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**Offshore law.
The tension between the
universality of human rights
and the practice of states in the
management of migration flows**

1. INTRODUCTION

An article published by the Guardian on August 9, 2016, by the title “A short history of Nauru, Australia’s dumping ground for refugees” opens up the “Pandora’s box” connected to the treatment of refugees wishing to enter Australia, shedding lights on the harsh life’s conditions they suffer. Far from being an isolated case, this represents a widespread practice. Truly, today States are more and more inclined to manage migration flows outside their territories creating hotspots where asylum seekers are processed or concluding agreements to stop the fluxes of migrants in transit States or, directly, in their States of origin. Such a practice is evidence of a shift towards an extra-territorial enforcement of law.

Clearly, the externalisation of the management of migration flows undermines the protection of the rights of asylum seekers on several grounds. In fact, as anticipated above, life’s conditions in these hotspots are below the threshold of human decency as established by international law, and thus amount to violations of human rights. At the same time, the practice consisting in blocking migration fluxes in foreign States might count as – among others – a violation of the principle of *non-refoulement*.

At a first glance, this may be surprising as the above-mentioned rights belong to a category of rights considered to be of a customary nature, therefore binding all States of the international community. This could be even more surprising if compared to the jurisprudence of international courts – and in particular the European Court of Human Rights (ECtHR) – which is evol-

ing towards an extensive approach to the extraterritorial application of the European Convention of Human Rights (ECHR or the Convention). An approach that is likely to influence the interpretation of other human rights treaties, the application of which is not geographically limited.

It seems that there is a growing tension between the scope of human rights law – that aspires to universality – and the conduct of States, which is based on legal decisions that, by allowing extraterritorial actions, openly violate human rights law. Against this background, it seems that the real problem is not the scope of human rights law, but, rather, its enforcement; a circumstance granting the States a regime of impunity.

This paper argues that more attention should be paid to the enforcement of human rights of asylum seekers than to their scope. In this regard, I will develop the idea that domestic courts' role should be enhanced. After having presented the features of States' practice in the field of the management of migration flows, I will demonstrate that human rights law has the potential to apply extraterritorially, thus limiting the conduct of States in respect to asylum seekers. I will then present the real problem, which consists in the lack of enforcement mechanisms in international law. In conclusion, I will discuss a possible theoretical framework for bolstering the role of national judges in the protection of asylum seekers' rights.

2. OFFSHORE LAW

The concept of law enforcement entails the exercise of coercive power to guarantee public security and to enforce law and order (Melzer 2009) and was originally conceived as a prerogative of sovereignty. Sovereignty, as it is known, has always been linked with territory (Crawford 2012) and territory has always been regarded as the “point of departure in settling most questions that concern international relations”.¹

Nowadays practice shows that States exercise their coercive powers outside their territories, in particular when they perform law enforcement operations. There are several evidences of this practice: the use of drones, digital

¹ Permanent Court of Arbitration, *Island of Palmas Case (Netherlands v. United States of America)*, Award of 4 April 1928, in *Reports of International Arbitral Awards*, vol. XI, p. 838.

surveillance, extraordinary renditions, anti-piracy operations and so on. The management of migration flows makes no exception.

The above-mentioned activities may appear to imply that a strict link between law enforcement and its territorial dimension no more exists, or that an extraterritorial dimension should be included in the definition of territory (Milano 2013). This is no novelty as Rolando Quadri, in 1968, proposed a functional approach to the very notion of territory (Quadri 1968). Practice is now confirming this doctrinal position. Certain authors believe that territory is losing importance even in the law of the state (Forteau 2007).

Such a practice is part of a broader process that is leading towards the detachment of States' authority from their territories (Brölmann 2007). This process has also been regarded as a process of de-territorialization of international law (Oddenino 2015); States are increasingly perceiving the need to protect the interests of the international community as a whole even in relation to conducts occurring beyond their borders.²

The new direction of States' practice has many causes. It can be considered as a sort of dark side of globalization (Megrét 2009) or as a side effect of an "unprecedented degree of international cooperation" (Gammeltoft-Hansen and Vedsted-Hansen 2017). Attempting to find a unique label, some scholars have regarded this practice as "transnational law enforcement" (Gammeltoft-Hansen and Vedsted-Hansen 2017; Gibney 2013). This definition seems to quite appropriately describe the features of States' action.

