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International Cooperation on Refugees: Between Protection and Deterrence

PhD thesis

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Spelling, punctuation and omission errors have been corrected in this version. The content of each page remains the same as in the original.

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To my grandfathers,
Herb and Houw,
refugees both.

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The origins of this study lie in the docks of Melbourne where, as a schoolboy, I remember looking out to the MV Tampa, moored offshore. Little did we know then that this standoff between asylum seekers requesting entry to Australia and government leaders claiming sovereignty would lead to multiple iterations of the Pacific Solution.

In more concrete terms, the contours of this study took shape in Copenhagen in 2013, when I assisted James Hathaway and Thomas Gammeltoft-Hansen in their research on cooperative deterrence. A PhD project on the law of international cooperation on asylum seekers and refugees seemed a logical next step, professionally and intellectually. And, of course, with the sense of crisis in Europe in the area of asylum law and policy more or less coinciding with the duration of the study, my research has always felt current and necessary in troubled times.

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AFP	Australian Federal Police
ALO	Airline Liaison Officer
APD	Asylum Procedures Directive
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Racial Discrimination against Women
CIA	Central Intelligence Agency
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CPA	Comprehensive Plan of Action
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EXCOM	Executive Committee of the High Commissioner's Programme
FCA	Federal Court of Australia
FRA	European Union Agency for Fundamental Rights
FRY	Federal Republic of Yugoslavia
Frontex	European Border and Coast Guard Agency
HCA	High Court of Australia
HEP	Humanitarian Evacuation Program
HTP	Humanitarian Transfer Program
HRC	United Nations Human Rights Committee
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILO	Immigration Liaison Officer
IOM	International Organization for Migration
IRO	International Refugee Organization
MoU	Memorandum of Understanding
MRT	Moldavian Republic of Transdniestria
MRCC	Maritime Rescue Coordination Centre
NATO	North Atlantic Treaty Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PJSC	Supreme Court of Papua New Guinea
PNG	Papua New Guinea
RIAA	Ad Hoc International Arbitral Tribunal
RRA	Regional Resettlement Agreement
RSD	refugee status determination
RPC	Regional Processing Centre
SAR	International Convention on Maritime Search and Rescue
SCR	Supreme Court of Canada
SOLAS	International Convention for the Safety of Life at Sea
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UKHL	United Kingdom House of Lords
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 International deterrence and transnational asylum

This study concerns the limits human rights and refugee law place on international cooperation on asylum seekers and refugees. Since the 1980s, the dominant policy response to irregular migration – including asylum seekers and refugees – among traditional asylum countries in the Global North ('destination states') has been one of control and deterrence.[1] Since 2000, deterrence policies have included cooperation with countries of origin and transit in the Global South ('partner states').[2] This form of *international deterrence*, defined as policies undertaken extraterritorially by a destination state in cooperation with a partner state to prevent asylum in the former, has become a part of states' 'toolbox' to prevent the arrival of irregular migrants.[3] Current examples of international deterrence include funding, equipping and training of partner states, such as Italy's assistance to the Libyan Coastguard; joint patrols between destination and partner states, for example, between Spain and Morocco; and third country processing, notably Australia's cooperation with Nauru and Papua New Guinea.

Destination states have enacted a number of policies aimed at preventing access to their territories with the dual aim of avoiding responsibility for any immediate asylum claims and dissuading prospective asylum seekers from attempting to reach a destination state.[4] Existing scholarly work discusses a range of *unilateral* deterrence policies, which include boat

[1] James C. Hathaway, 'The emerging politics of non-entrée' (1992) 91 Refugees 40.

[2] Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2014) 53 Columbia Journal of Transnational Law 235; and Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 Journal on Migration and Human Security 28.

[3] Bill Frelick, Ian M Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190, 192-3.

[4] It should be stressed that the deterrence approaches of Global North states are not necessarily reflected in other regions. See D J Cantor, L F Freier, and J-P Gauci (eds), *A Liberal Tide?: Immigration and Asylum Law and Policy in Latin America* (University of London 2015).

turnbacks,[5] visa controls,[6] carrier sanctions,[7] establishment of so-called 'international zones' within state borders,[8] excision of territory for the purposes of migration,[9] interdiction on the high seas[10] and information campaigns.[11] A number of more established forms of deterrence have been tested in national and international courts, leading in some cases to their abandonment.[12]

International deterrence approaches raise questions of *jurisdiction* under human rights and refugee law. Through extraterritorial cooperation with a partner state, destination states often seek to avoid jurisdiction over asylum seekers and refugees, or at least cloud the question of jurisdiction. International cooperation of this type thus complicates the dominant principle of territorial jurisdiction. While many states now acknowledge the existence of extraterritorial jurisdiction in certain limited circumstances, there remains the widespread belief among policymakers that extraterritorial actions are less likely to reach the threshold required to enliven obligations under human rights and refugee law.[13] Moreover, there

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[5] Natalie Klein, 'Assessing Australia's Push Bank the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 Melbourne Journal of International Law 414.

[6] Eleanor Taylor Nicholson, 'Cutting Off the Flow: Extraterritorial Controls to Prevent Migration' (2011) Issue Brief, the Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School.

[7] Antonio Cruz, *Shifting responsibility: carriers' liability in the member states of the European Union and North America* (Trentham Books and School of Oriental & African Studies 1995).

[8] Leah Haus, 'Migration and international economic institutions' in AR Zolberg and PM Benda (eds), *Global Migrants, Global Refugees: Problems and Solutions* (Berghahn Books 2001) 274-276.

[9] Tara Magner, 'A less than 'Pacific'solution for asylum seekers in Australia' (2004) 16 International Journal of Refugee Law 53.

[10] Stephen H. Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18 International Journal of Refugee Law 677.

[11] Gammeltoft-Hansen and Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' 38.

[12] *Amuur v France* App no 19776/92 (ECtHR, 10 June 1996); *Regina v Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55, House of Lords; *Plaintiff M70/2011 v Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32; and *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

[13] See for example *Sale v Haitian Centers Council* [1993] 509 US 155. In Australia's fifth periodic report under the ICCPR, the Australian government submitted: 'Australia accepts that there may be exceptional circumstances in which the rights and freedoms set out under the Covenant may be relevant beyond the territory of a State party (although notes that the jurisdictional scope of the Covenant is unsettled as a matter of international law). Although Australia believes that the obligations in the Covenant are essentially

seems to be little consideration given to the question of whether jurisdiction could be shared between cooperating states. Notwithstanding recent human rights law jurisprudence on extraterritorial jurisdiction, there is scant case law dealing with shared responsibility in the context of asylum.[14]

Cooperative policies also raise questions of *state responsibility* for the breach of obligations. In general, international law proceeds on the basis that a state is independently responsible for its own wrongful conduct. Through cooperation with a partner state, destination states attempt to shield themselves from responsibility for breaches of international law. Cooperative approaches are based on the assumption that state responsibility is, in most cases, attributed to a single state as a result of territorial jurisdiction. In general, of course, a state bears international responsibility for conduct that violates its international legal obligations.[15] However, the involvement of two sovereign actors in international deterrence raises questions of how state responsibility may be shared.[16] Recent scholarship on shared responsibility often takes a general approach not specific to the asylum context, highlighting the need for consideration of how multiple states may be held responsible for violations of obligations owed to asylum seekers and refugees.[17]

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territorial in nature, Australia has taken into account the Committee's views in General Comment 31 on the circumstances in which the Covenant may be relevant extraterritorially.' Human Rights Committee, *Replies to the list of issues to be taken up in connection with the consideration of the 5th periodic report of the Government of Australia* (21 January 2009) 4.

[14] An exceptional case is *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), in which both respondent states were held internationally responsible for the treatment of the applicant, an asylum seeker returned from Belgium to Greece.

[15] International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), Report of the ILC on the Work of its 53rd Session, UN Doc. A/56/10 (2001a) art 1.

[16] Ibid arts 1, 16 and 47.

