations with regard to their offshore processing of asylum claims.187 Further support can be found in its expressed concern of the practice of the US to transfer detainees from Guantánamo to Yemen.188

The absolute and non-derogable nature of the prohibition against torture, together with the purpose of the CAT to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”, as the preamble reads, speaks in favour of the more extensive application of the Convention formulated by the Committee. It would be inconsistent with the jus cogens nature of the prohibition against torture if states were not bound by the provision when acting abroad. Furthermore, the travaux préparatoires show that the original text prevented a state from practising torture within “its jurisdiction”.189 It was due to the fear that this might be interpreted too widely as to cover situations of citizens resident abroad that it was replaced with “any territory under its jurisdiction”, which is reminiscent of the reasoning of the ICJ concerning the word “and” in the ICCPR.190 Finally, it should be noted that two international political bodies, namely the UN General Assembly and the UN Human Rights Council, have, for the last decade, adopted resolutions clearly condemning torture and other forms of ill-treatment “at any time and any place whatsoever”.191

184 Committee against Torture, Concluding Observations on the Fifth Periodic Report of Israel, 57th sess, UN Doc CAT/C/ISR/CO/5 (3 June 2016), paras. 8-9.
186 J.H.A v Spain, supra note 180, para. 8.2.
189 Da Costa, supra note 92, pp. 267-268.
190 Da Costa, supra note 92, p. 267. See chapter 3.2.1.
191 Torture and other cruel, inhuman or degrading treatment or punishment, GA Res 70/146, UN GAOR, 3rd Comm, 70th sess, 80 plen mtg, Agenda Item 72 (a), UN Doc A/RES/70/146 (12 February 2016), adopted without a vote, para. 1 and
The practice of the Committee gives at hand that the exercise of jurisdiction *de jure* or *de facto*, wherever this occurs, trigger Convention obligations of the acting state. This interpretation is supported by state practice, the *travaux préparatoires* and a teleological interpretation that emphasise the *jus cogens* character of the customary norm and the wider normative context. This study will hence depart from the proposition that the CAT, and the *non-refoulement* obligation contained therein, is applicable whenever a state is exercising jurisdiction over territory or individuals, even when this is abroad.

### 3.2.4 The Convention on the Rights of the Child

Article 2(1) of the Convention on the Rights of the Child obliges signatory states to “respect and ensure the rights set forth in the present Convention to each child within their jurisdiction” leaving no room for doubt as to the *ratione loci* lacking a geographical limitation. Furthermore, the CRC Committee has consistently confirmed that Israel is obliged under the Convention in relation to children in the OPT, additionally confirming a factual understanding of jurisdiction.\(^{192}\)

### 3.2.5 The European Convention on Human Rights

Like the CRC, the ECHR is absent of an express definition of its geographical scope, instead article 1 of the Convention states that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” and the ECtHR have interpreted this Article to include extraterritorial acts of states, subjecting them to ECHR standards.\(^{193}\)

### 3.3 Jurisdiction as the Threshold Criterion

International human rights law has undergone significant change in terms of extraterritorial application of treaty obligations. Central for this development is the notion of jurisdiction, which this author argues to have become the threshold criterion for human rights obligations to be triggered under the ICCPR, CAT, CRC and ECHR.\(^{194}\) As a consequence, *non-refoulement* obligations stemming from human rights law apply whenever a state is exercising jurisdiction abroad. It is within this context that the principle of *non-refoulement* in the Refugee Convention must be understood. As this author is of the view that developments in international human rights law should

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\(^{192}\) Committee on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel*, 63rd sess, UN Doc CRC/C/ISR/CO/2-4 (4 July 2013), paras. 9 and 35-36.

\(^{193}\) See chapter 4.2. For example, *Hirsi Jamaa and Others v Italy* [2012] II Eur Court HR 97.

\(^{194}\) Hathaway, *supra* note 1, p. 119.
inform the interpretation of the *ratione loci* of article 33(1) of the Refugee Convention, it is argued that this provision applies correspondingly. To interpret the principle of *non-refoulement* in international refugee law as applying whenever a state is exercising jurisdiction would thus be coherent with the obligations stemming from international human rights instruments. As put by Hathaway:

> [t]he small set of core refugee rights subject to no attachment requirement nonetheless applies to state parties which exercise *de facto* jurisdiction over refugees not physically present in their territory. This is not only a natural conclusion from the way in which the text of the Refugee Convention is framed, but is an understanding that is consistent with basic principles of public international law.\(^{195}\)

Gammeltoft-Hansen also emphasises that protection under the Refugee Convention should correspond to the normative developments of extraterritorial application of human rights obligations, and that in this, “Art. 33.1 cannot be left unaffected”.\(^ {196}\) To recapitulate, the study can proceed from the position that states are bound by the prohibition against *refoulement* wherever they exercise jurisdiction, under both international refugee law and international human rights law.\(^ {197}\)

The question of whether the provision of *non-refoulement* applies to protection-seekers at diplomatic missions thus depends on whether states can be considered to assume jurisdiction over such applicants. What actions that amount to exercises of jurisdiction, as to trigger human rights obligations, is a complex matter which is in no way uncontroversial. Next chapter will answer the second sub-question by defining what jurisdiction under the various treaties entail and under what circumstances extraterritorial acts of state have inferred human rights obligations of states.

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\(^{196}\) Gammeltoft-Hansen, *supra* note 33, p. 131. See also Hathaway, *supra* note 1, p. 163.

\(^{197}\) Gammeltoft and Hathaway, *supra* note 5, p. 238.
4. Extraterritorial Jurisdiction Defined?

The question of how ‘jurisdiction’ in human rights treaties can or should be defined when states act outside of their territories have been grappled with by several courts, UN treaty bodies and legal scholars, which in turn have formulated different constructions. Many scholars argue that the concept and function of jurisdiction in international law and human rights law should be understood separately, as they serve different purposes and focuses on different subjects.\(^{198}\) In international law, jurisdiction is central in defining the right of states to exercise power in relation to the rights of other states, whereas international human rights law is concerned with the question of when and to whom a state is bound to respect treaty obligations in a given situation, thus serving as a threshold criterion. The Oxford English Dictionary defines ‘jurisdiction’ as the exercise of a legal authority or power and a judicial organisation, but also “power or authority in general; administration, rule, control” and “the extent or range of judicial or administrative power; the territory over which such power extends”.\(^{199}\)

Jurisdiction in human rights law has been understood as to reflect the ordinary meaning in international law, referred to as jurisdiction \textit{de jure}. Apart from jurisdiction \textit{de jure}, courts and UN treaty bodies have construed jurisdiction \textit{de facto}, such as, effective control over territory and authority or control over persons, to ensure effective protection under the respective treaties. Jurisdiction \textit{de facto} thus extend human rights protection for individuals beyond legally sanctioned exercises of jurisdiction and is based on factual grounds. It is unclear how the different concepts of jurisdiction interact and, while having established jurisdiction \textit{de facto}, the boundaries and detailed application of such constructions remain vague. In order to answer the second sub question of whether states can assume jurisdiction over an individual who enters their diplomatic or consular premises to apply for a humanitarian visa and subsequently asylum, this chapter will work out the different notions of extraterritorial jurisdiction in human right law. It will conclude that states do assume jurisdiction over such applicants on the basis of both jurisdiction \textit{de jure} and \textit{de facto}.

4.1 Extraterritorial Jurisdiction in International Law

Human rights law usually departs from the position that jurisdiction should reflect the ordinary meaning in international law. Thereto, the processing of humanitarian visas is located on the ter-


ritory of other states, which complicates the jurisdictional assessment. This section will therefore account for extraterritorial jurisdiction as understood in international law in order to establish whether humanitarian visas can constitute an exercise jurisdiction *de jure*.

The focus of jurisdiction in international law is the entitlement of a state to act and has the purpose to establish whether an exercise of jurisdiction by a state is lawful or unlawful in relation to other states. The main rule is that jurisdiction follows the essential territoriality of sovereignty and grants power to states to regulate conduct for all things and individuals within their own territory. International law however recognises that jurisdiction may be exercised beyond sovereign territory as well, although such exercises of jurisdiction needs some specific basis in international law. The earlier perception was that, in absence of a rule in international law to the contrary, a sovereign state may do whatever it pleases, although following the case of *Arrest Warrant*, the ICJ strengthened the territoriality principle by stating that if a state wishes to project even its prescriptive jurisdiction extraterritorially, it must find a recognized basis in international law for doing so. The general rule concerning executive jurisdiction have always been that it is “territorial and cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention”. This infers that states cannot take executive action in the territory of another state without the consent of that state.