In harsher terms, some of the activities that States carry out outside their borders are described as "legal black holes" (Steyn 2004). The use of the adjective 'legal' to describe a 'black hole' seems to be paradoxical: Indeed, a 'black hole' is usually a place that is not governed by law. However, the conducts of States in extraterritorial law enforcement is not outside the law, as it finds its basis in national or supranational legal principles, which are the result of a precise political will.

We can easily say that the conduct of States is acquiring an extraterritorial dimension which can be placed in a legal framework. Such a dimension implies an extension of States' jurisdiction, defined as "the competence of a State to

²This is stated in the join individual opinion of judges Higgins, Koojimens and Buergenthal in the *Arrest Warrant Case*. See International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002.

make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory” (Kamminga 2012). That is the reason why, to describe this practice, we can borrow a term from a book about contemporary trends in global economy - “Offshore world” (Palan 2003) – and decline it for our purposes as “offshore law”. In fact, extraterritorial law enforcement activities of States find their legal justification in national or supranational laws such as European Union laws and United Nations Security Council resolutions that explicitly allow them to act outside their territories.

As anticipated, this practice also involves the management of migration flows and, consequently, the approach of States towards asylum seekers.

In recent years, States have been facing an unprecedented ‘refugee crisis’. The solutions envisaged by many States consist in reducing the number of refugees that reach their borders by intercepting them in the high seas, creating extraterritorial hotspots, or concluding agreements with transit or countries of origin. The rationale of these solutions is quite clear: States are unwilling or unable to accept refugees and even the most sophisticated asylum system, such as the European one, is proving to be ineffective (Munari 2016; Nascimbene 2016). Moreover, this has become an issue to which many political parties make recourse to gain electoral consensus, associating the ‘refugee crisis’ with the terrorist threat.

I mentioned earlier the special case of Australia. It is worth recalling it, as it appropriately represents the practice of de-territorializing the management of migration flows. In 2012, Australia and Nauru signed an agreement by which the latter agreed to assess people’s claim for international protection and to host a facility to detain them, while the former assumed the cost of the entire project. Since then, and until 2014, Australia has been moving to Nauru all of its asylum seekers. According to a recent report³ published by Amnesty International, more than one thousand individuals are kept in Nauru, of whom more than half are detained in processing centers. As anticipated, detention in Nauru is severe to the point that if asylum seekers do not die because of the harsh conditions, they frequently commit suicide. Children represent the most affected category of subjects. In its latest report, the UN’s Committee on the Rights of the Child highlighted the “inhuman

³ Amnesty international, *Island of Despair. Australia’s “Processing” of Refugees on Nauru*, 2016, available at www.amnesty.org.

and degrading treatment, including physical, psychological and sexual abuse, against asylum seeking and refugee children living in the Regional Processing Centres” in Nauru.

The Special Rapporteur of the United Nations Human Rights Council on torture and other cruel, inhuman, or degrading treatment or punishment, Juan E. Méndez has recently condemned Australia’s indefinite detention of asylum seekers in processing centers.

Australia is not isolated: the management of migration flows is characterized by conducts that share the same rationale.

As to Europe, the operations set up by the European Union agency Frontex, which has the mandate to control EU external borders, have been raising several concerns. Since the deployment of the first mission, *Hera I*, Frontex contributed to pushback a high number of migrants. In a statement celebrating the first five years of activity, the Agency has highlighted how:

[T]he close proximity of these joint maritime and airborne patrols to the coast of West Africa was crucial: it meant that the unseaworthy boats used by the irregular immigrants could be stopped and turned back to safety before the dangerous voyage to the Canary Islands could claim even more lives. [...] The methodology of the organised crime people facilitating this flow of migrants was adaptable. We knew we faced a real challenge.⁴

It is clear from this passage that the activity of Frontex took place outside the territorial sea of the EU member States and in close proximity to the coast of African States and consisted in the ‘rescue’ of migrants and in their ‘turning back’ to their countries of origin. Although this action might reduce the number of people arriving in Europe, it shifts border control activities to an area – the high seas or the territorial sea of third countries –, which we may consider extraterritorial by its very nature (Gammeltoft-Hansen 2010).