[17] The University of Amsterdam's Shared Responsibility in International Law (SHARES) Project is a vital source of scholarship in this area. See André Nollkaemper and Dov Jacobs, 'Shared responsibility in international law: a conceptual framework' (2012) 34 Michigan Journal of International Law 359; André Nollkaemper and Ilias Plakokefalos, *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*, vol 1 (Cambridge University Press 2014); André Nollkaemper, Dov Jacobs and Jessica NM Schechinger, *Distribution of responsibilities in international law*, vol 2 (Cambridge University Press 2015); and André Nollkaemper, Ilias Plakokefalos and Jessica Schechinger (eds), *The Practice of Shared Responsibility in International Law,* vol 3 (Cambridge University Press 2017). See further André Nollkaemper, 'Shared responsibility for human rights violations: A relational account' in T. Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (Routledge 2017); and Tilmann Altwicker,

Moreover, cooperative deterrence policies raise questions about *accountability*. Accountability, often under-explored in this context, is used here to refer to adjudication of breaches of human rights and refugee law attributable to a state engaged in international deterrence policies.[18] A finding of state responsibility without adjudication and remedy severely limits the effectiveness of international law. Although a determination of responsibility outside formal mechanisms can be still useful, accountability through adjudication has the greatest impact on state policies and is most likely to deliver a remedy for asylum seekers and refugees.

It is against this backdrop that Part I of the study conducts a comprehensive analysis of the *limits* human rights and refugee law impose on international cooperation regarding asylum seekers and refugees. In so doing, the study discusses a number of questions flowing from international deterrence policies, including: the scope of human rights and refugee law obligations owed to asylum seekers and refugees, when these obligations are enlivened through the triggering of jurisdiction on the part of destination and partner states, and how state responsibility is determined, including on a shared basis. This study also puts forward a *global* view of accountability that views breaches of international law from a 'topographical' perspective considering the accountability of each responsible state.

Part II of the study sets out *standards* for future international cooperation on asylum seekers and refugees.[19] This part of the study shifts the analysis from questions of responsibility for violations in international deterrence to an inquiry into how international cooperation in this area could comply with obligations and even increase refugee protection. In so doing, the study employs the concept of *transnational asylum*, defined as the provision of asylum processing or international protection by two or more states, providing policy-relevant standards for future international cooperation in this area.

'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 European Journal of International Law 581, 594.

[18] Jutta Brunnée, 'International legal accountability through the lens of the law of state responsibility' (2005) 36 Netherlands Yearbook of International Law 21, 24. On litigation under international human rights law, see Ivan Shearer, 'Human rights as a subject of international litigation' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014).

[19] For previous proposals on international cooperation and responsibility sharing, see Terje Einarsen, 'Mass Flight: The Case for International Asylum' (1995) 7 International Journal of Refugee Law 551; James C. Hathaway and R Alexander Neve, 'Making international refugee law relevant again: A proposal for collectivised and solution-oriented protection' (1997) 10 Harvard Human Rights Journal; and Peter H Schuck, 'Refugee burden-sharing: A modest proposal' (1997) 22 Yale Journal of International Law 243.

Cooperation between two or more states on the processing of asylum claims or the provision of protection presents an opportunity to increase refugee protection, not only diminish it. While this study is concerned primarily with bilateral arrangements, the concept of transnational asylum extends to regional cooperation. Transnational asylum encompasses both third country processing policies, and third country protection approaches.

The relationship between transnational asylum and international deterrence may be understood as overlapping but not co-extensive. The concepts thus share a number of common elements, including international cooperation on asylum seekers and refugees and a shift away from the traditional approach of territorial asylum and protection. In other words, some international deterrence policies contain a number of elements for effective transnational asylum practices. For example, European Union (EU) financial support for Syrian nationals in Turkey flowing from the EU–Turkey Statement undoubtedly expands protections for refugees in Turkey. Moreover, Papua New Guinea's removal of reservations to the 1951 Convention Relating to the Status of Refugees (Refugee Convention or 1951 Convention),[20] as part of its Regional Resettlement Agreement with Australia, is a small but positive step for enhanced refugee protection.[21]

1.2 Research questions and structure of the study

This study investigates the *limits* international law places on state cooperation on asylum seekers and refugees and sets out *standards* for future cooperation in accordance with the protective principles of human rights and refugee law.

1. *What is the nature and scope of human rights and refugee law obligations in the context of international deterrence? (Part I)*

Chapter 2 classifies international deterrence policies, explaining the evolution of cooperative approaches over the past 20 years. Six forms of international deterrence are put forward, drawn from previous typologies and original research. The chapter further provides an overview of current policies undertaken by Australia and European states Greece, Italy and Spain, mapping key bilateral arrangements in the Mediterranean and the Pacific.

Chapter 3 explores the contours of obligations owed to asylum seekers in the course of international deterrence by analysing key human rights and refugee law norms applicable in this context. Drawing on relevant

[20] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

[21] Diana Glazebrook, 'Papua New Guinea's refugee track record and its obligations under the 2013 Regional Resettlement Arrangement with Australia' (SSGM discussion paper 2014/3, Australian National University 2014) 11.

jurisprudence, the chapter discusses the accepted and contested limits of obligations owed by both destination and partner states, comprising the right to leave any country, the right to life, *non-refoulement*, the right to liberty and security of person, and rights contained in Articles 2–34 Refugee Convention.

Chapter 4 analyses the applicability of obligations explored in chapter 3 via human rights law jurisdiction, the crucial threshold for the application of obligations. The chapter addresses those situations in which the obligations of a destination state are triggered extraterritorially under key human rights law treaties and the 1951 Convention. The chapter also deals with situations of *shared* jurisdiction, where both a partner state and a destination state owe obligations to asylum seekers and refugees concurrently. Finally, the chapter applies the various models of jurisdiction to the forms of international deterrence discussed in chapter 2.

2. *How does international law hold multiple states responsible for violations of human rights and refugee law obligations in the context of international deterrence?*

Chapter 5 analyses the law of state responsibility, vis-à-vis international deterrence policies, investigating how principles of independent and shared responsibility apply in this context. In particular, the chapter explores how shared responsibility for breaches of international law can be conceptualised on the basis of concurrent, joint and derived models of responsibility. Further, the chapter applies these principles to the forms of international deterrence discussed in chapter 2. The chapter concludes with some observations on how international cooperation on asylum seekers and refugees is, to a certain extent, limited by human rights and refugee law and the law of state responsibility.

Chapter 6 explores avenues for holding states accountable for breaches of obligations in the course of international deterrence. Moving beyond the existing focus on extraterritorial jurisdiction, the chapter puts forward a *global* approach to accountability. This innovative approach encompasses the international responsibility of each contributing state, the full range of applicable legal regimes available to asylum seekers and refugees in situations of shared responsibility, and the full range of accountability mechanisms available in each responsible state.

3. *How can transnational asylum approaches respect human rights and refugee law obligations and expand refugee protection? (Part II)*

Chapter 7 shifts the analysis from questions of responsibility for violations to an inquiry into how international cooperation in this area can comply with obligations owed to asylum seekers and refugees. The chapter introduces the concept of 'transnational asylum', defined as the provision of asylum processing or international protection by two or more states, as

well as a number of key principles underpinning the concept. While transnational asylum encompasses a range of cooperative approaches, this study hones in on two potential models.

Chapter 8 considers *third country processing* policies, which comprise the transfer of an asylum seeker from the jurisdiction of a destination state to a partner state for the purposes of refugee status determination. Drawing on practice and the limits set out in Part I, the chapter puts forward eight standards to support the legality of future approaches.

Chapter 9 addresses *third country protection*, involving the transfer of a recognised refugee from the jurisdiction of a destination state to a partner state for the purposes of receiving international protection. The chapter provides standards to ensure respect for human rights and refugee law obligations in such cooperation.

Chapter 10 makes some conclusions on the study as a whole and provides some further perspectives on the future of international cooperation on asylum seekers and refugees.

1.3 Objective of the study

As reflected in the overarching research question, the objective of this study is twofold. The primary goal is to provide a comprehensive account of the limits international law imposes on state cooperation on asylum seekers and refugees. The study also seeks to set out standards to ensure the legality of international cooperation in this area, using the concept of transnational asylum.

There are two primary audiences for the study. First, the study hopes to contribute to substantive and theoretical knowledge among international refugee law scholars. In addition, the research may be of use to lawyers and judges working in the field. Second, the study aims to influence policymakers in Australia and Europe by providing a comprehensive and timely account of the state of the law and setting out standards for consideration when shaping future policy with respect to asylum seekers and refugees.

