At the frontiers of state responsibility: Socio-economic rights and cooperation on migration

Annick Pijnenburg

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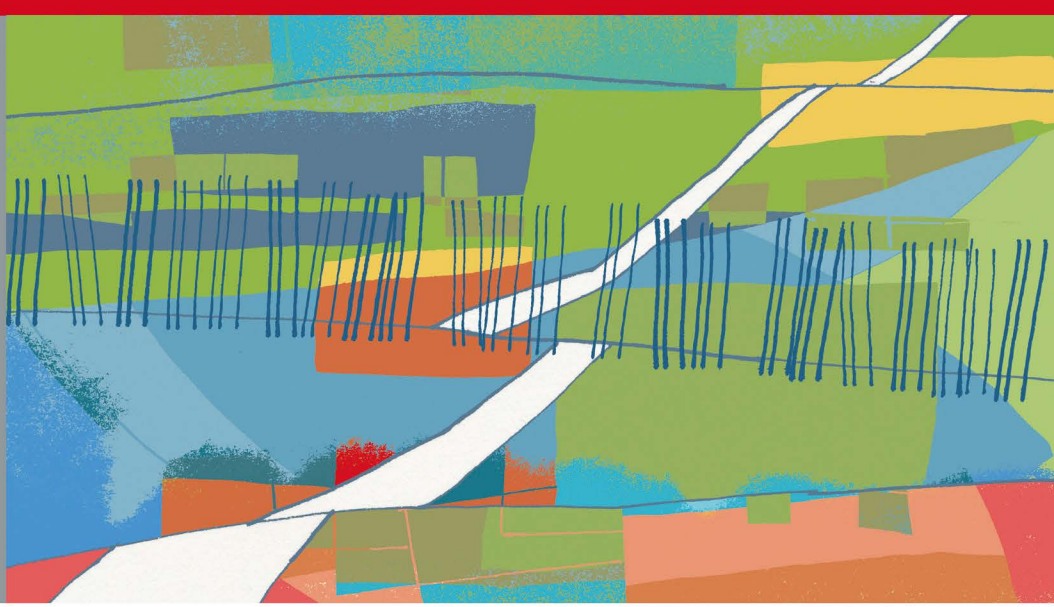
Socio-economic Rights and Cooperation on Migration



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PREFACE

In the interest of readability, sources are referenced as follows:

- Treaties, case law and other oft-cited output of treaty monitoring bodies, notably general comments, as well as oft-cited UN documents such as the ARSIWA and the Global Compacts for Migration and on Refugees are referenced in full at first mention and in abbreviated form afterwards;
- All other sources are referenced in full at the start of each chapter and cross-referenced within the chapter;
- Hyperlinks are provided in the bibliography.

This thesis takes into account legal, empirical and scholarly developments until 1 September 2020.

All web addresses were accurate as at 8 December 2020.

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I am also grateful to all the people at Tilburg Law School who accompanied me throughout the past five years, many of whom have become close friends, especially Alice, Anna, Daniela, Lisa, Lukasz, Mariëtte, Marissa and Rachel. Thanks to the Netherlands Network for Human Rights Research, the Refugee Law Initiative and various events I have had the privilege of meeting many brilliant scholars in my field. Among them, Dr. Maarten den Heijer, Dr. Daria Davitti, Mary Dickson, Mariana Gkliati, Lynn Hillary, Asher Hirsch, Dr. Nataša Nedeski, Amélie Poméon, Dr. Vladislava Stoyanova and Dr. Nik Tan deserve a special mention. My research stay at the Raoul Wallenberg Institute was easily one of the highlights of my PhD trajectory, and I would like to thank all my colleagues from Lund for making it both enjoyable and enriching.

While this book signals the end of my PhD journey, I am extremely fortunate in having found a new home at Radboud University Nijmegen. I am grateful to my Nijmegen colleagues for enabling me to finish my PhD while starting my new position and for making me feel immediately welcomed. My paranymphs, Dr. Lize Glas and Dr. Amy Weatherburn, deserve special thanks for accompanying me from the very beginning to the very end of my PhD journey.

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Utrecht, February 2021

CONTENTS

LIST OF ABBREVIATIONS

AComHPR	African Commission on Human and Peoples' Rights
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ARIO	Draft Articles on the Responsibility of International Organisations
ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCTE	Conditional Cash Transfer for Education
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DCIM	Department for Combatting Illegal Migration (Libya)
DGMM	Directorate General for Migration Management (Turkey)
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ESSN	Emergency Social Safety Net
EU	European Union
HRC	Human Rights Committee
IAComHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally displaced person
IOM	International Organisation for Migration
LFIP	Law on Foreigners and International Protection (Turkey)
MIDAS	Migration Information and Data Analysis System
MOU	Memorandum of Understanding
MRT	Moldovan Republic of Transdniestria
NGO	Non-governmental organisation
OHCHR	United Nations Office of the High Commissioner for Human Rights
RPC	Regional Processing Centre
TPR	Temporary Protection Regulation (Turkey)
UN	United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees
UNSMIL	United Nations Support Mission in Libya
VCLT	Vienna Convention on the Law of Treaties

LIST OF TABLES

CHAPTER I
INTRODUCTION

1. MIGRATION CONTROL AND SOCIO-ECONOMIC RIGHTS

Fariborz Karami, a 26-year old asylum seeker, committed suicide at the Regional Processing Centre in Nauru on 15 June 2018. He was held in immigration detention since 2013, first on Christmas Island and later on Nauru. Karami had been kidnapped, detained and threatened to be killed as a 10-year-old boy in Iran, resulting in severe trauma, and had consistently asked for medical help while his mental health deteriorated on Nauru.[1] Two years later, in May 2020, Tewelde Andom, a 39-year-old Eritrean man, died in a migrant detention centre in Libya. He is thought to have died of heatstroke, as temperatures in the detention centre reached 42 degrees. He had escaped Eritrea in 2017 after spending nearly two decades doing military service and had attempted to cross the Mediterranean Sea in 2018 but was returned to Libya by the Libyan Coast Guard.[2] At the same time, Richard, a 9-year-old boy from Honduras, lived in a tent with his mother in a makeshift migrant camp in Matamoros, a Mexican city on the US-Mexico border. The only school Richard attended was the Sidewalk School, a volunteer initiative to mitigate the effects of migrant children's lack of education.[3]

The cases of Fariborz Karami, Tewelde Andom and Richard are three examples among many, as violations of the rights to an adequate standard of living, health and education of people on the move are structural rather than incidental in many regions of the world. Indeed, on Nauru mental health problems are rampant among asylum seekers and refugees, with more than half having suicidal thoughts.[4] In Libya, many detainees in migrant detention centres are severely malnourished, lacking water, held in conditions amounting to inhuman and degrading treatment, and dozens of detainees

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1 Ben Doherty and Saba Vasefi, 'Iranian Asylum Seeker begged for Help: "I am Suffering Intensely"' *The Guardian* (16 June 2018).

2 Sally Hayden, 'Migrant (39) who Failed to Reach Europe Dies in Libyan Detention Centre' *The Irish Times* (25 May 2020).

3 Dylan Baddour, 'US-Mexico Border: The "Sidewalk School" Teaching Migrant Children' *Al Jazeera* (14 April 2020). See also www.sidewalkschool.org.

4 Médecins Sans Frontières, 'Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru' (December 2018).

suffer from tuberculosis, some of whom died of the disease.[5] More generally, detention conditions in Libya are particularly dire and 'fall well below accepted international standards.'[6] The Matamoros migrant camp where Richard lived hosted thousands of asylum seekers, including hundreds of children, who lived in tents in squalid conditions, with limited access to essential services such as sanitation, health care and education.[7]

Violations of the socio-economic rights of people on the move in Global South States like Nauru, Libya and Mexico are closely linked to efforts by the Global North to stem migration flows from the Global South to the Global North. Thus, Karami was transferred from Christmas Island, an Australian island, to Nauru, and the operation of the Regional Processing Centre involves both Australian and Nauruan officials. The EU and its Member States spend millions of euros on Libyan detention centres and have played a key role in establishing the Libyan Coast Guard which returned Tewelde Andom to Libya.[8] Residents of the migrant camp in Matamoros are waiting for their asylum claim to proceed in the US under the Migrant Protection Protocols Programme, commonly known as 'Remain in Mexico'. Under this policy, the USA returns asylum seekers to border towns in Mexico where they are expected to wait until their US asylum court proceedings conclude.[9] In other words, as a result of cooperation on migration control between the Global North and the Global South, numerous people on the move are contained in Global South States with a relatively weak track record in terms of socio-economic rights.

Yet scholarship pays scant attention to the fact that migration control agreements result in widespread violations of the socio-economic rights of individuals contained in the Global South. Rather, existing literature on migration control tends to focus on civil and political rights.[10] However, this not only ignores the empirical reality that cooperation on migration control often results in violations of socio-economic rights, but also that such violations can increase migration flows to the Global North. For instance, in the European context, the increase of irregular arrivals to the European Union in 2015 seems due at least in part to the fact that Syrian refugees in neighbouring countries like Lebanon were unable to receive an acceptable form

5 United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Press Briefing Note on Libya' (7 June 2019).

6 Médecins Sans Frontières, 'Libya: Report on Nutrition Screening Findings in Sabaa Detention Centre' (March 2019) 1.

7 UNICEF, 'Mexico: An Estimated 700 Migrant Children Stranded in Matamoros near US Border' (31 January 2020); Ana María Alarcón, 'Los Campamentos de Migrantes en Matamoros Están Peor que los de Zonas en Guerra, Acusa ONG' *Sin Embargo* (31 January 2020).

8 Maggie Michael, Lori Hinnant and Renata Brito, 'Making Misery Pay: Libya Militias Take EU Funds for Migrants' *AP News* (31 December 2019); Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *SS and others v Italy*, and the "Operational Model"' (2020) 21 German Law Journal 385, 390–96.

9 Human Rights Watch, *'We Can't Help You Here': US Returns of Asylum Seekers to Mexico* (Human Rights Watch 2019).

10 See Section 3.1 below.

of subsistence.[11] Moreover, examining migration control through the lens of socio-economic rights can contribute to existing debates, such as questions of extraterritorial jurisdiction. The relation between migration control and the socio-economic rights of people on the move contained in the Global South thus addresses various questions that can also be relevant for civil and political rights: what is the impact of each State's conduct on the plight of people on the move affected by migration control measures? What are the obligations of the various States involved? How is responsibility for violations assigned to them?

2. AIM AND RESEARCH QUESTIONS

The principal goal of this study is to develop an assessment framework applicable to the socio-economic rights of people on the move in the context of cooperative migration control. It not only contributes to existing literature in the area of migration and socio-economic rights but may also be of interest beyond academic audiences. Government lawyers and policy makers who design cooperative migration control policies may be expected to take into account States' obligations under international human rights law when doing so. Lawyers and advocates who seek to hold States accountable for alleged human rights violations may find this study useful for their work. Finally, judges who face complex legal questions that are raised by cooperative migration control and addressed in this study may refer to some of its findings.

More specifically, this study seeks to answer the following main research question:

> *To what extent and how do violations of socio-economic rights of people on the move give rise to the international responsibility of States involved in cooperative migration control?*

It can be further broken down into two sub-questions, which structure this study. In order to answer the responsibility question, we must first address the question of obligations:

> *1. What is the scope of States' international obligations as regards the socio-economic rights of people on the move in the context of cooperative migration control?*

Determining the scope of States' obligations as regards socio-economic rights is not a straightforward matter. Article 2(1) of the International Covenant on Economic,

[11] This triggered an increase in the demand for smugglers on the route to Greece, which – after a sharp increase in prices attracted more people to the smuggling business – increased supply and led to falling prices, which in turn provided an incentive for more people to travel to Europe. Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607, 622.

Social and Cultural Rights[12] (ICESCR) for instance requires each State party to 'take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization' of socio-economic rights. Thus, a State's available resources and the passing of time affect the scope of its obligations under the ICESCR. While it is clear that the scope of State obligations can vary for socio-economic rights, this is arguably also true for civil and political rights. Many rights, such as the right to life and the right to leave, are qualified rather than absolute rights, and raise the question as to what restrictions are permitted. The implementation of absolute norms like the prohibition of torture requires States to take measures such as training of police and border guards, which depend on resources and time. In other words, the question of the scope of State obligations applies to civil and political as well as socio-economic rights.

In the context of cooperative migration control and people on the move, efforts to determine the scope of State obligations face additional complicating factors. Indeed, States' sovereign right to control the entry and stay of non-nationals on their territory may limit their obligations towards people on the move. This raises the question to what extent States must realise the socio-economic rights of people on the move in relation to the rights of their own nationals. Moreover, as cooperative migration control policies serve to contain people on the move in the Global South, do Global North States incur extraterritorial obligations to realise their socio-economic rights? Finally, the involvement of multiple States in cooperative migration control raises the question of how the obligations of each State relate to those of other States: do they overlap? Are they complementary? Are there any gaps where the socio-economic rights of people on the move are not 'matched' by any corresponding State obligations? This study addresses these challenges in various ways. The due diligence standard of conduct is particularly helpful in conceptualising the scope of the obligations of the Global South States that host people on the move as well as the Global North States that initiate cooperative migration control policies. Other concepts and principles, such as territory, jurisdiction, non-discrimination and core socio-economic rights further help determine the scope of States' obligations to realise the socio-economic rights of people on the move in the context of cooperative migration control. The Global North's global obligations to provide international assistance and cooperation are particularly relevant in this context.

Furthermore, in international law responsibility is closely linked to obligations. Therefore, the answers to the questions above provide the starting point for addressing the issue of responsibility:

> *2. How does international law assign responsibility for violations of the socio-economic rights of people on the move where multiple States are involved in migration control?*

12 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

In order to answer this sub-question, the scope of the analysis broadens to include the law on State responsibility. It discusses key concepts such as attribution and derived responsibility, and the relation between international human rights law and the law on State responsibility. The study examines under which circumstances a State incurs responsibility under international law, as well as how the responsibility of one State relates to that of other States involved in cooperative migration control.

3. SCOPE OF THE STUDY

The answers to the research questions identified above are relevant because they contribute to existing literature in the area of migration and human rights. In particular, this study's focus on the socio-economic rights of people on the move complements existing research on migration control. The following discusses the study's added value before addressing its limitations and providing definitions of key terms.

3.1. SCIENTIFIC RELEVANCE

As noted at the start of this chapter, cooperative migration control can contribute to widespread violations of the socio-economic rights of individuals contained in the Global South. Yet existing scholarship has paid scant attention to this aspect, as many scholars tend to focus on access to asylum, *non-refoulement* and related civil and political rights such as the prohibition of torture and other forms of ill-treatment, the prohibition of arbitrary detention and the right to leave.[13] However, examining migration control from a civil and political rights perspective arguably fails to capture the wider context in which cooperative migration control takes place: the global inequalities between the Global North and the Global South and the consequent different level of realisation of socio-economic rights. Indeed, migration control policies that contain people on the move in the Global South raise questions that have been addressed by literature focusing on socio-economic rights beyond the migration

[13] See for instance Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011); Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012); Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017); Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018); Nikolas Feith Tan, *International Cooperation on Refugees: Between Protection and Deterrence* (PhD thesis, Aarhus University 2019); Anna Liguori, *Migration Law and the Externalization of Border Controls: European State Responsibility* (Routledge 2019); Lisa-Marie Komp, *Border Deaths at Sea under the Right to Life in the European Convention on Human Rights* (PhD thesis, Vrije Universiteit Amsterdam 2020); Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311 and other contributions to that special issue. A notable exception is Savitri Taylor, 'Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but no Responsibility?' (2010) 33 UNSW Law Journal 337.

context: is there a 'minimum level' of socio-economic rights that must be realised? How to conceptualise State obligations, especially in the light of available resources? Do Global North States have an obligation to provide international assistance and cooperation to the Global South?[14]

This study's socio-economic rights perspective also has the potential to help existing debates on civil and political rights move forward. It has now become a truism that human rights are 'universal, indivisible, and interdependent and interrelated.'[15] Under many civil and political rights instruments, jurisdiction plays an important role in delimiting the scope of States' extraterritorial obligations and it can form an obstacle to assigning responsibility to Global North States in the context of migration control.[16] Yet Article 2(1) ICESCR contains no reference to jurisdiction. Instead, it mentions international assistance and cooperation, which may provide another avenue for assigning responsibility to Global North States. Examining cooperative migration control through the lens of socio-economic rights can thus shed new light on States' extraterritorial obligations.

Likewise, this study's focus on socio-economic rights highlights issues of causation, since the causal link between cooperative migration control and violations of socio-economic rights is often more remote than for rights that have received much attention, like the principle of *non-refoulement* and the right to asylum. As cooperative migration control policies aim to stem migration flows from the Global South to the Global North, there is an obvious causal relation between such policies and violations of these rights. However, the causal link between measures designed to stem migration flows and violations of socio-economic rights in the Global South is less straightforward. The same arguably applies to other civil and political rights that risk being violated as a result of people on the move being contained in the Global South, such as the rights to liberty and security of person, freedom of expression, freedom of assembly and association, and family life. This study therefore addresses broader issues, such as causation, that are also relevant for civil and political rights.

Furthermore, as it examines migration control through the lens of socio-economic rights, it addresses the obligations and responsibility not only of Global North States but also of Global South States. Indeed, until recently the role of the Global South in

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14 See for instance Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (OUP 1995); Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002); Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003); Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013); Olivier De Schutter (ed), *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2013); Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014); Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019).

15 'Vienna Declaration and Programme of Action' World Conference on Human Rights (12 July 1993) UN Doc A/CONF.157/23, para 5.

16 See Chapter V, Section 2.

migration control received limited scholarly attention.[17] Yet, as people on the move are contained in the Global South on a large scale, it becomes necessary to move beyond an exclusive focus on the Global North's obligations.[18] This study extensively examines the obligations and responsibility of Global South States, as they have the primary obligation to realise the socio-economic rights of people on the move on their territory. It thus seeks to answer calls for migration control scholars to broaden their focus and include the Global South in their analysis.[19]

Finally, focusing on socio-economic rights enables us to address the plight of all people on the move affected by cooperative migration control. This study contributes to existing literature on migration control not only by including aspects of the lived experiences of people on the move that receive scant attention and by offering a new perspective on existing legal debates, but also by including those who are affected by migration control but do not qualify as refugees. Much literature in the field tends to focus on the plight of asylum seekers and refugees and on access to asylum.[20] It thereby downplays the impact of migration control on socio-economic rights and risks ignoring the fact that migration control also affects people on the move who do not qualify as refugees. Yet cooperative migration control policies can result in violations of the socio-economic rights of people on the move regardless whether they are forcibly or voluntarily displaced and whether they are entitled to international protection under the refugee regime. Therefore, the present study examines the impact of cooperative migration control on the socio-economic rights of people on the move more generally. Moreover, since some people on the move are refugees, this study highlights the role of socio-economic rights under the Convention Relating to the Status of Refugees[21] (Refugee Convention), which has received relatively little attention from refugee law scholars.[22]

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17 For recent literature addressing the role of the Global South in migration control see for instance Tan (n 13); Inka Stock, Ayşen Üstübici and Susanne U Schultz, 'Externalization at Work: Responses to Migration Policies from the Global South' (2019) 7(48) Comparative Migration Studies 1; Antje Missbach and Melissa Phillips, 'Introduction: Reconceptualizing Transit States in an Era of Outsourcing, Offshoring, and Obfuscation' (2020) 3 Migration and Society 19; Majd Achour and Thomas Spijkerboer, 'The Libyan Litigation about the 2017 Memorandum of Understanding Between Italy and Libya' (*EU Migration Law Blog*, 2 June 2020).

18 Examples of migration control scholarship that focuses on the Global North include Gammeltoft-Hansen, *Access to Asylum* (n 13); Den Heijer (n 13); Moreno-Lax, *Accessing Asylum in Europe* (n 13); Ghezelbash (n 13); David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019); Liguori (n 13); Komp (n 13).

19 See for instance David Cantor, 'The End of Refugee Law?' (2017) 9 Journal of Human Rights Practice 203; Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) 20 European Journal of Migration and Law 373, 385–91; Elena Fiddian-Qasmiyeh, 'Introduction: Recentering the South in Studies of Migration' (2020) 3 Migration and Society 1.

20 See, among many other examples, Gammeltoft-Hansen, *Access to Asylum* (n 13); Den Heijer (n 13); Moreno-Lax, *Accessing Asylum in Europe* (n 13); Ghezelbash (n 13); Tan (n 13); FitzGerald (n 18). Some forms of grey literature, such as the Mixed Migration Review, form an exception.

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

22 For an important exception see James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005). Foster examined socio-economic rights with regard to persecution under the Refugee Convention (i.e. whether a person can qualify as a refugee because of violations of her socio-economic

3.2. DEFINITIONS AND LIMITATIONS

As noted above, this study is concerned with *people on the move*. This rather loose term refers to people who move from one place to another for relatively long periods of time, regardless of the reason why they do so, and includes migrants, refugees and internally displaced persons (IDPs).[23] It is preferred over the term 'migrant' because it has less (negative) connotations and transcends the perceived dichotomy between refugees and migrants, which is problematic for various reasons.[24] First, the distinction between 'refugees' and 'migrants' risks giving the wrong impression that States have no legal obligations towards people on the move who do not qualify as refugees.[25] Second, various scholars have argued that the legal category of refugee itself is problematic, both in terms of its narrow definition and of existing deficits in asylum decision-making.[26] Third, sociological critiques question the assumption that there is a mutually exclusive distinction between migrants and refugees, as people may decide to migrate for multiple reasons, which may change over time and are not static.[27] The term 'people on the move', however, emphasises the fact that both refugees and migrants are human beings and hence have human rights. While it remains a broad term that raises questions as to its scope, it seems to be gaining traction both in policy and scholarship.[28] Crucially, in the context of this study it highlights that human rights norms apply to all persons affected by cooperative migration control. In addition, refugees are also entitled to the rights granted in the Refugee Convention and, where applicable, complementary protection mechanisms.[29] This includes refugees in accordance with Article 1A(2) of the 1951 Refugee Convention and beneficiaries of other forms of protection.

While 'people on the move' as a term of art is a broad concept that includes migrants, refugees and IDPs, this study addresses the plight of people on the move who are

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rights in her country of origin) but not what socio-economic rights the Refugee Convention grants refugees (i.e. what socio-economic rights must be realised in the country of refuge): Michelle Foster, *International Refugee Law and Socio-Economic Rights* (CUP 2017).

23 'People on the move' can also be interpreted more broadly. See for instance Russell King and others, *People on the Move: An Atlas of Migration* (University of California Press 2010).

24 For a detailed discussion see Annick Pijnenburg and Conny Rijken, 'Moving beyond Refugees and Migrants: Reconceptualising the Rights of People on the Move' (2021) 23 Interventions 273.

25 Cathryn Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' (2018) 30 International Journal of Refugee Law 643, 645–46.

26 Costello and Mann (n 13) 313. See for instance Andrew Shacknove, 'Who is a Refugee?' (1985) 95(2) Ethics 274; Alexander Betts, 'Survival Migration: A New protection Framework' (2010) 16 Global Governance 361.

27 See for instance Heaven Crawley and Dimitris Skleparis, 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crisis"' (2018) 44 Journal of Ethnic and Migration Studies 48.

28 Pijnenburg and Rijken (n 24) 283.

29 Complementary protection refers to 'States' protection obligations arising from international legal instruments and custom that complement – or supplement – the 1951 Refugee Convention.' Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 285. See also Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007).

affected by cooperative migration control and hence contained in the Global South. It focuses especially on *people on the move who have left their country of origin but cannot reach the Global North*. While acknowledging that citizens of Global South States that cooperate with the Global North on migration control may also seek to migrate, this study focuses on States' obligations towards people on the move who are on their territory but not their nationals, as this raises additional issues in terms of legal analysis. Furthermore, when they cross borders, people on the move often migrate irregularly, as a result of which they do not have the necessary approval or documentation to be in a State.[30] From the perspective of States, they are 'unwanted' or 'unauthorised' migrants. This study raises the question to what extent States must realise the socio-economic rights of people on the move who are on their territory, considering that they are non-nationals and often have irregular status. Yet scholarship on socio-economic rights pays relatively little attention to this issue.[31] Of course, cooperative migration control can also affect host communities in the Global South.[32] More research is needed on the impact of migration control measures on other communities, especially local hosting communities, IDPs and those who are prevented from leaving their country of origin because of cooperative migration control policies. The findings in this study may provide a useful starting point for further research on this issue.

Cooperative migration control, in turn, is defined here as cooperation between two or more States with the aim to stop, or at least substantially reduce, migration flows. It broadly overlaps with other terms used in the literature, such as offshoring and outsourcing,[33] externalisation,[34] cooperation-based *non-entrée*,[35] non-arrival and non-

30 Katharine T Weatherhead, 'Irregular Status' in Elspeth Guild, Stefanie Grant and CA Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (Routledge 2018) 35.

31 Limited exceptions include Marlies Hesselman, 'Sharing International Responsibility for Poor Migrants: An Analysis of Extra-Territorial Socio-Economic Human Rights Law' (2013) 15 European Journal of Social Security 187; Stefano Angeleri, 'The Impact of the Economic Crisis on the Right to Health of Irregular Migrants, as Reflected in the Jurisprudence of the UN Committee on Economic, Social and Cultural Rights' (2017) 19 European Journal of Migration and Law 165; Claude Cahn, 'The Economic, Social and Cultural Rights of Migrants' in Elspeth Guild, Stefanie Grant and CA Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (Routledge 2018); Bjarney Friðriksdóttir, 'Rights at Work' in Elspeth Guild, Stefanie Grant and CA Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (Routledge 2018). On the obligations of other States towards people on the move in the Global South see Amanda Gray Meral, 'Assessing the Jordan Compact One Year On: An Opportunity or a Barrier to Better Achieving Refugees' Right to Work' (2019) 33 Journal of Refugee Studies 42.

32 See for instance Brian Opeskin and Daniel Ghezelbash, 'Australian Refugee Policy and its Impacts on Pacific Island Countries' (2016) 35(3) Journal of Pacific Studies 73; Sébastien Moretti, 'Transit Migration in Niger: Stemming the Flows of Migrants, but at What Cost?' (2020) 3 Migration and Society 80.

33 Gammeltoft-Hansen, *Access to Asylum* (n 13).

34 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; Stock, Üstübici and Schultz (n 17).