The involvement of third countries in migration control is often taking the form of specific agreements between States with the aim of countering irregular migration. Typical examples are the agreement between Italy and Libya of 2009 and that signed between the same parties in January 2017.

⁴ Frontex, *Beyond the Frontiers. Frontex: The First Five Years*, Warsaw, 2010, p. 32, http://frontex.europa.eu/assets/Publications/General/Beyond_the_Frontiers.pdf

Even the European Union made use of this practice. In March 2016, it reached an agreement – the legal status of which is still disputed (Cannizzaro 2016) – with Turkey to reduce the number of refugees approaching and entering EU borders (Favilli 2016).

To sum up, these agreements externalise the processing of asylum seekers, which is delegated to third States as part of broader deals that are favourable to those countries. As a consequence asylum procedures are performed in the countries of origin of migrants, or in transit countries or in detention centres (Noll 2003).

States are progressively delegating their powers to third entities – international organizations, third countries or private persons or organizations – over which they do not exercise a full control.

Although migration control procedures are normally carried out by states within their borders, this sort of activities are now being often conducted outside of state borders, either in the high seas, or in countries where human rights are not generally enforced.

Within this scenario, the rights of migrants are severely affected.

Clearly, moving asylum procedures to third countries, whose respect for human rights is dubious at the least, may be detrimental to the protection of migrants; pushback operations are, instead, a clear violation of the principle of *non-refoulement*. Insofar as there is no supranational institution that can issue sanctions and establish that a given recipient state must enforce migrants' right of asylum, the issue will hardly be solved.

3. IS HUMAN RIGHTS LAW EXPANDING ITS SCOPE? THE ROLE OF CUSTOMARY LAW.

As seen in the previous paragraph, the extraterritorial management of migration flows impacts on the protection of human rights.

States are trying to move migration control procedures outside their borders for a specific reason: normally (albeit not always), recipient states are rich and respectful of human rights. Within their borders, they are obliged by their own domestic law to fulfil certain standards in the treatment of individuals, including migrants. If, however, migration controls take place outside of their territory, this obligation no longer holds and, more importantly, they cannot be held responsible for any failure to enforce human rights outside of their territorial jurisdiction.

The effectiveness of this defense depends largely on the capacity of human rights law to expand its scope. If human rights law were to be enforceable extraterritorially, the conduct of States would have to be subjected to the jurisdiction of national or supranational courts.

The hypothetical formulation of the previous sentence is justified by the fact that the enforcement of human rights law depends largely on the identification of the source of law that contains the appropriate human rights provisions.

From the perspective of the sources of international law, in particular international treaties and customary law, can we really say that human rights are universal? In other words, can we say that human rights law is part of customary law and, therefore, binding the international community as a whole?

It is true that States' actions shall be influenced by all the obligations flowing from international law, included those that have acquired a customary status. As James Eadie put it in his *plaidoirie* in the *Al-Skeini* case before the ECtHR, international law binds States in their extraterritorial action even if treaties are not applicable. In addition to this consideration, it should be noted that, in the absence of a specific applicable treaty, general international law – customary international law and general principles – is considered the best law available in purely international scenarios such as activities in the high seas and involvement of international organizations (Lubell 2008). In fact, the scope of customary law is universal in nature and its application does not depend on the number of human rights treaties that States have ratified.

Nowadays it is under discussion if and to what extent the whole set of human rights norms is part of customary law.

The customary nature of human rights might be derived from the inclusion of the protection of human rights in the wording of the United Nations Charter (Lauterpacht 1950). The protection of human rights is mentioned in Article 1, in which the purposes of the United Nations are set forth: “The purposes of the United Nations are: [...] To achieve international problems of cooperation in solving economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”.

This provision should be read along with Article 55 of the UN Charter: “[...] The United Nations shall promote: [...] universal respect for, and ob-

servance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”. The following article calls on UN member States to “take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55”.