1.4 Definitions

This study uses the term 'asylum seeker' to describe a person claiming international protection and 'refugee' to describe a person who has been recognised as requiring international protection. This is a useful distinction to show the status of an individual vis-à-vis the receiving state, although refugee status is declaratory not constitutive.[22] International protection

[22] Accordingly, 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition… Recognition of his refugee status

encompasses both refugee protection, which flows from recognition under Article 1A(2) of the Refugee Convention, and subsidiary protection, which flows from protection under human rights law.[23]

The terms 'Global North' and 'Global South' refer to countries with significant disparities in their levels of industrialisation and wealth. These are not absolute categories, but indicate the relative power and resources of states involved in international deterrence and – in almost all cases – a discrepancy in the level of obligations owed to asylum seekers and refugees. In general, Global North countries, including Australia and European states, owe more obligations toward refugees than states in the Global South, by virtue of a higher rate of ratification of human rights and refugee law instruments.

As noted at the outset, 'destination states' refer to those traditional asylum states leading the use of deterrence policies. International deterrence is almost exclusively a phenomenon initiated by destination states, who possess the resources and political will to engage other states to assist in preventing access to their territories. The study also refers to 'partner states', defined as Global South states – often countries of origin or transit – who cooperate with destination states on migration control and asylum. These categories are not unqualified. For example, Greece is both a destination country and a transit state for many refugees seeking passage to northern Europe.

The research employs the term 'irregular migrants' to denote people seeking to cross international borders without authorisation.[24] Irregular migration encompasses so-called 'mixed' movements whereby refugees and other migrants not in need of international protection use the same routes to gain entry into a state.[25] However, this study confines itself to the obligations owed to asylum seekers and refugees.

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does not therefore make him a refugee but declares him to be one.' UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* HCR/1P/4/ENG/REV, December 2011 para 28.

[23] James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 184 n 143; and Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007) 51 and 244.

[24] The term 'irregular migration' refers to 'entry into the territory of another country, without the prior consent of the national authorities or without an entry visa'. UNHCR EXCOM, Conclusion No 58 (XL), 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection' (1989) para (a).

[25] See further Marina Sharpe, 'Mixed Up: International Law and the Meaning(s) of "Mixed Migration"' (2018) 37 Refugee Survey Quarterly 116.

1.5 Scope of the study

1.5.1 Actors

The study focuses on the roles and responsibilities of states. As states hold broad sovereign powers to regulate immigration and control their borders, the study delimits its analysis to the conduct of states as the primary subjects of international law and the primary agents of deterrence policies. This focus is not intended to underplay the significance of international and supranational organisations in this field. The role of the European Union (EU) and its border agency, Frontex, in asylum and refugee policy is rightly the subject of substantial academic work.[26] The role of other international organisations in monitoring – and in some cases implementing – cooperative policies, such as the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), are not addressed here.[27] Nor does this study examine the role of private actors, which may be involved in carrying out migration control or aspects of asylum processing.[28]

1.5.2 Cooperation and geographic scope

International deterrence includes both formal and informal deterrence arrangements. Formal cooperation takes place under an international agreement between states, while informal cooperation relates to *ad hoc* actions forming part of the broader bilateral relationship. Although

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[26] Madeline Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' (2006) 18 International Journal of Refugee Law 601; Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press 2016); Izabella Majcher, 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?' (2015) 7 Silesian Journal of Legal Studies; Violeta Moreno-Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 European Journal of Migration and Law 315; Anna Triandafyllidou and Angeliki Dimitriadi, 'Deterrence and Protection in the EU's Migration Policy' (2014) 49 The International Spectator 146; and Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017).

[27] See Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing control: the International Organization for Migration in Indonesia' (2018) The International Journal of Human Rights 1.

[28] See Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011) 158-208. State attribution for the conduct of private actors in third country processing is discussed at chapter 5.3.1.3.

international deterrence may include both bilateral and multilateral forms of cooperation, this study focuses on bilateral arrangements.

A number of asylum policies involving multiple states are beyond the limits of this study. The use of 'safe third country' and 'first country of asylum' concepts, notably, have rightfully been the subject of scholarly attention[29] but are not considered here in and of themselves. The study is limited to actions outside the territory of the destination state, i.e. policies carried out on the high seas or within the territories of partner states. Deterrence measures implemented after the asylum seeker's arrival in the territory of a destination state are not considered.[30]

This study focuses on the international deterrence policies of Australia and European states, Greece, Italy and Spain, as well as selected partner states. An appraisal of international deterrence policies in these regions is a sound starting point for a number of reasons. Both Australia and European states are archetypical destination states with a long history of receiving and integrating refugees. These states are all parties to the Refugee Convention and core human rights treaties relevant to the protection of asylum seekers and refugees, notably The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[31] and the International Covenant on Civil and Political Rights (ICCPR).[32] Moreover, Australia and the Southern European states addressed in this study have extensive maritime borders that have long attracted irregular migration by boat. The United States is not included in this study for two reasons. First, time constraints did not allow a substantive account of international deterrence across all three regions. Second, recent scholarly work provides

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[29] Guy S Goodwin-Gill, 'Safe Country? Says Who?' (1992) 4 International Journal of Refugee Law 248; Kay Hailbronner, 'The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective' (1993) 5 International Journal of Refugee Law 31; Cathryn Costello, 'The Asylum Procedures Directive and the proliferation of safe country practices: deterrence, deflection and the dismantling of international protection?' (2005) 7 European Journal of Migration and Law 35; and Cathryn Costello, 'Safe Country? Says Who?' (2016) 28 International Journal of Refugee Law 601.

[30] See Jens Vedsted-Hansen, 'Non-admission policies and the right to protection: refugees' choice versus states' exclusion' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999); and Gammeltoft-Hansen and Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' 34-5.

[31] Opened for signature 10 December 1984, 1486 UNTS 85 (entered into force 26 June 1987)

[32] Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

an in-depth account of policy transfer between the United States and Australia in the area of interdiction and third country processing.[33]

1.5.3 Legal frameworks

This study draws on three legal frameworks in analysing international cooperation, namely international human rights law, international refugee law and the general international law doctrine of state responsibility. The study views human rights law and refugee law as complementary based on their common history, similar humanitarian aims and integrated uses.[34] The study thus analyses relevant state obligations contained in the Refugee Convention and its 1967 Protocol[35] the ICCPR, CAT and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[36] These instruments are selected as the key sources of binding legal obligations protecting asylum seekers and refugees.

At the level of general international law, the study draws on the law of state responsibility as codified by the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which set out a secondary set of rules governing attribution and responsibility for international wrongful acts.[37] The ARSIWA, a mix of binding and non-binding rules, provide a framework for establishing state responsibility for violations of human rights and refugee law obligations in cooperation. Recourse to the ARSIWA is necessary because human rights and refugee law lack clear rules on shared responsibility, with few mechanisms to hold two or more states responsible for breaches during cooperation.

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[33] Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press 2018). See also Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (Cambridge University Press 2015).

[34] Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 8; Hathaway, *The Rights of Refugees under International Law* 5, 10; Kees Wouters, *International Legal Standards for the Protection from Refoulement, Intersentia,* (Intersentia 2009) 526; and Jason M Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017) 35.

[35] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[36] As amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[37] General international law may be defined 'the opposite of special international law (*lex specialis*) which governs particular topics (international trade law, law of the sea etc.). Examples of general international law are the law of treaties as codified in the Vienna Convention on the Law of Treaties and the law of state responsibility as codified in the Articles on the Responsibility of States for Internationally Wrongful Acts.' International Law Association Committee on International Human Rights Law and Practice, *Final report on the impact of international human rights law on general international law*, 2008 2.

1.6 Methodology

The following sets out the role of positivism in international law, positivist approaches within international refugee law scholarship and the position of this study. This study adopts a balanced positivist approach to the selection and interpretation of legal sources, explained in detail below.

1.6.1 Positivism in international law scholarship

Legal positivism, which replaced natural law as the pre-eminent approach to international law in the nineteenth century, views law as binding standards agreed to by states that can be identified and objectively interpreted.[38] *Classical* positivism argues that international law's legitimacy is guaranteed by the will of states according to their consent through treaty law, and their practice and custom.[39] Thus, according to Simma and Paulus:

> The main characteristic of the classic view is the association of law with an emanation of state will (voluntarism). Voluntarism requires the deduction of all norms from acts of state will: states create international norms by reaching consent on the content of a rule.[40]

This classical approach argues that this emphasis on the 'contractual' nature of international law promotes certainty and clarity of state obligations and responsibilities.