35 Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235.

admission,[36] remote control[37] and international deterrence.[38] Because it focuses on limiting irregular migration flows, it is narrower than migration management.[39] This study uses 'cooperative migration control' as a generic term. Where relevant, it refers more specifically to migration control policies, measures and agreements. Migration control *policies* can be either unilateral (involving a single State) or cooperative (involving two or more States). States implement migration control policies through migration control *measures*, which are often applied in parallel. Finally, cooperative (as opposed to unilateral) migration control policies depend on migration control *agreements* between two or more States, which can have different levels of formality.

This study further focuses on *cooperation between the Global North and the Global South* to stem migration flows from the Global South to the Global North, which results in the containment of people on the move in the Global South. Migration flows refer to migration paths followed by refugees and other migrants, often with the help of smugglers. They exist not only from the Global South to the Global North but also within the Global South and Global North.[40] Likewise, violations of socio-economic rights of people on the move also take place in the Global North.[41] However, as this study focuses on socio-economic rights, exploring issues surrounding cooperation between the Global North and Global South becomes particularly interesting, especially as regards the question whether the Global North has an obligation to contribute to realising the socio-economic rights of people on the move contained in the Global South. Therefore this study focuses on cooperation between the Global North and the Global South.

Sponsor States[42] are the Global North States that seek to avoid people on the move reaching their territory and collaborate with Global South States in order to achieve this objective. These States are also referred to as destination States[43] or receiving States.[44] They include notably EU Member States, the USA and Australia. The Global

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36 Gregor Noll and Jens Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999).

37 FitzGerald (n 18).

38 Tan (n 13).

39 Migration management, a term often used in policy documents, covers broader efforts to manage migration, including legal pathways, resettlement and return policies. For a critical discussion of the term 'migration management' see Martin Geiger, 'Policy Outsourcing and Remote Management: The Present and Future of Border and Migration Politics' in Ruben Zaiotti (ed), *Externalizing Migration Management: Europe, North America and the Spread of 'Remote Control' Policies* (Routledge 2016) 262–66.

40 In terms of numbers, migration within and across countries of the Global South is more important than migration from the Global South to the Global North: Fiddian-Qasmiyeh (n 19) 2.

41 See for instance Commissioner for Human Rights of the Council of Europe, 'Report Following her Visit to Greece from 25 to 29 June 2018' (6 November 2019) CoE Doc CommDH(2018)24.

42 Other authors similarly refer to sponsoring States; see for instance Gammeltoft-Hansen and Hathaway (n 35).

43 See for instance Frelick, Kysel and Podkul (n 34); Tan (n 13).

44 See for instance Pia M Orrenius and Madeline Zavodny, 'Economic Effects of Migration: Receiving States' in Marc R Rosenblum and Daniel J Tichenor (eds), *Oxford Handbook of the Politics of International Migration* (OUP 2012); Gary P Freeman, 'Migration Policy and Politics in the Receiving States' (1992) 26 International Migration Review 1144.

South States that host people on the move are *partner States*: they participate in but do not take the initiative for cooperative migration control policies.[45] Partner States are transit States[46] or third States that otherwise would not be affected by migration flows, such as Nauru.[47] The terms 'sponsor State' and 'partner State' do not aim to endorse a Global North bias but rather reflect the empirical reality that cooperative migration control policies are often designed by wealthy Global North States and implemented in cooperation with Global South States.[48] The terms 'Global North' and 'Global South', in turn, refer to differences in countries' level of economic development and have been contested, as they fail to capture the diversity among States in each category as well as the similarities between certain States across categories.[49] The qualification of certain partner States, like Turkey, as Global South countries can thus be challenged. Nevertheless, considering their overall levels of development, socio-economic rights realisation and global power, for the purpose of this study we can distinguish sponsor States in the Global North from partner States in the Global South.

More generally, this study examines the responsibility of *States*, as they are the primary subjects of international law. Moreover, migration control is a core function of State sovereignty and States are the key players in migration control: they design and, to a great extent, implement migration control policies. Yet such policies can also involve non-State actors such as private companies and humanitarian actors, as well as international organisations like the office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organisation for Migration (IOM) and, in the European context, the European Union (EU) and its agencies. The analysis explores the role of non-State actors involved in cooperative migration control insofar as their conduct can have implications for the responsibility of States.[50] Indeed, although

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45 Other scholars have also referred to partner States; see for instance Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019); Tan (n 13); Nikolas Feith Tan and Thomas Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control' (2020) 21 German Law Journal 335.

46 The terms destination State, transit State and State of origin refer to the 'position' of States along migration routes. However, these definitions are fluid: Mexico for instance could qualify as a State of origin (for migration from Mexico to the USA), transit (for migration from Central America to the USA) and destination (for migration from Central America to Mexico rather than the USA as a result of cooperative migration control). Indeed, as a result of migration control, transit States often become final destinations. See Missbach and Phillips (n 17) 22.

47 While as a matter of empirical reality sponsor States also cooperate with States of origin, this study focuses on cooperation with transit and third States because it examines the plight of people on the move who have left their country of origin.

48 In the EU context, policies involving multiple EU Member States, such as the hotspots in Greece and Italy for instance, may also raise issues in terms of socio-economic rights. However, as this study focuses on people on the move affected by cooperative migration control beyond the territory of sponsor States, they are excluded from this study.

49 For a discussion see Rory Horner and Pádraig Carmody, 'Global North/South' in Audrey Kobayashi (ed), *International Encyclopedia of Human Geography* (Elsevier 2019).

50 See Chapter VI, Section 3.2. On non-State actors see for instance Gammeltoft-Hansen, *Access to Asylum* (n 13) ch 5; Tendayi Bloom, 'The Business of Migration Control: Delegating Migration Control

non-State actors can play an important role in implementing cooperative migration control policies, it remains a contentious issue whether they have obligations and can incur responsibility under international law.[51] In the European context, this study complements scholarship that explores the role of the EU and its agencies in migration control.[52]

This study further focuses on *international human rights law*. As there is no single legal framework applicable to international migration law, various international legal instruments include provisions applicable to migrants.[53] Because it is deemed universal, international human rights law applies to all people on the move, and therefore provides an adequate framework for the present study.[54] This focus complements scholarship under other legal regimes, such as international refugee law,[55] the law of the sea,[56] international criminal law,[57] and budget and public

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Functions to Private Actors' (2015) 6 Global Policy 151; Thomas Gammeltoft-Hansen, 'Private Actor Involvement in Migration Management' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2016). On international organisations see for instance Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (CUP 2016); Melanie Fink, *Frontex and Human Rights: Responsibility in 'Multi-actor Situations' under the ECHR and EU Public Liability Law* (OUP 2018); Asher Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 22 The International Journal of Human Rights 681.

51 See for instance Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (Brill 2015); Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015).

52 See, among many other examples, Mungianu (n 50); Moreno-Lax, *Accessing Asylum in Europe* (n 13); Fink (n 50); David Fernández Rojo, *Evolution of the Operational Tasks of Frontex, EASO and Europol: Towards an Integrated Border Management, Migration and Asylum Administration in the European Union?* (PhD thesis, University of Deusto 2018).

53 Jaya Ramji-Nogales and Peter J Spiro, 'Introduction to Symposium on Framing Global Migration Law' (2017) 111 American Journal of International Law Unbound 1; Thomas Gammeltoft-Hansen, 'The Normative Impact of the Global Compact on Safe, Orderly and Regular Migration' in Thomas Gammeltoft-Hansen and others, 'What Is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration' (2017) Raoul Wallenberg Institute Working Paper 1:2017, 7; Jane McAdam, 'The Global Compacts on Refugees and Migration: A New Era for International Protection?' (2018) 30 International Journal of Refugee Law 571, 573; Elspeth Guild, Tugba Basaran and Kathryn Allinson, 'From Zero to Hero? An Analysis of the Human Rights Protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)' (2019) 57(6) International Migration 43, 45.

54 On the long-standing debates about the universality of human rights see Abdullahi Ahmed An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1995); Michael J Perry, 'Are Human Rights Universal? The Relativist Challenge and Related Matters' (1997) 19 Human Rights Quarterly 461; Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 Human Rights Quarterly 281.

55 See for instance Tan (n 13).

56 See for instance Efthymios Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017).

57 See for instance Ioannis Kalpouzos, 'International Criminal Law and the Violence against Migrants' (2020) 21 German Law Journal 571. See also (regarding the Mediterranean) 'Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to Article 15 of the Rome

procurement law.[58] More specifically, this study examines the impact of cooperative migration control on people on the move from a socio-economic rights perspective. It focuses on the socio-economic rights enshrined in the ICESCR: the rights to an adequate standard of living, health and education as well as the right to work, labour rights and the right to social security. Although the ICESCR includes cultural rights, this study focuses only on socio-economic rights for two reasons. First, there is more evidence to suggest that cooperative migration control jeopardises socio-economic rights. Second, cultural rights are arguably of a different nature because they depend less on the allocation of resources.[59] The analysis uses the ICESCR as starting point but also includes other instruments where relevant, such as the International Covenant on Civil and Political Rights[60] (ICCPR), the Convention on the Rights of the Child[61] (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[62] (ICRMW). Likewise, the analysis refers to the Refugee Convention's provisions on socio-economic rights, as this instrument is relevant for people on the move who are refugees. Existing scholarship on States' obligations towards specific groups of people on the move further complements the present study.[63]

Finally, the analysis focuses on the *responsibility* question. Given its focus on international human rights law, in this study 'responsibility' refers to 'responsibility under international law'. Responsibility is a prerequisite for accountability: only if a State is responsible can it be held accountable.[64] Other scholars have addressed the issue of accountability in the context of migration control, especially as regards refugee rights and civil and political rights.[65] The present study complements this scholarship

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Statute, EU Migration Policies in the Central Mediterranean and Libya (2014–2019)' (2019); (regarding Australia) 'Letter of the Office of the Prosecutor of the International Criminal Court to the Office of Andrew Wilkie MP' (12 February 2020) Ref OTP-CR-322/14/001.

58 In the European context see Thomas Spijkerboer and Elies Steyger, 'European External Migration Funds and Public Procurement Law' (2019) 4 European Papers 493. See also Philipp Dann, Michael Riegner and Lena Zagst, 'Bouncers Beyond Borders – On the (Il)legality of EU Funding for the Libyan Coast Guard' (*Völkerrechtsblog*, 20 May 2020).

59 See Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113, 119–20; Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (CUP 2018) 15.

60 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

61 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

62 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

63 See for instance Alan Desmond (ed), *Shining new Light on the UN Migrant Workers Convention* (Pretoria University Law Press 2017); Jason Pobjoy, *The Child in International Refugee Law* (CUP 2017); Ruth Brittle, *The Interplay of Children's Rights and International Refugee Law: Protection and Best Interests of the Refugee and Asylum-Seeking Child* (PhD thesis, University of Nottingham 2019).

64 See Arne Vandenbogaerde, *Towards Shared Accountability in International Human Rights Law* (Intersentia 2016) 37–38.

65 See for instance Patrick van Berlo, 'The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality' (2017) 17 Human Rights Law

by exploring States' responsibility under international law for violations of socio-economic rights. It thus provides a starting point for examining issues of accountability for such violations in the context of cooperative migration control. Finally, this study does not address the legal consequences of a finding of (shared) responsibility by a court or human rights body. Nevertheless, the question as to what remedies are appropriate and how they should be divided in cases where more than one actor is found to be responsible is relevant from the perspective of access to remedies.

4. SOURCES

This study examines to what extent and how violations of the socio-economic rights of people on the move give rise to the international responsibility of States involved in cooperative migration control. It is therefore important to establish what sources it uses to determine the scope of States' international obligations and assign responsibility under international law. Article 38(1) of the Statute of the International Court of Justice[66] (ICJ) provides the starting point of this study. It holds that the ICJ shall apply:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b) international custom, as evidence of a general practice accepted as law;
c) the general principles of law recognized by civilized nations;
d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

As the primary sources of international law enumerated in Article 38(1) ICJ Statute do not suffice to provide an unequivocal answer to the research questions that this study seeks to answer, we must have recourse to other sources, such as judicial decisions, scholarship, and soft law sources.[67] Moreover, Article 38(1) ICJ Statute precedes the development of international human rights law and the law on State responsibility, yet in both fields other sources play a crucial role, such as the case law of international

Review 33; Tan (n 13) ch 6; Costello and Mann (n 13) and other contributions to that special issue; Sergio Carrera and Marco Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice* (Routledge 2020).

66 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355.

67 See Mátyás Bódig, 'Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 70: 'Due to the deficiencies of the ICESCR (…) and the scarcity of relevant domestic jurisprudence, clarifying the content of economic and social rights has always required more than a mere articulation of existing hard law.'

courts and the Draft Articles on the Responsibility of States for Internationally Wrongful Acts[68] (ARSIWA). Accordingly, this section discusses how this study uses the following sources: international conventions and judicial decisions; international custom; general principles; scholarship; and soft law.[69]

4.1. INTERNATIONAL CONVENTIONS AND JUDICIAL DECISIONS

According to Article 38(1)(a) ICJ Statute, human rights treaties are primary sources of international law. At the international level, this study focuses especially on the ICESCR, ICCPR, CRC, ICRMW and the Refugee Convention. It also includes regional treaties, notably the European Convention on Human Rights[70] (ECHR), the American Convention on Human Rights[71] (ACHR) and the African Charter on Human and Peoples' Rights[72] (ACHPR). The relevance of a given treaty varies between States. Any general findings regarding the meaning of a treaty provision must take into account whether a State has signed or ratified the treaty in question, whether it has made any reservations, and whether the findings of courts or monitoring bodies at the regional level have any relevance for that particular State. Given the multiplicity of States involved in cooperative migration control, these differences can have implications for determining the obligations and responsibility of other States.

Article 38(1)(d) ICJ Statute recognises that judicial decisions can be subsidiary sources of international law. Indeed, the pronouncements of courts and human rights monitoring bodies play an important role in interpreting human rights treaties. This study focuses particularly on the case law of international and regional courts, especially the ICJ, European Court of Human Rights (ECtHR) and Inter-American Court of Human Rights (IACtHR). Where relevant, it also refers to decisions of domestic courts. 'Soft jurisprudence', which includes conclusions, views, communications and recommendations of treaty monitoring bodies, further complements this 'hard jurisprudence'.[73] Soft jurisprudence includes the *erga omnes*

68 International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' in International Law Commission, 'Report of the International Law Commission on the Work of its 53rd Session' (2001) UN Doc A/56/10.

69 For a discussion of the sources of international law see for instance Malcolm N Shaw, *International Law* (6th edn, CUP 2008) ch 3; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) ch 2.

70 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5.

71 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36.

72 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

73 Angelika Nußberger, 'Hard Law or Soft Law – Does it Matter? Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018) 45.

effect of judgments beyond the parties on which they are binding.[74] This study relies on the non-binding output of the Committee on Economic, Social and Cultural Rights (CESCR), Human Rights Committee (HRC), Committee on the Rights of the Child (CRC Committee), Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) as well as the European Commission of Human Rights (EComHR), Inter-American Commission on Human Rights (IAComHR) and African Commission on Human and Peoples' Rights (AComHPR). As explained below, the exact weight and relevance of the non-binding output of human rights treaty bodies varies.[75]

4.2. INTERNATIONAL CUSTOM

According to Article 38(1)(b) ICJ Statute, international custom, as 'evidence of a general practice accepted as law', is a source of international law.[76] In practice, however, it can be difficult to determine whether State practice and *opinio juris* are established. Carrying out an exhaustive overview of State practice is challenging for practical reasons such as language barriers and accessibility of empirical evidence. Moreover, views differ as to the relevance of both requirements for customary law, especially among human rights scholars, with some arguing for a diminished role for practice where human rights are concerned.[77] Thus, the same empirical evidence can lead to different legal findings. An oft-cited example in the migration context is the status of the principle of *non-refoulement* in international law: some scholars argue that it has reached the status of custom and *jus cogens* whereas others argue that it fails to meet the requirements for custom.[78] This study does not purport to examine extensively State practice and *opinio juris* to establish the existence of a customary norm. The measures discussed are specific examples, rather than an exhaustive overview, of State practice. As such they may contribute towards the development of international custom as a source of law.

Since all States involved in cooperative migration control have ratified multiple human rights treaties, whether a human rights norm is part of customary international

74 Ibid 46.

75 See Section 5.2.2 below.

76 On custom as a source of international law see for instance Shaw (n 69) 72–93; Crawford, *Brownlie's Principles of Public International Law* (n 69) 23–30.

77 Samantha Besson, 'Sources of International Human Rights Law: How General is General International Law?' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 858.

78 Compare for instance Jean Allain, 'The *Jus Cogens* Nature of *Non-refoulement*' (2001) 13 International Journal of Refugee Law 533; Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (CUP 2003); James C Hathaway, 'Leveraging Asylum' (2010) 45 Texas International Law Journal 503; 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?* (Vol 46, Asser Press 2016) 273.

law is relevant only where a State has not ratified human rights treaties embodying this norm, since the customary norm may then serve as source of obligations. While the ICJ has recognised the customary law status of at least some human rights norms, and there is broad consensus that human rights norms can be of a customary nature, it remains unclear which rights have reached the status of customary international law.[79] This is particularly true with regard to socio-economic rights and extraterritorial obligations. Therefore, this study addresses customary human rights norms where relevant to determining the obligations of States.

However, customary norms play an important role in the law on State responsibility. Unlike international human rights law, international rules on State responsibility are not codified in international treaties. Rather, the ARSIWA 'seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts.'[80] As such, they are evidence of the law rather than a source of law itself.[81] Courts and commentators consider the ARSIWA to be 'in whole or in large part an accurate codification of the customary international law of State responsibility'.[82] The ICJ has for instance recognised that Articles 4, 8 and 16 ARSIWA reflect rules of customary international law.[83] Furthermore, there is extensive evidence that international courts, tribunals and other bodies refer to the ARSIWA in their decisions.[84] Accordingly, this study uses the ARSIWA provisions as evidence of rules of customary international law that pertain to the law on State responsibility.

4.3. GENERAL PRINCIPLES OF LAW

Article 38(1)(c) ICJ Statute further lists 'the general principles of law recognized by civilized nations' as a source of international law.[85] They include both general principles of law and general principles of international law *stricto sensu*.[86] General principles of law are principles of national law that are common to jurisdictions from different

79 Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2010) 68–69 and references cited there.

80 ARSIWA Commentary 31, para 1.

81 James Crawford, *State Responsibility: The General Part* (CUP 2013) 87.

82 Ibid 43. See also Gammeltoft-Hansen, *Access to Asylum* (n 13) 179; Patrick van Berlo, *Human Rights Elephants in an Era of Globalisation: Commodification, Crimmigration and Human Rights in Confinement* (Wolf 2020) 244. For a more hesitant view see Erik Kok, *Indirect Responsibility in the Contemporary Law of State Responsibility* (Prufrock 2018) 17.

83 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007) ICJ Reports 2007, 43, paras 385, 398 and 420.

84 UNGA, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies' (23 April 2019) UN Doc A/74/83 and references in paras 2 and 3 of that report.

85 On general principles of law as a source of international law see Shaw (n 69) 98–109.

86 Besson (n 77) 853.

legal traditions around the world.[87] General principles of international law *stricto sensu* are fundamental to the international legal order itself and arise from sources of international law such as treaties and custom.[88]

Like customary international law, determining whether a particular concept qualifies as a general principle of (international) law goes beyond the scope of this study. Various concepts play an important role in this study, like due diligence and causation. Yet scholars have provided divergent answers to the question whether they qualify as general principles of law.[89] This study refers to general principles when they have been recognised as such in other sources of law or scholarship.[90] It uses general principles in two ways. First, it uses them as a guide to interpretation. That is the case for the principle of good faith discussed below.[91] Indeed, as interpretative principles, general principles are particularly useful to help resolve conflicts of interpretation when other sources of law are insufficient to provide a clear interpretation, for instance in areas of law that are still under development. Therefore, this study uses general principles to guide the interpretation where there is room for multiple interpretations. Second, it refers to certain concepts which may qualify as general principles as understood in Article 38(1)(c) ICJ Statute, such as State sovereignty and non-discrimination. It uses them as a source of international law itself rather than an interpretative principle.

4.4. SCHOLARSHIP

Article 38(1)(d) ICJ Statute also lists the teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of rules of law. This study relies on scholarly literature as guidance for the interpretation of other sources of international law, especially when the primary sources of international law as listed in Article 38(1)(a) to (c) ICJ Statute fail to provide a clear answer and can lead to different interpretations. In other words, scholarship can provide evidence of the state of the law.[92] More specifically, given the lack of clarity that still permeates many legal questions raised by cooperative migration control and its impact on the socio-economic rights of people on the move, this study uses scholarship to provide clarity in legal grey areas

87 Sigrun I Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia 2006) 131.

88 Besson (n 77) 853.

89 See for instance Dávid Miklós Pusztai, *Causation in the Law of State Responsibility* (PhD thesis, Cambridge University 2017) ch III; Neil McDonald, 'The Role of Due Diligence in International Law' (2019) 68 International & Comparative Law Quarterly 1041, 1043.

90 For instance, Article 2 of the UN Charter recognises the sovereign equality of States as a general principle, while the ICJ has acknowledged that good faith is a basic principle of law. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119; ICJ, *Nuclear Tests (Australia v France)* Judgment (20 December 1974) ICJ Reports 1974, 253, para 46.

91 See Section 5.2.1 below.

92 Shaw (n 69) 113; Crawford, *Brownlie's Principles of Public International Law* (n 69) 20 and 42–43 (qualifying the writings of publicists as material sources of international law that provide evidence of the existence of binding rules of general application).

and indicate trends in legal interpretation. It may reveal either widespread support for a given interpretation or reflect divergences on a certain issue. Where the interpretation proposed here is widely supported by scholarship, it is arguably more persuasive than where it is not. Literature is also relevant because it can inform the decisions of courts or monitoring bodies and thus indirectly contribute to the development of the law itself. In other words, it can point towards future legal developments.

In international human rights law, scholars themselves sometimes take on a more authoritative position, such as membership of monitoring bodies, and 'import' scholarly developments into the international human rights regime. Therefore, it can be particularly relevant to examine scholarship in this field. For instance, Eide imported the tripartite typology of States' obligations to respect, protect and fulfil human rights into the United Nations (UN) system when he joined the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.[93] Similarly, when the CESCR was set up, academics and non-governmental organisations (NGOs) drafted the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights[94] in order to ensure that the CESCR's work would be based on solid ground. Four members of the CESCR attended the expert meeting in Maastricht while Alston, the CESCR's first rapporteur, not only attended the Maastricht meeting but had been influential as a scholar in developing thinking on economic, social and cultural rights.[95] More generally, 'CESCR General Comments have often served as a channel through which conceptual devices developed by human rights scholars have been incorporated into human rights law.'[96] Likewise, beyond the CESCR, Shany, as chairperson of the HRC and one of the principal drafters of General Comment 36, arguably influenced the Committee's recent endorsement of the functional model of jurisdiction.[97] As an academic he had previously advocated for a functional approach to jurisdiction.[98] In other words, because of the human rights regime's porosity, scholarship can play an important role and may itself contribute to the development of international human rights law, especially in the field of socio-economic rights.

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93 Olivier De Schutter, 'Introduction' in Olivier de Schutter (ed), *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2013) xvii.

94 UN Commission on Human Rights, 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (8 January 1987) UN Doc E/CN.4/1987/17 (annex) para 42.

95 Olivier De Schutter, 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019) 534. See for instance Philip Alston and Gerard Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156; Philip Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 332.

96 Bódig (n 67) 71.

97 Marko Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (2020) 20 Human Rights Law Review 1, 21. See also Chapter V, Section 2.2.

98 Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 The Law & Ethics of Human Rights 47.

4.5. SOFT LAW

Although it is not listed in Article 38(1) ICJ Statute, soft law can play a role in the interpretation of international law. Soft law can be defined as normative statements that have acquired a degree of traction in the form of at least some degree of State acceptance.[99] Soft law norms can be placed on a spectrum of relative hardness/softness: some soft law norms are 'harder' than others. Moreover, norms which do not (yet) qualify as soft law may nevertheless have legal effects.[100] Accordingly, this study takes into account the relative weight or 'hardness' of soft law sources.

General Assembly resolutions and similar documents, although non-binding, can nonetheless contribute to the development and interpretation of international law.[101] Three recent General Assembly resolutions play an important role in the context of migration: the 2016 New York Declaration for Refugees and Migrants[102] (New York Declaration), the 2018 Global Compact for Safe, Orderly and Regular Migration[103] (Global Compact for Migration) and the 2018 Global Compact on Refugees.[104] The nature of the Global Compacts as international legal instruments and their significance for the protection of refugees and migrants has been widely discussed.[105] Both Global Compacts are explicitly not legally binding.[106] However, they are international agreements that evidence States' political commitments.[107] Thus, they come closer to the hard end of the hardness/softness spectrum and are particularly helpful in understanding States' interpretations of their obligations towards people on the move. Whether and how they are implemented in practice will clarify their exact significance.[108]

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99 John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 21; see also Thomas Gammeltoft-Hansen, Stéphanie Lagoutte and John Cerone, 'Introduction: Tracing the Roles of Soft Law in Human Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 5.

100 Cerone (n 99) 24.

101 See for instance Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III); Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, UNGA Res 40/144 (13 December 1985); Declaration on the Right to Development, UNGA Res 41/128 (4 December 1986). The ARSIWA have also been included as an annex to UNGA Res 56/83 (12 December 2001).

102 New York Declaration for Refugees and Migrants, UNGA Res 71/1 (3 October 2016).

103 Global Compact for Safe, Orderly and Regular Migration, UNGA Res 73/195 (19 December 2018).

104 Global Compact on Refugees, UNGA Res 73/12 (Part II) (26 November 2018).

105 See for instance Thomas Gammeltoft-Hansen and others, 'What Is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration' (2017) Raoul Wallenberg Institute Working Paper 1:2017; McAdam (n 53) and the other contributions to that special issue; Guild, Basaran and Allinson (n 53).

106 Global Compact for Migration, para 7; Global Compact on Refugees, para 4.

107 Thomas Gammeltoft-Hansen, 'The Normative Impact of the Global Compact on Refugees' (2018) 30 International Journal of Refugee Law 605, 609; Guild, Basaran and Allinson (n 53) 47.