It is uncertain if Articles 55 and 56 impose an obligation upon States to respect human rights. The International Court of Justice tried to solve this doubt in the Opinion on *The legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)*.⁵ The Court, in paragraph 131 of that opinion, seems to confirm the binding nature of the provision in the UN Charter which impose to States parties a duty “to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter” (emphasis added).

The previous quotation seems to imply the binding nature of the UN Charter provision (Schwelb 1972). Since it has been ratified by the whole international community, it can be inferred that the protection of human rights is an obligation that all States are bound to respect.

Such a strong basis was reinforced after the adoption of the Universal Declaration of Human Rights. It is true that the UDHR is enclosed in a non-binding instrument, i.e. a General Assembly Resolution, however, it is nowadays uncontroversial the fact that the Declaration is part of customary international law (Clapham 2006).

Is this enough to establish the customary nature of human rights? What seems to be doubtful is the process that eventually led to the formation of general international law in this field (Dimitrijevic 2006). In international law, a rule is considered to be customary if it satisfies two conditions: it must be supported by States’ practice (*diuturnitas*) and such practice must be considered by States as a binding rule upon them (*opinio juris*) (Conforti 2015).

⁵ International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971.

According to some scholars, human rights law is a sort of special regime in international law that should not be assimilated to other branches of international law. The core of this position is that human rights law is not subjected to the general categories of international law and deserves a special treatment. It follows that the process leading to the formation of customary international law in the field of human rights is different from that regarding other branches of international law (Flauss 1998). In this particular branch, States' practices are difficult to establish, as human rights are frequently violated, therefore the affirmation of a consolidated *opinio juris* might be sufficient to assess the existence of a rule of general international law (Condorelli 2012).

According to other scholars, customary law is not the most appropriate source of international law for human rights, as an *ad hoc* category of general international law should be imagined for them (Sirma and Alston 1988; Henkin 1995-1996) in order to strengthen their universal application.

These positions, albeit based on arguments that are formally different, share a common rationale, that seems to be twofold. First, States' practice in the field of human rights is characterized by frequent violations, therefore it is difficult to establish a *diuturnitas* favorable to their protection. Second, human rights law does not really regard the relations between States, but, rather, the relations between States and individuals.

As anticipated above, this is not the mainstream position. Rather, it seems to be fiercely countered by other scholars, who make recourse to at least two arguments.

First, the idea that human rights law is a 'special regime' is disputed. Indeed, it regards the relations between States, which only indirectly concern the rights of individuals. The methods of formation of the rules are thus the same applicable to any other rule of international law (Pellet 2000; Wood 2016).

Second, and according to a more formal argument, the content of human rights' norms is not clear. Being uncertain the source of international law in this field, it is not easy to grasp the content of the rule (D'Amato 2010). One may argue that the content of customary human rights rules is equivalent to that enshrined in human rights treaties and developed through human rights courts, but human rights treaties are valid only *inter partes* and therefore the consent of States should be requested to consider such norms applicable.

The doctrinal debate on the customary nature of human rights is characterized by a plurality of views and seems to lead to a dead end. In fact, it can

be used both by advocates of a sort of universality of human rights and by the States that wish to act *legibus soluti*, especially in the field of migration control.

The practice of national and international courts, by contrast, shows that customary international law can be used to extend States' jurisdiction and, therefore, to expand the scope of human rights law.

The Canada Supreme Court explicitly mentioned international human rights law in order to grant the protection afforded by the Canadian Charter of Rights and Freedoms to its citizens abroad in the *Khadr* case. The reference to international human rights law could be understood as a reference to those human rights' norms that have acquired a customary status (Keitner 2011).

Such an approach is not new in Canadian jurisprudence; the Canadian Charter was invoked in international contexts in two extradition cases, where the fugitive persons feared to be executed in the United States. In the *Kindler and Burns* cases, respectively decided in 1991 and 2001, the Supreme Court made reference to the Canadian 'basic constitutional values'; more in detail, in the *Burns* case, the Supreme Court also referred to the international moratoria of the death penalty in order to identify Canadian values in international law.