International law recognises that jurisdiction can be exercised extraterritorially on various grounds, although the definitions of extraterritorial jurisdiction are vague. Being aspects of sovereignty, the principle of territoriality and nationality are commonly accepted to create jurisdiction over acts, events and individuals abroad. The principle of nationality for example, allows states to legislate for its own nationals, even though not present within the state’s territory. Other principles used to assert jurisdiction over aliens are somewhat controversial, and Brownlie underlines that the *sufficiency* of grounds for jurisdiction, is normally considered relative to the territorial

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203 The ICJ stated that “restriction upon the independence of states cannot be presumed”, *Lotus* (*Judgment*), [1927] PCIJ (ser A) No 10, para. 18.
207 Shaw, *supra* note 3, pp. 474-499. The ECtHR recognises the following exceptions to the principle of territoriality: nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality, although they are “defined and limited by the sovereign territorial rights of the other relevant States”, *Bancovic and Others v Belgium and Others* [2001] XII Eur Court HR 333, para. 59.
208 The principle of territoriality have been given an extensive interpretation in criminal, Crawford *supra* note 18, pp. 458-59 and Jennings and Watts, *supra* note 3, p. 460.
rights of other states. Oppenheim, however, points out that “the coexistence of overlapping jurisdiction is acceptable and convenient” and notes that competing jurisdictions seldom become problematic. The law of diplomatic relations for example, allows states to exercise certain functions, without questioning the principal jurisdiction of the receiving state and is an example of de jure jurisdiction that territorial states have agreed to by consent, treaty or customary law. In an attempt to formulate a rule on extraterritorial jurisdiction in international law, Brownlie states that “[i]f there is a cardinal principle emerging, it is that of genuine connection between the subject-matter of jurisdiction and the territorial base or reasonable interest of the state in question”. This is confirmed by Oppenheim, who confirms the idea of a connection which should be sufficiently close “to justify that state in regulating the matter and perhaps also to override any competing rights of other states”.

Although international law recognises that states can exceptionally exercise jurisdiction beyond their borders, the scope of extraterritorial jurisdiction in international law is hard to define, and while the principle of territory stay the main rule, it rests on a system of concurring and sometimes competing jurisdictions. It is in this context that jurisdiction de jure, employed by courts and UN treaty bodies to define human rights obligations of states, should be understood.

4.2 ‘Jurisdiction’ for Human Rights Protection Purposes

In human rights law, jurisdiction acts like a threshold criterion, which must be satisfied in order for treaty obligations to arise in the first place, and does not, unlike international law, serve to determine the legal entitlement of states to exercise authority. It is argued that although the concepts can be related they are not the same in that that human rights and international refugee law do not contemplate whether the state action in question was ‘lawful’ under international law but, quite the contrary, aim to protect individuals from abuse and the arbitrary power of states. The ICJ has confirmed that obligations and responsibilities under international law do not cease to exist although the legal title to exercise power has done so. On the other hand, UN treaty bodies and the ECtHR have confirmed that jurisdiction must be understood as it is generally understood in international law. Analysing the case law from the UN treaty-bodies and the ECtHR, most scholars agree that, besides extraterritorial jurisdiction de jure, a differentiation is made between de facto jurisdiction due to control over a defined territory and de facto jurisdiction due to the

210 Crawford, supra note 18, pp. 457 and 477 and Jennings and Watts, supra note 3, pp. 456-458.
211 Jennings and Watts, supra note 3, p. 457.
212 Crawford, supra note 18, pp. 456-547.
213 Jennings and Watts, supra note 3, pp. 457-458.
exercise of authority or control over individuals. There is some ambiguity surrounding the extent of factual control or authority a state needs in relation to a person on foreign soil before he or she becomes subject to its jurisdiction for human rights purposes. The vagueness of the ECtHR and the UN treaty bodies has been heavily criticised by legal scholars, who on their behalf, have interpreted the case law in various ways, according different weight to different statements made by the Court. In order to examine how these different constructions relate to migration control and the activities of diplomatic and consular missions, and ultimately to the processing of humanitarian visas, this section will present the various notions of jurisdiction that have been developed in human rights law.

4.2.1 Jurisdiction de Jure

Understanding jurisdiction as reflecting the concept in international law provides that jurisdiction is primarily territorial, and that other instances of jurisdiction are exceptional and require a specific basis in international law. The ICJ, the UN treaty bodies and the ECtHR have repeatedly confirmed that there are situations where customary international law and treaty provisions have recognised the extraterritorial exercise of jurisdiction, and that human rights obligations must follow that exercise. Such scenarios noted by the ECtHR, the CAT Committee and the HRC are, inter alia, activities of its diplomatic or consular agents abroad, and on board craft and vessels registered in or flying the flag of, that state. Understanding jurisdiction in line with its ordinary meaning in international law was emphasised by the ECtHR in Banković and has been confirmed subsequently. The HRC relied on the function of diplomatic missions and nationality to establish jurisdiction and thus ICCPR obligations in a series of cases where Uruguayan nationals living abroad complained against Uruguay due to the state’s refusal to issue or renew passports to ap-

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217 Bancović, supra note 207, para. 61. In line with the principle of territoriality, it is also unquestionable that treaty obligations concerning human rights applies to the whole territory of a state and thus individuals located in that territory, and that territory can not be exempted in order to avoid responsibility under the ECHR, Amur v France [1996] III Eur Court HR 826, CRC Committee, General Comment No. 6 (2005), supra note 93, para 12 and Goodwin-Gill and McAdam, supra note 6, p. 254.

218 Bancović, supra note 207, paras 71 and 73. Wall in the Occupied Palestinian Territory, [2004] Advisory Opinion, ICJ Rep 136, supra note 168, para. 111, CRC Committee, General Comment No. 6 (2005), supra note 93, para. 12, CAT Committee, General Comment No. 2 (2008), supra note 178, paras. 7 and 16 and Lopez Burgos v Uruguay, supra note 162.

219 CAT Committee, General Comment No. 2 (2008), supra note 178, para. 16, J.H.A v Spain, supra note 180, para. 8,2, and Bancović, supra note 207, paras 71 and 73. See also “passport cases” note 221.

220 Al-Skeini and Others v United Kingdom [2011] IV Eur Court HR 99, para 134 and Hirsi Jaama, supra note 193, para. 75.
In the case of *Lichtensztein v Uruguay* for example, it stated that “[t]he issuing of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is “subject to the jurisdiction’ of Uruguay for that purpose.” The European Commission on Human Rights (EComHR) also confirmed that ECHR obligations attach to the activities of consular authorities, in the early case of *X v Federal Republic of Germany*, where it pronounced that “the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make the country liable in respect of the convention”.

To rely on jurisdiction *de jure* when interpreting the applicability clauses in human rights treaties would mean that processing humanitarian visas would constitute an exercise of jurisdiction as to trigger human rights obligations, since the issuing of visas is a recognised function of diplomatic missions in the law of diplomatic relations. However, relying on jurisdiction *de jure* also means that this exercise must not interfere with the exclusive jurisdiction of the territorial sovereign, to even constitute a case of *de jure* jurisdiction in the first place. This notion of jurisdiction may therefore not necessarily trigger human rights obligations in relation to individuals e.g. charged with criminal offences or other persons of interest that the receiving state wish to exercise authority over. The British High Court was faced with such a situation in *R (B & Others) v SSFCA* regarding two asylum seekers who asked for protection at the British consulate in Melbourne, after having escaped from a detention centre where they were held under severe conditions.