108 Guild, Basaran and Allinson (n 53) 55.

More specifically, the Global Compact for Migration can influence the interpretation of States' obligations towards migrants under international human rights law.[109] Indeed, its recognition that international human rights law applies to migrants sparked controversy and a number of Global North States rejected it.[110] The USA formally withdrew from the process in December 2017, while Australia and a number of EU Member States either voted against the Global Compact for Migration or abstained at the final vote in December 2018.[111] This highlights sponsor States' reticence to recognising that they have legally binding obligations towards irregular migrants. More generally, the Global Compact illustrates the risk that soft law standards can weaken rather than strengthen the protection of the rights of people on the move.[112]

As regards international human rights norms, the relative binding force of the *output of treaty monitoring bodies* is discussed in detail below.[113] The pronouncements of *other human rights mechanisms*, such as special rapporteurs, can have more authority than the findings of scholars on account of their mandate, although they do not necessarily have sufficient traction to qualify as soft law. In other words, if they qualify as soft law at all, they are located at the soft end of the spectrum. Accordingly, where relevant, this study refers to such pronouncements in a similar way to scholarship. Given the limited availability of case law to guide the interpretation of the relevant treaty norms, soft law plays an important role with regard to socio-economic rights. Scholars have therefore advocated the 'zebra' approach, which combines abstract binding norms and non-binding concrete standards.[114] Interpretations of the ICESCR often rely on *principles and guidelines drafted by scholars*, such as the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles).[115] Such documents are relevant because they have the potential to influence the CESCR's output.[116] Yet the Maastricht Principles remain 'a product of the deliberations of non-state experts and while authoritative in terms of their provenance, are nonetheless merely persuasive in respect of the interpretation of

109 Elspeth Guild, 'Conclusions' in Thomas Gammeltoft-Hansen and others, 'What Is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration' (2017) Raoul Wallenberg Institute Working Paper 1:2017, 34.

110 Guild, Basaran and Allinson (n 53) 47.

111 UN News, 'General Assembly Officially Adopts Roadmap for Migrants to Improve Safety, Ease Suffering' (19 December 2018); Guild, Basaran and Allinson (n 53) 44.

112 Gammeltoft-Hansen and others (n 105); Guild, Basaran and Allinson (n 53) 49. See also Gammeltoft-Hansen, Lagoutte and Cerone (n 99) 7.

113 See Section 5.2.2 below.

114 Eibe Riedel, Gilles Giacca and Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 22–23.

115 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2011) 29 Netherlands Quarterly of Human Rights 578.

116 For instance, the CESCR refers to the Maastricht Principles in CESCR, 'General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24, paras 31 and 36.

the ICESCR rather than binding, having not been formally endorsed by states.'[117] In other words, the Maastricht Principles have authority as scholarship under Article 38(1)(d) ICJ Statute because they were drafted by 'experts in international law and human rights' who 'came from universities and organizations located in all regions of the world and included current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council.'[118] However, they need to gain State traction in order to qualify as soft law as defined above.

Likewise, as regards the law on State responsibility, the Guiding Principles on Shared Responsibility in International Law have been elaborated by a group of international lawyers with recognised expertise in the field of international responsibility.[119] In line with Article 38(1)(d) ICJ Statute, they are authoritative pronouncements of leading scholars which provide useful guidance in a field under development, and which may move towards the hard end of the soft law spectrum in the future if they receive State traction. This study uses these Principles in the same way as scholarship, recognising that their collective nature grants them more authority than the pronouncements of single authors, and that they may reflect a consensus among scholars on certain issues.

5. METHODOLOGY

Given the multiplicity and variety of sources on which this study relies, it is important to define how it uses them in order to answer the research questions identified above. This section seeks to clarify and justify the methodological choices that underpin this study's interpretation of international law.

5.1. INTERPRETING INTERNATIONAL HUMAN RIGHTS LAW

At its core, this study concerns the interpretation of international human rights law and the law on State responsibility. It must determine to what extent the rules of treaty interpretation embodied in the Vienna Convention on the Law of Treaties[120] (VCLT) apply to human rights treaties.[121] Debates surrounding the preliminary question

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117 Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 976 at n 293.

118 Maastricht Principles (n 115) 578.

119 André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 European Journal of International Law 15, 21.

120 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

121 For a detailed discussion of the interpretation of human rights treaties see Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 18–47; Başak Çali, 'Specialized Rules of Treaty Interpretation: Human Rights' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012); Martin Scheinin, 'The Art and

whether international human rights law constitutes a *lex specialis* have arguably been settled with a negative answer: there is now widespread support for the position that international human rights law is part of general international law.[122] International courts have also adopted this integrationist perspective.[123] This study acknowledges that human rights treaties may differ from other treaties insofar as they:

> prescribe obligations of an essentially *objective character* (rather than reflecting reciprocal concessions or advantages, as in classic treaties), to be *collectively* guaranteed, with the prevalence of considerations of general interest and *ordre public* (transcending individual interests of States Parties) (…) they all seek the realization of the ultimate goal of the protection of the rights inherent to the human person.[124]

As this study covers international human rights law as well as the law on State responsibility, any methodological choices must be defensible beyond the field of international human rights law. Moreover, the VCLT rules on the interpretation of treaties can accommodate the specificities of human rights treaties. Human rights courts and treaty bodies themselves claim to interpret their treaties in line with the VCLT provisions[125] and most scholars agree that the VCLT rules are flexible enough to

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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* (Edward Elgar 2017).

122 Menno T Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 1–2.

123 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion (21 June 1971) ICJ Reports 1971, 16, para 53. See also George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 European Journal of International Law 509, 521–23; Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 European Journal of International Law 585; Alejandro Fuentes, 'Expanding the Boundaries of International Human Rights Law: The Systemic Approach of the Inter-American Court of Human Rights' (European Society of International Law 2017 Annual Conference, Naples, September 2017); Iulia Motoc and Johann Justus Vasel, 'The ECHR and Responsibility of the State: Moving Towards Judicial Integration – A View from the Bench' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018).

124 Antônio Augusto Cançado Trindade, 'Conclusion: Reflections on the 2015 Strasbourg Conference' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018) 295–96. For a contrary view on the objective character of human rights treaties see Bruno Simma, 'Sources of International Human Rights Law: Human Rights Treaties' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017).

125 See for instance ECtHR, *Golder v UK* App No 4451/70 (21 February 1975) para 29; see also IACtHR, *Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Series C No 148 (1 July 2006) para 155; HRC, *Broeks v the Netherlands* Communication No 172/1984 (9 April 1987) paras 12.2–12.3. See also Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 757; Anja Seibert-Fohr, 'The Effect of Subsequent Practice on the European Convention on Human Rights: Considerations from a General International Law Perspective' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018) 64–68.

accommodate the approaches developed by human rights courts and treaty bodies.[126] In sum, the VCLT rules on the interpretation of treaties apply to human rights treaties.

Articles 31 to 33 VCLT provide the starting point for interpretations of treaty provisions. Although many human rights treaties predate the entry into force of the VCLT, the ICJ has recognised that Articles 31 and 32 VCLT 'may in many respects be considered as a codification of existing customary international law on the point.'[127] Therefore, these provisions are also relevant for human rights treaties concluded before 1969.[128] Article 31(1) VCLT contains the general rule of interpretation. It provides that:

> 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.

There is broad agreement that the three elements (text, context and object and purpose) are relevant factors of interpretation which must be viewed together, since Article 31(1) does not establish an order of priority between them.[129] This 'crucible approach' leaves considerable room for interpretation: depending on how much weight the interpreter gives to each element, different interpretations of the same provision are possible.[130] In fact, the same holds true for the interpretation of international legal norms more generally. Indeed, multiple interpretations of a norm can arise, which in turn may lead to different conclusions, as illustrated by the divergence of opinion about the status of the principle of *non-refoulement*.[131] Likewise, under the law on State responsibility, the debates surrounding the interpretation of Article 16 ARSIWA illustrate how the same sources can lead to different interpretations and conclusions.[132]

Furthermore, international human rights law is a normatively driven field: scholars working in this field tend to interpret international norms in a way that advances

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126 See for instance Kamminga (n 122) 9–10; Jonas Christoffersen, 'Impact on General Principles of Treaty Interpretation' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009); Gondek (n 121) 38–39; Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905, 913; Çali (n 121) 526–33; Ineta Ziemele, 'European Consensus and International Law' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018) 39; Seibert-Fohr (n 125) 66; Daniel Moeckli, 'Interpretation of the ICESCR: Between Morality and State Consent' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (OUP 2018) 57; Geir Ulfstein, 'Interpretation of the ECHR in Light of the Vienna Convention on the Law of Treaties' (2020) 24 The International Journal of Human Rights 917, 928.

127 ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* Judgment (12 November 1991) ICJ Reports 1991, 53, para 48.

128 Scheinin (n 121) 22. See for instance ECtHR, *Golder* para 29.

129 Mechlem (n 126) 911; Çali (n 121) 528; Fitzmaurice (n 125) 746; Scheinin (n 121) 23; Alain Pellet, 'Canons of Interpretation under the Vienna Convention' in Joseph Klingler, Yuri Parkhomenko and Constantino Salodinis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2019) 4–5.

130 See Christoffersen (n 126) 39–40; Moeckli (n 126) 53; Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020) 21–24.

131 See Section 4.2 above.

132 See Chapter VI, Section 4.3.1.

human rights protection.[133] This creates tension in terms of what counts as the 'correct' interpretation of international law, as it must arguably both be methodologically sound and offer protection to individuals. This tension influences not only scholars but also adjudicators: human rights treaty bodies tend to adopt a teleological interpretation when interpreting international human rights norms.[134] The IACtHR thus applies the principle of the norm most favourable to the victim (*pro homine* or *pro persona* principle).[135] The ECtHR, for its part, requires human rights protection to be 'practical and effective' rather than 'theoretical or illusory'.[136] Yet interpretations of human rights norms must remain methodologically defensible in order to retain their legitimacy in the eyes of States and international law more generally. Therefore, the present study must broker this tension between methodological soundness and the normative call of human rights protection.

5.2. THE APPROACH IN THIS STUDY

This study applies the general rule of interpretation embodied in Article 31(1) VCLT. As noted above, the relative weight of the three elements (text, context and object and purpose) varies depending on the approach one chooses. This study takes the ordinary meaning of the terms in a treaty provision as a starting point.[137] It interprets these terms in the light of the object and purpose of human rights law and of the contemporary context. The due diligence standard of conduct, which requires States to take reasonable measures to avoid reasonably foreseeable human rights violations, is well-suited to reconcile a treaty's object and purpose with the specific context in which it applies. It is particularly useful in determining the scope of States' obligations under international human rights law (Section 5.2.1). This study also pays attention to the role of subsequent practice (Section 5.2.2) and takes into account the charged political context in which migration control takes place (Section 5.2.3).

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133 Byrne and Gammeltoft-Hansen argue that international human rights law and refugee law have a 'dual imperative' to simultaneously advance scholarly and protection-oriented objectives. Rosemary Byrne and Thomas Gammeltoft-Hansen, 'International Refugee Law Between Scholarship and Practice' (2020) 32 International Journal of Refugee Law 181, 185.

134 Seibert-Fohr (n 125) 66; Cançado Trindade (n 124) 296; Ulfstein, 'Interpretation of the ECHR in Light of the Vienna Convention on the Law of Treaties' (n 126) 919; James Crawford and Amelia Keene, 'Interpretation of the Human Rights Treaties by the International Court of Justice' (2020) 24 The International Journal of Human Rights 935, 941.

135 IACtHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* Advisory Opinion OC-21/14 (19 August 2014) para 54. See also Fuentes (n 123).

136 ECtHR, *Airey v Ireland* App No 6289/73 (9 October 1979) para 24.

137 Article 31(4) VCLT confirms the primacy of the ordinary meaning of a term by establishing a presumption that it shall be given a special meaning only when it can be established that the parties so intended. See also Scheinin (n 121) 23.

5.2.1. Using Due Diligence to Interpret Human Rights Obligations

It can be argued that determining a treaty's *object and purpose* is itself an inherently evaluative rather than empirical exercise, because deciding which facts are relevant for identifying a treaty's object and purpose ultimately depends on some normative proposition about moral reasons or values.[138] For human rights treaties, the object and purpose is, in general terms, human rights protection.[139] As noted above, regional courts and human rights treaty bodies often adopt a teleological interpretation, emphasising the object and purpose of human rights treaties. More generally, restrictive interpretations tend to be rejected in international decisions, including beyond the field of international human rights law.[140]

Article 31(2) VCLT provides guidance on how to determine the *context* in which a treaty's terms must be interpreted:

> 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.

The principle of evolutionary interpretation is prevalent in international human rights law: legal norms are interpreted according to the contemporary context rather than the situation that prevailed when such norms were drafted.[141] Many human rights treaties were drafted decades ago and in vague terms, while the societies to which they apply evolve over time. This study takes into account the contemporary context when interpreting human rights norms. Indeed, both the ECtHR and the IACtHR have held that their respective human rights treaties must be interpreted in the light of present day conditions.[142] There appears to be a modern trend in the jurisprudence

138 Letsas (n 123) 535. See also Raible (n 130) ch 1.

139 Sepúlveda (n 14) 79.

140 Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 European Journal of International Law 681, 682.

141 Tzeng identifies five objective factors that militate in favour of an evolutionary interpretation: the term is by definition evolutionary; it is generic; the instrument was entered into for a very long period; it is multilateral; and the instrument concerns human rights. Peter Tzeng, 'The Principles of Contemporaneous and Evolutionary Interpretation' in Joseph Klingler, Yuri Parkhomenko and Constantino Salodinis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2019) 418–20. See also Çali (n 121) 529–32.

142 ECtHR, *Tyrer v UK* App No 5856/72 (25 April 1978) para 31; IACtHR, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights* Advisory Opinion OC-10/89 (14 July 1989) para 37. See also IACtHR, *'Street Children' v Guatemala* (Merits) Series C No 32 (19 November 1999) paras 192–93; IACtHR,

of international judicial bodies beyond international human rights law in favour of applying the principle of evolutionary interpretation.[143] The ICJ has also applied this principle.[144] While an evolutionary approach often leads to better human rights protection because human rights standards have increased protection over time, evolving understandings of human rights may equally lower protection standards.[145] In other words, an evolutionary approach does not necessarily increase human rights protection.

Furthermore, the requirement in Article 31(1) VCLT to interpret treaty provisions in *good faith* plays an important role in the context of this study. Indeed, there is a risk that States seek to interpret their obligations under international human rights law restrictively so as to avoid incurring obligations towards people on the move. Interpretations that limit or expand States' obligations towards people on the move must follow from a good faith interpretation of human rights treaties. The principle of good faith cannot provide an independent legal basis for expansive interpretations of human rights treaties. Rather, it serves to favour the interpretation that ensures the most actual performance of the treaty within the scope of possible interpretations.[146]

A key question in this study concerns the scope of States' international obligations as regards the socio-economic rights of people on the move in the context of cooperative migration control. Yet interpreting the terms of a treaty in the light of the object and purpose of human rights law and the contemporary context risks imposing an unreasonable burden on States. Indeed, in order for human rights protection to be effective and avoid criticisms of 'wishful legal thinking',[147] legal interpretations must not impose an impossible burden on States. Therefore, States' obligations under international human rights law must be delimited. This study uses the *due diligence* standard to delimit the scope of States' obligations towards people on the move. It holds that States must take reasonable measures to avoid reasonably foreseeable human rights violations.[148] Due diligence has received particular attention in the context of non-State actors, both as regards State obligations to protect against harm committed by non-State actors and the human rights due diligence of businesses.[149] However, the due

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Gómez-Paquiyauri Brothers v Peru (Merits, Reparations and Costs) Series C No 110 (8 July 2004) para 165.

143 Tzeng (n 141) 421.

144 See for instance ICJ, *South West Africa* para 53; ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* Judgment (13 July 2009) ICJ Reports 2009, 213, para 70.

145 See Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 78; Gammeltoft-Hansen, Lagoutte and Cerone (n 99) 7; Moeckli (n 126) 58; Guild, Basaran and Allinson (n 53) 49.

146 Gammeltoft-Hansen, *Access to Asylum* (n 13) 97.

147 Kay Hailbronner, '*Non-Refoulement* and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?' (1986) 26 Virginia Journal of International Law 857.

148 See Chapter III, Section 3.

149 See for instance Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.

diligence standard of conduct is also particularly relevant in the context of this study. It helps determine the scope of States' obligations to realise socio-economic rights, since Article 2(1) ICESCR links States' obligation to realise socio-economic rights to their available resources and recognises that they must be realised progressively. It further helps operationalise State obligations in situations where multiple States can have obligations simultaneously and helps address the question how the obligations of one State relate to that of another State.

It must be recognised that the due diligence standard is no silver bullet, as ultimately the scope of State obligations depends on an assessment of what is 'reasonable'. This remains a vague standard which makes it difficult, if not impossible, to determine, at a general level, whether a State complies with its obligations and hence whether it incurs responsibility. Any such determination depends on the specificities of the case and hence the standard varies according to the circumstances in which it is applied. Moreover, as subjective interpretations ultimately determine what is 'reasonable', the due diligence standard remains susceptible to criticism from both sides of the interpretation spectrum. Those favouring a restrictive interpretation of State obligations could label unwelcome findings as 'wishful legal thinking', while those favouring an expansive interpretation could argue that the due diligence standard is insufficient because it allows gaps in human rights protection to exist: since States are only required to do what is 'reasonable', it creates the risk that human rights are not 'covered' by corresponding State obligations. Nevertheless, the due diligence standard arguably enables an interpretation that strikes a balance between the object and purpose of international human rights law and the context of cooperative migration control. On the one hand it does not include a clear threshold like territory or jurisdiction which could be deemed to unduly limit State obligations and hence fail to comply with the object and purpose of human rights protection.[150] On the other hand, due diligence only requires States to take *reasonable* measures to avoid *reasonably foreseeable* human rights violations, and hence avoids imposing an impossible burden on States. In other words, it takes the context into account when determining a State's ability to realise socio-economic rights. Knowledge and ability are thus factors that help delimit the scope of State obligations.[151] Therefore, an interpretation that applies the due diligence standard is a legitimate application of Article 31 VCLT, taking into account the object and purpose as well as the context.

5.2.2. The Role of Subsequent Practice

The VCLT addresses the role of subsequent practice in treaty interpretation. This is particularly relevant for human rights treaties, which have often been drafted decades earlier. Article 31(3) VCLT provides that:

150 Many human rights scholars criticise jurisdiction thresholds that are too high in their view, such as 'effective control'. See Chapter V, Section 2.

151 See Chapter III, Section 3.

There shall be taken into account, together with the context:

(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.

This supports the integrationist perspective which considers international human rights law to be part of international law, as international norms beyond international human rights law form part of the context. Yet Article 31(3) raises two issues.

First, what is the role of State practice in treaty interpretation? On the one hand, as the source of States' human rights obligations is their consent to be bound by human rights treaties, States may arguably modify this consent through practice.[152] On the other hand, since the aim of human rights treaties is to restrain State conduct, it would be 'counterintuitive to allow State practice to change or develop the meaning of a treaty that seeks to restrain State practice'.[153] As the object and purpose of human rights treaties is to protect human rights, one must exercise great caution when examining State practice that runs counter to a good faith interpretation of States' obligations. This does not mean, however, that it can be ignored altogether. Accordingly, this study takes State practice into account, balancing practice that is contrary to the object and purpose of human rights law against authoritative interpretations of human rights monitoring bodies. For instance, with regard to obligations of international assistance and cooperation, it recognises that such global obligations exist at a general level, although there is no obligation to provide specific assistance to another State.[154]

This issue is closely linked to the second question raised by Article 31(3)(b): what is the role of international courts and monitoring bodies in human rights treaty interpretation? The interpretation of human rights treaty monitoring bodies can be seen as subsequent practice under Article 31(3)(b) VCLT.[155] Indeed, these entities have been specifically established to interpret human rights treaties. The ICJ recognised with regard to the HRC that 'it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.'[156] International courts and monitoring bodies are the primary interpreters of human rights treaties at the international level.[157] A State may not simply ignore a treaty body's interpretation with which it disagrees.[158] Accordingly, the interpretation

152 Seibert-Fohr (n 125) 61.
153 Ibid 81.
154 Chapter V, Section 3.1.
155 Scheinin (n 121) 30.
156 ICJ, *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)* Judgment (30 November 2010) ICJ Reports 2010, 639, para 66.
157 Mechlem (n 126) 919; Kasey L McCall-Smith, 'Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or a Hammer' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 27.
158 Mechlem (n 126) 929. See also Gondek (n 121) 43; Moeckli (n 126) 51.

of human rights norms advanced in this study relies on the pronouncements of human rights treaty bodies.

Not all pronouncements have the same weight. The output of treaty bodies carry more weight when States accept and act upon treaty bodies' interpretations.[159] Where States reject, indicate disapproval of or ignore the views of human rights treaty bodies, it is more difficult to argue that treaty bodies' interpretation establishes subsequent practice.[160] The nature of the treaty body is also relevant in determining the weight attributed to its output. A judgment of the ICJ, because of its binding nature and universal reach, has more authority than a decision of the IAComHR for instance, which is a non-binding pronouncement of a regional commission. Likewise, some quasi-judicial bodies tend to be seen as more authoritative than others. For instance, a pronouncement by the HRC may carry more weight than a similar pronouncement by the CMW.[161] Furthermore, the weight of judicial decisions is relative. The output of a given treaty body is only directly relevant for States which are parties to the treaty in question. Beyond their respective regions, the case law of regional bodies is not authoritative but rather provides a guide to interpretation.[162] For European States the case law of the ECtHR carries more weight than that of UN treaty monitoring bodies because of its binding nature, whereas for States in the Asia-Pacific the decisions of UN bodies are more important because of the ECHR's limited geographical scope. The analysis thus takes into account regional differences and examines to what extent State practice aligns with treaty bodies' interpretation of human rights norms.

Moreover, the type of output in question matters. Binding *judgments* of international and regional courts are the most authoritative.[163] However, Article 38(1)(d) ICJ Statute does not explicitly recognise the *decisions on individual communications* of quasi-judicial bodies as a subsidiary source of international law. Indeed, unlike court judgments, they are not legally binding.[164] Nevertheless, they can be considered authoritative interpretations of human rights treaties because human rights monitoring bodies possess the inherent power to interpret 'their' treaty.[165] A thin line separates decisions on individual communications from the other output of quasi-judicial bodies. Drawing a clear distinction between the different types of output of these bodies is

159 Mechlem (n 126) 921. See also Geir Ulfstein, 'Treaty Bodies and Regimes' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 440–41.

160 Mechlem (n 126) 921.

161 On the limitations of the monitoring by the CMW (including compared to the HRC) see Mariette Grange, 'The Migrant Workers Convention: A Legal Tool to Safeguard Migrants against Arbitrary Detention' in Alan Desmond (ed), *Shining new Light on the UN Migrant Workers Convention* (Pretoria University Law Press 2017).

162 Tan (n 13) 17.

163 See Section 4.1 above.

164 However, the Spanish Supreme Court held that the decisions of UN treaty bodies in individual complaints are legally binding on Spain. See Spanish Supreme Court, Judgment 1263/2018 (17 July 2018). See also Koldo Casla, 'Supreme Court of Spain: UN Treaty Body Individual Decisions are Legally Binding' (*EJIL: Talk!* 1 August 2018).

165 Scheinin (n 121) 29; Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42 Human Rights Quarterly 48, 55.

difficult, as treaty bodies often include cross-references to different types of output.[166] *Concluding observations* 'reflect a consensus on how the provisions of a treaty should be interpreted with regard to the particular situation in a country' and their jurisprudential impact is limited.[167] Nevertheless, if the States acquiesce in the findings, they are an authoritative source to be taken into account in subsequent interpretation.[168] *General comments*, in turn, 'provide detailed content in a comprehensive and coherent way to the rather generally worded provisions of a human rights treaty'.[169] The more recent general comments of the CESCR for instance detail the normative content of specific rights, as well as the nature of State obligations and violations regarding these rights.[170] Although the legal value of general comments is debated and may differ per treaty body, they are an increasingly authoritative form of soft law.[171] Likewise, advisory opinions of international courts offer an interpretation of international law *in abstracto* rather than regarding a specific situation. They can therefore be considered to be part of international law and have legal effect, because they are produced by bodies which have legal competence to interpret the treaty in question, notwithstanding their non-binding nature.

In this study, the general comments of the CESCR play a key role in determining the scope of States' obligations. States, through the UN Economic and Social Council (ECOSOC) and the UN General Assembly, invited the CESCR to prepare general comments.[172] They 'enjoy a considerable degree of acceptance by States parties and are often relied upon by national courts when they interpret the Covenant.'[173] The CESCR's general comments play a particularly important role in the interpretation of the ICESCR, as its Optional Protocol,[174] which provides for an individual complaint mechanism, entered into force only in 2013, and the CESCR has taken no decisions on the merits that are relevant for this study.[175] Its concluding observations generally do not address the issue of migration control and the plight of people on the move in

166 For example, in two cases involving interceptions at sea the Committee against Torture referred explicitly to Committee against Torture, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2. See Committee against Torture, *JHA v Spain (Marine I)* Communication No 323/2007 (10 November 2008) para 8.2; Committee against Torture, *Sonko v Spain* Communication No 368/2008 (25 November 2011) para 10.3.

167 Mechlem (n 126) 923.

168 Gondek (n 121) 44.

169 Mechlem (n 126) 927.

170 Foster (n 22) 84.

171 McCall-Smith (n 157) 29. See also Daria Davitti, 'Beyond the Governance Gap: Accountability in Privatized Migration Control' (2020) 21 German Law Journal 487, 500.

172 UNGA Res 42/102 (7 December 1987) para 5; see also ECOSOC, Resolution 1988/4 (24 May 1988) UN Doc S/RES/1988/4, para 13.

173 Moeckli (n 126) 50. See also Sepúlveda (n 14) 42.

174 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) 2922 UNTS 58.