The Canadian cases are examples of extraterritorial prescriptive jurisdiction, in the sense that a domestic act – the Canadian charter – was considered binding, notwithstanding the presumption against extraterritoriality, on the basis that the conducts at stake were in violation of international human rights law. Indeed, the Canadian Charter is not meant to be binding outside of Canada, but the Supreme Court decided to overcome this limitation due to the specific facts of the cases which amounted to a violation of human rights on the part of the plaintiff.

A similar approach inspired a decision of the Court of Appeals in The Hague in 2011 in the famous *Nuhanic* case. The Court was asked to apply Dutch law to the Dutch military contingent deployed in Former Yugoslavia within the United Nations peacekeeping operation UNPROFOR. Interestingly, the judges identified the applicable norms by reference to the customary duties of the Netherlands in the field of human rights. This conclusion is of paramount importance because the Court assessed that some human rights norms – in that case the right to life – were of a customary nature and therefore binding all States irrespective of the place where the violations are committed (Nollkaemper 2011).

Such an approach was endorsed by the ECtHR. In the *Demir and Baykara* case, the Court found that Turkey was responsible for the violations of the right to free assembly on the basis of some international agreements which were not ratified by that State, but which, nonetheless, were considered by the ECtHR as part of general international obligations binding upon States. In that occasion the Court stressed that “it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned [...] to denote a continuous evolution in the norms and principles applied in international law”.

This case is considered as a demonstration of the living character of human rights and that human rights norms must be interpreted in accordance with the current stance of international law, even taking into account norms that are not binding upon States through treaties but nonetheless binding as part of customary international law (Zimmele 2013).

It is clear from what precedes that although the doctrinal debate on the customary nature of human rights is far from reaching a unique position, domestic courts have elaborated tools to extend States’ jurisdiction by making reference to general international law.

4. THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS’ TREATIES

The phenomenon of extraterritorial application of human rights norms has always been linked to the application of international human rights treaties, such as the International Covenant for Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Therefore, the practice concerning the extraterritoriality of human rights is mainly developed by the commissions and the courts that deal with the extraterritorial application of the above-mentioned treaties (De Sena 2002). The ECtHR, in particular, has been playing an active role to this end; its jurisprudence is constantly evolving and it is leading in this field.

Although the ECtHR affirmed in the *Banković* case (2001) that its jurisdiction is primarily territorial and that it should be confined to the espace juridique of the States parties to the Convention, nowadays it is commonly accepted that the ECHR is competent extraterritorially. The ECtHR has opened the way to the extraterritorial application of the Convention in cases

where States exercise control over an area or an individual or a group of individuals outside of their borders.

In this regard, the Judges in Strasbourg elaborated two notions of control (Milanovic 2011).

The first is the “effective control over an area” exception, typically of actions conducted by public agents outside the country’s territory. The examples are military actions in other countries, as detailed in *Loizidou v. Turkey*, *Ilaşcu v. Moldova*, *Catan and Others v. Moldova and Russia*. In the first, the Court ruled for the first time that the responsibility of a Contracting Party might also arise when States exercise effective overall control of portion of territory outside its own. In that case, Turkey was militarily occupying a portion of the territory of Cyprus. Human rights’ obligations of the State occupying foreign territories should extend to such territories under occupation: any other solution would result in depriving the population under occupation of the protection of human rights for the sole reason that the occupation is illegal under international law.

In *Ilaşcu* and *Catan* the ECtHR dealt with two cases concerning similar circumstances in the same territory. In the latter, while the Court found that control exercised by the Russian federation over Transdnistria had been decreasing over the years and notwithstanding the lack of direct involvement by Russian authorities, Russia still had jurisdiction over the area. This shows that the concept of ‘effective control’ is changeable and dependent on a case-by-case assessment.

The second notion of control implies a control over individuals. This line of reasoning was first developed by the ECtHR in the *Issa and Others v. Turkey* case in 2004, in which the Turkish army violated the right to life of Iraqi citizens who were killed in military operations. The Court reaffirmed the principle in *Al-Skeini v. United Kingdom* (2011), where it held that the UK was responsible for having failed to protect the right to life of Iraqi citizens under its control. It must be said, however, that the ECtHR, in the *Al-Skeini* case, found that the UK was exercising control over both an area – the Basrah City in Iraq – and a group of individuals, precisely those killed in the contested military operation.