Classical positivism also involves some analytical choices beyond the consent of states, requiring a strict delineation between binding norms and mere soft law, or non-legal factors, such as ethics or morals.[41] Stricter strands of positivism dismiss soft law altogether, as 'arguments that have

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[38] Hathaway, *The Rights of Refugees under International Law* 24. For a useful overview of the relationship between natural law and positivism see Stephen Hall, 'The persistent spectre: natural law, international order and the limits of legal positivism' (2001) 12 European Journal of International Law 269.

[39] In the *Case of the S.S. Lotus* PCIJ Series A, No 10 (Permanent Court of International Justice) the PCIJ stated at 18: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.'

[40] Bruno Simma and Andreas L Paulus, 'The responsibility of individuals for human rights abuses in internal conflicts: A positivist view' (1999) 93 American Journal of International Law 302, 303.

[41] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 614.

no textual, systemic or historical basis, are deemed irrelevant… there is only hard law, no soft law'.[42]

Modern positivism, in some contrast, acknowledges the role of soft law in influencing state behaviour, while seeking to maintain a clear separation between *lex lata* and *de lege ferenda*.[43] A common approach in this vein is seeking to set out the objective state of the law based on *lex lata,* followed by normative arguments for its development, drawing on *de lege ferenda*.

Moreover, modern positivism takes a more progressive view of the formation of customary law and the existence of general principles of law. Thus, modern human rights law positivists have been accused of using the legitimacy of the positivist approach for their own ends:

> Clearly, doctrinal rigour is not of utmost importance for modern positivists: treaty practice, custom and general principles are liberally combined so as to achieve the desired result: increased promotion and protection of human rights.[44]

Rather than relying on the clear consent of states, modern positivists may form arguments for the existence of a customary norm drawing on soft law sources. Analysis on the existence of a general principle of law may be even less precise, given the subjective nature of the inquiry, leaving the existence of general principles 'in the ethical eye of the beholder'.[45]

1.6.2 Positivism in international refugee law scholarship

International legal positivism has long been the 'default' position for most international lawyers and remains the foremost methodology employed by refugee law scholars.[46] The dominance of positivism in the field has led to a level of internal diversity among refugee law scholars. Substantial variation in 'positivist' approaches lead to substantially different legal interpretations

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[42] Simma and Paulus, 'The responsibility of individuals for human rights abuses in internal conflicts: A positivist view' 304; and Prosper Weil, 'Towards relative normativity in international law?' (1983) 77 American Journal of International Law 413.

[43] Ibid 308.

[44] Jan Wouters and Cedric Ryngaert, *The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law* (Institute for International Law working paper no 121, 2009) 17.

[45] Ibid.

[46] Tamara Hervey and others, *Research Methodologies in EU and International Law* (Bloomsbury Publishing 2011) 39; Maurice Mendelson, 'The Subjective Element in Customary International Law' (1996) 66 The British Year Book of International Law 177, 178; and Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 87.

and a level of indeterminacy as to the content and weight of key norms.[47] Take for example the broad spectrum of views on the fundamental principle of *non-refoulement*, in which self-described positivists put forward arguments ranging from a treaty norm falling short of custom,[48] to a customary norm,[49] to a norm of *jus cogens*.[50]

Critical legal scholars have called into question the positivist dominance in international refugee law. In 1998, Chimni, in a seminal article, highlighted the politics behind the legal principles developed during the Cold War, arguing that positivist delinking of law from politics had serious practical and theoretical consequences following the end of the bipolar era. Chimni specifically highlighted legal impotence with regard to deterrence: 'by a refusal to engage with the question of the politics and ethics of refugee policies, legal scholarship disarmed itself when it came to questioning the non-entrée policies'.[51] More radical critical scholars have berated the 'legal idolatry' of positivists placing legal texts at the core of their work, arguing the very terms of these texts exclude vast numbers of people in need of protection.[52]

Realists have also critiqued the 'positivist paradigm'. In a 1999 article mapping proposals to reform international refugee law, Harvey, calling for self-reflection, challenged the positivist approach as conservative, risk-averse and increasingly lacking in legitimacy.[53] Further warning against abandoning a normative agenda in the face of state power, Harvey argued that 'legality is not the static mechanistic concept sometimes advanced in some legal positivist work. It is a dynamic relationship between norms and participants and is always about contestation and argumentation.'[54]

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[47] In 1999, Harvey noted in relation to refugee law's uncertain future: 'At times there appears to be little or no consensus surrounding the basic meaning of the law or even the precise purpose it is intended to serve'. Colin Harvey, 'Talking about refugee law' (1999) 12 Journal of Refugee Studies 101, 126.

[48] James C Hathaway, 'Leveraging Asylum' (2010) 45 Texas International Law Journal 503.

[49] Goodwin-Gill and McAdam, *The Refugee in International Law* 345; and Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (T.M.C. Asser Press 2016).

[50] Jean Allain, 'The jus cogens nature of non-refoulement' (2001) 13 International Journal of Refugee Law 533.

[51] Bhupinder S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 350, 354-5.

[52] Nadine El-Enany, 'On Pragmatism and Legal Idolatry: Fortress Europe and the Desertion of the Refugee' (2015) 22 International Journal on Minority and Group Rights 7, 10.

[53] Colin J Harvey, 'Talking about refugee law' 126.

[54] Ibid 132.

In fact, the positivist paradigm has shifted – to some extent – in the past 20 years. Most notably, the question of whether a positivist reading of refugee law incorporates human rights law norms is now settled in the affirmative.[55] As Lambert points out, the human rights–based approach to international refugee law may not only be compatible with positivism, it has become the dominant approach within international refugee law scholarship.[56]

1.6.3 Locating this study: balanced positivism

This study uses a positivist approach that remains true to the doctrinal tradition, while explicitly acknowledges the broader political context in which this study takes place. International deterrence policies may be seen as part of a broader illiberal shift among Global North states, including the increasing politicisation of human rights – particularly in relation to asylum.[57] As a result, destination states are intentionally pushing the boundaries of international law, resulting in adherence to the bare minimum required by their obligations or overstepping into non-compliance.[58]

This study sets out to avoid the dual traps of 'legal wishful thinking' on the one hand, and blackletter deference to states on the other.[59] This approach, which may be termed *balanced positivism,* recognises both the protective purpose of human rights and refugee law and the importance of state sovereignty in interpreting international law sources. This approach further

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[55] James C Hathaway, 'Reconceiving refugee law as human rights protection' (1991) 4 Journal of Refugee Studies 113. On complementary protection against *refoulement,* see McAdam, *Complementary Protection in International Refugee Law*. On the human rights-based approach to persecution in refugee law, see Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2007) 27-51.

[56] Helene Lambert, 'International refugee law: dominant and emerging approaches' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 348; and Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* 33.

[57] David Cantor, 'Bucking the trend? Liberalism and illiberalism in Latin American refugee law and policy' in D J Cantor, L F Freier, and J-P Gauci (eds), *A Liberal Tide?: Immigration and Asylum Law and Policy in Latin America* 185-211, 190; Alex Aleinikoff, 'The arc of protection: toward a new international refugee regime' (Paper presented at the Refugee Studies Conference, Beyond Crisis: Rethinking Refugee Studies, Oxford, 17 March 2017); and Thomas Gammeltoft-Hansen, 'International refugee law in a post-liberal world' (Paper presented at the Refugee Studies Conference, Beyond Crisis: Rethinking Refugee Studies, 16 March 2017).

[58] Zoltán I Búzás, 'Evading international law: How agents comply with the letter of the law but violate its purpose' (2016) 23 European Journal of International Relations 857.

[59] Siobhán McInerney-Lankford, 'Legal methodologies and human rights: Challenges and opportunities' in Bård A. Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar 2017).

matches the framing of the study with reference to existing state policies, acknowledging that international law is not independent of context.[60]

A balanced positivist approach is fit for purpose in two key respects. First, the emergence of international deterrence policies, as an instantiation of a broader 'non-entrée regime' or 'deterrence paradigm', demonstrates that there are limited policy options realistically considered in the field of asylum and refugee policy in Australia and Europe.[61] Second, and related, the current refugee policy climate calls for an emphasis on fundamental principles of law rather than ambitious normative claims based on soft law sources.[62]

So far, balanced positivism may appear decidedly conservative. However, it does not begin and end with a blackletter approach. Rather, the study goes beyond binding law by exploring state responsibility, a combination of hard and soft law.[63] However, the study retains a positivist outlook by clearly demarcating the distinction between binding and non-binding obligations.