175 One case concerned a non-national who alleged discrimination on the basis of her son's refugee status but the complaint was declared inadmissible for non-exhaustion of domestic remedies: CESCR, *AMB v Ecuador* Communication No 3/2014 (20 June 2016). For a detailed analysis of the CESCR's decisions in individual cases see Liebenberg (n 165).

partner States.[176] CESCR statements that clarify its position with respect to important international developments and issues relevant for the implementation of the ICESCR further complement its general comments.[177]

Yet various authors contend that some interpretations advanced by the CESCR in its General Comments are not guided by the rules on interpretation in the VCLT.[178] Others defend the CESCR's doctrinal and interpretive work.[179] The fact that States only very rarely disagree with the CESCR's general comments or concluding observations increases the legitimacy of the CESCR's interpretation.[180] Moreover, as noted above, the VCLT allows a multiplicity of interpretations to coexist, provided they correspond to a legitimate application of the rules on interpretation. This study takes the view that an interpretation of the ICESCR cannot ignore the views of the CESCR as it is the body that has been tasked to interpret the ICESCR, especially in light of the scarcity of other authoritative interpretations of the ICESCR. However, it only adopts the CESCR's interpretation to the extent that it is compatible with the rules of interpretation in the VCLT. In addition, the interpretation advanced in this study does not rely exclusively on the CESCR's interpretation of the ICESCR but also takes into account State practice and the relevant findings of courts and other human rights bodies, and includes international norms protecting socio-economic rights beyond the ICESCR.

Finally, interpretations of human rights norms evolve over time.[181] Therefore, recent interpretations carry more weight than older ones.[182] Thus, the analysis in this study

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176 For notable exceptions see CESCR, 'Concluding Observations on the Fifth Periodic Report of Australia' (11 July 2017) UN Doc E/C.12/AUS/CO/5, paras 17 and 18 (on regional processing centres); CESCR, 'Concluding Observations on the Second Periodic Report of Lebanon' (24 October 2016) UN Doc E/C.12/LBN/CO/2, paras 23 and 25 (on Syrian and Palestine refugees); CESCR, 'Concluding Observations on the Fifth Periodic Report of Italy' (28 October 2015) UN Doc E/C.12/ITA/CO/5, para 18 (mentioning pushbacks).

177 See for instance CESCR, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (10 May 2001) UN Doc E/C.12/2001/10; CESCR, 'Statement: An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant' (10 May 2007) UN Doc E/C.12/2007/1; CESCR, 'Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights' (13 March 2017) UN Doc E/C.12/2017/1.

178 Mechlem (n 126) 931. See also Bódig (n 67) 83–84; Moeckli (n 126) 58–71.

179 See for instance Sepúlveda (n 14) 84–87; Bódig (n 67) 84–87.

180 Moeckli (n 126) 69–70. For a detailed analysis of the legitimacy of the CESCR's interpretation see Sepúlveda (n 14) 87–111.

181 For instance, the HRC's most recent general comment on the right to life, General Comment 36, replaces two older general comments. See HRC, 'General Comment No 36 on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36, para 1. Likewise, the ECtHR's judgment in *Al-Skeini and others v UK* ([GC] App No 55721/07 (7 July 2011)) overtook its decision in *Banković and others v Belgium and others* ([GC] [Admissibility] App No 52207/99 (12 December 2001)) as the leading case on extraterritorial jurisdiction. See England and Wales Court of Appeal, *Al-Saadoon and others v Secretary of State for Defence and others* [2016] EWCA Civ 811 (9 September 2016) para 31: 'It is clear that *Al-Skeini* must now be taken as the starting point for any consideration of the extra-territorial application of the Convention.'

182 A similar rationale seems to underlie Article 59 VCLT on the termination or suspension of the operation of a treaty implied by conclusion of a later treaty.

presents a snapshot of the international legal framework, as future developments are likely to impact the interpretation of international legal norms. The juxtaposition of older and newer standards serves to identify trends that can suggest convergences in interpretations and point towards future developments. More specifically, in the field of socio-economic rights, the operationalisation of human rights norms tends to become more concrete and nuanced over time. For instance, the CESCR's General Comment 3 (1990) on the nature of obligations only refers to obligations of conduct and result.[183] General Comment 14 on the right to health (2000), on the other hand, not only details States' obligations to respect, protect and fulfil the right to health (including obligations to facilitate, provide and promote), but also defines States' core obligations as well as the various elements of the right to health (availability, accessibility, acceptability and quality).[184] These are welcome developments for the interpreter of international human rights law, as more detailed conceptualisations of States' obligations make it easier to determine whether an obligation has been breached. This does not mean that developments in interpretation necessarily lead to better or more human rights protection. Indeed, as noted above, evolving understandings of human rights may equally lower protection standards. In the European migration context, for instance, various recent decisions of the ECtHR can be seen as diminishing rather than increasing human rights protection for people on the move.[185] These decisions, which have been described as a 'genuflection to political power',[186] illustrate the importance of the political context in which legal interpretations are advanced.

5.2.3. Legal Interpretation in a Charged Political Context

As migration is a highly politicised issue, the question arises how the politically charged context of this study affects the interpretation it proposes. While refugee and migrant rights advocates are likely to favour an expansive interpretation of States' obligations towards people on the move, politicians, in the light of anti-migrant sentiments and discourses among voters, are unlikely to be receptive to such arguments. The Global North's reticence to recognise the rights of migrants is illustrated by the fact that no Global North State has ratified or even signed the ICRMW and that various sponsor States opted out of the Global Compact for Migration. In fact, the Global North's desire to evade responsibility for people on the move is arguably one of the main drivers of cooperative migration control.[187]

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183 CESCR, 'General Comment No 3 on the Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23, para 1.

184 CESCR, 'General Comment No 14 on the Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4, paras 12, 33–37 and 43.

185 See ECtHR, *Ilias and Ahmed v Hungary* [GC] App No 47287/15 (21 November 2019); ECtHR, *ND and NT v Spain* [GC] Apps Nos 8675/15 and 8697/15 (13 February 2020); ECtHR, *MN and others v Belgium* [GC] App No 3599/18 (5 May 2020).

186 Costello and Mann (n 13) 320.

187 See Chapter II, Section 3.1.

Refugee law scholars must arguably broker the 'dual imperative' to simultaneously advance knowledge and protection in a field heavily influenced by policy interests.[188] The same applies to this study, which locates itself in the normatively driven field of human rights law and addresses the politically contentious issue of migration. More specifically, to what extent should this study take policy considerations into account? On the one hand, one can argue that the role of legal scholars is limited to interpreting the law, without paying attention to the consequences of a given interpretation, and that implementation should be reserved for policy makers. Various courts thus found that the argument that an expansive interpretation of the refugee definition would 'open the floodgates' cannot in itself justify a restrictive interpretation.[189] On the other hand, human rights lawyers have been criticised for focusing insufficiently on impacts.[190] Taking policy considerations into account may be necessary given their relevance to the design and implementation of migration control policies by States and to avoid undermining the persuasiveness of a legally sound analysis.[191] In fact, advancing expansive but 'unwelcome' interpretations of State obligations and responsibility in the face of perceived public hostility to such interpretations carries certain risks, as they may be either ignored or attacked as 'wishful legal thinking'. States could also decide to disregard human rights obligations altogether or even try to withdraw from them. In other words, there is a risk that States call into question the existence of, and attempt to withdraw from, their obligations under international human rights law.[192]

In light of the above, while this study undertakes a legal analysis and proposes an assessment framework to determine issues of (shared) responsibility, it takes into account factors that go beyond the realm of mere legal analysis. It starts from the empirical reality that migration flows include not only refugees but also migrants: this mixed nature of migration flows can create challenges for States which may have specific obligations towards certain people on the move under refugee law, and different obligations towards all people on the move under human rights law. This study seeks to overcome the dichotomy between refugees and migrants that is prevalent in political discourse by demonstrating that States may have obligations towards people on the move who are not refugees. Moreover, by using the due diligence standard to interpret States' obligations, it seeks to strike a balance between the object and purpose of international human rights law on the one hand and the reality that States' ability to realise socio-economic rights is constrained by their available resources. The following chapters illustrate in more detail how the study seeks to strike this balance in the context of cooperative migration control.

188 Byrne and Gammeltoft-Hansen (n 133) 185.

189 Foster (n 22) 344.

190 Siobhán McInerney-Lankford, 'Legal Methodologies and Human Rights Research: 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) 50.

191 See Foster (n 22) 344.

192 See Lixinski (n 123) 604.

6. STRUCTURE OF THE VOLUME

Chapter II provides the empirical backdrop for the legal analysis in the rest of this study. It first depicts the violations of the socio-economic rights of people on the move contained in the Global South as a result of policies to stem migration flows from the Global South to the Global North. It illustrates how their rights to an adequate standard of living, health, education, work and social security are often violated when they are contained in partner States in the Global South. Chapter II further describes why and how sponsor States in the Global North cooperate with partner States in the Global South to implement cooperative migration control policies, and addresses the relation between the violations of the socio-economic rights of people on the move in partner States and migration control.

The following three chapters seek to answer the first sub-question: what is the scope of States' international obligations as regards the socio-economic rights of people on the move in the context of cooperative migration control? *Chapter III* first proposes a conceptualisation of State obligations regarding the socio-economic rights of people on the move. It starts by discussing the preliminary issue of the relation between economic, social and cultural rights on the one hand and civil and political rights on the other. It shows the relevance of each category of rights for the other. The chapter then examines how the due diligence standard of conduct, which requires States to take reasonable measures to avoid reasonably foreseeable human rights violations, delimits State obligations in the context of cooperative migration control. It further discusses to what extent core socio-economic rights and the principle of non-discrimination impose obligations on States in the context of cooperative migration control. Finally, Chapter III addresses the role of territory, jurisdiction and 'international assistance and cooperation' in determining the scope of States' obligations under international human rights law. It identifies three types of obligations: the direct obligations of partner States on whose territory people on the move find themselves; the direct obligations of sponsor States when they exercise extraterritorial jurisdiction; and sponsor States' global obligations of international assistance and cooperation.

Chapters IV and V build on these findings by applying them to partner and sponsor States respectively. *Chapter IV* examines in more detail the obligations of partner States to realise the socio-economic rights of people on the move in the context of cooperative migration control, not only under the ICESCR but also under international human rights law more broadly. The chapter first specifies the scope of partner States' obligations towards people on the move with regard to the availability of resources and the progressive realisation of socio-economic rights. It then clarifies partner States' obligations regarding the rights to an adequate standard of living, health, education, work and social security.

Chapter V, in turn, examines the obligations of sponsor States towards people on the move affected by cooperative migration control policies. It first addresses their direct extraterritorial obligations. It discusses existing models of extraterritorial jurisdiction

and argues in favour of a functional approach to jurisdiction: a State exercises jurisdiction when it can take reasonable measures to avoid reasonably foreseeable human rights violations. The chapter further analyses sponsor States' global obligations of international assistance and cooperation. More specifically, it explores the relation between the support that sponsor States provide to partner States for migration control purposes and their global obligations under international human rights law.

Chapters VI and VII build on the findings from the previous chapters, as they seek to answer the second sub-question: how does international law assign responsibility for violations of the socio-economic rights of people on the move where multiple States are involved in migration control? *Chapter VI* explores State responsibility in the context of cooperative migration control from the perspective of a single State. It first discusses how the law on State responsibility applies to human rights violations, clarifying the role of jurisdiction and attribution in determining State responsibility. It then examines the different ways in which a sponsor State and a partner State could incur responsibility for violations of the socio-economic rights of people on the move. It analyses partner States' responsibility for the conduct of their own organs and the conduct of non-State organs, sponsor States' direct responsibility for breaches of both their direct and global obligations, and sponsor States' derived responsibility in relation to a partner State's failure to realise the socio-economic rights of people on the move.

In *Chapter VII* the analysis shifts from the perspective of a single State to a bird's eye view of the responsibility of the States involved in cooperative migration control. The chapter first explains how, given the predominance of the principle of independent responsibility in international law, cooperative migration control is likely to trigger the exclusive responsibility of the partner State under international law, notwithstanding the fact that sponsor States can contribute to violations of the socio-economic rights of people on the move. However, cooperative migration control can also give rise to various constellations of shared responsibility. Thus, concurrent responsibility arises when two or more States incur responsibility for separate internationally wrongful acts, while joint responsibility arises when they incur responsibility for the same internationally wrongful act. Chapter VII concludes by discussing the possibility of responsibility gaps in the context of cooperative migration control: situations where the socio-economic rights of people on the move in partner States are not realised yet no State incurs responsibility under international law.

Finally, *Chapter VIII* provides an overview of this study's key findings. It sums up the main conclusions and answers the two research questions. It also develops an assessment framework that allows us to answer the main research question and reflects on the implications of applying this framework in a specific situation. It further looks back at common concepts that weave through the various levels of the analysis: the interaction between international human rights law and the law on State responsibility; assistance and cooperation; causation; and time. The last section identifies avenues for further research.

CHAPTER II

SOCIO-ECONOMIC RIGHTS AND COOPERATIVE MIGRATION CONTROL POLICIES

1. INTRODUCTION

As this study is concerned with responsibility for violations of the socio-economic rights of people on the move, it takes their plight as its starting point. This chapter starts by depicting the violations of the socio-economic rights of people on the move contained in the Global South as a result of policies to stem migration flows from the Global South to the Global North. Section 2 thus illustrates how their rights to an adequate standard of living, health, education, work and social security are often violated when they are contained in partner States in the Global South. Section 3 then turns to migration control policies themselves: it describes why and how sponsor States in the Global North increasingly cooperate with partner States in the Global South to implement cooperative migration control policies, and clarifies the relation between the violations of the socio-economic rights of people on the move in partner States and migration control.

By discussing both the extent to which the socio-economic rights of people on the move are realised and the conduct of the various States involved, this chapter provides the backdrop for the legal analysis in the rest of this study. It first shows that, as a matter of empirical reality, the socio-economic rights of people on the move in partner States are often violated, which raises the question that this study ultimately seeks to answer: to what extent and how do these violations give rise to States' international responsibility? The empirical analysis also reveals that sponsor States' desire to avoid obligations towards people on the move and evade responsibility for their plight plays an important role in the development of cooperative migration control. Finally, it addresses the different forms of cooperation between sponsor and partner States. Indeed, the various ways in which States cooperate to stem migration flows is not only relevant for the realisation of the socio-economic rights of people on the move but also for determining the obligations and responsibility of the various States involved. Therefore, clarifying the conduct of each State is relevant in order to answer the research questions that this study seeks to address.

This study adopts a broad, international approach to cooperative migration control, including the Mediterranean region, the Asia Pacific and the Americas. It does not purport to provide an exhaustive overview of measures implemented by States to stop migration flows. Rather, it presents examples of changing practices to illustrate their development over time. The geographical diversity of the practices examined further shows that cooperative migration control is a geographically widespread phenomenon. In addition to the ubiquity of migration control, the selected examples reveal, on the one hand, the variety of policies implemented, and, on the other hand, the similarities between the different regions, since comparable policies are implemented and have similar consequences in different parts of the globe. The focus lies on policies involving multiple States aimed at stemming migration flows from the Global South to Europe, the USA and Australia. As the following analysis will show, they are often enabled by the differences in overall levels of development and global power between sponsor States in the Global North and partner States in the Global South. This does not mean, however, that other policies are less important or relevant, nor that this study provides an exhaustive overview of current migration control measures and their impact.

Furthermore, secrecy often surrounds migration control and it can be difficult to gather information about what happens in practice.[1] This is typically the case for interceptions at sea, as it is notoriously difficult to find out what happens exactly when State authorities intercept migrant boats.[2] Yet it also holds true for processing centres to which access may be limited, as a result of which it becomes difficult to document living conditions.[3] As this study does not include empirical, on-site research, the limited availability of information can be a constraint in certain cases. Nevertheless, the policies examined below and their impact on the human rights of people on the move have been sufficiently documented to allow for an analysis of the obligations and responsibility of the States involved. The empirical element of this study is thus informed by cooperation agreements themselves as well as secondary sources, such as scholarly publications, official reports, grey literature, and media reports. The inherent limitations of these sources are acceptable in the context of this study. Indeed, its primary aim is not to paint a faithful and detailed picture of the implementation

1 Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 211–13; David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019) 11; Daniel Ghezelbash, 'Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' (2020) The American Journal of Comparative Law (forthcoming).

2 Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018) 138; for limited exceptions see Charles Heller and Lorenzo Pezzani, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration across the Mediterranean' (May 2018); Violeta Moreno-Lax, Daniel Ghezelbash and Natalie Klein, 'Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia' (2019) 32 Leiden Journal of International Law 715; Azadeh Dastyari and Daniel Ghezelbash, 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures' (2020) 32 International Journal of Refugee Law 1.

3 Ghezelbash, 'Hyper-Legalism and Obfuscation' (n 1).

of cooperative migration control and its effects, but rather to provide sufficient information to carry out a legal analysis. In particular, this study only refers to grey literature such as reports by NGOs insofar as it provides evidence of factual realities rather than a valid interpretation of international law.

2. THE SOCIO-ECONOMIC RIGHTS OF PEOPLE ON THE MOVE IN PARTNER STATES

As a result of migration control, the majority of people on the move in South-North migration flows does not reach or is turned back from Global North States.[4] Accordingly, this section provides a non-exhaustive overview of the plight of people on the move in partner States in the Global South. The analysis focuses on selected examples from partner States across the Mediterranean, the Asia Pacific and the Americas to illustrate that violations of socio-economic rights are ubiquitous. These examples include both transit States that neighbour sponsor States, such as Turkey, Libya, Indonesia and Mexico, as well as other partner States involved in cooperative migration control, like Nauru and Guatemala.

2.1. THE MEDITERRANEAN

With some 3.6 million registered Syrian refugees and close to 370,000 protection seekers from other nationalities, Turkey hosts the largest number of refugees worldwide.[5] Until 2014, the Turkish authorities had considered them as 'guests' and basic issues such as their access to shelter and health care services were based on political and administrative discretion.[6] In April 2014, the Law on Foreigners and International Protection (LFIP) came into force. It is the first-ever comprehensive law regulating asylum and migration issues in Turkey and is aligned on EU legislation.[7] The LFIP also created the Directorate General for Migration Management (DGMM) which is in charge of asylum applications. As Turkey maintains its geographical limitation on the Refugee Convention, people on the move who do not come from Europe cannot obtain refugee status in Turkey. Therefore, the LFIP created the status of 'conditional refugees' and 'subsidiary protection' for non-European people on the move in need

4 Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 242; Antje Missbach and Melissa Phillips, 'Introduction: Reconceptualizing Transit States in an Era of Outsourcing, Offshoring, and Obfuscation' (2020) 3 Migration and Society 19, 26.

5 UNHCR, 'Refugees and Asylum Seekers in Turkey' (2020).

6 Orçun Ulusoy and Hemme Battjes, 'Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement' (2017) VU Migration Law Series No 15, 12–13.

7 Ibid 12.

of international protection.[8] In addition, a separate temporary protection regime was set up for Syrian refugees. The Temporary Protection Regulation (TPR), adopted in October 2014, regulates their access to social services such as health care and education. However, the inability for certain people on the move in Turkey to register as conditional refugee or as beneficiary of subsidiary protection or temporary protection has a negative impact on their ability to access socio-economic rights.[9]

More generally, Turkey does not grant people on the move access to accommodation, even when they are entitled to international protection under the LFIP or TPR. The DGMM set up temporary accommodation centres for Syrians but their number has been steadily declining. The vast majority of Syrians in Turkey live in urban and rural areas rather than camps. While the quality of accommodation varies, a significant proportion lives in poor and unhealthy accommodation conditions, such as humid and non-ventilated basements, warehouses, and storage and shanty houses and tents. Households often accommodate more than one family. Likewise, non-Syrian people on the move in Turkey must secure accommodation by their own means and without financial assistance. As a result, many are destitute and homeless or live in poor conditions.[10]

People on the move in Turkey who are registered as conditional refugee or as beneficiary of subsidiary or temporary protection have the right to access health care services provided by public health care service providers. An income test determines to what extent health care costs are covered. People on the move can spontaneously access initial diagnosis, treatment and rehabilitation services at primary and secondary health care institutions but access to tertiary health care providers, such as university hospitals, is only possible upon referral. In practice, people on the move in Turkey face various obstacles when accessing health care services, including the registration procedure, navigating the health care system and language barriers. Moreover, in December 2019 amendments to the TPR and the LFIP restricted people on the move's access to health care, thereby increasing the risk of violations of their right to health.[11]

Turkish legislation further provides that all children, including non-nationals, have the right to access basic education. The number of children on the move enrolled in formal education gradually increased: by 2019, 63% of school-aged Syrian children were enrolled in Turkish public schools and temporary education centres. However, it was also estimated that hundreds of thousands of Syrian children did not attend school, and many face discrimination, prejudice and bullying in public schools. The enrolment

8 Ilse van Liempt and others, 'Evidence-Based Assessment of Migration Deals: The Case of the EU-Turkey Statement' (December 2017) 20; Asylum Information Database, 'Country Report: Turkey (2019 Update)' (April 2020) 19.

9 See Asylum Information Database, 'Country Report: Turkey' (n 8) 15 and 17.

10 Association for Solidarity with Asylum Seekers and Migrants (SGDD-ASAM) and UN Women, 'Needs Assessment of Syrian Women and Girls under Temporary Protection Status in Turkey' (June 2018) 21–27; Asylum Information Database, 'Country Report: Turkey' (n 8) 71–73, 117 and 142–44.

11 Basak Bilecen and Dilara Yurtseven, 'Temporarily Protected Syrians' Access to the Healthcare System' (2018) 15 Migration Letters 113; Asylum Information Database, 'Country Report: Turkey' (n 8) 78–82 and 156–59.

of Syrian students in higher education in Turkey remains low but is increasing.[12] The problems faced by some Syrian children on the move to access to education are compounded by the prevalence of child labour in sectors such as agriculture and the textile industry.[13] More generally, although many Syrian refugees find work, the large majority works in the informal sector and faces temporary employment with long hours, difficult working conditions, late payment of low wages or no payment at all.[14] Although Syrian temporary protection beneficiaries have access to work permits since January 2016, only a small proportion received such permits, as significant obstacles remain to their access to employment in practice. Applicants for international protection likewise face widespread undeclared employment and labour exploitation. This is compounded by the fact that there is a quota on temporary protection beneficiaries based on the needs of the sectors and provinces, and the number of beneficiaries active in a specific workplace may not exceed 10% of the workforce.[15]

In sum, the plight of people on the move in Turkey represents a mixed picture. On the one hand, those who are registered have access to basic services and increasing numbers of Syrian children have access to education. On the other hand, numerous problems remain, including labour exploitation and child labour, poor accommodation and living conditions, and limited access to health care and education. Moreover, recent legislative changes seem to create additional obstacles to accessing health care. Overall, however, the situation of people on the move in Turkey is better than in Libya. Unlike Turkey, Libya has no asylum legislation nor asylum procedures.[16] In fact, Libyan law criminalises irregular entry into, stay in and exit from Libya, and people on the move in Libya risk imprisonment with forced labour.[17] Since the fall of Gaddafi in 2011, Libya is riven with armed conflict, as rival governments and militias fight for control, and public services have collapsed.[18] Notwithstanding these difficult conditions, Libya hosts several hundreds of thousands of people on the move, of which tens of thousands have

12 Asylum Information Database, 'Country Report: Turkey' (n 8) 76–78 and 150–55; see also Bülent Aras and Yasin Duman, 'I/NGOs' Assistance to Syrian Refugees in Turkey: Opportunities and Challenges' (2019) 21 Journal of Balkan and Near Eastern Studies 478, 485; UNICEF, 'Turkey Humanitarian Situation Report (January – March 2019)' (2019) 1; UNHCR, 'Turkey 2019 Operational Highlights' (2019) 7.

13 European Commission, 'Education and Protection Programme for Vulnerable Syrian and Host Community School-Aged Children in Lebanon, Jordan and Turkey' (30 June 2017) EU Doc Ares (2017) 3292256, 4; Development Workshop, 'Analysis of Legislative Gaps and Recommendations in the Context of Preventing Child Labour in Agriculture' (August 2018); Asylum Information Database, 'Country Report: Turkey' (n 8) 150.

14 Izza Leghtas and Ann Hollingsworth, '"I am only Looking for my Rights": Legal Employment still Inaccessible for Refugees in Turkey' (December 2017) Refugees International Field Report.

15 Asylum Information Database, 'Country Report: Turkey' (n 8) 75 and 146–50.

16 United Nations Support Mission in Libya (UNSMIL) and OHCHR, 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' (18 December 2018) 22.

17 Article 6 Law No 19 (2010) on Combating Irregular Migration and Law No 6 (1987) on Regulating Entry, Residence and Exit of Foreign Nationals to/from Libya, amended by Law No 2 (2004). See also UNSMIL and OHCHR (n 16) 24.

18 Médecins Sans Frontières, 'Trading in Suffering: Detention, Exploitation and Abuse in Libya' (23 December 2019).

been registered as asylum seekers and refugees with UNHCR, in addition to hundreds of thousands of IDPs; an estimated 1.3 million people are in need of humanitarian assistance.[19]

Unsurprisingly in light of these conditions, people on the move often refer to Libya as 'hell on earth'.[20] Indeed, many are placed in arbitrary and indefinite detention, without due process or the ability to challenge their detention.[21] Although the Department for Combatting Illegal Migration (DCIM), which was set up in 2012, is in charge of managing immigration detention centres, in practice a number of centres are effectively controlled by armed groups who benefit financially from the exploitation of people in detention.[22] As illustrated by the death of Tewelde Andom at the start of this study, detention conditions in Libya are particularly dire. They are characterised by a lack of basic infrastructure such as toilets, shelter, electricity, lighting, heating and proper ventilation, while adequate interior space and access to outdoor settings is often severely restricted, and the provision of basic services is often poor or inconsistent.[23] Many people on the move detained in Libya face death from torture, starvation or medical neglect; inhuman detention conditions; and forced labour and exploitation.[24]

People on the move who are not detained in Libya also face severe violations of their socio-economic rights. There are no shelter or accommodation services, and as they must pay for accommodation on their own, they are at risk of forced labour, sexual violence and exploitation.[25] People on the move engaged in daily work and other manual labour face the risk of being paid less wages than agreed or even not at all. Those who are employed legally in sectors such as teaching and nursing have faced challenges to access their salaries. Furthermore, people on the move, especially those in an irregular situation, have little to no access to public health services, including emergency services. This is due partly to their fear of denial of service and even arrest, and to limited resources and the general breakdown of public health services.[26] Overall, then, people on the move in Libya often suffer severe violations of their socio-economic rights, including the rights to an adequate standard of living, health, and just

19 IOM Libya, 'Migration Crisis Operational Framework (MCOF) 2017–2019' (2016) 9; UNHCR, 'Libya' (2020).

20 On the plight of people on the move in Libya see for instance Amnesty International, 'Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants' (2017); Izza Leghtas, '"Hell on Earth": Abuses Against Refugees and Migrants Trying to Reach Europe from Libya' (June 2017) Refugees International Field Report; UNSMIL and OHCHR (n 16) 25; Human Rights Watch, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya* (Human Rights Watch 2019).