This notion of control allowed the ECtHR to extend the application of the ECtHR to vessels in the high seas. In *Medvedyev v. France*, in particular, where a Cambodian vessel was intercepted in high seas by the French Navy, the Court stated that since the boat was under the control of French au-

thority, the crew onboard was subjected to French jurisdiction. The same reasoning was developed in the case *Hirsi Jamaa and Others v. Italy* (2012), in which Italian authorities rescued Somali and Eritrean citizens in high seas. Considering that the asylum seekers were held into custody on Italian navy ships, they were considered under Italian jurisdiction according to the law of the sea, which extends States' jurisdiction over vessels that ship under those States' flag.

In particular – and concerning the issue of migration control – the *Hirsi and Jamaa* case is surely the leading one. In that case, the ECtHR had to assess if Italy could be deemed to have control over some migrants intercepted in the high seas and subsequently handed over to Libyan authorities in a classic pushback operation within the framework of the 2009 agreement between Italy and Libya. The ECtHR affirmed that Italy had jurisdiction on the ground that it exercised “*de jure and de facto control*” over the migrants. To reach this conclusion the Court applied the principles enshrined in the Montego Bay Convention and in the Italian Navigation Code, according to which Italy has jurisdiction for facts committed on its vessels, even in the high seas (Napoletano 2012). In this case, therefore, there was no need to explore the definition of control as the facts at stake occurred on board of a vessel of the Italian Armed Forces. Although it was somehow an easy case to decide, it is important as it clarifies that pushback operations violate human rights law even if they are performed outside States' territory.

The principle of extraterritorial jurisdiction of States under Article 1 has been recently reinforced in *Chiragov v. Armenia* (2015). The ECtHR affirmed that “the concept of jurisdiction within the meaning of Article 1 of the Convention “is not restricted to the national territory of the High Contracting Parties and the State's responsibility can be involved because of acts and omissions of their authorities producing effects outside their own territory”. This case is also important because it accepted a lower standard of proof to establish the extraterritorial jurisdiction of Armenia. In fact, the Court evaluated the exercise of effective control over an area considering more elements than just the physical presence of States' agents in the territory of another State, such as political and financial support to foreign troops or governments.

This last judgment shows that although the link between territory and jurisdiction is still present in the jurisprudence of the ECtHR, there is room for adopting a flexible approach to the notion of effective control. In fact, the

rationale of the recent case law of the Court is “*the need to avoid a vacuum in Convention protection*” (*Sargyyan v. Azerbaijan*, 2015). With this in mind, some international law categories could be interpreted in a more liberal way, to expand the reach of human rights law.

It is understood, however, that the application of the ECtHR is limited to the European States that have ratified it; hence, it is not enforceable in other regional scenarios. This notwithstanding, the evolution of the jurisprudence of the ECtHR is of an utmost importance as it can influence the interpretation of jurisdictional clauses in other human rights treaties such as the ICCPR.

The ICCPR is broader in scope, being it a universal treaty, hence it applies in scenarios such as the one mentioned in the introduction: the offshore detention centers in Nauru. Australia is part of the ICCPR.

In light of the above-mentioned interpretation of the jurisdictional clauses of human rights treaties, it should be demonstrated that Australia is exercising extraterritorial control over the detention centers in Nauru or over the individuals detained therein. This seems to be possible for several reasons. First, Australia exercised control through the two agreements signed with Nauru and physically transferring the migrants in the Island. Moreover, there are allegations that Australian officials contribute to the running of the detention centers, being physically present in Nauru. This can be sufficient to extend the reach of the ICCPR.

5. THE “REAL” PROBLEM: THE ENFORCEMENT OF THE RIGHTS OF ASYLUM SEEKERS

the real problem posed at the beginning of this paper cannot be solved by answering the question: which source of law is the most appropriate for making human rights more effective? In fact, if we look at the substance of the human rights of asylum seekers, we should probably conclude without any doubt that they are customary in nature.