The asylum seekers argued that the detention infringed articles 3 and 5 of the ECHR. In deciding on the issue of jurisdiction, the Court noted that consular authorities have limited authority in the receiving state and that the entitlement to exercise that authority focused in particular on nationals of the sending state and did not leave much room for securing or infringing ECHR rights. However, when deciding that the UK through its consulate, despite this limited authority, exercised jurisdiction over the two asylum seekers, the level of contact between them and the consular staff was considered in detail. The Court thus seemed to rely on factual circumstances and deliberations on effective control rather than a case of jurisdiction *de jure*. Furthermore, the

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222 *Lichtensztein v Uruguay*, *supra* note 221, para. 6.1.  
223 *X v Federal Republic of Germany* [1965] 12 Eur Comm HR 73, para. 5.  
224 See chapter 2.2.3 and 4.1  
225 *R (B) v Secretary of State for Foreign and Commonwealth Affairs* (2005) QB 643 EWCA Civ 1344.  
EComHR as well as the HRC, have handed down a series of cases related to states’ embassies abroad and their activities, where the notion of control and authority, as a result of factual circumstances, were used to assess the question of jurisdiction.\footnote{For example: \textit{Lopez Burgos v Uruguay}, supra note 162, Human Rights Committee, \textit{Views: Communication No 56/1979}, 13\textsuperscript{th} sess, UN Doc CCPR/C/13/D/56/1979 (29 July 1981) (\textit{Celiberti de Casariego v Uruguay}) and \textit{X v Federal Republic of Germany}, supra note 223. See also \textit{R (on the application of Sandiford) v SSFCA The Secretary of State for Foreign and Commonwealth Affairs} [2014] UKSC 44.} For example, in the \textit{Cyprus v Turkey} case, the EComHR observed that:

authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any persons or property ‘within the jurisdiction’ of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.\footnote{\textit{Cyprus v Turkey} [1975] 2 Eur Comm HR 125, para. 8.}

It is therefore argued that although activities in general of diplomatic and consular agents constitute exercises of \textit{de jure} jurisdiction, there are cases in which individuals are not considered as being subject to the jurisdiction of the sending state, unless it assumes authority or control \textit{de facto} over them.\footnote{See also \textit{Al-Skeini}, supra note 220, para. 134.} This allows us to draw the conclusion that it is necessary to examine cases of jurisdiction \textit{de facto} as well, to see whether individuals presenting themselves at embassy or consular premises in search of protection can trigger the application of treaty provisions also under this notion of jurisdiction.

\subsection*{4.2.2 Jurisdiction on Factual Grounds}

The extraterritorial application of human rights obligations does not solely depend on the lawfulness or unlawfulness of a given action, and the HRC, the CAT Committee as well as the ECtHR have founded jurisdiction on factual grounds in several cases concerning extraterritorial activities of states. This has also been confirmed by the CRC Committee.\footnote{CRC Committee, General Comment No. 6 (2005), supra note 93, paras 12 and CRC Committee, \textit{Concluding Observations on the Second to Fourth Periodic Reports of Israel} (2013), supra note 192, paras. 9 and 35-36.} The rationale behind this is that it would lead to absurd effects and gaps in protection to base jurisdiction solely on legitimacy and \textit{de jure} jurisdiction. However, the question that must be asked is what actions embassy and consular officials must undertake to assume jurisdiction over asylum seekers presenting themselves at the premises to apply for humanitarian visas in order for human rights obligations to be triggered.
4.2.2.1 Effective Control Over Territory

Effective control over territory via military means by occupation, invitation or acquiescence of the government of that territory, is such an exercise of jurisdiction that trigger the application of the ICCPR, CAT, CRC and the ECHR. In the heavily debated case of Banković, which concerned the bombing of a radio and television station in Belgrade by NATO, the ECtHR appeared to limit the extraterritorial application of the ECHR on factual grounds to cases where the state assumes effective control of a territory and exercises all or some of the public powers which that government would normally exercise. It was found that the victims did not come under the jurisdiction of the respondent states within the meaning of article 1 of the ECHR. However, in the intervening years, the Court found jurisdiction in several cases not dissimilar to Banković, such as, Issa v Turkey and Isaak and Others v Turkey. Nevertheless, the high level of control over the territory concerned, and the significance of military means in these cases, renders this notion of jurisdiction rather ill-suited for the case of asylum seekers and the exercise of jurisdiction over them at diplomatic and consular premises.

4.2.2.2 Authority or Control Over Persons

That authority over persons can entail an exercise of jurisdiction is most visible in decisions concerning the extraterritorial detention and custody of individuals. In the similar cases of Lopez Burgos v Uruguay and Celiberti de Casariego v Uruguay the HRC addressed the issue of the extraterritorial application of the ICCPR for the first time. The applicants had been abducted by Uruguayan security forces, in Argentina and Brazil respectively. In its views, the HRC did not consider itself incompetent to deal with the communications, although in both instances the arrest and initial detention took place on foreign territory. It stated that the reference to jurisdiction is “not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they oc-

233 Bancović, supra note 207, para. 71.
234 Ibid., para 70.
235 Isaak and Others v Turkey (European Court of Human Rights, Fourth section, Application No 44587/98, 28 September 2006) and Issa v Turkey (European Court of Human Rights, Fourth section, Application No 31821/96, 16 November 2004).
236 For the significance of military means, see also Illiaçcu and Others v Moldova and Russia [2004] VII Eur Court HR 1 and Pisari v the Republic of Moldova and Russia (European Court of Human Rights, Fourth section, Application No 42139/12, 21 April 2015).
237 Lopez Burgos v Uruguay, supra note 162 and Celiberti de Casariego v Uruguay, supra note 228.
The EComHR was faced with several similar cases where it was held that from the moment of the handover, the applicants were effectively under the authority, and therefore jurisdiction, of the respondent state. In establishing jurisdiction in these cases, jurisdiction de jure could have been relevant, in terms of consent of the territorial state or the nationality principle, although this is not referred to by the HRC or the ECtHR who base their assessments on control and authority.

The CAT Committee have confirmed that the Convention applies when states assume de facto jurisdiction over individuals outside of their territory. In *J.H.A v Spain*, it contended that Spain exercised the requisite degree of control over migrants rescued at sea from the time that the vessel was rescued and throughout the identification and repatriation process that took place in Mauritania, as Spain exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant de facto control over the migrants. Additionally, the CAT Committee explicitly refers to persons who are under the jurisdiction of the state party and “persons under the effective control of its authorities, of whichever type, wherever located in the world” in their concluding observations regarding Israel and US.

There are a few cases from the ECtHR that confirm that jurisdiction can be established over aliens abroad due to factual circumstances. One of the most important cases from the ECtHR, which is said to have expanded the notion of jurisdiction under the ECHR significantly, is the unanimous Grand Chamber judgment of *Al-Skeini* from 2011. In this case the ECtHR formulated an extension of jurisdiction, resulting from the exercise of state agents of physical power and control over persons, by stating that “[i]t is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual”.

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243. Ibid., para 136–137, with reference to *Öcalan*, supra note 239, *Issa and Others*, supra note 235, *Al-Saadon and Mufdhi v The United Kingdom* [2009] 49 Eur Court HR 95 and *Medvedev and Others v France* [2010] III Eur Court 1. However, in finding that all of the applicants were under the jurisdiction of the UK, the ECtHR based its conclusion on the UK’s exercise of “public powers normally to be exercised by a sovereign government” to find that the British soldiers “engaged in security operations in Basrah … exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom”, *Al-Skeini*, supra note 220, para. 149.
In some cases the ECtHR have gone so far as to suggest a cause-and-effect-type jurisdiction.\footnote{Such as cause-and-effect like notion of jurisdiction was implicated in the early \textit{Cyprus v Turkey} case when the EComHR observed that authorised agents engage the responsibility of a state, insofar as they, by their acts or omissions, affect persons or property, \textit{Cyprus v Turkey}, supra note 229, para. 8.}

One example is the case of \textit{Andreou v Turkey} where the Turkish-Cypriot troops had opened fire on demonstrators on Greek-Cypriot territory.\footnote{\textit{Andreou v Turkey} (European Court of Human Rights, Fourth section, Application No. 45653/99, 27 October 2009).} The Court stated that although Turkey exercised no control over the territory in which the applicant sustained her injuries,

the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as ‘within [the] jurisdiction’ of Turkey within the meaning of Article 1 and that the responsibility of the respondent State under the Convention is in consequence engaged.\footnote{Ibid., para. 11.}

Furthermore, in the case of \textit{Pad and Others v Turkey}, the ECtHR found seven Iranians killed by a Turkish military helicopter on Iranian territory to have been under the jurisdiction of Turkey,\footnote{\textit{Pad and Others v Turkey} (European Court of Human Rights, Third section, Application No. 60167/00, 28 June 2007), paras. 54–55, cited in Den Heijer, supra note 133, pp. 40–41.} and in the admissibility decision \textit{Xhavara and others v Italy and Albania}, the ECtHR found Italy to be subject to the Convention standards when its naval vessel collided with an Albanian boat in an attempt to intercept it, with the result of killing irregular migrants on board.\footnote{\textit{Xhavara and others v Italy and Albania} (European Court of Human Rights, Fourth section, Application No. 39473/98, 11 January 2001).}

From this case law it can be drawn that authority or control over persons trigger human rights obligations of states as this constitutes exercises of jurisdiction \textit{de facto} over the individuals concerned. There is some ambiguity surrounding the extent of factual control or authority a state needs in relation to a person on foreign soil before he or she becomes subject to its jurisdiction. The majority of cases involve interception on the high seas or physical control by abduction, detention and arrest. On the other hand, in the cases of \textit{Andreou v Turkey}, \textit{Xhavara and others v Italy and Albania} and \textit{Pad and Others v Turkey} jurisdiction was found although no physical control of the individuals were at hand, and less consideration was given to the “effective control” over the individuals. Rather, the ECtHR seemed to rely on the fact that the state, through its agents, had effected the human rights of the applicants adversely. Furthermore, the landmark judgement of \textit{Al-Skeini} combined the personal and territorial aspect to establish a jurisdictional link between the deceased and the UK. Before comparing these situations to the circumstances of an asylum seeker applying for a humanitarian visa at an embassy or consulate, some cases that involve juris-
dictional assessments in relation to the activities of diplomatic and consular missions, as well as in relation to migration control, will be accounted for.