21 UNSMIL and OHCHR (n 16) 25 and 39.

22 Ibid 38–39; Melissa Phillips, 'Managing a Multiplicity of Interests: The Case of Irregular Migration from Libya' (2020) 3 Migration and Society 89, 91.

23 Médecins Sans Frontières, 'Libya: Report on Nutrition Screening Findings in Sabaa Detention Centre' (March 2019).

24 UNSMIL and OHCHR (n 16) 27–34 and 42–51. See also Amnesty International, 'Libya's Dark Web of Collusion' (n 20); Leghtas (n 20); Human Rights Watch, *No Escape from Hell* (n 20).

25 Médecins Sans Frontières, 'Trading in Suffering' (n 18).

26 UNSMIL and OHCHR (n 16) 52–54.

and favourable conditions of work. A similar picture emerges when we examine the plight of people on the move in the Asia Pacific.

2.2. THE ASIA PACIFIC

Unlike Libya that can be considered a quasi-failed State, Indonesia is an emerging democracy and rising economic power.[27] Yet, like Libya, it hosts numerous people on the move and often fails to realise their socio-economic rights. Indonesia hosts high-skilled and irregular migrant workers, human trafficking victims, and some 14,000 refugees and asylum seekers from Myanmar, Afghanistan, Iraq, Iran, Syria and Somalia. Given its position at the crossroads between Asia and Australia, Indonesia has received many forcibly displaced people on the move over the last decade, including some who sought to travel to Australia.[28] The present analysis focuses on the latter. As a result of Australian migration control policies and dwindling opportunities for resettlement elsewhere, Indonesia has *de facto* become a destination State for many people on the move, although it still sees itself as a transit State.[29] Indonesia considers itself generous in providing temporary shelter to asylum seekers and refugees but places responsibility for anything beyond that on the international community. It rejects any financial responsibility for their care, arguing it lacks capacity and domestic support to do more, and offers no legal options to make their residence permanent.[30] As a result, many people on the move struggle to survive for prolonged periods as they are unable to work, without access to services and with only limited support from organisations.[31]

A major obstacle to realising the socio-economic rights of people on the move is the fact that Indonesian law prohibits them from working and that there are very limited work options, including in the informal economy.[32] As a result, those who live in local communities have to find and pay for their own accommodation. They often live in cramped conditions in overpriced accommodation of poor quality.[33] Until

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27 Francesca Mussi and Nikolas Feith Tan, 'Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia' in Fiona de Londras and Siobhán Mullally (eds), *Irish Yearbook of International Law 2015* (Vol 10, Hart 2017) 100–101.

28 Ibid 96; Antje Missbach and Wayne Palmer, 'Indonesia: A Country Grappling with Migrant Protection at Home and Abroad' (19 September 2018) Migration Information Source; Heru Susetyo, 'Lost in Transit: Refugees Stranded in a Legal Vacuum in Indonesia' (22 July 2020) Kaldor Centre for International Refugee Law.

29 Gemima Harvey, 'Beyond Limbo, Building Lives: Livelihood Strategies of Refugees and Asylum Seekers in Java, Indonesia' (2019) Refugee Law Initiative Working Paper No 38, 9; Antje Missbach and Gerhard Hoffstaedter, 'When Transit States Pursue Their Own Agenda: Malaysian and Indonesian Responses to Australia's Migration and Border Policies' (2020) 3 Migration and Society 50, 75.

30 Missbach and Hoffstaedter (n 29) 68.

31 Harvey (n 29) 10.

32 Antje Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia* (ISEAS Yusof Ishak Institute 2015) 99–100.

33 Ibid 92–93; Thomas Brown and Antje Missbach, 'Refugee Detention in Indonesia' *The Interpreter* (12 May 2017).

2018, many people on the move who were unable to financially support themselves surrendered themselves to immigration detention centres in order to access shelter and food provided by the IOM.[34] Vulnerable asylum seekers and refugees were hosted in special community housing schemes and shelters, while many unaccompanied minors lived in overcrowded immigration detention centres where they faced the risk of violence, extortion and abuse. However, since 2018, the IOM drastically reduced its support for people on the move in Indonesia and immigration detention is being phased out, resulting in people on the move sleeping on the street as they are no longer able to access the food, shelter and health care that the IOM provided. Thus, the number of people on the move that the IOM supported dropped from almost 9,000 people to less than 800.[35] Moreover, the Jakarta Provincial Government, where many people on the move live, stopped providing food aid to refugees and asylum seekers and handed over responsibility to UNHCR, yet the latter has no means to establish refugee camps or shelters for refugees or asylum seekers.[36]

Furthermore, people on the move in Indonesia often suffer from psychological problems. There are increasing reports of mental health problems due to the hopelessness they feel at living in what is perceived as an 'open prison'.[37] They also suffer from diseases caused by poor water quality and unhygienic conditions or that are airborne or insect borne. While those under the care of the UNHCR and IOM could usually enjoy a level of basic health care funded by these organisations, people on the move are not entitled to community health insurance.[38] Access to education for children on the move remains problematic and varies from region to region, although school attendance levels are generally very low: in 2012, only seven schools in Indonesia accepted refugee children and offered them free education. Obstacles to accessing education include language barriers, the unclear legal status of many people on the move, and the fact that most regional governments do not allow foreigners to send their children to Indonesian schools.[39]

In sum, people on the move in Indonesia face long-term and severe material deprivation and social isolation because they are left in a legal, social, political and economic limbo in a transit State that has become a 'cul-de-sac' as a result of migration control.[40] Protracted precariousness, including lack of access to work, housing,

34 Brown and Missbach (n 33).

35 Harvey (n 29) 10–11.

36 Susetyo (n 28).

37 Ian Morse, '"Open Prison": The Growing Despair of Refugees Stuck in Indonesia' *Al Jazeera* (4 March 2019).

38 Missbach, *Troubled Transit* (n 32) 96–97.

39 Amy Nethery, Brynna Rafferty-Brown and Savitri Taylor, 'Exporting Detention: Australia-Funded Immigration Detention in Indonesia' (2013) 26 Journal of Refugee Studies 88, 93; Missbach, *Troubled Transit* (n 32); Nikolas Feith Tan, 'The Status of Asylum Seekers and Refugees in Indonesia' (2016) 28 International Journal of Refugee Law 365, 375.

40 Missbach, *Troubled Transit* (n 32) 242; Sally Clark, 'Seeking Asylum: Factors Driving Irregular Migration from Indonesia to Australia during the Fifth Wave 2008–2013' (2019) 38 Refugee Survey Quarterly 83, 85; Missbach and Hoffstaedter (n 29) 66.

education and health care, leads to psychological health problems.[41] The reduction in IOM support further jeopardises the realisation of their basic socio-economic rights. Thus, the situation in Indonesia illustrates the difficulties that people on the move can face in transit countries. Likewise, the Regional Processing Centres (RPCs) in Papua New Guinea and Nauru highlight the risks for socio-economic rights that migrant detention and confinement entail. Since 2012, more than 4,000 people have been held in RPCs, with several hundred remaining in Papua New Guinea and Nauru in 2020.[42] Yet while many people on the move in Indonesia hope to travel onward to Australia, most people on the move in Nauru and Papua New Guinea were transferred there by Australia as part of its Operation Sovereign Borders.[43]

The CESCR noted that the harsh conditions prevailing in RPCs include 'acute isolation, overcrowding, limited access to basic services, including health care and education, allegations of sexual abuse by the service providers, acts of intimidation, taunting and provocation, and continuing reports of suicide and self-harm.'[44] Although the RPC on Nauru is an open centre since 2015, its residents remain confined on the smallest island nation in the world. This has been found to amount to arbitrary detention.[45] There is also widespread agreement that the forced offshore confinement of people on the move in Nauru in poor living conditions can amount to cruel, inhuman and degrading treatment.[46] Indeed, they have been held for long periods of time in unhygienic, overcrowded tents or other primitive structures without being able to shelter from the sun and stifling heat.[47] The tents were unable to cope effectively with rain and high levels of humidity: they were covered in mould and stagnant pools of water created breeding grounds for mosquitos, which in turn increased the risk of serious disease.[48] The deficiencies in the accommodation and overcrowding further negatively affected the health of people on the move, as they facilitated the spread of

41 Missbach, *Troubled Transit* (n 32) 113.

42 Amnesty International, 'Australia: Human Rights in Review – Amnesty International Submission for the UN Universal Periodic Review, 37th Session of the UPR Working Group, January-February 2021' (July 2020) 8.

43 See Section 3 below.

44 CESCR, 'Concluding Observations on the Fifth Periodic Report of Australia' para 17.

45 Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name just as Unlawful?' (2015) 38 UNSW Law Journal 669, 693; Senate Legal and Constitutional Affairs References Committee, *Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in relation to the Nauru Regional Processing Centre, and any like Allegations in relation to the Manus Regional Processing Centre* (Commonwealth of Australia 2017) para 7.15; Ghezelbash, *Refuge Lost* (n 2) 151–53.

46 UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Australia and the Regional Processing Centres in Nauru' (24 April 2017) UN Doc A/HRC/35/25/Add.3, para 80. See also Ghezelbash, *Refuge Lost* (n 2) 157; Australian Human Rights Commission, *Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128, para 217; 'Letter of the Office of the Prosecutor of the International Criminal Court to the Office of Andrew Wilkie MP' (12 February 2020) Ref OTP-CR-322/14/001.

47 'Letter of the Office of the Prosecutor of the International Criminal Court' (n 46).

48 Australian Human Rights Commission, *BK, CO and DE* para 208.

illness. Heat, humidity, phosphate dust and close living quarters caused or exacerbated illnesses such as fungal infections, respiratory infections and other skin conditions.[49] The Australian Human Rights Commission thus found that the Regional Processing Centre did not provide an adequate standard of living, especially for children.[50] Moreover, after a school run by Save The Children was closed in 2015, children held in Nauru had access to Nauru's public school, but reportedly no children on the move are attending this school.[51] Furthermore, the duration and conditions of confinement in Nauru increasingly caused severe mental suffering, such as post-traumatic stress disorder, anxiety and depression. As illustrated by the example of Fariborz Karami at the start of this study, people on the move attempt to commit suicide or engage in other forms of self-harm, and physical and mental health problems are themselves exacerbated by limited access to adequate medical care in Nauru.[52] Transferring people on the move from Nauru to Australia in order to receive appropriate medical treatment that is unavailable on Nauru is a vexed issue and arguably not everyone in need of transfer has been transferred.[53]

The case of *Kamasaee* suggests that detention conditions at the Manus RPC likewise fell short of acceptable standards.[54] It concerned a class action suit filed in the Supreme Court of Victoria against corporate contractors engaged by the Australian Government to operate the Manus RPC.[55] The applicants complained *inter alia* that the conditions in which the detainees were kept were unsanitary, provided little to no privacy, were crowded and exposed to the elements; they were not given sufficient access to potable water and at times were given contaminated food; medical facilities were inadequate and the standard of care was poor; and the medical centre at the Centre was unhygienic and understaffed.[56] The case was settled without admission of liability, although the defendants agreed to pay a settlement sum of $70 million.[57] This further suggests that people on the move in RPCs in Nauru and Papua New Guinea suffered severe violations

49 Ibid para 209.

50 Ibid para 206.

51 Susanna Dechent, Sharmin Tania and Jackie Mapulanga-Hulston, 'Asylum Seeker Children in Nauru: Australia's International Human Rights Obligations and Operational Realities' (2019) 31 International Journal of Refugee Law 83, 113.

52 'Letter of the Office of the Prosecutor of the International Criminal Court' (n 46).

53 See Australian Human Rights Commission, *BK, CO and DE*; Kaldor Centre for International Refugee Law, 'Factsheet: The Medevac Law: Medical Transfers from Offshore Processing to Australia' (8 March 2018); Refugee Council of Australia, 'Australia's Offshore Processing Regime: The Facts' (22 May 2020); Amnesty International, 'Submission for the UN Universal Periodic Review' (n 42) 9.

54 On the regional processing centre on Manus Island more generally see Azadeh Dastyari and Maria O'Sullivan, 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in *Namah* (2016)' (2016) 42 Monash University Law Review 308; Nikolas Feith Tan, 'The Manus Island Regional Processing Centre: A Legal Taxonomy' (2018) 20 European Journal of Migration and Law 427.

55 Supreme Court of Victoria, *Kamasaee v Commonwealth of Australia and others* S CI 2014 06770.

56 Gabrielle Holly, 'Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: *Kamasaee v Commonwealth*' (2018) 19 Melbourne Journal of International Law 52, 69–70.

57 Ibid 71.

of their rights to an adequate standard of living, to health and to education. As the next section shows, a similar picture emerges in the Americas.

2.3. THE AMERICAS

Like in the Mediterranean and the Asia Pacific, people on the move in the Americas who seek to travel to the USA face deprivation and hardship. In recent years, increasing numbers of people fleeing Central America's so-called Northern Triangle (El Salvador, Guatemala, and Honduras) travel through Mexico.[58] Following legislative reforms in the 2000s, Mexico's legal framework emphasises the rights and protection of people on the move.[59] In 2011 Mexico passed a new migration law that guarantees the rights to health and education of people on the move, although in practice most Central Americans on the move are unable and/or unwilling to seek access to these rights out of fear of interacting with Mexican state institutions and officials who are known to abuse them.[60]

Central Americans on the move in Mexico struggle to access just and favourable conditions of work, education and health care. As in other partner States like Turkey and Libya, they are routinely exploited and treated differently from Mexican workers, especially in the agricultural sector. This includes receiving less or no pay, living in unsafe and unhealthy conditions, working very long days and not having any days off, while social security rights are not transferrable.[61] Child labour also prevents children on the move from accessing education.[62] Although Mexican legislation provides for the right of migrants to receive life-saving emergency medical attention free of charge, in practice people on the move in an irregular situation cannot use the public health system nor afford to pay for private health care.[63]

Furthermore, asylum seekers are automatically detained in immigration detention.[64] Overcrowding is a key feature of Mexican migration detention centres.[65]

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58 Stephen Meili, 'Constitutionalized Human Rights Law in Mexico: Hope for Central American Refugees?' (2019) 32 Harvard Human Rights Journal 103, 104.

59 IAComHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico* (OAS 2013) para 283; FitzGerald, *Refuge Beyond Reach* (n 1) 152; see also Manuel Ángel Castillo, 'Transborder Mobility Between Chiapas and Guatemala: Current Migration and Security Policies' (2017) 8 Entre Diversidades: Revista de Ciencias Sociales y Humanidades 53, 69–72.

60 Wendy Vogt, 'Dirty Work, Dangerous Others: The Politics of Outsourced Immigration Enforcement in Mexico' (2020) 3 Migration and Society 50, 52.

61 IAComHR (n 59) paras 599–606.

62 Ibid paras 607–610.

63 Ibid para 614.

64 Meili (n 58) 120.

65 Consejo Ciudadano del Instituto Nacional de Migración, 'Personas en Detención Migratoria en México: Misión de Monitoreo de Estaciones Migratorias y Estancias Provisionales del Instituto Nacional de Migración' (July 2017) para 86; Maureen Meyer and Adam Isacson, 'The "Wall" before the Wall: Mexico's Crackdown on Migration at its Southern Border' (December 2019) WOLA Research Report, 27.

Like in Libya, living conditions are often dire, with problems such as lack of light and natural ventilation, sleeping supplies, and sanitary installations.[66] Insufficient water, food and hygienic supplies characterise Mexican migrant detention facilities.[67] As on Nauru, these detention conditions have negative effects on the mental and physical health of those detained, which are further compounded by the lack of adequate health care.[68] The fact that people on the move often remain in detention for long periods of time exacerbates the effect of these poor detention conditions.[69]

More recently, people on the move who have to remain in Mexico in the context of the Migrant Protection Protocols[70] often do so in makeshift camps along the US-Mexico border. As mentioned at the start of this study, many people in the border town of Matamoros sleep in tents or under tarps. Hygiene conditions are insufficient, as there is no running water and there are insufficient toilets and showers. Health problems include rashes, funguses and respiratory infections. Some NGOs provide basic health care services and some children are enrolled in Mexican schools, while others have access to education through an informal 'sidewalk school'. People on the move in Matamoros are also at risk of extortion, kidnapping, and rape at the hands of cartels and other criminal actors.[71]

Finally, although many Guatemalans who are forced to flee their country travel to Mexico, people on the move from El Salvador and Honduras can be transferred to Guatemala under an agreement signed with the USA in July 2019.[72] Asylum seekers transferred under this agreement likewise face the risk of severe violations of their socio-economic rights. While almost a thousand people on the move were transferred in the first four months following the conclusion of the 2019 US-Guatemala cooperative agreement, only 20 applied for asylum in Guatemala.[73] This is partly due to the fact that asylum seekers in Guatemala face difficulties sustaining themselves while their claims are pending.[74] Indeed, as the Guatemalan government does not provide

66 Consejo Ciudadano del Instituto Nacional de Migración (n 65) paras 87, 89 and 91.

67 IAComHR (n 59) para 573; Consejo Ciudadano del Instituto Nacional de Migración (n 65) paras 90–93 and 155; Meyer and Isacson (n 65) 27–28.

68 IAComHR (n 59) para 573; Consejo Ciudadano del Instituto Nacional de Migración (n 65) paras 132–39.

69 UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mission to Mexico' (29 December 2014) UN Doc A/HRC/28/68/Add.3, para 73.

70 See Section 3 below.

71 Nicole Narea, 'The Abandoned Asylum Seekers on the US-Mexico Border' *Vox* (20 December 2019); Ana María Alarcón, 'Los Campamentos de Migrantes en Matamoros Están Peor que los de Zonas en Guerra, Acusa ONG' *Sin Embargo* (31 January 2020); UNICEF, 'Mexico: An Estimated 700 Migrant Children Stranded in Matamoros near US Border' (1 February 2020); Dylan Baddour, 'A Refugee Camp Grows on the US-Mexico Border' *Al Jazeera* (12 February 2020).

72 Agreement between the United States of America and Guatemala on Cooperation Regarding the Examination of Protection Claims (signed 26 July 2019, entered into force 15 November 2019) US Treaties and Other International Acts Series 19–1115.

73 Human Rights Watch and Refugees International, *Deportation with a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement* (Human Rights Watch 2020) 33.

74 Ibid 32–34.

support to asylum seekers, people on the move returned under the agreement must rely on civil society actors to address their physical, psychological, and humanitarian needs, including accommodation. Yet the capacity of civil society and international organisations like UNHCR is insufficient to help all transferred people on the move.[75]

Thus, although they have the right to work, they struggle to find formal employment as many employers do not recognise the validity of their refugee identification, and, like in Turkey, employers may hire no more than 10% foreign workers. The limited availability of childcare presents an obstacle to finding employment for many people on the move with children. Many therefore work in the informal sector and women may resort to prostitution to generate an income. At the same time, without an employer, people on the move cannot access many services, including health insurance, and hence they have no access to specialist health care and medication. Moreover, the quality and availability of public health care is generally poor in Guatemala, especially for people with a low income, while many Guatemalans suffer from malnutrition. The Guatemalan Ministry of Public Health and Social Assistance does not have the capacity to help all the people seeking the services they provide, such as medicine, mental health services, and primary care. In sum, people on the move in Guatemala face the risk of being denied the rights to work, health and education.[76]

2.4. CONCLUDING OBSERVATIONS ON THE SOCIO-ECONOMIC RIGHTS OF PEOPLE ON THE MOVE IN PARTNER STATES

The plight of people on the move in partner States depends on numerous factors, including the country that hosts them, the willingness and ability of local or national authorities to realise their socio-economic rights, the resources that people on the move have, and the length of their stay. However, it is clear that many people on the move risk suffering violations of their socio-economic rights through lack of access to education and health care, vulnerability to labour exploitation and dire living conditions. These violations are often interrelated, as an inadequate standard of living can cause or exacerbate health issues for instance. Likewise, the realisation of the socio-economic rights of people on the move is closely connected to their civil and political rights. Material deprivation and lack of access to health care can amount or contribute to inhuman and degrading treatment for instance, especially in situations of detention or confinement, as illustrated by the plight of people on the move in Libya and Nauru.

While their situation can improve over time, as illustrated by the increasing numbers of Syrian children enrolled in Turkish schools, it can also worsen, as the plight of people on the move in Indonesia shows. Prolonged periods of deprivation,

75 Georgetown Law Human Rights Institute, 'Dead Ends: No Path to Protection for Asylum Seekers under the Guatemala Asylum Cooperative Agreement' (June 2020) 69–71.

76 Human Rights Watch and Refugees International (n 73) 32–33; Georgetown Law Human Rights Institute (n 75) 72–74. See also CESCR, 'Concluding Observations on the Third Periodic Report of Guatemala' (9 December 2014) UN Doc E/C.12/GTM/CO/3.

uncertainty and hopelessness can have very serious consequences for their health. This is especially the case for people on the move in detention, be it in Libya or Mexico: inadequate detention conditions cause both physical and mental health problems, which are often not addressed due to inadequate health care. These problems, especially the ones related to mental health, tend to increase with the length of detention and lack of perspectives.

While there is a clear causal link between the transfer of asylum seekers to Guatemala, Nauru and Papua New Guinea and violations of their socio-economic rights in these countries, the link between the plight of people on the move described here and migration control more generally requires further clarification. As the next section shows, efforts by the Global North to stem migration flows lead to the containment of people on the move in partner States in the Global South, which can in turn result in violations of their socio-economic rights. More specifically, the closeness of the causal link between cooperative migration control and these violations depends *inter alia* on the forms of cooperation between sponsor and partner States. The next section addresses these issues.

3. COOPERATIVE MIGRATION CONTROL POLICIES

This section complements the previous one by examining cooperative migration control policies and their impact on the socio-economic rights of people on the move. It first illustrates how various factors, including the Global North's desire to avoid obligations towards people on the move, drive the development of cooperative migration control (Section 3.1). It also depicts how multiple migration control policies developed in parallel and how the centre of gravity of such policies gradually shifts from the Global North to the Global South, resulting in the containment of people on the move in the Global South (Section 3.2). The analysis further identifies four forms of cooperation that are prevalent today and that illustrate the different ways in which sponsor States can have an impact on the socio-economic rights of people on the move in partner States: people transfers; the provision of funding, equipment and training; information sharing; and diplomatic relations and development aid (Section 3.3). Finally, this section discusses the relation between cooperative migration control and the violations of the socio-economic rights of people on the move discussed above (Section 3.4).

3.1. RATIONALES AND DRIVERS OF MIGRATION CONTROL

Both sponsor and partner States may be willing to engage in cooperative migration control for a number of reasons, ranging from domestic political considerations to humanitarian motives and geopolitical factors. A key aim of migration control is to

prevent people on the move from triggering the obligations – and hence responsibility – of sponsor States.[77] This is closely linked to the deterrence rationale that often underlies migration control: some policy makers argue that migration control policies which cause human rights violations have a deterrent effect.[78] Thus, poor living conditions in partner States may have a deterrent effect by preventing others from undertaking similar journeys. Such deterrence rationales can reinforce humanitarian motives: dissuading prospective people on the move from undertaking dangerous journeys can prevent their arrival in sponsor States. The latter often justify migration control measures in humanitarian terms, arguing that they save the lives of people on the move, notably by preventing them from undertaking dangerous sea crossings.[79] However, accounts that focus on saving lives at sea and people smuggling arguably ignore or downplay not only the absence of legal pathways which pushes many people on the move to travel irregularly in the first place but also the role of migration control policies in making their journeys more dangerous.[80] In other words, policies designed to reduce the dangers of irregular migration can become drivers of the very process they are meant to combat. Furthermore, sponsor States often frame migration as a security threat.[81] In particular, many migration control policies are explicitly designed to combat people smuggling and trafficking.[82] Various domestic factors, such as political dynamics and hostility towards people on the move among the electorate, may also push sponsor States to engage in migration control.[83] Finally, the political

77 Gammeltoft-Hansen and Hathaway (n 4) 241; 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; Violeta Moreno-Lax and Martin Lemberg-Pedersen, 'Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization' (2019) 56(1) Questions of International Law 5, 19; Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (CUP 2019) 81.

78 See for instance the so-called 'let them drown policy' endorsed by the UK: Karolina Follis, 'Ethnography up the Stream: The UK "Let them Drown" Policy and the Politics of Bordering Europe' in Ruben Zaiotti (ed), *Externalizing Migration Management: Europe, North America and the Spread of 'Remote Control' Policies* (Routledge 2016) 72–73.

79 For instance, the EU-Turkey Statement is designed 'to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk'. Council of the European Union, 'EU–Turkey Statement' (18 March 2016) Press Release 144/16.

80 Leanne Weber, 'Visible and Virtual Borders: Saving Lives by "Seeing" Sovereignty' (2013) 22 Griffith Law Review 666, 679; Thomas Faist, 'Contested Externalisation: Responses to Global Inequalities' (2019) 7(45) Comparative Migration Studies 1, 3.

81 Valsamis Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 44–45.

82 See for instance the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, a multilateral framework for discussing migration in the Asia Pacific, which focuses on transnational crime and whose discourse has become increasingly securitised: Susan Kneebone, 'The Bali Process and Global Refugee Policy in the Asia–Pacific Region' (2014) 27 Journal of Refugee Studies 596, 601.

83 Ghezelbash, *Refuge Lost* (n 2) 29–30 and 184.

economy of migration control may benefit the economies of sponsor States, for instance through the export of surveillance technology for border control.[84]

Yet, as migration control leads to the containment of people on the move in partner States in the Global South, it raises the question why the latter agree to cooperate with sponsor States. Indeed, authorities and local communities in partner States may be reticent to hosting large numbers of people on the move.[85] Financial and other incentives are possibly the main reason why partner States engage in cooperative migration control policies: they often involve sponsor States providing partner States with funding, training and equipment as well as development aid.[86] Partner States themselves can use migration control as a negotiation tool in their relations with sponsor States.[87] Regional power dynamics may also be an incentive for partner States to cooperate with sponsor States on migration control.[88] Finally, as for sponsor States, domestic factors may play a role in the willingness of Global South to cooperate: domestic actors can use the support provided by sponsor States to bolster their power.[89]

Moreover, the broader relationships between a partner and sponsor State shape their cooperation on migration control. For instance, while Turkey and Libya have an interest in increasing their political leverage with EU Member States, Indonesia downgraded its bilateral relationship with Australia.[90] More specifically, the relationship within which cooperation on migration control is implemented sometimes has its roots in colonialism. Thus, Libya is a former Italian colony, while Australia has colonial ties to Nauru and Papua New Guinea and continues to exercise considerable influence over them.[91] On the one hand, the existence of historical ties may facilitate cooperation between a sponsor State and its former colony. On the other hand, resentment against former colonial powers may complicate such cooperation.[92] Therefore, which rationales

84 Moreno-Lax and Lemberg-Pedersen (n 77) 16.

85 See for instance Brian Opeskin and Daniel Ghezelbash, 'Australian Refugee Policy and its Impacts on Pacific Island Countries' (2016) 35(3) Journal of Pacific Studies 73, 85–86; Missbach and Hoffstaedter (n 29).