The rights connected with the protection of these individuals are centered in the principle of *non-refoulement*, which is stated in article 33 of the 1951 Geneva Convention on the Protection of Refugees. It is now commonly accepted that the principle of *non-refoulement* is part of customary international law and therefore binding for all States (Pisillo Mazzeschi 2011). Furthermore,

with respect to migrants, human rights norms of a general character must be regarded as applicable. As noted, there is a tendency of merging human rights norms and norms related more specifically to the rights of migrants (*ibidem*). This process more specifically regards five civil and political rights that might be at risk in the operations and procedure aimed at limiting migration fluxes: the right to life, the right not to be subjected to torture or inhuman treatment, the right not to be subjected to slavery and finally the right to access to a remedy in case of expulsion. For all these rights, it can be said that, apart from their inclusion in international treaties, their binding forces derives from customary international law (*ibidem*). The prohibition of torture is even considered a *jus cogens* rule, to which no derogation is permissible.

Domestic courts can apply customary human rights norms, as seen, to extend their States' jurisdiction and therefore offer protection to asylum seekers whose rights are violated 'offshore'. The same can be said for rights enshrined in human rights treaties. At both universal and regional level, their extraterritorial application is no longer disputed. Therefore, 'offshore law' does not immunize States as they must ensure the application of human rights even if they shift the management of migration control outside their borders.

Therefore, the real question should probably be, is it possible to enforce such rights?

Looking again at the Australian case, it is worth noting that Australia is part of the first Optional Protocol of the ICCPR that established the Human Rights Committee (HRC). The HRC is a monitoring body that can receive individual communications regarding violations of the rights enshrined in the ICCPR. While the function of the Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

It remains possible that an individual or group of individuals affected by the offshore processing regime may bring a claim against Australia before HRC. If this committee were to find that Australia had breached its international obligations, Australia would have a duty to respect the international processes it has voluntarily agreed to be bound by, and bring its law and policies into line with international law accordingly.

However, successive Australian governments have sought to argue that they do not bear responsibility for what is happening in Nauru. These arguments are generally based on a combination of (1) the fact that asylum seekers and refugees are located in the territory of another sovereign State; and on (2) the assertion that Australia does not have the very high level of effective control necessary to establish its jurisdiction over asylum seekers and refugees offshore. As a result, according to the Australian government, this is sufficient to deny the possibility of Australia owing asylum seekers human rights' obligations.

Apparently, there are few possibilities to sanction the human rights violations suffered by asylum seekers in Nauru, even though, as we have seen before, human rights are applicable to them and Australia should in principle be responsible for that conduct.

6. THE SOLUTION "IS NOT TO BE FOUND IN THE GUNMAN SITUATION" BUT RATHER IN THE ENHANCEMENT OF THE ROLE OF DOMESTIC COURTS

The partial conclusion presented in the previous paragraph might suggest another question: is international law strong enough to limit the practices of States in the field of migration control?

Many authors challenge the force of international law because of its inability to sanction violations committed by States (Schauer 2015). This position relies on the assumption that law consists of rules issued by a sovereign, which defines them as commands, coercive orders, and backs them by the threat of imposing sanctions in case of non-compliance (Austin 1832). Recently, the 'new-realist' approach to international law reinvigorated this argument affirming that only States' interests decisively determine compliance with its international obligations (Goldsmith and Posner 2005).

However, the above-mentioned doctrinal theories seem to offer a misrepresentation of the features of international law. If one judges international law solely on this basis, it would be probably easy to conclude that international law is...not law. Indeed, the force of international law "is not to be found in the gunman situation" (Hart 1994) but, rather, in its intrinsic value. This is particularly true in the field of human rights, where States' choice to comply with international rules should be limited (Ohlin 2015).

Moving from the last consideration, one should not underestimate the potential of domestic courts in enhancing human rights law and, more in

general, international law. Indeed, national judges might contribute to fill the gap between the expanding scope of human rights law and the lack of international enforcement mechanisms (Shany 2012). Domestic courts can therefore act as courts of the international legal order, enforcing rules emanating from international law.