4.2.3 Jurisdiction at Embassies and Consular Premises
There are relatively few cases where the activities of diplomatic and consular agents abroad have triggered human rights obligations in relation to non-nationals, and the reasoning in these judgements might be out-dated in light of recent developments in the application of human rights treaties to the extraterritorial acts of states. Nevertheless, they still offer some guidance on the level of authority over an alien that diplomatic and consular officials need in order for it to be defined as a case of de facto jurisdiction and under what circumstances a state assumes human rights obligations due to the acts of diplomatic missions. It is argued that the important factor when deciding if diplomatic and consular agents exercise jurisdiction over aliens is the level of engagement and contact between them, as well as physical presence at the premises.

In R (B & Others) v SSFCA, exemplified above, the British High Court found jurisdiction after a thorough contemplation of the level of contact between the asylum seekers and the consular staff. The asylum seekers had presented themselves at the consulate with a written statement which said that they claimed asylum. Before being removed from the premises, they were welcomed into the office area and told that they would be kept safe there while on consular premises, meanwhile the consular staff looked closer into their claim and sought guidance from superiors. Despite the minimal contact between the asylum seekers and the consular staff, the Court was “content to assume (without reaching a positive conclusion on the point)” that these events placed the asylum seekers under the jurisdiction of the UK as the consular staff had authority and control over them. The Court supported this conclusion by stating that “the applicants were told that while they were in the Consulate they would be kept safe” and in that they were given “temporary shelter in the Consulate while consideration was given to their written requests for assistance and, in particular, for the grant of asylum.”

Another case concerning the alleged breach of the non-refoulement principle is Munaf v Romania, which was decided by the HRC. The applicant, an Iraq-American dual national, had spent a couple of hours at the Romanian embassy in Iraq subsequent to a rescue-operation from a kidnapping of him and other Romani nationals. Shortly after leaving the premises, the applicant was charged with a criminal offence, arrested and detained in a camp where he was subjected to tor-

249 R (B & Others) v SSFCA, supra note 225, para. 66.
250 Ibid.
ture and ill-treatment and subsequently sentenced to death. Romania argued that he “was neither in its territory nor subject to its jurisdiction.”\textsuperscript{252} The HRC however, declared the application admissible, and requested clarifications on whether the Romani authorities were aware of the risk that awaited the applicant, implicitly stating that Romania did in fact, have jurisdiction over the applicant despite the fact that the applicant left the premises by own will.\textsuperscript{253}

The early, although still relevant, case of \textit{M v Denmark} concerned a German citizen claiming a violation of ECHR rights by Danish consular agents.\textsuperscript{254} The applicant wanted to flee from East Germany to West Germany and had entered the consular premises, together with a group of others, and requested negotiations with the East German authorities regarding a permit to leave the country. The Danish diplomatic agents requested them to leave after some negotiations, which the group did, when the East German police asked them to do so at the request of the Danish Ambassador, and were immediately arrested and detained. The complaint against Denmark was based on arbitrary detention and contained allegations that Denmark deprived him of his right to move freely on Danish territory and that Denmark expelled him unlawfully, amongst others. The EComHR ultimately found the application inadmissible.\textsuperscript{255} However, some interesting remarks were made on the embassy’s jurisdiction over the applicant and the other individuals:

\begin{quote}

diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged … Therefore, in the present case the Commission is satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of Article 1 (Art. 1) of the Convention.\textsuperscript{256}
\end{quote}

In \textit{X v United Kingdom} the applicant complained of a violation of article 8 of the ECHR due to the failure of the British Consul to intervene in a dispute concerning her child, that the father had taken to Jordan.\textsuperscript{257} The EComHR recalled their statement from the Cyprus cases, and although the case involved a national, the question was framed according to the authority exercised by state agents abroad. It stated: “\[t\]herefore, in the present case the Commission is satisfied that even though the alleged failure of the consular authorities to do all in their power to help the applicant

\textsuperscript{252} \textit{Ibid.}, paras. 14.2, 14.5 and 7.5.
\textsuperscript{253} \textit{Ibid.}, paras. 7.5-8.
\textsuperscript{254} \textit{M v Denmark} [1992] 73 Eur Comm HR 193.
\textsuperscript{255} The EComHR did not find the violations of the ECHR imputable to Denmark as the provisions invoked by the applicant were “not applicable to his case” and that the events did not “engage the responsibility of Denmark” referring to the \textit{Soering} doctrine which it did not find the circumstances exceptional enough to apply, \textit{ibid.}, paras. 1-2.
\textsuperscript{256} \textit{Ibid.}, para. 1.
\textsuperscript{257} \textit{X v United Kingdom} [1977] 12 Eur Comm HR 73.
occurred outside the territory of the United Kingdom, it was still ‘within the jurisdiction’ within the meaning of Article 1 of the Convention”.

From this it can be drawn that jurisdiction over individuals may arise in relation to the activities of diplomatic missions, either by the physical presence of an individual or through actions taken by the diplomatic agents. Of importance is the level of engagement and contact between the diplomatic mission and the individual. Next section will look closer at a couple of cases concerning extraterritorial migration control of states in order to see whether actions undertaken by state officials in relation to individuals seeking entrance can constitute exercises of jurisdiction as to trigger human rights obligations.

4.2.4 Jurisdiction and Migration Control

That states are bound by human rights obligations when exercising extraterritorial migration control have been a controversial standpoint, but is becoming less so with the strengthening of the principle of non-refoulement. As visa regimes form part of extraterritorial migration control mechanisms of states, it is relevant to examine when such migration control activities have been seen as amounting to exercises of jurisdiction over the individuals concerned as to trigger non-refoulement obligations in relation to them.

In the Roma Rights case, the UK House of Lords addressed the issue of extraterritorial applicability of article 33 of the Refugee Convention. British immigration officers were posted at the airport in Prague in order to prevent individuals who stated that they wanted to claim asylum in the UK, or those who the officers concluded were intending to do so, from boarding any aircraft bound for the UK. The applicants alleged that this was a violation of the prohibition against discrimination and the prohibition against torture as well as constituted refoulement. The House of Lords did not find article 33 applicable, as the applicants had not left their country of origin. However, it found prohibitions against discrimination under various human rights treaties to have been violated, although the migration control functions were carried out on foreign soil. Although the principle of non-refoulement was disregarded the House of Lords confirmed that migration control on another state’s territory constitutes exercises of jurisdiction as to trigger human rights obligations towards the individuals seeking entry.

258 The Commission, however, concluded that consular authorities had done all that could be reasonably expected of them, and declared the application inadmissible, Ibid., para. 74.
259 R (European Roma Rights Centre) v Immigration Officer at Prague Airport, [2004] UKHL 55.
260 Ibid., paras. 104-105.
The 2012 Grand Chamber decision of the ECtHR, Hirsi Jamaa, considered Italy’s interception of, and decision to return, a boat from Libya without determining if anyone on board was in need of protection.\(^{261}\) The migrants were transferred to an Italian military vessel and brought to Libya against their protests. The Court recognised that Italy had jurisdiction both de jure and de facto. Firstly, it was a case of de jure jurisdiction as the vessel was sailing under the Italian flag on the high seas.\(^{262}\) Secondly, the individuals were under the de facto control of the Italian authorities from the moment they boarded the Italian armed forces as the Italian crews “were composed exclusively of Italian military personnel”.\(^{263}\) Moreover, Judge Pinto de Albuquerque elaborated further, in a concurring opinion, on jurisdiction in relation to extraterritorial migration policies and measures of states. Under his approach, jurisdiction would embrace and subject all official border control-related activities to ECHR standards, irrespective of where or by whom they were carried out, including denial of entry to territorial waters, denial of visa, denial of pre-clearance embarkation or provision of funds, equipment or staff to immigration control operations performed by other states or international organisations on behalf of the Contracting Party.\(^{264}\) The underlying message of the concurring opinion is that no state can “evade its treaty obligations in respect of refugees by using the device of changing the place of determination of their status”.\(^{265}\)

4.3 The Processing of Humanitarian Visas as a Case of de Jure and de Facto Jurisdiction

This chapter has examined the different notions of jurisdiction that courts and UN treaty bodies have used in order to decide whether states were bound by their human rights obligations when acting extraterritorially. Jurisdiction in international human rights law can firstly be understood as the legal notion of jurisdiction – de jure – which to a large extent mirror the concept in international law. However, from the case law of the ECtHR and the UN treaty bodies, as well as by developments in legal doctrine, it can be concluded that jurisdiction as understood in international law does not fully correspond to the idea of jurisdiction in human rights treaties. Jurisdiction has also been interpreted to include instances where states exercise jurisdiction abroad based on factual circumstances – de facto – such as effective control over territory or exercise of authority or power over an individual, regardless of the legality of the act in terms of international law. To include this factual notion of jurisdiction finds additional support in the meaning attributed to the word by the Oxford English Dictionary as “power or authority in general”.