There are limits to these methodological choices. The framing of the study in response to deterrence policies renders the subject of the investigation something of a 'moving target' given the significant policy innovation in this field. However, while individual instantiations of policies may come and go, international cooperation in this area is likely to remain in place for some time. In addition, the positivist, doctrinal approach may be accused of being unimaginative. However, legal rigour does not preclude creativity in the interpretation of law, rather it provides useful boundaries within which

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[60] Accordingly, 'Both custom and general principles cannot simply be reduced to instances of state will. So-called soft law is an important device for the attribution of meaning to rules and for the perception of legal change. Moral and political considerations are not alien to law but part of it. However, formal sources remain the core of international legal discourse. Without them, there is no "law properly so-called."' Simma and Paulus, 'The responsibility of individuals for human rights abuses in internal conflicts: A positivist view' 306.

[61] Phil Orchard, *A Right to Flee* (Cambridge University Press 2014) 203; and Gammeltoft-Hansen and Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy'.

[62] James C Hathaway, *Reconceiving International Refugee Law* (Martinus Nijhoff Publishers 1997) xxv; Schuck, 'Refugee burden-sharing: A modest proposal' 248; and Guy S Goodwin-Gill, 'The International Protection of Refugees and Asylum Seekers: Between Principle and Pragmatism?' (Keynote Address, Andrew & Renata Kaldor Centre for International Refugee Law Conference, UNSW, Sydney, 3 November 2014) <https://www.kaldorcentre.unsw.edu.au/event/annual-conference-between-principle-and-pragmatism-australia-and-refugee-law-60-years> accessed 5 March 2018.

[63] See chapter 5.2.

such creativity can take place. It is on these grounds that the standards for transnational asylum are developed in Part II of this thesis.

1.7 Sources

As a doctrinal undertaking, this study relies on binding sources of international law set out in Article 38(1) of the Statute of the International Court of Justice (ICJ). The ICJ Statute identifies three primary sources: international conventions, international custom, and general principles of law; and two secondary sources: judicial decisions and the teachings of jurists.[64]

1.7.1 Primary sources

This study relies on *treaty law* to inform the content of binding international obligations. As noted above, state obligations are drawn from the Refugee Convention, the ICCPR, CAT and the ECHR. The study further relies on *custom,* as it exists in parallel to key norms contained in the treaties enumerated above and the ARSIWA. Customary norms are particularly important to this study in two respects. First, as a corollary source of obligations where partner states are not party to relevant treaties, for example with regard to the principle of *non-refoulement* or the prohibition against torture.[65] Second, as a means to strengthen the normative footing of certain provisions of the ARSIWA, where they are considered to reflect customary law.

1.7.2 Secondary sources

The analysis also relies on the views of international, regional and national courts and treaty bodies in clarifying the state of the law through interpretation. In keeping with the positivist approach, however, the relative weight of legal sources is noted throughout the study.

Within the Council of Europe, the European Court of Human Rights (ECtHR) produces binding judgments and contributes to international human rights law jurisprudence more generally. Obviously, decisions of the Strasbourg court are not binding in the Pacific, however ECtHR jurisprudence does interact with international human rights law, thus providing an influential guide to interpretation.

Finally, the study includes national judicial decisions where relevant, giving particular weight to the decisions of superior courts interpreting key human rights and refugee law obligations.

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[64] Hall, 'The persistent spectre: natural law, international order and the limits of legal positivism' 284.

[65] See chapter 3.

1.7.3 Soft law sources

This study finally draws on soft law as an aid to interpretation. The analysis considers the views of the United Nations treaty bodies, expressed in individual communications, general conclusions and general comments, as important sources of soft law. Individual communications are afforded particular attention given their important role in interpreting obligations in concrete cases. While not binding on states, these bodies are the mandated authoritative source of interpretation for their respective instruments.[66] Further relevant soft law includes conclusions of the UNHCR Executive Committee (EXCOM) and UNHCR guidelines and handbooks.

1.8 Interpretative principles

In light of the sources noted above, the following explains the study's approach to interpretation, an exercise in finding the 'normative meaning… expressed in the linguistic formulation of a treaty provision'.[67] The classical starting point is Article 31 of the Vienna Convention on the Law of Treaties (VCLT).[68] Article 31 provides, in part:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
>   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
>   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:

[66] Martin Scheinin, 'The art and science of interpretation in human rights law' in Bård A. Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Research Methods in Human Rights: A Handbook, Edward Elgar 2017) 29.

[67] Martin Scheinin, 'The art and science of interpretation in human rights law' in Bård A. Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Research Methods in Human Rights: A Handbook, Edward Elgar 2017) 20.

[68] 23 May 1969, 1155 UNTS 331.

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

Article 31 thus comprises three elements requiring that an international lawyer interpret a treaty in *good faith* in accordance with the *ordinary meaning* of its terms in line with the instrument's *object and purpose* (Article 31(1)); with due regard to the treaty's *context*, comprising material related to the conclusion of the treaty (Article 31(2)); and taking into account *subsequent* matters and material beyond the treaty (Article 31(3)). These three elements may be conflated into one 'crucible approach' forming a single 'holistic', 'integrated' rule.[69] Rather than creating a hierarchy or separate tests, Article 31 provides for a general rule of interpretation to be followed as a 'logical progression, nothing more'.[70] As a result, the ordinary meaning of a term 'may not be read in isolation', but rather interpretation requires integration of the term into the treaty's context, object and purpose.[71] Article 32 VLCT further provides for subsidiary sources of interpretation, providing:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

It is not necessary here to argue on one side or the other in the debate of whether treaty interpretation is an art or a science.[72] However, as discussed

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[69] Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* 41; Jane McAdam, 'Interpretation of the 1951 Convention' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press 2011) 83; and Pobjoy, *The Child in International Refugee Law* 34;

[70] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2013) 208.

[71] International Law Commission, Yearbook of the International Law Commission vol II (1964) 169;
McAdam, 'Interpretation of the 1951 Convention' 83; Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* 42.

[72] See Aust, *Modern Treaty Law and Practice* 205; and Scheinin, 'The art and science of interpretation in human rights law'.

above, the indeterminacy of treaty texts gives rise to significant variation in interpretation among refugee law scholars. This indeterminacy, while by no means unique to the field of international refugee law,[73] tends toward the conclusion that Article 31 VCLT provides 'guidelines' framing the interpretative process rather than strict parameters leading to a *true* meaning of the text.[74] In other words, the VCLT provides a universally accepted framework to arrive at meaning in a legally sound manner but does not provide a roadmap to reach the exact meaning of a treaty term.[75]

This study adopts a teleological, or purposive, approach to the interpretation of treaties examined. There are three key points to be made in balancing the relative weight of sources in light of the interpretative principles set out in the VCLT.

First, the references in Article 31(1) to good faith and a treaty's object and purpose explicitly call for consideration of the protective purpose of human rights and refugee law.[76] In particular, there is now general support for the proposition that the humanitarian object and purpose of refugee law allows for due consideration of human rights law principles when interpreting the Refugee Convention.[77]

Second, this study places significant weight on the subsequent practice of states in the application of the above treaties, as reflected in Article 31(3)(b). State practice must be considered as a limited source of interpretation given its inclusion in Article 31(3)(b) where it 'establishes the agreement of the parties regarding its interpretation'. As state policy is the driving force behind this study, close regard to state practice as an expression of treaty interpretation is fundamental to the inquiry.

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[73] Scheinin, 'The art and science of interpretation in human rights law' 25-6. Scheinin rather caustically observes at 22 that 'human rights scholars and human rights courts and treaty bodies tend to refer to the provisions of the VCLT, to demonstrate that their interpretive activity is in line with international law, sometimes perhaps just to strengthen the legitimacy of the outcome of their interpretation'.

[74] Hathaway, *The Rights of Refugees under International Law* 64; Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* 40-49; Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* 71-2; and Pobjoy, *The Child in International Refugee Law* 35.

[75] While the VCLT is not binding on treaties finalised before 1969, articles 31 and 32 form part of customary international law. On diverging approaches to the VCLT rule, see generally Michael Waibel, 'Demystifying the Art of Interpretation' (2010) 22 European Journal of International Law 571, 573-4.

[76] Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 756.

[77] Pobjoy, *The Child in International Refugee Law* 35.