86 Section 3.3 below. See also Ilke Adam and others, 'West African Interests in (EU) Migration Policy: Balancing Domestic Priorities with External Incentives' (2020) 46 Journal of Ethnic and Migration Studies 3101.

87 See for instance Lena Laube, 'The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy' (2019) 7(29) Comparative Migration Studies 1.

88 On Indonesia and Turkey respectively see Carly Gordyn, 'Pancasila and Pragmatism: Protection or Pencitraan for Refugees in Indonesia?' (2018) 2 Journal of Southeast Asian Human Rights 336, 351; Sibel Karadağ, 'Extraterritoriality of European Borders to Turkey: An Implementation Perspective of Counteractive Strategies' (2019) 7(12) Comparative Migration Studies 1, 2.

89 Stephan Dünnwald, 'Europe's Global Approach to Migration Management: Doing Border in Mali and Mauritania' in Ruben Zaiotti (ed), *Externalizing Migration Management: Europe, North America and the Spread of 'Remote Control' Policies* (Routledge 2016) 123; Moreno-Lax and Lemberg-Pedersen (n 77) 17.

90 Missbach and Phillips (n 4) 24.

91 Opeskin and Ghezelbash (n 85) 84.

92 For instance, France and Spain are the main actors in migration management in Mali because they are the EU Member States that are the most affected by migration from Mali. Spain's negotiations on migration control were arguably more efficient because France, as former colonial power, bears the burden of colonial ties with West African States. Dünnwald (n 89) 128.

are at play, which ones are mentioned explicitly and which ones remain implicit, depend on the States involved and the broader bilateral and/or multilateral relations between them.

In addition to the various rationales of partner and sponsor States, several other factors influence the development of contemporary migration control. These include changes in migratory patterns and technologies, including the existence of an advanced human smuggling industry.[93] One could argue that States and people on the move play a cat-and-mouse game, as migration flows respond to developments in migration control policies, with new smuggling routes opening up in response to the blocking of old ones, which in turn triggers the implementation of new policies targeting these new routes.[94] Policy transfers constitute another factor that drives migration control.[95] Ghezelbash shows how policy transfers regarding long-term mandatory detention, interceptions at sea and extraterritorial processing of asylum claims took place not only between the USA and Australia but also beyond.[96]

Finally, since cooperative migration control policies are designed to avoid triggering sponsor States' obligations and responsibility under international law, evolving interpretations of international law drive policy developments. States seek creative ways to maintain or increase their ability to stop migration flows within the confines of international law. As a result, the centre of gravity of migration control moves further away from sponsor States in order to avoid triggering their obligations towards people on the move or responsibility for their plight. Indeed, various authors have pointed to the interaction between policy and international law, in particular as regards judicial decisions' influence on State practice.[97] The ECtHR's *Hirsi* decision, which condemned Italy for the return to Libya of asylum seekers intercepted by Italian vessels on the

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93 Thomas Gammeltoft-Hansen and Nikolas F Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 Journal on Migration and Human Security 28, 33. See also Ghezelbash, *Refuge Lost* (n 2) 26.

94 See for instance Paula García Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 317.

95 Because of this study's concern with policies designed by the Global North to stem migration flows from the Global South, the analysis focuses on policy transfers between sponsor States. However, similar transfers may also take place from the Global North to the Global South or between Global South States. On this topic see for instance Elena Fiddian-Qasmiyeh, 'Southern-Led Responses to Displacement: Modes of South-South Cooperation?' in Elena Fiddian-Qasmiyeh and Patricia Daley (eds), *Routledge Handbook of South-South Relations* (Routledge 2018).

96 Ghezelbash, *Refuge Lost* (n 2) 167.

97 See for instance Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013' (2013) 54 Harvard International Law Journal 315; Thomas Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy: The Case of Deterrence Policies' (2014) 27 Journal of Refugee Studies 574; Ghezelbash, *Refuge Lost* (n 2) 177–80; Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) 20 European Journal of Migration and Law 373, 375–81; Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311, 325–27.

high seas, is an oft-cited example.[98] Italy's current forms of cooperation with Libya, which involve 'pullbacks' by the Libyan Coast Guard rather than 'pushbacks' by Italian vessels, seem to take into account the ECtHR's *Hirsi* ruling in seeking to prevent 'unwanted' arrivals without triggering Italy's jurisdiction and hence human rights obligations.[99] The Australian High Court's negative ruling in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[100] (*Malaysian Solution* case) can likewise be seen as the blueprint for the current offshore processing regime in Nauru.[101] Thus, recent developments in migration control suggest that sponsor States actively learn from courts' decisions and intentionally design new policies to avoid triggering their obligations and responsibility.[102] In other words, the dialectic between normative and policy developments can be characterised as a cat-and-mouse game between executives and courts, like that between people on the move and State authorities.[103] This also accounts for the proliferation of increasingly remote migration control policies implemented by the Global North to stem migration flows from the Global South, which is discussed below.

3.2. THE DEVELOPMENT OF COOPERATIVE MIGRATION CONTROL

The rationales and drivers identified above help explain the development of cooperative migration control.[104] State efforts to prevent the arrival of 'unwanted' people on the move date back to the 1930s and 1940s, when they sought to prevent European Jews from reaching the Americas and Palestine.[105] However, a combination of factors led to the proliferation of migration control policies in the 1980s and 1990s:

> the widespread adoption of the 1951 UN Refugee Convention that inadvertently incentivized states to keep asylum seekers away from their borders, the creation of a more universal definition of 'refugee' in the 1967 Protocol to the Convention that limited the utility of refugee

98 ECtHR, *Hirsi Jamaa and others v Italy* [GC] App No 27765/09 (23 February 2012).

99 Mann, 'Dialectic of Transnationalism' (n 97) 366–67; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *SS and Others v Italy*, and the "Operational Model"' (2020) 21 German Law Journal 385; Annick Pijnenburg, 'Containment instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control?' (2020) 20 Human Rights Law Review 306, 310–11.

100 High Court of Australia, *Plaintiff M70/2011 v Minister for Immigration and Citizenship; and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

101 Mann, 'Dialectic of Transnationalism' (n 97) 370; Dastyari, 'Detention of Australia's Asylum Seekers in Nauru' (n 45) 673–74; Ghezelbash, *Refuge Lost* (n 2) 179.

102 Gammeltoft-Hansen, 'International Cooperation on Migration Control' (n 97) 379.

103 Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy' (n 97) 588.

104 For an overview of the development of (cooperative) migration control see Gammeltoft-Hansen and Hathaway (n 4); Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (CUP 2016); Frelick, Kysel and Podkul (n 77); Ghezelbash, *Refuge Lost* (n 2); FitzGerald, *Refuge Beyond Reach* (n 1).

105 FitzGerald, *Refuge Beyond Reach* (n 1) 21.

> policy as a tool of realpolitik and racial selection, the end of the Cold War that reduced the propaganda value for the West of shaming East bloc origin countries, hostile media coverage, securitization, and improved communication and transportation technologies.[106]

Moreover, since the turn of the century sponsor States increasingly cooperate with partner States in the Global South in order to stem migration flows, resulting in a shift from unilateral to cooperative migration control.[107] Cooperative measures have not replaced unilateral ones. Rather, they exist alongside each other and rely on each other to be effective.[108] In other words, cooperative migration control measures complement rather than replace unilateral ones, as States often implement multiple measures in parallel. US migration control policies, for instance, include an interlocking system of visas, carrier sanctions, airport pre-clearance arrangements and airport liaison officers; interdictions at sea and extraterritorial processing; and pressuring Mexico to prevent Central American people on the move from reaching the US border.[109] The parallel implementation of multiple migration control measures and their shifting centre of gravity towards the Global South result in the containment of people on the move increasingly far away from the territories of sponsor States. The fact that the juxtaposition of multiple measures prevents people on the move from leaving the Global South altogether is relevant when determining the obligations and responsibility of sponsor States, as is the fact that their own involvement becomes increasingly remote. The following illustrates how migration control prevents people on the move from reaching the Global North by blocking air, sea and land routes increasingly far away from the territories of sponsor States.

One of the oldest forms of migration control consists in sealing off air routes.[110] All States in the Global North have imposed visa requirements.[111] As they often do not meet the visa requirements, most nationals of Global South countries are unable

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106 Ibid 48.

107 Gammeltoft-Hansen and Hathaway (n 4) 248; Gammeltoft-Hansen and Tan (n 93) 31; Gammeltoft-Hansen, 'International Cooperation on Migration Control' (n 97) 374; Nikolas Feith Tan, *International Cooperation on Refugees: Between Protection and Deterrence* (PhD thesis, Aarhus University 2019) 35.

108 FitzGerald, *Refuge Beyond Reach* (n 1) 14.

109 Ibid 18 and 82.

110 On the blocking of air routes see for instance Tilman Rodenhäuser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control' (2014) 26 International Journal of Refugee Law 223; Sophie Scholten, *The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control* (Brill 2015); Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017) 117–52; Fabiane Baxewanos, 'Relinking Power and Responsibility in Extraterritorial Immigration Control: The Case of Immigration Liaison Officers' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017); Maarten den Heijer, 'Visas and Non-discrimination' (2018) 20 European Journal of Migration and Law 470; FitzGerald, *Refuge Beyond Reach* (n 1) 58–70.

111 Savitri Taylor, 'Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility' in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart 2008) 94–103; FitzGerald, *Refuge Beyond Reach* (n 1) 60, 58–70, 164 and 221–22.

to access the Global North.[112] The latter has also successfully pressured the Global South into implementing similar restrictions. For instance, since 2011 Algeria, Egypt, Libya, Morocco and Tunisia have introduced visa requirements for Syrians, probably due to EU pressure.[113] Carrier sanctions further complement visa requirements, as they impose fines on carriers which transport foreign nationals who are not in possession of the required immigration documentation to the territory of the State.[114] As a result, airline companies have taken on migration control functions related to document checks, and carriers are likely to reject people on the move travelling without the correct documents.[115] Efforts to seal off air routes also include more intensive cooperation with partner States, such as the stationing of immigration liaison officers. Typically, sponsor States post immigration liaison officers at airports in the Global South, where they check passengers' identities and documentation before departure, with the stated aim of advising partner State authorities or airline carriers whether passengers should be allowed to board.[116] Although the officers merely provide advice, 'in practice, the airlines do the bidding of foreign agents stationed on their soil because of the threat of sanctions for transporting inadmissible passengers.'[117] Thus, the combination of visa requirements, carrier sanctions, and immigration liaison officers effectively prevents most Global South citizens from reaching the Global North by plane. This pushes them into irregular migration flows over land and sea routes.

However, various other migration control policies, including interdiction at sea, close off these alternative routes.[118] Depending on regional geographies, people on the move who cannot travel to the Global North by plane may attempt the journey by boat. Sponsor States, in turn, interdict people on the move at sea to prevent them from reaching their territories.[119] While pushbacks by sponsor States continue to take place,[120] sponsor States increasingly cooperate with the Global South to stop migration at sea, as illustrated by migration control policies in the Central Mediterranean. In 2017 Italy and Libya signed a Memorandum of Understanding (MOU) which revived the 2008 Treaty

112 Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 European Journal of Migration and Law 452, 458–59.

113 Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607, 620–21.

114 Rodenhäuser (n 110) 224.

115 Gammeltoft-Hansen, *Access to Asylum* (n 1) 160.

116 Tan, *International Cooperation on Refugees* (n 107) 40.

117 FitzGerald, *Refuge Beyond Reach* (n 1) 64.

118 Weber (n 80) 668.

119 Interdiction at sea is 'action taken by states to prevent sea-borne migrants from reaching their intended destination.' Bernard Ryan, 'Extraterritorial Immigration Control: What Role for Legal Guarantees?' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 22.

120 See Ghezelbash, *Refuge Lost* (n 2) 75–95. On the US Migrant Interdiction Programme see Niels Frenzen, 'US Migrant Interdiction Practices in International and Territorial Waters' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010); FitzGerald, *Refuge Beyond Reach* (n 1) chs 5 and 6.

of Friendship that formed the backdrop of the *Hirsi* case.[121] They agreed to implement cooperation initiatives as foreseen in previous bilateral agreements, including efforts to prevent clandestine immigration; yet under the current agreements, the Libyan Coast Guard rather than the Italian forces rescue people on the move in distress and return them to Libya.[122] Italy, through its maritime rescue coordination centre and its direct military presence in Libya, has assumed the overall coordination of the Libyan Coast Guard operational response in the Central Mediterranean.[123] In addition, EU Member States have made efforts to restrict the work of humanitarian rescue vessels in the Mediterranean.[124] In other words, Italy, the EU and other EU Member States seek to stem migration from Libya by gradually shifting search and rescue operations to the Libyan Coast Guard. Sponsor States also cooperate in other ways with neighbouring States to prevent arrivals by sea. Such cooperation includes joint patrols, which often take the form of ship rider agreements, whereby a State agent of one State is present on board another State's vessel.[125] Moreover, sponsor States cooperate with States that are increasingly far away from their own territories. In Europe, Spain provides equipment and training to prevent irregular migration not only to Morocco but also to Mauritania, Cape Verde and Senegal.[126] Likewise, Australia cooperates with States as far away as Malaysia and Sri Lanka to disrupt irregular migration at sea.[127]

Furthermore, the USA and Australia carry out extraterritorial processing, which is 'any process for screening or assessing asylum claims carried out beyond a state's territorial geographic boundaries' and is often combined with interdictions at sea.[128] Extraterritorial processing can be carried out by sponsor States themselves, as is the case of the US and Australian practice of on-board screenings during interdictions.[129] It can also involve the transfer of an asylum seeker from the jurisdiction of a sponsor State to a partner State for the purpose of processing her asylum claim.[130] The USA thus operates a Migrant Operations Centre on the US naval base at Guantánamo Bay in Cuba.[131] Numerous proposals for extraterritorial processing have been floated

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121 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). See also Anna Liguori, *Migration Law and the Externalization of Border Controls: European State Responsibility* (Routledge 2019) 9–13; Moreno-Lax, 'The Architecture of Functional Jurisdiction' (n 99) 391.

122 Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strasbourg?' (2018) 20 European Journal of Migration and Law 396, 402–04.

123 Moreno-Lax, 'The Architecture of Functional Jurisdiction' (n 99) 396.

124 UNSMIL and OHCHR (n 16) 15–16.

125 Tan, *International Cooperation on Refugees* (n 107) 42.

126 Ibid 39.

127 Nikolas Feith Tan, 'State Responsibility and Migration Control: Australia's International Deterrence Model' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 215.

128 Ghezelbash, *Refuge Lost* (n 2) 100.

129 Dastyari and Ghezelbash (n 2) 16–24.

130 Tan, *International Cooperation on Refugees* (n 107) 44.

131 On asylum processing at Guantánamo Bay see Sonia R Farber, 'Forgotten at Guantánamo: The *Boumediene* Decision and Its Implications for Refugees at the Base Under the Obama Administration' (2010) 98 California Law Review 989; Christina M Frohock, '"Brisas del Mar": Judicial and Political

in Europe since the 1980s, although they have not yet been implemented.[132] The development of Australian migration control policies illustrates how partner States play an increasingly important role in extraterritorial processing. Under the Pacific Solution (2001–2007), which followed the 2001 *Tampa* incident[133], Australia transferred interdicted people on the move to Papua New Guinea's Manus Island and Nauru, where UNHCR or Australian immigration officials processed their claims. Under the current policy, Operation Sovereign Borders, however, refugee status determination procedures are carried out under the domestic law of Papua New Guinea (until 2016) and Nauru.[134] In other words, responsibility for refugee status determinations shifted to Papua New Guinea and Nauru.

Finally, like sea and air routes, sponsor States seek to block migration routes over land through a variety of policies. They erect physical barriers to prevent people on the move from crossing their border.[135] Such constructions are sometimes combined with pushback practices at the frontiers of sponsor States.[136] In 2019 the USA started implementing the 'Migrant Protection Protocols' Programme, known as 'Remain in Mexico'. Under this policy, the USA returns asylum seekers to border towns in Mexico where they are expected to wait until their US asylum court proceedings conclude.[137] In addition, sponsor States have started cooperating with their direct neighbours to restrict immediate access to their borders. In the USA so-called 'metering' practices at official ports of entry restrict the number of asylum seekers allowed to enter the USA, obliging asylum seekers to wait in line in Mexico.[138] Sponsor States also cooperate with neighbouring States to prevent people on the move from approaching their border through interceptions: practices that physically prevent a person from reaching the territory of a sponsor State.[139] At least since the 1980s, Mexican authorities keep

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Outcomes of the Cuban Rafter Crisis in Guantánamo' (2012) 15 Harvard Latino Law Review 39; Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (CUP 2015); Ghezelbash, *Refuge Lost* (n 2) 103–110.

132 For an overview see Ghezelbash, *Refuge Lost* (n 2) 171–74; Tan, *International Cooperation on Refugees* (n 107) 244–47; FitzGerald, *Refuge Beyond Reach* (n 1) 213–17.

133 On the *Tampa* incident see *inter alia* Chantal Marie-Jeanne Bostock, 'The International Legal Obligations Owed to the Asylum Seekers on the *MV Tampa*' (2002) 14 International Journal of Refugee Law 279; Mary Crock, 'In the Wake of the *Tampa*: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 Pacific Rim Law and Policy Journal 49.

134 Ghezelbash, *Refuge Lost* (n 2) 112, 158.

135 See for instance *ND and NT v Spain* para 16; Asylum Information Database, 'Country Report: Hungary (2017 Update)' (December 2017) 17. See also www.trumpwall.construction.

136 On the US-Mexico border see David Scott FitzGerald, 'Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence' (2020) 46 Journal of Ethnic and Migration Studies 4, 7; on pushbacks at the borders of European States see Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe, 'Pushback Policies and Practice in Council of Europe Member States' (8 June 2019) PACE Doc 14909.

137 Human Rights Watch, *'We Can't Help You Here': US Returns of Asylum Seekers to Mexico* (Human Rights Watch 2019).

138 Human Rights First, 'Barred at the Border: Wait "Lists" Leave Asylum Seekers in Peril at Texas Ports of Entry' (April 2019).

139 Stephen H Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18 International Journal of Refugee Law 677, 678.

migrants away from the US border while the USA provide Mexico with *inter alia* funding, equipment and training.[140] Moreover, as for sea migration, sponsor States cooperate with States that are increasingly far away from their own borders. The EU's priority countries under the 2016 EU Migration Partnership Framework are Mali, Nigeria, Niger, Senegal, and Ethiopia.[141] Niger has thus become 'the southern border of Europe'.[142] The blocking of land routes further has a 'domino effect' whereby the closing of the sponsor States' borders leads to the closing of borders of transit States or even States of origin. For instance, in 2019, following US pressure, Mexico agreed to send troops to its southern border to stop migration flows from Guatemala.[143]

However, partner States may not always be willing to cooperate with sponsor States.[144] Indeed, partner States become increasingly aware of their bargaining power and are beginning to prioritise their political and economic interests linked to migration over the interests of sponsor States.[145] The willingness to cooperate varies across partner States. For instance, cooperation on migration control between Australia and Nauru and Papua New Guinea represents a highly asymmetrical, hierarchical relationship between a wealthy, industrialised nation and developing nations, whereby Australia can exercise considerable political and legal influence on the latter.[146] Nauru is the world's smallest island microstate and remains heavily reliant on Australia as it faces serious economic problems following the exhaustion of its phosphate reserves. It has been estimated that half of Nauru's gross domestic product comes from the regional processing centre that it hosts as part of Australia's Operation Sovereign Borders.[147] Indonesia, on the other hand, is not dependent on Australian aid, and is therefore less receptive to interventionist Australian policy making unless it also serves its own domestic interests.[148] Accordingly, Nauru is likely to be a more compliant partner on migration control than Indonesia.

In conclusion, notwithstanding some partner States' unwillingness to cooperate with sponsor States, the combination of measures to block air, sea and land routes succeeds in preventing many people on the move from leaving the Global South altogether. Moreover, the centre of gravity of migration control has increasingly shifted from the Global North to the Global South, both in terms of its geographical location

140 See Section 3.3.2 below.

141 European Commission, 'Communication from the Commission on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration' COM (2016) 385 final.

142 UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Migrants: Visit to the Niger' (16 May 2019) UN Doc A/HRC/41/38/Add.1, para 6.

143 Doug Palmer, Adam Behsudi and Ted Hesson, 'Trump Drops Tariff Threat on Mexico after Migration Deal Reached' *Politico* (6 July 2019).

144 See for instance Dünnwald (n 89); Mohamed Khachani, 'Contribution de la Société Civile à la Coopération Union Européenne-Afrique en Matière de Migration: Le Cas du Maroc' European Council on Refugees and Exiles Working Paper 05/2020, 3.

145 Missbach and Phillips (n 4) 23.

146 Dastyari and O'Sullivan (n 54) 314.

147 Dastyari, 'Detention of Australia's Asylum Seekers in Nauru' (n 45) 691–92; FitzGerald, *Refuge Beyond Reach* (n 1) 237–38; Tan, *International Cooperation on Refugees* (n 107) 49–50.

148 Missbach and Hoffstaedter (n 29) 65.

and sponsor States' involvement. As a result, multiple forms of cooperation characterise contemporary migration control.

3.3. MULTIPLE FORMS OF COOPERATION

While the foregoing illustrated the development and increasingly cooperative aspect of migration control at a general level, this section focuses on *cooperative* migration control policies. As noted above, not only the cumulative effect of migration control measures is relevant for establishing the obligations and responsibility of sponsor States but also the different forms that cooperation takes. Therefore, the following overview illustrates the different ways in which States can cooperate on migration control, focusing especially on the different levels of involvement of sponsor States and their impact on the socio-economic rights of people on the move. It complements more general categorisations of migration control policies advanced by scholars in recent years.[149] This study identifies four forms of cooperation that are prevalent today: people transfers; the provision of funding, equipment and training; information sharing; and diplomatic relations and development aid. While not all instances of cooperation may clearly fall within one of the categories identified below, the following overview helps clarify the various ways in which States can cooperate and can thus provide a useful tool for analysing their obligations and responsibility.

3.3.1. People Transfers

Interdictions at sea and interceptions on land can involve transferring people on the move from sponsor to partner States, for instance for extraterritorial asylum processing.[150] Different types of people transfers exist. The most common consists of returning people on the move who have reached a sponsor State to a partner State through which they have previously travelled.[151] They include readmission and – in the refugee context – safe third country agreements. For instance, the EU-Turkey Statement

149 See for instance Gammeltoft-Hansen and Hathaway (n 4) 244–46 and 251–55; Ruben Zaiotti, 'Mapping Remote Control: The Externalization of Migration Management in the 21st Century' in Ruben Zaiotti (ed), *Externalizing Migration Management: Europe, North America and the Spread of 'Remote Control' Policies* (Routledge 2016) 13; Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 European Journal of International Law 591, 610–613; Gammeltoft-Hansen and Tan (n 93) 34–40; Ghezelbash, *Refuge Lost* (n 2) 2–3; FitzGerald, *Refuge Beyond Reach* (n 1) 6–9; Tan, *International Cooperation on Refugees* (n 107) 38–46.

150 Australia entered into people transfer agreements with the USA in 2007 and 2016: Ghezelbash, *Refuge Lost* (n 2) 127–29.

151 This study discusses return policies where such policies raise issues in terms of obligations or responsibility of multiple States for violations of socio-economic rights. On European return policies more generally see Emanuela Roman, *Cooperation on Readmission in the Mediterranean Area and its Human Rights Implications* (PhD thesis, University of Palermo 2017); Izabella Majcher, *The European Union Returns Directive and its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention, and Removal* (Brill 2020).

provides that people on the move who do not apply for asylum or whose application is unfounded or inadmissible are returned to Turkey, in accordance with the relevant international standards and in respect of the principle of *non-refoulement*.[152] The Migration Protection Protocols recently implemented by the USA also involve a high degree of cooperation between the USA and Mexico, as asylum seekers must remain in Mexico while US immigration courts process their cases.[153] In its June 2019 agreement with the USA, Mexico agreed to extend the Migrant Protection Protocols along the whole US-Mexico border and to 'offer jobs, health care and education according to its principles.'[154] In other words, Mexico is solely responsible for realising the socio-economic rights of people on the move, while in practice much of the burden to assist people on the move in Mexico rests on overcrowded nongovernmental migrant shelters. In other words, 'Mexico has become more than simply a country of transit, but does not have the infrastructural or institutional ability to accommodate large numbers of migrants or asylum seekers, much less protect their most basic human rights'.[155]

Other forms of people transfers involve transferring people on the move to a partner State through which they have not previously travelled. Such transfers typically take place when people on the move are interdicted at sea before they reach the territory of the sponsor State. Australia's cooperation with Nauru involves transferring people on the move who have been interdicted at sea to Nauru for refugee status determination. Under the 2013 MOU, Australia bears all costs, including, where needed, infrastructure or service development which benefit the broader community in which intercepted people on the move are resettled.[156] The MOU also includes a number of human rights safeguards. Both States commit to 'treat Transferees with dignity and respect and in accordance with relevant human rights standards'.[157] Although the government of Nauru is formally in charge, various Australian State actors are involved in the management of the regional processing centre.[158] Australia retains ultimate responsibility for decisions to arrange medical transfers and for negotiating resettlement agreements.[159] Although Australia has a significant discretionary decision-making space and a *de facto* large influence, it argues that Nauru has the ultimate authority.[160] Nauru committed to undertake refugee status determination[161] and those found to be in need of international protection may be integrated in Nauru or resettled

152 'EU–Turkey Statement' (n 79) para 1.