\(^{261}\) Hirsi Jamaa, supra note 193.
\(^{262}\) Ibid., paras. 77-81.
\(^{263}\) Ibid., para. 81
\(^{264}\) Separate opinion Judge Pinto de Albuquerque, Hirsi Jamaa, supra note 193, pp. 75-77.
\(^{265}\) Ibid., p. 76.
To process humanitarian visas constitutes an exercise of de jure jurisdiction, as consulates and embassies embody a well-established scenario of de jure extraterritorial jurisdiction, and in that visa processing is part of their recognised functions. Noll concluded in 2005 that this could be derived from the Banković judgment and stated that the term within the jurisdiction “does not refer to a geographical, but to an administrative boundary, and the administrative reach of a state exceeds its territorial borders. In tracking these administrative boundaries, international law provides the benchmarks”. By referring to the law of diplomatic relations he concludes: “[t]herewith, it should be established beyond doubt that the grant or denial of an entry visa at a diplomatic representation forms part of the exercise of jurisdiction within the meaning of article 1 ECHR”. As the doctrine of jurisdiction de jure as formulated in Banković still stands, and has subsequently been confirmed in Al-Skeini and Hirsi Jamaa, this still applies in respect of the ECHR. Regarding the ICCPR, the ICJ as well as the HRC, have confirmed such a legal understanding of jurisdiction in human rights applicability clauses. The same is true under the CAT and the CRC.

Regarding jurisdiction de facto, there is arguably a possibility that an individual applying for a humanitarian visa at diplomatic or consular premises can trigger the application of human rights treaties due to factual circumstances. That the notion of effective control over territory can lie as a basis for this conclusion seems ill-suited, as the doctrine of extraterritoriality of diplomatic premises can be disregarded, and in that the sending state does not exercise a high level of effective control over that territory. The other approaches to de facto jurisdiction based on control and authority over persons however, could be of interest to our case.

Human rights obligations can be triggered when a state has physical power or control over an individual. It may be difficult to establish that consular or embassy officials could ever exercise such control over asylum seekers entering the premises to apply for a humanitarian visa when comparing this to situations of interception on the high seas or the arrest and detention of individuals. Any protection-seeker would enter the premises voluntary and would likewise be free to

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266 VCDR and VCCR. See Cyprus v Turkey, supra note 229, Banković, supra note 207 and Al-Skeini, supra note 220, Noll, supra note 16, Costello, supra note 10 and Milanovic, supra note 46.
267 Noll, supra note 16, p. 567.
268 Ibid., pp. 567-568.
269 See chapter 4.2.1. ICJ stated “while the jurisdiction of states is primarily territorial, it may sometimes be exercised outside the national territory”, Wall in the Occupied Palestinian Territory, [2004] Advisory Opinion, ICJ Rep 136, supra note 168, para. 109 and the HRC have repeatedly confirmed that nationality create jurisdiction for consular officials, see chapter 4.2.1.
270 CAT Committee, General Comment No. 2 (2008), supra note 178, J.H.A v Spain, supra note 180, CRC Committee, General Comment No. 6 (2005), supra note 93. See also chapter 4.2.1.
leave. On the other hand, in the cases of Andreou v Turkey, Xhavara et al v Italy and Albania and Pad and Others v Turkey jurisdiction was found although no physical control of the individuals was at hand, and in X v United Kingdom, although the case concerned a national, no physical contact was needed for the consul to assume jurisdiction over extraterritorial acts that affected the applicant’s right under the Convention. This was also the case in Lichtensztein v Uruguay and X v Federal Republic of Germany. In Al-Skeini the ECtHR implied that if state agents are in a position to abide by certain human rights obligations, they have ipso facto jurisdiction with regard to certain rights it is able to preserve.271 Furthermore, the cases of M v Denmark, R (B & Others) v SSFCA, as well as Munaf v Romania speaks in favour of a possibility of establishing that states exercise jurisdiction over asylum seekers presenting themselves at embassies and consulates in search of protection, depending on the level of engagement with the individual. Furthermore, in relation to migration control carried out in third countries, the UK House of Lords held in the Roma Rights case that provisions on discrimination were applicable on acts of extraterritorial migration control, and thus confirmed migration control, that did not involve physical custody of individuals, to be an exercise of jurisdiction. The concurring opinion of Judge Pinto de Albuquerque in Hirsi Jamaa would support the proposition that the issuing of humanitarian visas trigger human rights obligations. He even argues that visa policies in general trigger non-refoulement obligations, although case law on extraterritorial jurisdiction may not yet have evolved to support such a broad reading of state jurisdiction as the concurring opinion proposes.272

From all of this, the conclusion can be drawn that it is fully possible for the extraterritorial activities of diplomatic missions to be regarded as exercises of jurisdiction over aliens as to trigger human rights obligations in relation to them. When the embassy or consulate staff engages with the asylum seeker by conducting an interview, collecting personal information perhaps in the form of photos or DNA, reading and evaluating submissions and evidence relevant for the protection needs of the individual, as well as by offering temporary protection at the premises and the possibility to appeal a negative decision, the sending state could come in a position where it assumes jurisdiction over an applicant.

Chapter 3 reached the conclusion that the exercise of jurisdiction could trigger the application of the non-refoulement principle under international refugee law as well as under international human rights law.273 This chapter has shown that to process humanitarian visas amount to an exercise of

272 Separate opinion Judge Pinto de Albuquerque, Hirsi Jamaa, supra note 193, p. 76.
273 Hathaway, supra note 1, pp. 169-170 and 339.
jurisdiction *de jure* and that sending states may assume jurisdiction *de facto* over an applicant as it engages with it. Consequently, states are bound to respect the principle of *non-refoulement* in relation to applicants for humanitarian visas seeking protection at embassies and consulates. What must be asked then, is what this implicates for the sending state. Can the rejection of a humanitarian visa or the removal of an applicant from the premises ever amount to an act of *refoulement*? Next chapter will look closer into the applicability of the protection against *refoulement* in order to answer the last sub question of this thesis.
5. Extraterritorial Non-Refoulement Applied

Having established that states exercise jurisdiction over individuals entering diplomatic premises abroad for the purpose of applying for a humanitarian visa and that this in turn, trigger non-refoulement obligations of states, one question remains. The last sub question of this study is if the principle of non-refoulement can prevent a state from removing, or refusing entry to an individual with a well-founded fear of persecution or that could be exposed to serious human rights violations. This final chapter will look closer at definitions and interpretations of the prohibition the scope of its protection in order to conclude whether refoulement can occur by the denial of a humanitarian visa or the removal of an applicant from the premises.

5.1 The Act of Refoulement

5.1.1 Non-Refoulement Obligations Stemming from Human Rights Norms

Protection against refoulement stemming from international human rights norms – article 3 of the CAT aside – does generally not make mention of acts such as expulsion, return or refoulement. For example, prohibitions against torture or inhuman or degrading treatment merely declare that “no one is to be subjected to” such treatment, why these provisions do not depend on whether an act can be labelled as refoulement or whether the individual is outside her or his country of origin or the place where the risks of such treatment prevails. Furthermore, it is widely accepted that, when obligations are triggered, a state would be in breach if “by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment”. A breach can thus occur if the denial of a humanitarian visa or the removal from the premises of the individual has the direct consequence of exposing that individual to torture, inhumane or degrading treatment. This principle is applicable with respect to several human rights norms, such as, the flagrant violation of the right to a fair trial, the right to privacy and the right to life.