The question of the extent to which subsequent state practice should inform interpretation is a vexed one.[78] While Aust considers subsequent state practice the primary element of treaty interpretation,[79] Hathaway points out the inherent nature of human rights and refugee law instruments as crafted to limit state behaviour requires a level of caution in assessing the weight of state practice.[80] Relatedly, conduct in direct and flagrant breach of human rights and refugee law obligations should not be considered state practice for the purposes of interpreting obligations in this area, but rather non-compliance with the relevant treaty.[81]

Finally, as this study deals with three – at least to some extent – distinct international legal regimes, the principle of *systemic integration* contained in Article 31(3)(c) VCLT assumes particular importance. Article 31(3)(c) requires that the interpretative process include consideration of 'any relevant rules of international law applicable in the relations between the parties'. Such a systemic approach to interpretation requires that treaties be interpreted with reference to their 'normative environment'.[82]

As a general matter, this study takes an integrationist approach to these three branches of law on the basis of Article 31(3)(c).[83] This principle acts to align interpretation across seemingly disparate legal regimes, creating a 'bridge to a wider context' for interpretation.[84] Given this study's reliance on the general international law doctrine of state responsibility, the systemic integration principle is vital to the coherence of the enterprise. It is this principle that links, for example, principles of jurisdiction under human rights law with principles of state responsibility under the ARSIWA.[85]

Article 31(3)(c) has recently been described as the ' "master key" to the house of international law',[86] given its role in bringing in other, relevant rules to the interpretation process. This may be somewhat overstating its importance given its overlap with the context of a treaty; however, its function in broadening the range of rules considered is a strong argument

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[78] See, for example, Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* 72-3

[79] Aust, *Modern Treaty Law and Practice* 215.

[80] Hathaway, *The Rights of Refugees under International Law* 71.

[81] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* 72

[82] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission, A/CN.4/L.682 (2006) 208.

[83] See for example chapter 4.1 below in relation to the general international law and human rights law concepts of jurisdiction.

[84] Fitzmaurice, 'Interpretation of Human Rights Treaties' 764.

[85] Hathaway, *The Rights of Refugees under International Law* 340. See chapter 5.1.1.

[86] Pobjoy, *The Child in International Refugee Law* 37.

for the human rights–based approach to interpretation of refugee law.[87] Nevertheless, over-reliance on Article 31(3)(c) may lead to undesired results through, for example, the current application of the international law of migrant smuggling to asylum seekers and refugees moving irregularly.[88]

1.9 Framing the study

The final section of this introductory chapter frames the subsequent analysis with brief explorations of key themes that form the backdrop to the study. Four themes are addressed: the relationship between state sovereignty and asylum, the principle of international cooperation vis-a-vis refugees, an overview of how destination states justify international deterrence and the value of comparing Australian and European policies in this area.

1.9.1 Sovereignty and asylum

In general, states retain the sovereign right to migration and border control. A person seeking international protection claims an exception to this right, on the basis of their assertion of refugee status. The principle of *non-refoulement*, set out in Article 33(1) of the Refugee Convention, is the closest the international community of states has come to enacting a binding right to seek asylum. *Non-refoulement* does not amount to an absolute right of entry. Rather, the principle imposes a negative obligation to refrain from *returning* a refugee to persecution, once within the state's jurisdiction. This duty is expanded upon by human rights law, which prohibits the return of any person to a real risk of particular forms of serious harm, irrespective of the grounds for such harm.[89] The importance of *non-refoulement* in the context of international deterrence is clear where measures involve the transfer of asylum seekers between states.

The gap between a positive right to seek asylum contained in the 1948 Universal Declaration of Human Rights (UDHR)[90] and the *non-refoulement* obligation under the Refugee Convention leaves a significant amount of flexibility in how states navigate within the framework of international refugee law. This normative gap has been filled by state policies focused on deterring asylum seekers.[91] From the perspective of the asylum seeker,

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[87] Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* 52.

[88] See 1.9.3 below.

[89] CAT art 3; ICCPR art 7; and ECHR art 3. See further chapter 3.3.

[90] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)).

[91] Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*; Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*; Maarten den Heijer, *Europe and Extraterritorial*

international deterrence policies prevent the possibility of choosing one's country of asylum and, in some cases, preclude the chance to seek asylum at all.[92] Moreover, such policies generally have the effect of containing asylum seekers in countries that offer markedly lower levels of protection.

International deterrence policies thus reflect a tension between sovereignty and human rights and refugee law. This dialectic between the individual rights of the asylum seeker and sovereign state interests is a red thread through this study. An exclusive focus on individual rights places the refugee at the centre of asylum policy, while emphasis on state sovereignty gives almost unfettered power to the state. The study seeks to strike a balance between these two standpoints.

1.9.2 International cooperation on refugees

As a general matter, cooperation between states is an underlying principle generally encouraged – and sometimes required – by international law. In general, international cooperation refers to 'two or more states working together towards a common goal'[93] or the 'voluntary coordinated action of two or more states which takes place under a legal regime and serves a specific objective'.[94] As Hathaway and Neve point out, international law promotes cooperation among states in dealing with 'issues of transnational importance'.[95] By way of example, the 1945 United Nations Charter requires 'joint action' on the part of states to promote universal respect for and observance of human rights.[96]

However, the law of international cooperation *on refugees* is inchoate, with no binding provision included in the Refugee Convention.[97] A soft law

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Asylum (Bloomsbury 2012); and Gammeltoft-Hansen and Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy'.

[92] Vedsted-Hansen, 'Non-admission policies and the right to protection: refugees' choice versus states' exclusion' 269.

[93] Rebecca Dowd and Jane McAdam, 'International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How' (2017) 66 International and Comparative Law Quarterly 863, 869.

[94] Rüdiger Wolfrum, 'International law of cooperation' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (North-Holland 1995) 1242.

[95] Hathaway and Neve, 'Making international refugee law relevant again: A proposal for collectivised and solution-oriented protection' 170.

[96] United Nations Charter arts 55 and 56. See also 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States.

[97] Isabelle Swerissen, *Shared Responsibility in International Refugee Law* (SHARES Expert Seminar Report, March 2012) 7-8; and Michael Barutciski and Astri Suhrke, 'Lessons from the Kosovo Refugee Crisis: Innovatons in Protection and Burden-sharing' (2001) 14 Journal of Refugee Studies 95, 108.

principle of international cooperation has developed based on the Preamble, which acknowledges that:

> the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international cooperation.[98]

There are no substantive obligations on states to cooperate in relation to refugees in the text of the Refugee Convention. The Convention drafters included a plea for states to admit refugees and 'act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement'.[99] Similarly, the 1967 Declaration on Territorial Asylum provides, in Article 2(2):

> Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.

In the absence of a binding duty to cooperate, responsibility for refugees is generally territorial.

Confusion around terminology further clouds the meaning and content of the principle of international cooperation in this area. According to Dowd and McAdam:

> Burden-sharing and responsibility-sharing can be understood as particular forms of international cooperation, or as objectives thereof, arising in the context of refugee protection. These concepts have not been clearly defined… States adopt a variety of interpretations as to what they entail in practice.[100]

While the concepts of 'burden sharing' and 'responsibility sharing' involve cooperation between states in relation to the protection of refugees,

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[98] Refugee Convention preambular para 4. The 1967 Declaration on Territorial Asylum further provides in article 2(2): 'Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State'.

[99] United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, A/CONF.2/108/Rev.1 (25 July 1951) para IV(d).

[100] Dowd and McAdam, 'International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How', 569.

international cooperation is a broader principle encompassing other actions such as combatting human smuggling.[101]

In essence, therefore, international cooperation on refugees is a non-binding principle open to state interpretation. A UNHCR expert roundtable on the principle recommends that cooperation must 'enhance refugee protection and prospects for durable solutions' and 'must be in line with international refugee and human rights law'.[102] The practice of international cooperation on refugees varies widely, ranging from small-scale, *ad hoc*, bilateral agreements, such as the 1999 Kosovo Evacuation Plan, to regional or international programmes, such as the Comprehensive Plan of Action providing for the admission and resettlement of Vietnamese refugees in the 1980s and 1990s.[103] International cooperation may thus take many forms, including the provision of assistance between states and the physical relocation of asylum seekers and refugees.[104]

1.9.3 State deterrence rationales

Destination states initiate international deterrence arrangements for a range of reasons. In some cases, deterrence measures do not intend to prevent access to asylum but do so as a consequence of actions taken in the pursuit of other policy goals. The major rationales in Australia and Europe are explored briefly below. Firstly, *combatting people smuggling* is often cited as justification for international deterrence, as the inherently transnational nature of migrant smuggling lends itself to international cooperation. Increasingly, destination states engage partner states to prevent migrant smuggling across state frontiers, relying on the migrant smuggling legal framework rather than human rights and refugee law.