153 Clare Ribando Seelke, 'Mexico's Immigration Control Efforts' (February 2020) Congressional Research Service IF10215.

154 Office of the Spokesperson, 'US-Mexico Joint Declaration' (7 June 2019).

155 Vogt (n 60) 60.

156 Article 6 Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues (signed 3 August 2013).

157 Ibid art 17.

158 Patrick van Berlo, 'The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality' (2017) 17 Human Rights Law Review 33, 41–47.

159 Senate Legal and Constitutional Affairs References Committee (n 45) paras 7.42 and 7.53.

160 Van Berlo (n 158) 43–44.

161 Nauru-Australia MOU (n 156) art 19.

in a safe third country, while the others are removed elsewhere with the assistance of Australia.[162] Australia further contracts various private actors to provide advice and services, while the Regional Processing Centre increasingly employs Nauruans, and goods and services are sourced as much as possible from Nauruan companies.[163] Australia's desire to escape its obligations towards people detained on Nauru and avoid responsibility for human rights violations arguably explains the drive to involve Nauruan and private actors.

In 2011, Australia agreed to resettle 4,000 refugees in exchange for Malaysia accepting 800 asylum seekers interdicted at sea, although the Australian High Court invalidated the agreement, which was never implemented.[164] Nevertheless, having 'learned' from the *Malaysian Solution* case, Australia has successfully concluded resettlement arrangements with Cambodia in 2014[165], and has extended its agreements with Papua New Guinea and Nauru to include local integration as well as asylum processing.[166] However, the number of people transferred under these agreements remains very low.[167] The USA has likewise concluded bilateral agreements with third countries to provide for the resettlement of refugees held at Guantánamo Bay.[168] It recently also concluded cooperative agreements with Guatemala, El Salvador and Honduras, whereby people on the move can be transferred to one of these countries without having previously travelled through it.[169]

Finally, some transfer agreements take the form of a people exchange, whereby a group of people on the move is transferred from a sponsor State to a partner State in exchange for the transfer of another group in the other direction.[170] They are a relatively new phenomenon, and practice remains limited.[171] The proposed agreement between Australia and Malaysia is an example of such an agreement. Likewise, the EU-Turkey Statement provides that, for every Syrian returned from the Greek Aegean Islands to Turkey, another Syrian will be resettled from Turkey to the EU.[172] In the first four years of its implementation, although almost 27,000 Syrian refugees have been resettled

162 Ibid arts 12–14.

163 Van Berlo (n 158) 44–46.

164 See Section 3.1 above; High Court of Australia, *Plaintiff M70/2011 v Minister for Immigration and Citizenship*. See also Michelle Foster, 'The Implications of the Failed "Malaysian Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 Melbourne Journal of International Law 395; Ghezelbash, *Refuge Lost* (n 2) 117–20.

165 Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Resettlement of Refugees in Cambodia (signed 26 September 2014).

166 For a detailed discussion see Shani Bar-Tuvia, 'Australian and Israeli Agreements for the Permanent Transfer of Refugees: Stretching Further the (Il)legality and (Im)morality of Western Externalization Policies' (2018) 30 International Journal of Refugee Law 474.

167 Ibid 475.

168 Ghezelbash, *Refuge Lost* (n 2) 109.

169 For an overview see US Department of Homeland Security, 'Fact Sheet: DHS Agreements with Guatemala, Honduras and El Salvador' (2019).

170 Tan, *International Cooperation on Refugees* (n 107) 43.

171 Bar-Tuvia (n 166).

172 'EU–Turkey Statement' (n 79) para 2.

from Turkey to EU Member States, only 2,735 persons were returned to Turkey under the Statement.[173] Moreover, the EU-Turkey Statement also provides for other forms of cooperation, such as funding.

3.3.2. The Provision of Funding, Equipment and Training

Sponsor States in the Global North provide equipment, training and funding to partner States in the Global South in order for the latter to intercept people on the move. As they are intercepted by the partner State before they reach the sponsor State's borders, sponsor States' involvement is more remote than for people transfers. There remains a clear causal link, however, between the support provided and migration control: the funding, training or equipment aims to enhance the migration control capacity of partner States. The EU and its Member States, especially Italy, play a crucial role in Libya's capacity to intercept people on the move who seek to cross the Mediterranean. Although most migration in Libya concerns South-South migration, including circular and seasonal migration, European States have given disproportionate attention to its role as a transit country for migration flows from Africa to Europe.[174] The 2017 MOU between Italy and Libya *inter alia* requires Italy to provide technical and technological support to the Libyan institutions in charge of the fight against illegal immigration.[175] Italian and European funding is used to maintain Libyan boats and train their crew, while Italy donated boats to the Libyan Coast Guard.[176] Italy allegedly paid Libyan militias to stop them from smuggling people on the move across the Mediterranean.[177] Furthermore, the 2017 Malta Declaration by EU Member States endorsed the Libya-Italy MOU and announced new cooperation measures with Libya such as training, equipment and funding.[178] For instance, EU Member States contribute to the training of the Libyan Coast Guard through EUNAVFOR MED.[179]

In addition to strengthening the Libyan Coast Guard's capacity to interdict people on the move at sea, European support for Libya also concerns the plight of people on the move contained in Libya. The Italian-Libyan MOU provides that Italy finances reception centres, trains their personnel and delivers medicines and medical equipment.[180] Indeed, Italy provides financial assistance to people on the move detained in a number of Libyan detention centres.[181] The EU and its Member States likewise spend millions

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173 European Commission, 'EU-Turkey Statement: Four Years On' (18 March 2020).

174 Phillips (n 22) 94.

175 Libya-Italy MOU (n 121) art 1(c).

176 Moreno-Lax, 'The Architecture of Functional Jurisdiction' (n 99) 392–93. For a detailed overview of Italian cooperation with Libya see Heller and Pezzani (n 2).

177 Phillips (n 22) 93.

178 European Council, 'Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route' (3 February 2017).

179 Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED Operation SOPHIA) OJ L 162, art 1.

180 Libya-Italy MOU (n 121) art 2.

181 Human Rights Watch, *No Escape from Hell* (n 20) 27.

of euros on Libyan detention centres, and considerable amounts of European money have been diverted to intertwined networks of militiamen, traffickers and coast guard members who exploit people on the move.[182] Thus, in April 2017 the EU pledged €90 million to protect and assist people on the move and the communities that host them, in addition to €120 million to support the Libyan authorities.[183]

The EU-Turkey Statement also provides that the EU will disburse a total of €6 billion for the Facility for Refugees in Turkey and further projects for persons under temporary protection, notably in the field of health, education, infrastructure, food and other living costs.[184] Unlike for Libya, European funding has helped improve the situation of people on the move in Turkey. The EU and its Member States have funded cash assistance programmes, which mainly target Syrian temporary protection holders, such as the Emergency Social Safety Net (ESSN) and the Conditional Cash Transfer for Education (CCTE). As of December 2019, the ESSN was assisting around 1.7 million people, while EU-funded partner organisations had distributed over 700,000 e-vouchers, food parcels or kits with other urgently needed items. The CCTE, which involves bi-monthly cash transfers to vulnerable refugee families whose children attend school regularly, benefited more than 600,000 children. The EU funds the construction of new schools under the Facility for Refugees in Turkey and a project that aims to increase Syrian children and youth's access to quality formal education. European funding further enabled partner organisations to provide over 1 million primary health care consultations to refugees and to establish almost 200 Migrant Health Centres for Syrian beneficiaries of temporary protection. It also served to build six new Reception and Accommodation Centres, although they were re-purposed to serve as removal centres following the EU-Turkey Statement.[185]

In the Asia-Pacific, Australia has supported Indonesia in strengthening its border control capacity since the late 1990s through funding, infrastructure, equipment, and technical assistance and training.[186] In 2000 Australia concluded the Regional Cooperation Arrangement together with Indonesia and the IOM. Under this agreement, Indonesian authorities intercept migrants and refugees suspected of travelling irregularly to Australia, while the IOM provides repatriation assistance for

182 Council of the European Union, 'Libya and the Surrounding Area: Current Situation and Need for Immediate Action' (4 September 2019) EU Doc 11538/19; Maggie Michael, Lori Hinnant and Renata Brito, 'Making Misery Pay: Libya Militias Take EU Funds for Migrants' *AP News* (31 December 2019).

183 Phillips (n 22) 92.

184 'EU–Turkey Statement' (n 79) para 6.

185 Asylum Information Database, 'Country Report: Turkey' (n 8) 66, 72, 94 and 151–58; European Commission, 'Communication from the Commission to the European Parliament and the Council: Fourth Annual Report on the Facility for Refugees in Turkey' COM (2020) 162 final; European Commission, 'European Civil Protection and Humanitarian Aid Operations: Turkey' (26 August 2020); 'Promoting Integration of Syrian Kids into the Turkish Education System (PIKTES)'.

186 Nethery, Rafferty-Brown and Taylor (n 39) 95; Asher Hirsch, 'The Borders Beyond the Border: Australia's Extraterritorial Migration Controls' (2017) 36 Refugee Survey Quarterly 48, 74; Mussi and Tan (n 27) 99; Azadeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 Human Rights Law Review 435, 441–42.

migrants wishing to return to their country of origin.[187] Furthermore, Australian police have worked closely together with their Indonesian counterpart in order to survey, disrupt and intercept asylum seekers attempting to travel to Australia through Indonesia.[188] Under the Regional Cooperation Arrangement, Australia also funded the IOM to provide basic health care, shelter and food for people on the move in Indonesia. However, in an attempt to stem irregular migration flows to Indonesia, in 2018 Australia cut funding to the IOM, leaving many people on the move living on the streets and unable to access basic shelter, food and health care.[189] The Indonesian authorities seem both unable and unwilling to fill this gap. A 2016 Presidential Regulation delegated responsibility for hosting refugees to local governments, but they often lack the funding, capacity and capability to provide shelters for people on the move. Moreover, 'local heads of government are very reluctant to use their budgets for refugee-related expenses, especially as support for refugees is not high amongst Indonesian voters.'[190] Thus, the reduction in Australia's IOM funding, combined with the Indonesian authorities' failure to take over the provision of food, shelter and health care, leaves many people on the move in dire straits.

In the Americas, Mexican efforts to prevent Central American migrants from reaching the USA date from the 1980s and increased throughout the 1990s.[191] Today the USA *inter alia* provides assistance to Mexico as part of security cooperation within the framework of the Mérida Initiative, a bilateral partnership launched in 2007.[192] In 2014, Mexico started to implement the 'Programa Frontera Sur' (Southern Borders Programme), which created three concentric cordons across southern Mexico.[193] Mexico patrolled and established detention centres on migration routes towards the US border by creating a 'vertical frontier' from south to north across its territory.[194] As a result, between 2014 and 2017 Mexico deported 176,000 more Central American people on the move than the USA.[195] Indeed, although the Mexican government's discourse around 'Programa Frontera Sur' is steeped in the language of human rights, it has increased the criminalisation and vulnerability of people on the move.[196] Since 2014, Mexico has benefited from hundreds of millions of dollars of US funding to support

187 Nethery, Rafferty-Brown and Taylor (n 39) 95; Hirsch (n 186) 71; Dastyari and Hirsch (n 186) 440.

188 Dastyari and Hirsch (n 186) 441.

189 See Section 2.2 above.

190 Antje Missbach, 'Falling through the Cracks: The Impacts of Australia's Funding Cuts on Refugees in Indonesia' (8 August 2018) Policy Forum of the Asia and the Pacific Policy Society.

191 For a general overview see Castillo (n 59); FitzGerald, *Refuge Beyond Reach* (n 1) 123–59.

192 On the Mérida Initiative see Eric L Olson, 'The Evolving Mérida Initiative and the Policy of Shared Responsibility in US-Mexico Security Relations' (February 2017) Wilson Center Mexico Institute; Clare Ribando Seelke, 'Mexico: Evolution of the Mérida Initiative, 2007–2020' (February 2020) Congressional Research Service IF10578.

193 FitzGerald, *Refuge Beyond Reach* (n 1) 141.

194 Ibid 131.

195 Meili (n 58) 104; see also Andrea Villasenor and Elba Coria, 'Protection Gaps in Mexico' (2017) 56 Forced Migration Review 6.

196 Vogt (n 60).

its immigration control and border and port security efforts.[197] Under the Mérida Initiative, the USA thus allocated over $200 million in funding to provide Mexico with nonintrusive inspection equipment, mobile kiosks, canine teams and vehicles, as well as training in immigration enforcement. The USA also provided $58 million in recent years to the UNHCR and $24 million to the IOM for improving shelters, providing assistance and carrying out voluntary returns.[198]

In sum, sponsor States are involved in migration control by providing funding, training and equipment, while partner States do the lion's share of the work in terms of intercepting, containing and detaining people on the move. Most funding, training and equipment provided focuses on border control, while relatively little support serves to improve the living conditions of people on the move in partner States. Thus, in Libya European funding is diverted to exploit people on the move, Australia has reduced its support for people on the move contained in Indonesia but not its other forms of assistance to Indonesia, and US funding for Mexico includes more than twice as much for border control than for the work of the UNHCR and IOM. Furthermore, sponsor States also cooperate with partner States by sharing information.

3.3.3. Information Sharing

A third form of cooperation between sponsor and partner States is the sharing of intelligence and data which enables partner States to intercept and contain people on the move. It is not only a more remote form of involvement for sponsor States than people transfers or the provision of funding, equipment and training, but also one that has a less direct impact on the socio-economic rights of people on the move. Indeed, although sharing information can lead to the containment of people on the move in partner States, it has no direct influence on the extent to which their socio-economic rights are realised, unlike people transfers and the provision of funding, equipment and training.

In some cases, information sharing primarily concerns partner States granting sponsor States access to data about people on the move. The example of Niger illustrates sponsor States' interest in getting access to data from transit countries. With Global North funding the IOM developed the Migration Information and Data Analysis System (MIDAS) which captures fingerprints and facial images. It is linked to a biometric registration system of the US Department of State. The European Border and Coast Guard Agency, Frontex, has further set up the first African risk analysis cell in Niger, which collects data on cross-border crime and security threats and will rely on systems such as MIDAS. Frontex programmes also intersect with other EU-funded data initiatives, such as the Free Movement of Persons and Migration in West Africa, which aims *inter alia* to introduce biometric identity cards for West African citizens.[199]

197 Ribando Seelke, 'Mexico's Immigration Control Efforts' (n 153).

198 Ibid. See also Meyer and Isacson (n 65) 43–44.

199 Giacomo Zandonini, 'Biometrics: The new Frontier of EU Migration Policy in Niger' *The New Humanitarian* (6 June 2019).

Likewise, the USA finances scanning equipment, hardware, and software for migration databases in Latin American countries in return for access to the data.[200] For instance, with US support Mexico built a secure communications network in the southern border area and collects biometric information that interfaces with US databases.[201] Mexico thus shares information with the USA on air passengers arriving from outside North America.[202]

In other cases, sharing information consists of sponsor States supplying information to partner States in order to intercept people on the move. The European Border Surveillance System can generate information on departing boats and share it with partner States.[203] Likewise, the Italian authorities transmit information about received distress calls to the Libyan Coast Guard, either through the maritime rescue coordination centre in Rome or an Italian warship deployed in Tripoli harbour.[204] This results in people on the move being rescued by the Libyan Coast Guard and returned to Libya. As noted above, this operational involvement of Italy in interceptions at sea in the Mediterranean differs from earlier patterns of cooperation, which were at stake in the *Hirsi* case. However, although the sharing of information may contribute to containing people on the move in partner States, it has no direct influence on the realisation of their socio-economic rights, in contrast to development aid.

3.3.4. Diplomatic Relations and Development Aid

Finally, sponsor States can use their broader diplomatic relations with partner States to enlist the latter's help in stemming migration flows. This includes reliance on 'sticks' such as withholding development assistance as well as 'carrots', including trade agreements, visa facilitation and labour immigration quotas.[205] In other words, partner States can reap benefits in other areas if they cooperate on migration control and risk being penalised if they do not. The 2016 EU-Turkey Statement thus includes various incentives for Turkey to cooperate with the EU on migration control: in exchange for hosting Syrian refugees, the EU Member States agreed to accelerate visa liberalisation for Turkish citizens and reconfirmed their commitment to re-energise Turkey's accession process to the EU.[206] More generally, the EU has used its diplomatic relations with neighbouring States to negotiate migration control agreements, and requires candidate States for EU accession to meet specific migration control standards.[207] The EU's Migration Partnership Framework explicitly endorses applying a mix of positive

200 FitzGerald, *Refuge Beyond Reach* (n 1) 65–66; David Scott FitzGerald, 'Remote Control of Migration' (n 136) 10.
201 Ribando Seelke, 'Mexico's Immigration Control Efforts' (n 153). See also Meyer and Isacson (n 65) 44.
202 FitzGerald, *Refuge Beyond Reach* (n 1) 65.
203 Markard (n 149) 612–13.
204 Moreno-Lax, 'The Architecture of Functional Jurisdiction' (n 99) 394–95.
205 Gammeltoft-Hansen and Hathaway (n 4) 251.
206 'EU-Turkey Statement' (n 79).
207 Gammeltoft-Hansen and Hathaway (n 4) 251.

and negative incentives for each partner country with regard to areas such as trade and development aid. Moreover, the ability and willingness of a third country to cooperate on migration control must guide the overall relationship between the EU and that State.[208] Likewise, in its relations with Mexico, the USA has linked migration control to financial aid and trade policy.[209] In 2019, following threats to impose import tariffs on Mexican goods, Mexico agreed to send troops to its southern border to stop migration flows from Guatemala and both countries agreed to expand the Migration Protection Protocols programme across the entire southwest border.[210]

Sponsor States also increasingly condition development aid on cooperation on migration control. For instance, the EU promotes a 'more for more' approach, whereby development aid is made conditional on cooperation on migration control.[211] Under its agreement with Australia, Cambodia offers permanent resettlement to people identified as refugees on Nauru in exchange for $40 million in development assistance.[212] The USA recently cut part of its development aid to El Salvador, Honduras and Guatemala and made new funding conditional on migration control.[213] Although both involve the transfer of financial and other resources from the Global North to the Global South, development aid conditionality differs from the direct provision of funding, equipment and training in terms of causation. While the latter is provided *in order to* stop migration flows, development aid conditionality is used as leverage to convince partner States to cooperate. However, the distinction between the two becomes increasingly blurred, as development aid funding itself is also used for migration control purposes. EU Member States thus increasingly seek to use the EU Trust Fund for Africa – which is funded primarily by the European Development Fund – to stop migration flows to Europe.[214] For instance, the projects that the EU Trust Fund for Africa finances in Libya focus on border management and enhancing the capacity of the Libyan Coast Guard, rather than contributing to poverty reduction or development in Libya.[215]

The use of diplomatic relations and development aid is one of the forms of cooperation with the most remote involvement on the part of sponsor States. It can have a significant impact on the realisation of the socio-economic rights of people on the move in partner States. The fact that partner States receive more development aid or

208 European Commission, 'Communication on Establishing a New Partnership Framework' (n 141).

209 FitzGerald, *Refuge Beyond Reach* (n 1) 137 and 142.

210 Palmer, Behsudi and Hesson (n 143); Maureen Meyer and Gina Hinojosa, 'Implications of the Recent US-Mexico Agreement on Addressing Regional Migration Flows' (14 June 2019).

211 Daria Davitti and Annamaria La Chimia, 'A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control' in Fiona de Londras and Siobhán Mullally (eds), *Irish Yearbook of International Law 2015* (Vol 10, Hart 2017) 136. See also European Council on Refugees and Exiles, 'Migration Control Conditionality: A Flawed Model' (2020) ECRE Policy Note 25.

212 Tan, 'State Responsibility and Migration Control' (n 127) 221.

213 Matthew Lee, 'US Restores some Aid to El Salvador, Honduras, Guatemala' *AP News* (18 June 2019).

214 Oxfam, *The EU Trust Fund for Africa: Trapped between Aid Policy and Migration Politics* (Oxfam 2020).

215 Philipp Dann, Michael Riegner and Lena Zagst, 'Bouncers Beyond Borders – On the (Il)legality of EU Funding for the Libyan Coast Guard' (*Völkerrechtsblog*, 20 May 2020).

favourable trade agreements as a reward for cooperating on migration control could enable them to better realise the socio-economic rights of their own population and people on the move. This is not the case, however, if development aid is used to fund migration control efforts instead of development projects in partner States. Therefore, the relation between development aid and the socio-economic rights of people on the move affected by migration control requires further analysis.

3.4. THE RELATION BETWEEN SOCIO-ECONOMIC RIGHTS AND MIGRATION CONTROL

The overview above revealed that the conduct of both sponsor and partner States can have an impact on the realisation of the socio-economic rights of people on the move affected by migration control. The parallel implementation of multiple migration control measures prevents many people on the move from leaving the Global South, as a result of which they stay for long periods of time in partner States where their basic rights such as housing, education, health and work are often jeopardised. Yet this also raises the question whether these violations of the socio-economic rights of people on the move depicted in Section 2 are *caused by* cooperative migration control policies, or whether they are rather an unfortunate consequence of policies aimed at stemming migration flows. The answer to this question arguably depends on two factors: the closeness of the causal link between State conduct and the violation at stake; and whether a State is unable or unwilling to realise the socio-economic rights of people on the move.

As regards the first factor, the causal link between a State's conduct and the plight of people on the move is closer in some cases than in others. Since people on the move find themselves on the territory of partner States, it is obvious that the latter's conduct has a direct impact on their socio-economic rights. However, the causal link is less straightforward as regards sponsor States. As noted above, the sharing of information has no direct impact on the socio-economic rights of people on the move, unlike people transfers and the provision of funding, training and equipment. For instance, the sharing of data between Mexico and the USA is largely irrelevant for the plight of Central American people on the move in Mexico. Australia's transfer of people on the move to Nauru, its influence over their living conditions there and its ability to allow or refuse medical transfers creates a stronger link between Australia's conduct and the plight of people on the move in Nauru. Likewise, the causal link between the provision of development aid, migration control and the socio-economic rights of people on the move in partner States is complex and requires further analysis. Moreover, the coexistence of multiple migration control measures in parallel suggests there may be a causal relation between the aggregate efforts of sponsor States in the Global North to contain people on the move in the Global South and violations of their socio-economic rights. The following chapters explore this issue in more detail.

The second factor concerns the extent to which the States involved are unable or unwilling to realise the socio-economic rights of people on the move. The difficulties that many partner States, like Guatemala, face in realising the socio-economic rights of their own nationals suggest that they may be unable rather than unwilling to realise the socio-economic rights of people on the move. Considering the numerous problems that Libya faces in light of the ongoing armed conflict and collapse of public services, it is also arguable that Libya is unable rather than unwilling to realise the socio-economic rights of people on the move. Likewise, given the very high number of people on the move that it hosts, one could argue that Turkey may be unable rather than unwilling to realise their socio-economic rights, including with the support it receives from EU Member States. However, the reluctance of partner States like Indonesia to host people on the move legitimates the question to what extent unwillingness rather than lack of resources contributes to the violations of the socio-economic rights of people on the move in partner States. The question to what extent sponsor States are unable or unwilling to realise the socio-economic rights of people on the move is equally important, especially in light of the comparatively high level of realisation of socio-economic rights in the Global North.

The deterrence rationale underlying many cooperative migration control policies may explain why certain States may be unwilling to realise the socio-economic rights of people on the move. According to this reasoning, human rights violations suffered by people on the move can contribute to dissuading prospective people on the move from attempting to reach a destination State. Some scholars have argued that suffering is embedded in cooperative migration control policies by design.[216] Indeed, as noted above, Australia cut IOM funding in Indonesia in 2018 in an attempt to stem irregular migration flows to Indonesia. Likewise, the transfer and detention, often in very poor conditions, of migrants intercepted at sea in places like Guantánamo Bay, Manus Island and Nauru discourages future attempts to reach the USA and Australia by boat.[217] Australia spent $7.1 billion on offshore contracts for Papua New Guinea and Nauru, at a cost of around $450,000 per person per year.[218] These considerable amounts stand in clear contrast to the substandard living conditions of people on the move held at the RPCs, suggesting that such conditions result not from a lack of available resources but rather from deliberate policy choices. Thus, where cooperative migration control policies are designed to include violations of socio-economic rights for deterrence purposes, there is arguably a causal link between the conduct of the States involved and the plight of those affected.[219]

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216 Moreno-Lax and Lemberg-Pedersen (n 77) 32–33.

217 Bar-Tuvia (n 166) 505; Farber (n 131) 990; UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Australia and the Regional Processing Centres in Nauru' (n 46) para 79.

218 Angus Grigg, Lisa Murray and Jonathan Shapiro, 'Home Affairs Rebuked over Paladin's $532m Contract' *Financial Review* (28 May 2020).

219 However, violations of socio-economic rights in partner States can also have the opposite effect of inducing people on the move to move onwards to sponsor States. See for instance Den Heijer, Rijpma

Where violations of socio-economic rights are not embedded in cooperative migration control policies by design, an important issue concerns any mitigating measures that sponsor States may take to limit the risk of such violations occurring. As noted above, US funding for Mexico includes more than twice as much for border control than for the work of the UNHCR and IOM, while the USA does not contribute towards the reception of people on the move affected by the Migrant Protection Protocols who reside in makeshift camps along the US-Mexico border. This suggests that migration control takes priority over the rights of people on the move. In the case of the EU-Turkey Statement, the question arises whether the financial aid which the EU and its Member States provide is sufficient considering the very large number of people on the move that Turkey hosts. Thus, we must ask to what extent cooperative migration control measures take into account their effects on the rights of those it affects, and what measures they include to mitigate any negative consequences, especially as regards the contribution of sponsor States. Here also, the effect of the aggregate of multiple measures implemented in parallel plays a role in determining whether sponsor States are unable or unwilling to realise the socio-economic rights of people on the move contained in partner States in the Global South.

In sum, then, although the multiplicity of States involved complicates the assessment, various parameters can help determine each State's contribution to the harm suffered by people on the move. Causation plays an important role: although cooperative migration control policies primarily aim to stem migration flows, some forms of cooperation involve a closer causal link between a State's conduct and the non-realisation of the socio-economic rights of people on the move than others. Furthermore, the extent to which the States involved are unable or unwilling to realise the socio-economic rights of people on the move is equally important. The discrepancy in some cases between the resources that sponsor States spend to prevent the arrival of people on the move and their efforts to help realise their rights illustrates this. In particular, the deterrence rationale underlying many cooperative migration control policies suggests that at least in some cases both sponsor and partner States may be unwilling rather than unable to realise the socio-economic rights of people on the move.