From the case law of the ECtHR it can be drawn that once jurisdiction under the ECHR is established, nothing precludes this principle from applying to extraterritorial acts of states as well. In the case of M v Denmark the EComHR found that the rights complained of did not give rise to

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274 Article 7 of the ICCPR, article 3 of the ECHR and article 37 of the CRC. See also Den Heijer, supra note 133, p. 147.
275 See chapter 2.3.3.
277 Al-Saadoon and Al-Siddi v the United Kingdom, supra note 243, covering the transfer of Iraqis detained by British troops in Iraq who, if handed over to Iraqi authorities, would face a real risk of treatment contrary to key Convention provisions.
any obligations for Denmark as the embassy premises were not part of the territory of the sending state and that the circumstances were not exceptional enough to engage the responsibility of Denmark. Since then, the extraterritorial application of the ECHR have developed substantially. Furthermore, the EComHR stated that “an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention”, thus confirming the application of this principle in relation to the activities of diplomatic agents.²⁷⁸ A case of great importance with regard to states’ extraterritorial migration control activities is the above mentioned case of Hirsi Jamaa. Judge Pinto de Albuquerque, in his concurring opinion states that:

if a person in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the [ECHR] a visa to enter the territory of that State has to be granted, in order to allow the launching of a proper asylum procedure in the receiving State. This will not be a merely humanitarian response, deriving from the good will and discretion of the State. A positive duty to protect will then arise under Article 3.²⁷⁹

In 2005, Noll similarly concluded that article 3 of the ECHR require a state to allow entry to an individual over whom it exercised jurisdiction, if there was a sufficiently large risk that the protection seeker would be subjected to treatment contrary to the provision if denied a visa.²⁸⁰ He stated that this was due to the positive character of the duty and, that in principle, all Convention rights may impact the legality of removal.²⁸¹ The crucial element in this analysis was the scope of the positive obligation, stemming from the wording of each specific right, in relation to the circumstances, which could be “assessed only in casu”.²⁸² Noll applied this reasoning to obligations under the CRC as well, observing that state parties

take upon themselves to ‘ensure’ that no child ‘shall be subjected’ to torture, which provides another example for the combining of negative and positive elements in the construction of human rights. Thus, the degree of positive obligations inherent in the formulation of a right determines the existence and reach of an implicit prohibition of refoulement. The same goes for a right to entry. The more predominant positive obligations are in the formulation of a right, the stronger a claim for non-refoulement or for an entry visa under that right is.²⁸³

Additionally, article 22 of the CRC explicitly require a state to “take measures to ensure” that a child who is seeking refugee status receives appropriate protection and the “best interest of the

²⁷⁸ M v Denmark, supra note 254, para. 1.
²⁷⁹ Separate opinion Judge Pinto de Albuquerque, Hirsi Jamaa, supra note 193, p. 70.
²⁸⁰ Noll, supra note 16, p. 564.
²⁸¹ Ibid., pp. 568-570.
²⁸² Ibid., pp. 565-570.
²⁸³ Ibid., p. 569.
child” principle enshrined in article 3 may add obligations owed under other instruments of international law. Noll as well as Gammeltoft-Hansen have concluded that article 22(1) can trigger obligations in cases where asylum seekers encounter authorities extraterritorially. Although allowing access to territory cannot be equated with the obligation to avoid *refoulement*, this is a strong indication of the fact that the *non-refoulement* obligation that can be derived from the CRC would prevent a state from removing a child from the premises or denying a child a humanitarian visa if this would expose that child to treatment contrary to the Convention.

The ICCPR is, like the ECHR, applicable when acts of a state as a consequence exposes an individual to violations of Covenant rights in another jurisdiction. With regard to *refoulement* in an extraterritorial setting, the HRC has confirmed that *refoulement* can occur when an individual is handed over from one jurisdiction to another in their latest periodic review of the UK, when it expressed concern over allegations about British special forces personnel handing over detainees into US custody at a secret prison in Baghdad. Furthermore, in the case of *Munaf v Romania* the HRC was prepared to consider the acts of the diplomatic mission to amount to *refoulement*, although they found that the risk was not foreseeable enough as to hold Romania responsible. The HRC has thus confirmed that state acts performed abroad, such as, to hand over individuals to third states’ authorities or jurisdiction of another state, that exposes an individual to a real risk of treatment contrary to fundamental rights of the Covenant, may constitute a breach of the principle of *non-refoulement* that can be derived from the ICCPR.

It is clear that *non-refoulement* obligations stemming from international human rights norms prevent states from denying access or forcibly removing an individual if this means that the individual would be exposed to risks of flagrant violations of human rights provisions. Looking at explicit prohibitions of *refoulement* the assessment might be somewhat different as the formulations refer to specific prohibited acts and places to where removal is forbidden.

5.1.2 Explicit Non-Refoulement Obligations

The meaning of the term *refouler* have been dealt with extensively by courts, UN treaty-bodies and scholars. In *Sale v Haitian Centre’s Council*, the US Supreme Court did a thorough examination of

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284 McAdam, supra note 95, pp. 251–274.
the literal meaning of the word *refouler* and found that the ordinary meaning of the expression was equivalent to repulse, repel, refuse entry, and drive back.\textsuperscript{289} The House of Lords rejected the proposition that the denial of asylum seekers to board a plane at a foreign airport constituted an act of *refoulement* in the context of the Refugee Convention in the *Roma Rights* case.\textsuperscript{290} UNHCR submitted a brief arguing that a state which obstructs the passage of refugees must do so within the law and that “pre-clearance” within the state of claimed persecution in this respect was to been seen as “rejection at the frontier”.\textsuperscript{291} This interpretation was not accepted by the House of Lords.\textsuperscript{292} Since then, the principle of *non-refoulement* has been substantially strengthened, as well as the extraterritorial application of the provision.

An enlightening part of the judgment in *Hirsi Jamaa* evolves around the extraterritorial collective expulsion of individuals. The ECtHR compared the extraterritorial interpretation of jurisdiction to an extraterritorial interpretation of expulsion. Noting that it should be understood as primarily territorial, as such acts were usually conducted from national territory, the Court then went on by stating that where it had been established that jurisdiction had been exercised extraterritorially it did “not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion”.\textsuperscript{293} It pointed out that to conclude otherwise would result in a discrepancy between the *ratione loci* of the ECHR as such, and the prohibition against expulsion and that this “would go against the principle that the Convention must be interpreted as a whole”.\textsuperscript{294}

Furthermore, in finding that the acts of the Italian authorities amounted to *refoulement*, the ECtHR attached particular weight to the fact that the intention of the act was to prevent irregular migrants from embarking on Italian soil.\textsuperscript{295} In his concurring opinion, Judge Pinto de Albuquerque, defines the act of *refoulement* as consisting, *inter alia*, of “removal, informal transfer, “rendition”, rejection, refusal of admission or any other measure which would result in compelling the person to remain in the country of origin”.\textsuperscript{296} And that the risk of serious harm may result from a fla-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{289} *Sale* v Haitian Centre’s Council, supra note 120, para. 181.
\item \textsuperscript{290} *Roma Rights*, supra note 259, para. 45.
\item \textsuperscript{291} UNHCR intervention before the House of Lords in the case of European Roma Rights Centre and Others v. Immigration Officer at Prague Airport, Secretary of State for the Home Department, 28 September 2004 <http://www.refworld.org/docid/41c1aa654.html>.
\item \textsuperscript{292} *Roma Rights*, supra note 259, para. 64.
\item \textsuperscript{293} *Hirsi Jamaa*, supra note 193, para. 178.
\item \textsuperscript{294} Ibid.
\item \textsuperscript{295} Ibid., para. 181.
\item \textsuperscript{296} Separate opinion Judge Pinto de Albuquerque, *Hirsi Jamaa*, supra note 193, p. 60.
\end{itemize}
\end{footnotesize}
grant violation of the essence of any ECHR right in the receiving state or further delivery of that person by the receiving state to a third state where there is such a risk.\textsuperscript{297}

He furthermore states that the same standard applies to the CAT, the CRC and the ICCPR and proposes that, although the concept of a refugee in the Refugee Convention is less extensive under that of international human rights law, the content of international protection is, nevertheless, strictly identical to persons receiving protection under international refugee law and international human rights law.\textsuperscript{298}

In the same spirit, Lauterpacht and Bethlehem consider that the term \textit{refoulement} in ‘any manner whatsoever’ prohibit “any act of removal or rejection that would place the person concerned at risk” and that the description of the actual act is immaterial.\textsuperscript{299} Although Goodwin-Gill and McAdam support the interpretation of Lauterpacht and Bethlehem in terms of the formal description of the act being immaterial, they clearly exempt the refusal of a visa application as a possible act of \textit{refoulement}, asserting that “state agents who, by refusing a visa to individuals with a well-founded fear of persecution, prevent or obstruct their flight to safety do not breach the prohibition on \textit{returning refugees to persecution}”.\textsuperscript{300} They rely on the wide-spread practice of states of imposing visa requirements to conclude that there is no right to access to asylum.\textsuperscript{301} Noll rejected the argument of Goodwin-Gill and McAdam that the denial of a visa could not be an act of \textit{refoulement} merely because of the wide-spread practice of states to employ them as measures of migration control. However, he argues that visa applications cannot be included in the scope of article 33 of the Refugee Convention as the term \textit{refoulement}, requires the removing agent to be a territorial sovereign and excludes an extraterritorial application of the provision all together.\textsuperscript{302}