Since 2011, Australian governments have rationalised deterrence measures on the basis of 'breaking the people smugglers' business model'.[105] The logic here is that people smuggling, a transnational crime, can only be effectively

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[101] Ibid 871; and UNHCR, *Expert Meeting on International Cooperation to Share Burdens and Responsibilities: Summary Conclusions* (Amman, Jordan, 27-28 June 2011) 2.

[102] UNHCR, *Expert Meeting on International Cooperation to Share Burdens and Responsibilities: Summary Conclusions* 4.

[103] Kirsten McConnachie, 'Refugee Protection and the Art of the Deal' (2017) 9 Journal of Human Rights Practice 190, 192.

[104] UNHCR, *Expert Meeting on International Cooperation to Share Burdens and Responsibilities: Summary Conclusions* 2; Gregor Noll, 'Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field' (2003) 16 Journal of Refugee Studies 236; Savitri Taylor, 'The Pacific Solution or a Pacific Nightmare: The Difference between Burden Shifting and Responsibility Sharing' (2005) 6 Asian-Pacific Law & Policy Journal 1; and Dowd and McAdam, 'International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How'.

[105] Catherine Barker, 'The People Smugglers' Business Model' (Australian Parliamentary Library research paper no 2, 2012–13).

eradicated by preventing all irregular migration by boat. This argument reached an extreme during the 2015 Rohingya crisis, when Australia refused to accept any of the 8000 Rohingya asylum seekers stranded at sea, on the basis that providing protection to this group would incentivise and encourage future smuggling operations.[106]

Since 2015, European leaders have also justified deterrence with reference to combatting people smuggling at both the EU and individual member state level.[107] In June 2016, the EU's 'Migration Partnership Framework' identified the dual goals of 'saving lives at sea and breaking the business model of smugglers'.[108] In February 2017, the Malta Declaration, announcing increased cooperation with Libya to prevent irregular migration in the Central Mediterranean, also aimed to 'break the business model' of smugglers.[109]

International law on migrant smuggling leaves open potential conflicts with human rights and refugee law. The 2000 Migrant Smuggling Protocol places international cooperation at the centre of the prevention of migrant smuggling.[110] The preamble thus calls for:

> effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other

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[106] Shalailah Medhora, 'Nope, nope, nope': Tony Abbott says Australia will take no Rohingya refugees' (*The Guardian,* 21 May 2015) <https://www.theguardian.com/world/2015/may/21/nope-nope-nope-tony-abbott-says-australia-will-take-no-rohingya-refugees> accessed 20 April 2018.

[107] In March 2016, in announcing the operation of the EU–Turkey Statement, members of the European Council stated: 'In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey today decided to end the irregular migration from Turkey to the EU'.

[108] Communication from the Commission to the European Parliament, the Council, and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, 7 June 2016.

[109] Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017 <http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/> accessed 7 November 2017.

[110] The duty to cooperate emerges from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime 2237 UNTS 319 (entered into force 15 November 2000).

> appropriate measures, including socio-economic measures, at the national, regional and international levels.[111]

The duty to cooperate is woven into various substantive provisions of the Migrant Smuggling Protocol. For example, Article 7 requires cooperation 'to the fullest extent to prevent and suppress the smuggling of migrants by sea', in accordance with the international law of the sea. Notwithstanding the duty to cooperate, the Protocol also includes a 'savings clause' that seeks to avoid 'collision of norms' between obligations to act against smuggling and obligations to ensure the rights of refugees.[112] Article 19 thus provides:

> Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

The savings clause limits the operation of the Protocol and its focus on cooperation in the combatting of smuggling by special reference to other relevant branches of international law, including those protecting the rights of refugees. The savings clause also recalls the triple purpose of the Protocol, contained in Article 2, 'to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants'. Article 16(1) thus requires state parties to take 'all appropriate measures' to protect the fundamental rights of those smuggled, 'in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.[113] Clearly, however, cooperation on the combatting of migrant smuggling frustrates access to asylum for refugees in practice.[114]

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[111] Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime 2241 UNTS 507 (entered into force 28 January 2004).

[112] Anne T Gallagher, 'Migrant Smuggling' in Neil Boister and Robert J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 197.

[113] James C Hathaway, 'The human rights quagmire of human trafficking' (2008) 49 Virginia Journal of International Law 1; and Anne Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway'(2009) 49 Virginia Journal of International Law 789, 839.

[114] Notably, a key advocate of the Migrant Smuggling Protocol, Anne Gallagher, has criticised states for effectively ignoring the protective aims of the Protocol, noting 'Very few States would be able to defend their actions against migrant smuggling as conforming to the letter and spirit of the Protocol with regard to smuggled persons rights under that instrument'. Anne T Gallagher, 'Whatever Happened to the Migrant

Secondly, deterrence is justified in *humanitarian* terms as necessary to save lives at sea. Once more, the transnational nature of irregular movements pushes destination states to reach beyond their borders and seek regional partners. In the Pacific, where approximately one thousand asylum seekers died *en route* to Australia between 2008 and 2013, the turning back of boats and re-establishment of third country processing arrangements was justified on the basis of humanitarian concern to prevent asylum seekers risking their lives on long, dangerous sea crossings.[115]

In the Mediterranean, around 15,000 people died trying to reach Europe between 2014 and 2017.[116] This placed saving lives at sea at the top of the 2015 European Agenda on Migration, which stated 'Europe cannot stand by whilst lives are being lost'.[117] The rationale here is that minimising irregular migration by sea prevents death by drowning, leading former Australian prime minister, Tony Abbott, to advise the EU that 'the only way to stop the deaths is in fact to stop the boats'.[118]

Thirdly, *ineffective return policies* are a reason for preventing the arrival of irregular migrants. While deterrence efforts *after* arrival have long employed the safe third country and first country asylum concepts to limit the scope of protection,[119] destination states are increasingly turning to cooperation to disrupt irregular passage *before* asylum seekers and refugees reach destination state territory.[120]

Smuggling Protocol?' in M McAuliffe and M Klein Solomon (Conveners), *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration* (IOM 2017) 105-10, 108.

[115] Jane McAdam, 'Australia and Asylum Seekers' (2013) 25 International Journal of Refugee Law 435

[116] The number of fatalities reached 3279 in 2014; 3770 in 2015; 5143 in 2016; and 2377 in 2017. See <www.missingmigrants.iom.int> accessed 30 October 2018.

[117] European Commission, *A European Agenda on Migration* COM(2015) 240 final, 13 May 2015 2.

[118] Gabrielle Chan, 'Tony Abbott urges Europe to adopt Australian policies in refugee crisis' (*The Guardian,* 27 October 2015) <https://www.theguardian.com/world/2015/oct/28/tony-abbott-urges-europe-to-adopt-australian-border-policies> accessed 20 April 2018.

[119] Gregor Noll and Jens Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies' in Philip Alston, Mara Bustelo and James Heenan (eds), *The EU and Human Rights* (Oxford University Press 1999) 382; and Vedsted-Hansen, 'Non-admission policies and the right to protection: refugees' choice versus states' exclusion' 270-2.

[120] See for example Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic (2 February 2017); and Federal Ministry Republic of Austria and Ministry of Immigration and Integration Denmark, *Vision for a Better Protection System in a Globalized World* (4 October 2018) 5.

In Europe, refugees join other migrants in 'mixed migration' flows that complicate the reception of new arrivals.[121] Under EU law, the 2008 Returns Directive sets out common return standards to be implemented by national authorities, with a focus on the issuing of return decisions for irregularly staying third country nationals and the importance of respecting the rights and dignity of individuals returned.[122] According to the European Commission, only around 40 per cent of return decisions are effectively enforced, a rate that has remained consistent since 2013.[123] In the Pacific, refugee recognition rates of asylum seekers arriving by boat are so high, generally around 90 per cent, that this rationale hardly applies.