George Scelle (1943) theorized such a role for national courts, labelling this phenomenon *dedoublement fonctionnel*. Scelle's main argument is that international society is affected by a *carence institutionnelle*, lacking legislative, executive and judicial functions (Dubouchet 2007). The *dedoublement fonctionnel* theory postulates that, as international law lacks these basic functions, it is up to States' organs to perform them using "*leur capacité 'fonctionnelle' telle qu'elle est organisée dans l'ordre juridique qui les a institués, mais pour assurer l'efficacité des normes d'un autre ordre juridique privé des organes nécessaires à cette réalisation, ou n'en possédant que d'insuffisant.*" (Scelle 1956).

With regard to the rights of asylum seekers, this could be a promising scenario. Indeed, in the past, domestic courts have already contributed both to the affirmation of the customary nature of the principle of *non-refoulement* and to the enforcement of the related rights (Iovane 2012).

A recent judgment (February 2016) of the High Court in Canberra seems to contradict this argument. That court found that the indefinite detention to which asylum seekers in Nauru have been subject since 2012 is legitimate as it finds justification in a law that allows the Australian government to transfer individuals to Nauru and to contribute to the offshore detention center located in that Island.

To now, this seems to be the only case presented before an Australian court; therefore, it is not enough to establish a jurisprudential precedent. However, something needs to change in the perception of national judges and this is precisely where the values of international law might come into play. Domestic orders should feel that they must uphold human rights. To this end, international law should be intended as an incentive that includes "sticks and carrots" (Shany 2012).

It is not easy to find an effective stick to induce national courts to enforce the rights of the asylum seekers, but a possibility came out recently. On February 2017, the Global Legal Action Network (Glan) and the Stanford International Human Rights Clinic submitted to the International Criminal Court (ICC) a legal brief, detailing what the network describes as the "harrowing practices of the Australian State and corporations towards asylum seekers".

The petition asks to the office of the prosecutor of the ICC to open an investigation into possible “crimes against humanity committed by individuals and corporate actors”.

It is early to predict the outcome of this submission, but it is not wrong to say that the case is not an easy one. However, this sort of activities may trigger the response of the global public opinion, so as to reinforce the intrinsic value of international law and, eventually, push national judges to enforce human rights law. In fact, the ICC jurisdiction is a complementary one: should the Prosecutor start a preliminary examination, Australia would have the power to stop it by investigating on its own the violations of human rights suffered by asylum seekers in Nauru.

The Australia-Nauru case is just one of the cases that could be defined as ‘offshore law’. The nature of the incentives that will encourage national courts to enforce human rights law will vary according to the scenario, but a common feature shall be found in the values stemming from international law.

A ‘stick’ is not a gun to the head of States, but a legal tool that should lead national judges to reflect on a practice that can hardly be viewed as an enforcement of the rights of asylum seekers and, eventually, it can give force to international human rights law.

7. FINAL AND PARADOXICAL REMARKS

At the beginning of this paper, I tried to explain that the practice in the field of migration control is shifting towards an extraterritorial paradigm, as States and international organizations are deliberately dealing with this issue outside their territories. I labelled this practice as ‘offshore law’ for mainly two reasons: 1) it actually finds justification in legal acts; 2) it is part of broader picture where territory is losing importance. ‘Offshore law’ has a negative impact on the protection of human rights and asylum seekers. The growing scope of human rights law, in theory, mitigates such a negative impact. In fact, both the evolution of customary law and the jurisprudence of international courts and tribunals are showing a tendency towards a universal enforcement of human rights.

I therefore argued that the real problem is the lack of enforcement mechanisms and bolstered the idea that domestic courts should have a role in filling this gap.

This conclusion appears as a paradox. The paper started by acknowledging that in international law the very notion of territory is losing weight, as States' actions are becoming extraterritorial by their nature. In conclusion, quite surprisingly, I suggested the role of domestic courts should be strengthened, as far as migration control and other international law issues are concerned; such an argument, moreover, implies a territorial dimension of the law (Oddenino 2015).

The paradox might have a way out. The territorial dimension of the law counterbalances the inclination of States to externalize their conducts and can offer a remedy to those asylum seekers who are struggling for their survival around the world.

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