Gammeltoft-Hansen is also sceptical of applying \textit{refoulement} obligations to visa regimes and argues that “granting or denying a visa, even if conducted directly by consular or embassy agents, has seldom been considered sufficient to constitute \textit{refoulement}. Merely refusing a visa does not necessarily provide a sufficient causal link to any future violation of the \textit{non-refoulement principle}”.\textsuperscript{303} Hathaway states that the principle

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{297} Ibid.
\item \textsuperscript{298} Ibid., p. 62.
\item \textsuperscript{299} Lauterpacht and Bethlehem, \textit{supra} note 32, p. 112.
\item \textsuperscript{300} Goodwin-Gill and McAdam, \textit{supra} note 6, p. 370.
\item \textsuperscript{301} Although this is something different than respecting the principle of \textit{non-refoulement}, see chapter 5.4.
\item \textsuperscript{302} Noll, \textit{supra} note 16, pp. 554-555.
\item \textsuperscript{303} Gammeltoft-Hansen, \textit{supra} note 31, p. 134.
\end{enumerate}
\end{footnotesize}
constrains, but does not fundamentally challenge, the usual prerogative of states to regulate the entry into their territory of non-citizens. State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted.\textsuperscript{304} However, when citing the Court of Appeal in the \textit{Roma Rights} case, Hathaway states that “on the basis of the Refugee Convention as it stands at present, there is no obligation on a signatory state not to introduce or continue a system of immigration control, whether by way of a requirement for visas or by the operation of a pre-clearance system”.\textsuperscript{305} It seems necessary to underline that this study does not wish to question the use of visa policies or pre-clearance systems \textit{per se}, rather, it attempts to establish whether states have \textit{non-refoulement} obligations towards individuals that apply for humanitarian visas at their diplomatic missions, or if these procedures are nothing but discretionary for the state.

The notion of diplomatic asylum departs from the idea of protecting an individual who seeks refuge at diplomatic missions, and could thus be informative when determining whether to refuse protection to individuals who are under the jurisdiction of diplomatic missions can constitute \textit{refoulement}. When comparing the processing of humanitarian visas to diplomatic asylum, Noll pointed out that although diplomatic asylum and humanitarian visas are different matters of international law, “[i]t would seem hard, though, to maintain that requests for diplomatic asylum fall under article 33 [of the Refugee Convention], while visa applications on protection grounds do not”.\textsuperscript{306} Diplomatic asylum provides some clarity as it has been implicitly confirmed that to remove or deny help to a protection-seeker, presenting her- or himself at diplomatic premises, can constitute \textit{refoulement} in cases where diplomatic asylum has been at the centre of the inquiry.\textsuperscript{307} In this respect, Goodwin-Gill and McAdam acknowledge that “in a case where an asylum-seeker, outside his or her country of origin, seeks asylum in a diplomatic mission in a third state, the principle of \textit{non-refoulement} applies” although when turning to if the removal of such an individual could amount to a breach of \textit{non-refoulement} they state that the removal must directly expose the individual “to a risk of \textit{refoulement}’ and refer to Noll’s argument on the casual link between the actions of a state and the infliction of harm.\textsuperscript{308} To resolve the conflict of whether the act of removal must be anchored to sovereign territorial connection and control to constitute \textit{refoulement} and his view of the \textit{non-refoulement} principle having to be anchored to sovereign territorial connec-

\textsuperscript{304} Hathaway, \textit{supra} note 1, p. 301.
\textsuperscript{305} \textit{Ibid.}, p. 311.
\textsuperscript{306} Noll, \textit{supra} note 16, p. 551.
\textsuperscript{307} Denza, \textit{supra} note 51, p. 142, Crawford, \textit{supra} note 18, p. 403, Roberts, \textit{supra} note 59, pp. 108-109, Goodwin-Gill and McAdam, \textit{supra} note 6, p. 251 with further references, \textit{Asylum} (1950) ICJ Rep. 266, \textit{supra} note 75, para. 35 and \textit{R (B & Others) v SSFCA, supra} note 225.
\textsuperscript{308} Goodwin-Gill and McAdam, \textit{supra} note 6, p. 252 with reference to Noll, \textit{supra} note 16, pp. 552-554.
tion and control, Goodwin-Gill and McAdam turn to the doctrine of chain _refoulement_ to conclude that the removal of the sending state, when this entails a risk of being subsequently returned to other territories where risks prevails, can violate the principle.\(^{309}\)

In light of the expansion of the extraterritorial scope of the principle of _non-refoulement_ and subsequent developments in human rights law extending application to situations of extraterritorial jurisdiction it seems reasonable to accept the extensive reading of explicit prohibitions against _refoulement_, understanding it as a duty not to expose individuals of certain risks regardless of the formal definitions of such acts. The reasoning of the Grand Chamber of the ECtHR in _Hirsi Jamaa_ is convincing in reaching the conclusion that it would be contradictory to acknowledge an application of the principle of _non-refoulement_ as a state exercises jurisdiction extraterritorially, only to find that extraterritorial acts of states cannot take the form of _refoulement_.\(^{310}\) Relying on the understanding that _refoulement_ can constitute any measure that exposes an individual to certain risks, it can be concluded that it would prevent sending states from removing or refusing entry to an applicant in search of protection. However, as diplomatic and consular premises remain the sovereign territory of the receiving state, one final issue needs to be resolved before contending that explicit prohibitions against _refoulement_ have relevance for the acts of diplomatic and consular agents in relation to applicants for humanitarian visas.

5.1.2.1 The Place Where Risks Prevail
Looking closer at the explicit prohibitions against _refoulement_ in the Refugee Convention and CAT, the place to where _refoulement_ is forbidden is somewhat specified. The provisions read “to the frontier of territories” and “to another State” respectively. This implicates that the individuals who can benefit from the prohibitions against _refoulement_ are only those who are outside the country where the risk of such treatment prevails. The question is if the obligation can be applied when protection is refused in the same country from which protection is sought. Aware of the limitation that the definition of a refugee in the Refugee Convention puts on an individual who has not yet left her or his country of origin, the following section still has relevance as they can cross an international border to be defined as such.

The CAT Committee has interpreted the expression “to another State” as equivalent to “to another jurisdiction” which is supported by some scholars that emphasise the object and the pur-

\(^{309}\) Goodwin-Gill and McAdam, _supra_ note 6, pp. 252-253.

\(^{310}\) _Hirsi Jamaa_, _supra_ note 193, para. 178.
pose of the Convention. From the Committee’s periodic reviews of both the UK and the US it can be concluded that the Committee favours an interpretation of the Convention which accords with its object and purpose, which is the eradication of torture worldwide. The wording “to another state” has earlier been argued by some states, namely the US and the UK, to prevent application of article 3 in cases where the authorities of one state party operating abroad hand individuals over to the authorities of the territorial state, since in this case the handover would take place within the same state. The Committee has on several occasions refuted this interpretation. In relation to the UK presence in and transfer of detainees to the Iraqi and Afghani authorities, the Committee recommended that the UK “should apply Articles 2 and/ or 3, as appropriate, to transfers of a detainee within a State party’s custody to the custody whether de facto or de jure of any other State”.

Da Costa argues in favour of reading “to another State” as “to another jurisdiction” and that this is supported by the travaux préparatoires as “drafters did not consider the precise possibility of exposing individuals to torture due to the transfer outside the territory of a State party”. Den Heijer stresses the absolute nature of the prohibition against torture, as well as the purpose of the CAT, to hold that it is justifiable to depart from the strict literal meaning of “another State”. With regard to the Refugee Convention and the expression “to the frontier of territories”, however, Den Heijer is of the view that it can only accommodate acts of return that occur outside the territory where the risks prevail. He states that “one cannot return (or ‘drive back’) a person to the territory of a third state if that person already finds himself in that territory” and that article 33 “can only apply to activity which involves the crossing of the border of the state where the persecution takes place”.