The key issue here is that European states are concerned that access to territory for migrants not in need of international protection, travelling alongside refugees, results in high numbers of migrants effectively unable to be returned. EU return policy is costly, complex and inefficient, leaving open the possibility – even likelihood – that rejected asylum seekers and other irregular migrants remain in Europe.[124]

The return of persons who do not face a risk of persecution or other serious human rights violations is in line with human rights and refugee law standards, absent some other overriding factor, such as the right to family or the best interests of the child. However, the perception that once a person reaches European territory, irrespective of their need for international protection, removal will be extremely difficult drives the development of extraterritorial deterrence measures to prevent arrival in the first place.[125]

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[121] Sharpe defines the term 'mixed migration' as 'complex migration phenomena, including irregular flows composed of people with varied and no international protection needs'. Sharpe, 'Mixed Up: International Law and the Meaning(s) of "Mixed Migration"' 135.

[122] Directive 2008/115 of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals; European Migration Network, *The effectiveness of return in EU Member States*, (Synthesis Report, 2017).

[123] European Commission, *A European Agenda on Migration* 2; European Commission, *Council EU Action Plan on return* COM(2015) 453 final, 9 September 2015; European Commission, *Communication on a more effective return policy in the European Union - a renewed action plan* COM(2017) 200 final, 2 March 2017 2.

[124] Mixed Migration Platform, 'Rejected but remaining: Analysis of the protection challenges that confront rejected asylum seekers remaining in Europe' (Briefing Paper 5, May 2017).

[125] The EU has emphasised the need for 'coherent, credible and effective policy with regard to the return of illegally staying third country nationals, which fully respects human rights and the dignity of the persons concerned as well as the principle of non-refoulement'. European Commission, *Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration* (2016) 2.

These three factors are not an exhaustive account of states' justifications for enacting deterrence policies. A number of other factors may be placed under the umbrella category of *national politics*, a realm in which asylum policy consistently plays a central role.[126] In Australia, for example, international deterrence policies, such as third country processing, are supported by both major political parties. A number of European countries, notably Hungary, have justified deterrence on the basis that the predominantly Muslim demography of refugees is incompatible with integration in the receiving society.

1.9.4 Comparing Australian and European approaches

The study focuses on how broadly similar *policies* operate between the two regions, but does not seek to attempt a comparative law analysis.[127] While there are a number of commonalities in international deterrence policies led by Australia and Europe, there are also important points of divergence. Firstly, there are *geographical* differences between the two contexts. Australia's island geography makes maritime migration controls effective in deterring asylum seekers by boat, while alternative land migration routes into Europe reduce the impact of patrols in the Mediterranean. Land migration into Europe, most notably through the Balkans, provides an alternative access point for asylum seekers not possible in the Australian context.[128]

Secondly, there are important *legal* differences between European states and Australia in at least two respects. Regional courts, including for the protection of human rights, in place in Europe lack counterparts in the Asia–Pacific. While asylum seekers within the jurisdiction of Council of Europe states enjoy protection under the ECHR, no such regional human rights framework protects asylum seekers under Australian jurisdiction. Further, the EU asylum *acquis* provides an extra layer of regulation inside the 28 member states or where EU law is otherwise applied, notably through the Charter of Fundamental Rights and the Court of Justice of the European Union (CJEU).[129]

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[126] Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press 2004) 2; David Cantor, 'Bucking the trend? Liberalism and illiberalism in Latin American refugee law and policy' 191-4.

[127] For a comparative legal analysis of Australia and the United States in this area, see Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World*. On policy transfer between Australia and Europe, see McAdam, 'Migrating laws? The 'plagiaristic dialogue' between Europe and Australia'.

[128] Frontex, Migratory routes map <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/> accessed 30 November 2018.

[129] Charter of Fundamental Rights of the European Union OJ 2007 C303/01. See further Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State

Moreover, variation between monist and dualist approaches impact the weight of human rights and refugee law within domestic systems. While the High Court of Australia has examined a number of cases relating to international deterrence, Australian constitutional law takes a dualist approach 'under which international law and national law are viewed as distinct legal orders', requiring that international obligations flowing from accession to treaties be implemented into domestic law via legislation.[130] Monist states, in contrast, view international and domestic law as cut from the same cloth, in some cases preferencing international law over national regulation.[131] Europe includes a combination of monist and dualist states, though notably Spain and Greece are considered monist, where the national constitutions build in respect for international law.[132] The Italian Constitutional Court, in contrast, takes a dualist approach.[133] These differences in legal context are significant, leaving European states'

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responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29 June 2013; Directive 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13 December 2005 (recast); and Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection, 29 June 2013, OJ L. 180/96 -105/32, 2013/33/EU (recast). For recent work on asylum and refugee policy and EU law, see Madeline Garlick, *Solidarity under strain: solidarity and fair sharing of responsibility in law and practice for the international protection of refugees in the European Union* (Radboud University 2016) and Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*.

[130] In general, the United Kingdom and United States are also considered dualist states. Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* 17; Maryellen Fullerton, 'Stealth Emulation: The United States and European Protection Norms' in H Lambert, J McAdam and M Fullerton (eds), *The Global Reach of European Refugee Law* (Cambridge University Press 2013) 205. On monism and dualism in Australian refugee law, see Anthony Pastore, 'Why judges should not make refugee law: Australia's Malaysia Solution and the Refugee Convention' (2012) 13 Chicago Journal of International Law 615.

[131] On the impact of monist and dualist approaches in the protection of human rights in Europe see Richard Carver, 'A new answer to an old question: national human rights institutions and the domestication of international law' (2010) 10 Human Rights Law Review 1.

[132] Constitution of Greece, 1975, art 28(1); Constitution of Spain, 1978. It is notable that the Spanish Supreme Court recently held the views of UN treaty bodies to be legally binding on the domestic plane. See Koldo Casla, 'Supreme Court of Spain: UN Treaty Body individual decisions are legally binding' (*EJIL: Talk!,* 1 August 2018) <https://www.ejiltalk.org/supreme-court-of-spain-un-treaty-body-individual-decisions-are-legally-binding/> accessed 1 December 2018.

[133] Marta Cartabia, 'The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Community' (1990) 12 Michigan Journal of International Law 173.

extraterritorial activities more open to legal challenge at both domestic and regional levels than Australia's.

Thirdly, the *composition* of irregular migration flows are distinct between Australia and Europe. Irregular movement across the Mediterranean is a classic example of 'mixed migration', with both refugees and other migrants using the same routes.[134] Over the decade 2008–2017, the percentage of *first instance* positive decisions ranged between 28 and 60 per cent across the EU, with the total number of final grants of protection certainly higher.[135] In some contrast, the significant majority of irregular migrants seeking to reach Australia by boat are refugees. Over the decade 2008–2017, recognition rates of asylum seekers arriving by boat was between 71 and 93 per cent. In the five years preceding Operation Sovereign Borders, 2008–2012, approximately 90 per cent of asylum seekers who arrived by boat were granted international protection in Australia.[136] In the five years following the reopening of regional processing centres, 2012–2017, recognition rates remained high, with 71 per cent of asylum seekers transferred to Papua New Guinea found to be refugees, and 87 per cent of asylum seekers in Nauru granted refugee status.[137]

Notwithstanding these important distinctions between the nature of asylum seeking in Australia and Europe, a comparison of policy in this area shows significant similarities and, in fact, convergences. Against this legal and policy backdrop, the following chapter provides a typology of international deterrence and key bilateral arrangements in the Mediterranean and the Pacific.

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[134] Judith Kumin, 'The challenge of mixed migration by sea' (2014) Forced Migration Review 49. On the concept of mixed migration, see Sharpe, 'Mixed Up: International Law and the Meaning(s) of "Mixed Migration"'.

[135] Protection may take the form of Convention status, subsidiary protection or humanitarian protection. Migration Policy Institute, Asylum Recognition Rates in the EU/EFTA by Country, 2008-2017 <https://www.migrationpolicy.org/programs/data-hub/charts/asylum-recognition-rates-euefta-country-2008-2017> accessed 16 August 2018.

[136] In 2010-11, 93.5 per cent of boat arrivals received refugee or subsidiary protection; 91 per cent in 2011-12; and 89 per cent in 2012-13. Department of Immigration and Citizenship, Asylum Statistics – Australia: Quarterly Tables – March 2013 14 <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/asylum-stats-march-quarter-2013.pdf> accessed 16 August 2018.

[137] Senate Estimates, Answer to Question on Notice, Legal and Constitutional Affairs, BE18/244, 21 May 2018; and Senate Legal and Constitutional Affairs Transcript, Senate Additional Estimates, 26 February 2018, 167.