The interpretation of article 33(1) made by Lauterpacht and Bethlehem would be in support of the proposition that the obligation to refrain from refoulement applies in relation to the jurisdiction

311 Da Costa, supra note 92, p. 278, with further references, Den Heijer, supra note 133, p. 145 and M. Nowak, ‘Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective’ in M. Gibney and S. Skogly (eds), Universal Human Rights and Extraterritorial Obligations (University of Pennsylvania Press, 2010).
312 Although the US disputed applicability of article 3 abroad it was indicated that “as a matter of policy” it did not return individuals when it considered it “more likely than not” that torture would take place in the event of refoulement, Da Costa, supra note 92, p. 270.
313 Committee against Torture, Conclusions and Recommendations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, 33rd sess, UN Doc CAT/C/CR/33/3 (10 December 2004), para. 5(e).
314 Da Costa, supra note 92, p. 273.
315 Den Heijer, supra note 133, p. 145.
316 Ibid., pp. 141-142. This interpretation could still accommodate chain refoulement.
of the territorial state, as well as any third country in case of further delivery.\textsuperscript{317} They mean that this can be derived from the meaning of the term “territories” where certain risks prevail, implying that the legal status of this place in immaterial.\textsuperscript{318} Goodwin-Gill and McAdam support the interpretation of Lauterpacht and Bethlehem of “territories” in that it is applicable to an individual who enters a diplomatic mission in a third country asking for protection.\textsuperscript{319} However they argue that the Refugee Convention fall short of protecting individuals within their country of origin due to the strict definition of a refugee.\textsuperscript{320}

UNHCR is of the view that states have a duty under customary law to establish, prior to implementing any removal measure, that the person whom it intends to remove from their jurisdiction would not be exposed to a danger of serious human rights violations such as torture and the arbitrary deprivation of life. If such a risk exists, the state is precluded from forcibly removing the individual concerned.\textsuperscript{321}

This study has repeatedly argued that the application of the \textit{non-refoulement} obligation as enshrined in the Refugee Convention must be interpreted in a way that is consistent with the protection that can be derived from international human rights law, meaning that it has relevance in any situation where a state is exercising jurisdiction over individuals. Furthermore, the CAT Committee has interpreted the expression “to another State” as equivalent to “to another jurisdiction”. For the application of explicit prohibitions against \textit{refoulement} to be meaningful in an extraterritorial setting and remain consistent with developments in human rights law, the interpretation of the expressions “to the frontier of territories” and “to another State” must arguably cover removal to the jurisdiction of another state.

5.3 \textit{Non-Refoulement} Constraining the Acts of Diplomatic Missions

International human rights law does not contain any limitation with regard to the definition of a refugee. Neither do these provisions contain reference to the place where risks prevail. Most scholars agree that protection against \textit{non-refoulement} stemming from human rights norms prevent states from exposing individuals within their jurisdiction to particular forms of serious harm, which in turn, can prevent the diplomatic mission from removing an individual to the territorial

\begin{footnotes}
\footnotetext[317]{Goodwin-Gill and McAdam, supra note 6, p. 250 with reference to Lauterpacht and Bethlehem, supra note 32, p. 122.}
\footnotetext[318]{Ibid.}
\footnotetext[319]{Goodwin-Gill and McAdam, supra note 6, p. 252.}
\footnotetext[320]{Ibid., pp. 250-251.}
\footnotetext[321]{UNHCR Advisory Opinion (2007), supra note 90, para. 21.}
\end{footnotes}
5.4 A Final Note on The Lack of a Right to Access Territory

Although this study has established that states have extraterritorial non-refoulement obligations that are triggered when an individual demands protection in the form of an application for a humanitarian visa from a diplomatic mission, the state does not necessarily have to allow access to territory to avoid a violation of non-refoulement. The fundamental principle of non-refoulement prevents states from removing any individual with a claim for asylum, if that would expose the individual to serious risks of harm to their person or freedom, and is in this sense a negative obligation. It might seem natural to assume that the other side of the coin would be to oblige states to grant access to territory, however, this is not the case. State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in exposing the refugee to a risk of being persecuted. As noted by Lauterpacht and Bethlehem:

322 Goodwin-Gill and McAdam, supra note 6, p. 253, Den Heijer, supra note 133, p. 301 and Noll, supra note 16, pp. 569-570.
323 Hathaway, supra note 1, p. 301.
324 Hathaway is of the view that the principle can amount to a de facto duty to admit the refugee, if admission is the only means of avoiding the consequence of exposure to risk, Ibid. This is rejected by Gammeltoft-Hansen who refer
[w]here States are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course of action which does not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge.325

Gammeltoft-Hansen identifies these practice as taking place in a space located “exactly between the negative responsibility not to return a refugee to persecution and the positive obligation of allowing entry”.326 This could be of great significance for refugees applying for humanitarian visas at diplomatic and consular offices in countries that do not ensure refugee protection and lack human rights standards.327 To go further in considering what this implicates for the sending state in terms of what measures that are needed in order to avoid a violation of the principle is due to spatial constraints beyond the scope of this study.

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325 Lauterpacht and Bethlehem, *supra* note 32, p. 113.
326 Gammeltoft-Hansen, *supra* note 31, p. 64.
6. Conclusion

This thesis has examined the extraterritorial *non-refoulement* obligations of states, in the context of humanitarian visa policies, with the aim of answering the question of to what extent international refugee and human rights law infer obligations of states when an individual applies for a humanitarian visa at diplomatic or consular offices located in other states.

By studying the extraterritorial applicability of the ICCPR, CAT, CRC, ECHR and the Refugee Convention it concluded that the protection against *refoulement* contained therein is triggered whenever a state exercises jurisdiction, also in extraterritorial settings. Furthermore, it shows that the broader field of international human rights law has undergone exceptional change in terms of extraterritorial application of human rights obligations. It found that human rights obligations can be extended to instances of extraterritorial jurisdiction *de jure*, that by large mirror the concept of jurisdiction in international law, as well as instances of extraterritorial jurisdiction *de facto*.

By applying the various construction of extraterritorial jurisdiction that courts and UN treaty bodies have developed, it was argued that states could assume jurisdiction over an applicant for a humanitarian visa under the notions of extraterritorial jurisdiction *de jure*, by relying on the law of diplomatic relations, as well as under the notion of extraterritorial jurisdiction *de facto*, provided that the embassy or consulate staff engages with the asylum seeker as to establish a sufficient level of authority and control over the applicant. Consequently it concluded that *non-refoulement* obligations are triggered when an individual applies for a humanitarian visa, in order to claim asylum, at diplomatic or consular offices located in other states.

Finally, when applying the prohibition against *refoulement* to the relevant circumstances it was found that the principle prevents states from exposing individuals within their jurisdiction to the risk of flagrant human rights violation or persecution, and that this can prevent diplomatic missions from denying access to an applicant or from removing it to the territorial state.\(^{328}\) This was argued to include situations where the risks prevail in the territorial state as well as situations where there was a risk of further delivery by the territorial state to a place where such risks prevail. By interpreting explicit prohibitions against *refoulement* in line with international human rights law, it was found that they operate correspondingly and that the only limitation in this respect is

the definition of a refugee in article 1A(2) of the Refugee Convention which require the individual to be outside her or his country of origin. Consequently it was concluded that states are bound to respect the principle of *non-refoulement* in relation to applicants for humanitarian visas seeking protection at embassies and consulates.

**Afterword**

The idea of visas issued on protection related grounds emerged due to the humanitarian crisis of large irregular migration flows as a way of enabling legal pathways for asylum seekers and refugees. The lack of such legal pathways to a large part of the developed world is to a large extent because of the extensive practice of extraterritorial migration control and non-arrival policies that states employ.

While any initiative that aspire to facilitate any part of the journey towards protection for those in need should be embraced, humanitarian visas still form part of the scheme of extraterritorial migration control, and, if one were to be slightly circumspect, humanitarian visas could even be said to justify the continuation of non-arrival policies as they constitute a protection-based exception the protectionist norm. This argument could be applied to international refugee law in general, but is especially visible in the case of humanitarian visas as they reconcile the commitment to human rights and the international protection of refugees with extraterritorial migration control, and thus, in a way, legitimises the restriction of admittance of aliens.

The development of the notion of jurisdiction in international refugee and human rights law has led to several extraterritorial acts of states being submitted to human rights norms and the principle of *non-refoulement*. However, states continue to develop policies with the purpose of avoiding obligations towards asylum seekers. This author is of the opinion that international law *should* have answers to states’ attempts to evade responsibility towards individuals in need of international protection, and hope to see legal challenges of these policies in the future, as well as a wider debate on the protectionist norm in general. States must recognise that the crisis of refugees is a global problem which requires other states to assume responsibility over persons who have fled armed conflict, persecution, violence and grave human rights abuses, and who, by definition, can no longer enjoy the protection of their own state.
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