4. CONCLUSION

This chapter first presented some examples of the plight of people on the move in partner States in the Mediterranean, the Asia Pacific and the Americas. They showed that many people on the move in partner States risk suffering violations of their socio-economic rights, such as lack of access to education and health care, labour exploitation, and an inadequate standard of living. The analysis then examined migration control

and Spijkerboer (n 113) 622–23; Heaven Crawley and Dimitris Skleparis, 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crisis"' (2018) 44 Journal of Ethnic and Migration Studies 48, 58.

policies themselves, illustrating how multiple measures are implemented in parallel and how their centre of gravity shifts from the Global North to the Global South as sponsor States seek to avoid their obligations towards people on the move by increasingly cooperating with partner States in the Global South. It also identified four forms of cooperation: people transfers, the provision of funding, training and equipment, information sharing, and diplomatic relations and development aid conditionality. The analysis further concluded that the relation between violations of the socio-economic rights of people on the move in partner States and cooperative migration control measures depends on the causal link between the two and the question whether States are unable or unwilling to realise the socio-economic rights of people on the move affected by these policies. The coexistence of multiple measures that results in the containment of people on the move in the Global South is relevant insofar as it can prevent people on the move from leaving the Global South altogether. What measures are implemented and what effects they have on the rights of people on the move depends on numerous factors such as geography, available resources, wider geopolitical considerations and legal constraints. Therefore, some policies may be easier to implement in one setting than in another, which arguably accounts for the variety of policies examined, notwithstanding the numerous similarities across various regions.

This chapter also revealed the importance of time when discussing these issues. Indeed, the plight of people on the move changes over time. On the one hand, the examples of Indonesia, Nauru and Mexico illustrated that prolonged periods of rights deprivation tend to worsen the plight of people on the move. On the other hand, the increasing number of Syrian children who attend school in Turkey suggests that the passing of time can lead to an increase in the level of rights realisation. Moreover, cooperative migration control measures themselves change over time in response to various factors, notably changing migration routes and legal developments. The different ways in which sponsor States cooperate with the same partner States over time illustrates this, as well as the fact that sponsor States continuously seek new partner States to cooperate with. Finally, this chapter highlighted some of the difficult issues raised by cooperative migration control that underlie this study. In particular, it highlighted the importance of the causal link between migration control measures and the plight of people on the move in partner States, as well as the question whether States are unwilling or unable to realise their socio-economic rights. As the next chapter shows, these considerations play a role in determining States' obligations towards people on the move under international human rights law.

CHAPTER III
CONCEPTUALISING STATE OBLIGATIONS TOWARDS PEOPLE ON THE MOVE

1. INTRODUCTION

The previous chapter traced the development of cooperative migration control and its impact on the socio-economic rights of people on the move. It showed that sponsor States in the Global North increasingly cooperate with partner States in the Global South to stem migration flows without triggering their obligations towards people on the move. This raises the question to what extent this endeavour is successful. Therefore, the first research question that this study seeks to answer is: what is the scope of States' international obligations as regards the socio-economic rights of people on the move in the context of cooperative migration control? This and the following two chapters address this issue. This chapter proposes a conceptualisation of State obligations which provides the background for the next two chapters, which will examine the obligations of partner States and sponsor States respectively. In other words, while Chapter III analyses various concepts and principles that serve to delimit the scope of States' obligations at a general level, Chapters IV and V apply its findings to partner and sponsor States in the context of cooperative migration control.

As this chapter proposes a general conceptualisation of State obligations regarding socio-economic rights under international human rights law, it takes the ICESCR as its starting point. As the following analysis will show, the guidance provided by the CESCR is an important but not determining factor in interpreting States' obligations. Other international and regional human rights treaties, especially the ICCPR, as well as the interpretations offered by their respective monitoring bodies, also play an important role. Where relevant, the analysis further takes into account the New York Declaration and Global Compacts and examines the publications of leading experts in the field to help clarify the scope of States' obligations.

Section 2 starts by discussing the preliminary issue of the relation between economic, social and cultural rights on the one hand and civil and political rights on the other. It seeks to transcend the traditional dichotomy between the two categories of rights by showing the relevance of each category for the other. This starting point has important consequences for the way we conceptualise State obligations regarding socio-economic rights. Indeed, Section 3 examines how the due diligence standard of conduct, which requires States to take reasonable measures to avoid reasonably

foreseeable human rights violations, ultimately delimits State obligations regarding socio-economic as well as civil and political rights. Section 4 builds on this analysis and discusses to what extent core socio-economic rights impose obligations on States in the context of cooperative migration control. Section 5, which focuses on the principle of non-discrimination, addresses the fact that people on the move are non-nationals. It examines to what extent States are allowed to differentiate between people on the move and their own nationals. Finally, Section 6 addresses the role of territory, jurisdiction and 'international assistance and cooperation' in determining the scope of States' obligations under international human rights law. It finds that there are three types of obligations: the direct obligations of partner States on whose territory people on the move find themselves; the direct obligations of sponsor States when they exercise extraterritorial jurisdiction; and sponsor States' global obligations of international assistance and cooperation. Section 7 concludes the chapter with an overview that provides the starting point for the detailed discussion of partner and sponsor States' obligations towards people on the move in the following chapters.

2. THE RELATION BETWEEN SOCIO-ECONOMIC RIGHTS AND CIVIL AND POLITICAL RIGHTS

Chapter II demonstrated that cooperative migration control policies often lead to violations of the socio-economic rights of people on the move contained in partner States in the Global South, such as Libya, Nauru and Mexico. Yet existing scholarship pays scant attention to the effect of migration control on the socio-economic rights of those it affects, focusing rather on violations of their civil and political rights. However, as this section shows, the two sets of rights are closely related: socio-economic rights can be relevant for civil and political rights and vice versa. Exploring the relation between them can provide a fuller picture of the scope of States' obligations towards people on the move under international human rights law, whereas focusing on one or the other can lead to an incomplete analysis. Moreover, a socio-economic rights perspective can blow new life into old debates on issues such as States' extraterritorial obligations.

Therefore, the interpretation of socio-economic rights and States' corresponding obligations proposed in this study takes as its starting point the oft-stated mantra that human rights are 'universal, indivisible, and interdependent and interrelated.'[1] Indeed, as the Universal Declaration of Human Rights included both civil and political rights and economic, social and cultural rights, it indicated the interwoven nature of both sets of rights.[2] Although disagreements during negotiations over a binding

1 Vienna Declaration and Programme of Action, para 5.

2 Ioana Cismas, 'The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 452.

human rights treaty during the Cold War led to two separate instruments, the ICCPR and the ICESCR, their drafting process can also be seen as a constant reaffirmation of the interdependence and indivisibility of human rights.[3] Thus, many debates about whether socio-economic rights are human rights and whether they are justiciable are now largely surpassed.[4] More generally, the interdependence and indivisibility of human rights 'has become a leading axiom in the international human rights discourse.'[5] Accordingly, this analysis seeks to transcend the dichotomy between civil and political rights on the one hand and socio-economic rights on the other hand. Indeed, numerous human rights instruments, often more recent than the two covenants, include both types of rights.[6] The Refugee Convention likewise grants refugees socio-economic as well as civil and political rights.[7] Furthermore, the prohibition of discrimination, a key principle of human rights law, features at the intersection of both sets of rights.[8]

Two norms protecting civil and political rights are particularly relevant to socio-economic rights in the context of cooperative migration control policies: the right to life and the prohibition of torture and other forms of ill-treatment. The *right to life* clearly applies to people on the move.[9] It includes the right to enjoy a life with

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3 Ibid 454.

4 Katharine G Young, 'Waiting for Rights: Progressive Realization and Lost Time' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019) 656; Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 29.

5 Theo van Boven, 'Categories of Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2017) 140. See for instance 'Final Act of the International Conference on Human Rights: Proclamation of Teheran' (13 May 1968) UN Doc A/CONF. 32/41, para 13; Declaration on the Right to Development; CESCR, 'General Comment No 2 on International Technical Assistance Measures' (2 February 1990) UN Doc E/1990/23, para 6; 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) para 13; UNGA Res 60/251 (3 April 2006) (establishing the UN Human Rights Council), preambular para 3; CRC Committee, 'General Comment No 19 on Public Budgeting for the Realization of Children's Rights' (20 July 2016) UN Doc CRC/C/GC/19, para 30.

6 See for instance, at the international level: CRC; ICRMW; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Convention on the Rights of Persons with Disabilities (CRPD) (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3. At the regional level see: ACHPR; ACHR; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No 69; Arab Charter on Human Rights (adopted 15 September 1994) (2005) 12 IHRR 893; Charter of Fundamental Rights of the European Union [2007] OJ C303/1. Within the Council of Europe, where different instruments on civil and political rights and on economic, social and cultural rights have been adopted, the Additional Protocol to the ECHR includes socio-economic rights such as the rights to property (Article 1) and education (Article 2): Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS No 9.

7 Articles 17–24 Refugee Convention.

8 Olivier De Schutter, 'Introduction' in Olivier de Schutter (ed), *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2013) xvii; Cismas (n 2) 469. See also Section 5 below.

9 HRC, 'General Comment No 15 on the Position of Aliens under the Covenant' (11 April 1986) UN Doc HRI/GEN/1/Rev.9 (Vol I), para 7: 'Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life.' In the Global Compact for Migration States also recognised

dignity.[10] Article 6 CRC requires States to 'ensure to the maximum extent possible the survival and development of the child.' With regard to children the right to life thus includes both survival and development, which in turn overlaps with socio-economic rights such as the rights to food, health and education. Moreover, States have the obligation to protect children from harm arising both from civil and political rights and from economic, social and cultural rights violations, including physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.[11] The IACtHR likewise interprets the rights to life and humane treatment as entitling individuals to a dignified life.[12]

Indeed, the *prohibition of torture and other forms of ill-treatment* also plays an important role in determining State obligations towards people on the move. Various courts and treaty bodies have recognised that a situation of material deprivation, which violates the right to an adequate standard of living, could raise issues under the prohibition of inhuman and degrading treatment.[13] For instance, in *MSS v Belgium and Greece* the ECtHR held that:

> the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. (…) such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.[14]

This illustrates the interdependence and indivisibility of civil and political rights and economic, social and cultural rights, as the same factual situation can amount to a

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that they 'must save lives and keep migrants out of harm's way.' Global Compact for Migration, para 13; see also Objective 8 on saving migrant lives.

10 HRC, General Comment 36, paras 3 and 26. In a recent decision concerning a person on the move the HRC also recognised that the effects of climate change could be so severe as to amount to a violation of the rights to life and the prohibition of torture and cruel, inhuman or degrading treatment: HRC, *Ioane Teitio v New Zealand* Communication No 2728/2016 (24 October 2019) para 9.11.

11 Article 19(1) CRC; African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49, art 16(1).

12 IACtHR, *Street Children* para 144. See also Tara J Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (CUP 2008) 388.

13 See for instance ECtHR, *Larioshina v Russia* [Admissibility] App No 56869/00 (23 April 2002), para 3; UK House of Lords, *R v Secretary of State for the Home Dept, Ex p Adam* [2005] UKHL 66, paras 7–9 (Lord Bingham); Court of Justice of the European Union (CJEU) *Joined cases of NS v UK and ME v Ireland* C-411–10 and C-493–10 (21 December 2011); ECtHR, *Tarakhel v Switzerland* [GC] App No 29217/12 (4 November 2014); HRC, *Warda Osman Jasin and others v Denmark* Communication No 2360/2014 (4 September 2015) paras 8.8–8.10; HRC, *Abdilafir Abubakir Ali and others v Denmark* Communication No 2409/2014 (29 March 2016) paras 7.7–7.8; CJEU, *Bashar Ibrahim and others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov* Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 (19 March 2019); CJEU, *Abubacarr Jawo v Bundesrepublik Deutschland* C-163/17 (19 March 2019).

14 ECtHR, *MSS v Belgium and Greece* [GC] App No 30696/09 (21 January 2011) para 263.

violation of both sets of rights. Likewise, Article 10(1) ICCPR provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' This right applies to non-citizens.[15] Therefore, States detaining people on the move must provide adequate sanitary, bathing and shower facilities; adequate food and drinking water; access to qualified medical personnel; and ensure that people on the move are not subjected to any form of inhumane treatment.[16]

Finally, other civil and political rights can impose obligations on States towards people on the move that contribute to the realisation of their socio-economic rights, such as the right to education. This was the case in the IACtHR judgment of *Yean and Bosico v Dominican Republic*, which concerned the inability of children of Haitian descent to enrol in school because they lacked a birth certificate. The IACtHR found that the Dominic Republic had violated their rights to nationality, to equal protection, to a name and to juridical personality.[17] It also held that the State 'should comply with its obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage'.[18]

Moreover, although the concepts of maximum available resources and progressive realisation are only mentioned explicitly in a few human rights treaties[19], they play a role for all human rights.[20] Thus, the prohibition of torture not only requires State agents not to torture, but it also includes the obligation to adopt concrete measures to prevent and sanction torture, such as training border guards and police officers.[21] This, in turn, requires both resources and time, as a result of which civil and political rights are also, to some extent, subject to progressive realisation and available resources.[22] The

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15 HRC, General Comment 15, para 7; Article 17(1) ICRMW; Article 37(c) CRC. In the Global Compact for Migration States recognised that immigration detention is not to be used as a form of cruel, inhumane or degrading treatment to migrants: Global Compact for Migration, para 29(c).

16 CMW, 'General Comment No 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families' (28 August 2013) UN Doc CMW/C/GC/2, para 36. See also Global Compact for Migration, para 29(f): '(…) guaranteeing (…) that, as a minimum, access to food, basic healthcare, legal orientation and assistance, information and communication, as well as adequate accommodation is granted, in accordance with international human rights law.'

17 IACtHR, *Girls Yean and Bosico v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs) Series C No 130 (8 September 2005) paras 260(2) and (3).

18 Ibid para 244.

19 See for instance Article 2(1) ICESCR; Article 4 CRC; Article 4(2) CRPD; Article 26 ACHR; Article 1 Protocol of San Salvador.

20 For a detailed discussion of the nature of State obligations under the ICESCR and instruments protecting civil and political rights see Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) ch IV.

21 Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2017) 98. See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, arts 2–16; International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, arts 3–25.

22 See Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156, 172.

New York Declaration, the Global Compact on Refugees, the Comprehensive Refugee Response Framework[23] and the Global Compact for Migration reflect this as they include references to different national realities, capacities and levels of development.[24]

Immediate obligations also include an element of time insofar as duration can play a role when determining whether a right has been violated. The answer to the question whether the threshold of severity for inhuman or degrading treatment has been reached depends on the duration of the deprivation. For instance, in *ZA and Others v Russia* the extremely long duration of asylum seekers' confinement in a Moscow airport transit zone contributed to the ECtHR's finding that Article 3 ECHR had been violated.[25] In the UK, Lord Bingham found that severe deprivation could amount to inhuman and degrading treatment 'if there were persuasive evidence that a late applicant was obliged to sleep in the street, *save perhaps for a short and foreseeably finite period*, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene'.[26] Immigration detention likewise illustrates the importance of duration for determining the scope of States' obligations:

> Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual (…).[27]

The New York Declaration and Global Compact on Migration also clarify that immigration detention must be 'for the shortest possible period of time'.[28] In other words, the duration of rights deprivation must not be disproportionate.[29]

Furthermore, the CESCR has developed the typology of obligations to respect, protect and fulfil human rights to help clarify the scope of States' obligations under the ICESCR.[30] It flows from conceptualisations proposed by scholars in the 1980s[31] which

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23 The Comprehensive Refugee Response Framework is found in Annex I to the New York Declaration. It also constitutes an integral part of the Global Compact on Refugees. See Global Compact on Refugees, para 10.

24 New York Declaration, paras 8, 21 and 68; Comprehensive Refugee Response Framework, paras 5 and 13; Global Compact on Refugees, paras 1, 4, 32 and 50; Global Compact for Migration, paras 15 and 41.

25 ECtHR, *ZA and Others v Russia* [GC] Apps Nos 61411/15, 61420/15, 61427/15 and 3028/16 (21 November 2019) para 194.

26 UK House of Lords, *R v Secretary of State*, *Ex p Adam* para 9 (emphasis added).

27 HRC, 'General Comment No 35 on Liberty and Security of Person' (16 December 2014) UN Doc CCPR/C/GC/35, para 18.

28 New York Declaration, para 33; Global Compact for Migration, para 29.

29 Young, 'Waiting for Rights' (n 4) 674.

30 For a detailed analysis of typologies of State duties under the ICESCR see Sepúlveda (n 20) ch V.

31 See for instance Henry Shue, *Basic Rights, Subsistence, Affluence and US Foreign Policy* (Princeton University Press 1980); UN Commission on Human Rights, 'Report on the Right to Adequate

Eide imported into the UN system.[32] The CESCR adopted the tripartite typology[33] and it is widely supported by human rights experts[34] and commentators.[35] The *obligation to respect* is a negative obligation not to interfere with existing levels of enjoyment of socio-economic rights.[36] The *obligation to protect*, in turn, is a positive obligation to 'intervene in order to control the conduct of non-State actors'.[37] Finally, the *obligation to fulfil* imposes on States the positive obligation to 'take proactive steps to move towards the full realisation of the right.'[38] As regards the right to health, for instance, States' obligation to respect the right to health of people on the move requires them to refrain from denying or limiting their access to health services.[39] The obligation to protect the right to health includes the duty to ensure equal access to health care and health-related services provided by third parties.[40] The obligation to fulfil the right to health, in turn, requires States *inter alia* to:

> ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions.[41]

Other treaty bodies have likewise recognised that States' obligations under international human rights law have various dimensions, regardless whether they concern socio-economic or civil and political rights. The HRC held that under Article 2(1) ICCPR States have a general obligation to respect and ensure human rights, and this obligation

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Food as a Human Right Submitted by Mr Asbjørn Eide, Special Rapporteur' (7 July 1987) UN Doc E/CN.4/Sub.2/1987/23.

32 De Schutter, 'Introduction' (n 8) xvii; Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff 2004) 28–29.

33 See for instance CESCR, 'General Comment No 12 on the Right to Adequate Food' (12 May 1999) UN Doc E/C.12/1999/5, para 15; CESCR, General Comment 14, paras 34–37; CESCR, General Comment 24, paras 10–24 and 29–37.

34 See for instance 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 Human Rights Quarterly 691, para 6; 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2011) 29 Netherlands Quarterly of Human Rights 578, principles 19–35; UN Human Rights Council, 'Annex to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Investigation into the Unlawful Death of Mr Jamal Khashoggi' (19 June 2019) UN Doc A/HRC/41/CRP.1, para 330.

35 See for instance Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentaries* (2nd edn, CUP 2014); Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2010) 96–98; Mégret (n 21); Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) and references cited there.

36 De Schutter, 'Introduction' (n 8) xvii.

37 Ibid.

38 Ibid.

39 CESCR, General Comment 14, para 34.

40 Ibid para 35.

41 Ibid para 36.

is both negative and positive.[42] Its references to obligations to respect[43], protect[44] and ensure[45] can be seen as largely equivalent to the doctrine developed by the CESCR. Regional treaty bodies use similar typologies. The IACtHR distinguishes between States' obligation to respect the rights and freedoms recognised in the ACHR and their duty to ensure the exercise of the latter.[46] The ECtHR interprets Article 1 ECHR as imposing both negative and positive obligations on States.[47] The African Commission on Human and Peoples' Rights, in turn, identified four obligations of States: to respect, protect, promote and fulfil human rights, which 'universally apply to all rights and entail a combination of negative and positive duties.'[48] Thus, similar typologies of obligations apply to socio-economic and to civil and political rights alike.

Furthermore, the different types of obligations apply in parallel. Indeed, while the obligation to respect applies primarily to State organs, the obligation to protect is relevant for the regulation of private actors, who, in the context of privatisation, may carry out the same tasks as State organs. The State also has an obligation to fulfil by 'jumping in' when, for instance, economic incentives do not suffice to realise human rights adequately. Moreover, a government's legislation, policy and resource spending ultimately define what resources are available for realising socio-economic rights, how they are spent, and whether the private sector plays a role in the provision of services like health care, education or housing. In other words, the realisation of human rights is multi-faceted and imposes parallel obligations on States. Therefore, the distinction between different types of obligations is of limited relevance to this study, as ultimately the State has an overarching obligation to realise socio-economic rights, and this study is concerned with the scope rather than the nature of this general obligation. Thus, it refers to the generic 'obligation to realise socio-economic rights' which encompasses obligations to respect, protect and fulfil socio-economic rights. The differentiation between different types of obligations can be useful, however, in order to determine whether a State complied with its obligations in a specific situation.

In sum, States' obligation to comply with their obligations to realise the civil and political rights of people on the move can imply an obligation to realise their socio-economic rights. States' obligations under norms protecting civil and political rights,

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42 HRC, 'General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, paras 3 and 6.

43 Ibid paras 3, 5, 10 and 12.

44 See for instance HRC, General Comment 35, paras 7, 9 and 54; HRC, General Comment 36, paras 18–31.

45 See HRC, General Comment 31, paras 3, 5, 8, 10, 12, 15, and 18.

46 IACtHR, *Velásquez-Rodríguez v Honduras* (Merits) Series C No 4 (29 July 1988), paras 165–166. See also De Schutter, *International Human Rights Law* (n 35) 451–52.

47 David J Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 18. See for instance ECtHR, *Marckx v Belgium* App No 6833/74 (13 June 1979) para 31; ECtHR, *Airey* para 32; ECtHR, *Abdulaziz, Cabales and Balkandali v UK* Apps Nos 9214/80, 9473/81 and 9474/81 (28 May 1985) para 67.

48 AComHPR, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* Communication No 155/96 (13–27 October 2001) para 44, see also paras 45–47.

especially the right to life and the prohibition of torture and other forms of ill-treatment, are relevant for socio-economic rights. Yet the opposite is also true: States' obligations regarding socio-economic rights can inform the interpretation of their obligations under civil and political rights instruments. A perspective that focuses on socio-economic rights reveals the importance of the concepts of available resources and progressive realisation, and highlights the different dimensions of States' obligations towards people on the move. However, in order to determine the scope of States' obligations, the due diligence standard of conduct may ultimately be more useful than typologies of rights and obligations.

3. DUE DILIGENCE AND STATE OBLIGATIONS TOWARDS PEOPLE ON THE MOVE

While the doctrine of obligations to respect, protect and fulfil serves to grasp the multi-faceted nature of States' obligations under international human rights law, it is of limited help when determining their scope, which is the question this study seeks to answer. The concept of due diligence proves useful in answering that question. Therefore, this section first discusses due diligence in international human rights law in general terms, before applying it to the context of cooperative migration control.

Due diligence plays a role in various areas of international law, including not only international human rights law but also international environmental law.[49] Commentators disagree about its role and nature in international law.[50] Some authors contend that it is a general principle of international law[51], while others argue that it is rather a standard of conduct by reference to a pre-existing rule of international law.[52] In international human rights law, due diligence is mostly used as a standard

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49 See for instance ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* Judgment (9 April 1949) ICJ Reports 1949, 4, 22; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment (19 December 2005) ICJ Reports 2005, 168, para 250; ICJ, *Genocide* para 430; ICJ, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment (20 April 2010) ICJ Reports 2010, 14, paras 101, 187, 197 and 209; International Law Commission, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' in International Law Commission, 'Report of the International Law Commission on the Work of its 53rd Session' (2001) UN Doc A/56/10, art 3. See also Duncan French and Tim Stephens, 'International Law Association Study Group on Due Diligence in International Law: First Report' (7 March 2014).

50 Neil McDonald, 'The Role of Due Diligence in International Law' (2019) 68 International & Comparative Law Quarterly 1041, 1043.

51 See for instance Robert P Barnidge Jr, 'The Due Diligence Principle under International Law' (2006) 8 International Community Law Review 81; Tim Stephens and Duncan French, 'ILA Study Group on Due Diligence in International Law: Second Report' (July 2016); Anja Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?' (2017) 60 German Yearbook of International Law 667; Vassilis P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 Michigan Journal of International Law 129.

52 See for instance McDonald (n 50).

of conduct that helps determine whether a State complied with its obligations.[53] It has received particular attention as regards obligations to protect against harm committed by non-State actors. In that context, due diligence requires States 'to use all reasonable means at their disposal to prevent or to remedy the reasonably foreseeable human rights violations caused by others.'[54]

Human rights treaty bodies often apply the due diligence standard when determining whether States complied with obligations to protect under human rights treaties. The IACtHR held that conduct that violates human rights 'can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'[55] The HRC likewise established that human rights violations can arise 'as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.'[56] The AComHPR similarly stated that a State can be held responsible if it fails to exercise due diligence to prevent killings by non-State actors or to ensure proper investigation and accountability.[57] The due diligence standard has received particular attention in the context of State obligations to protect against harm committed by transnational corporations.[58] Due diligence may also apply to businesses themselves which may have to carry out human rights due diligence.[59] However, the due diligence standard also applies to the obligation to protect in other contexts, including migration.[60] Moreover, the due diligence standard is relevant beyond the obligation to protect from harm caused by others. The ECtHR

53 See Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 577; Carla Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German Law Journal 459, 464; Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' (2020) 9(1) ESIL Reflections 1, 4.

54 Ferstman (n 53) 483.

55 IACtHR, *Velásquez-Rodríguez v Honduras* para 172. See also IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17 (15 November 2017) para 123.

56 HRC, General Comment 31, para 8. See also HRC, General Comment 36, paras 7 and 21.

57 AComHPR, *General Comment No 3 on the Right to Life* (18 November 2015) (Pretoria University Law Press 2015) para 9.

58 Ferstman (n 53) 465; Daria Davitti, 'Beyond the Governance Gap: Accountability in Privatized Migration Control' (2020) 21 German Law Journal 487, 499.

59 On businesses and due diligence see Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.Principle 17. See also Davitti (n 58).

60 See for instance UNGA, 'Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions: Unlawful Death of Refugees and Migrants' (15 August 2017) UN Doc A/72/335, paras 16 and 56; UN Human Rights Council, 'Investigation into the Unlawful Death of Mr Jamal Khashoggi' (n 34) paras 330–38; Maastricht Guidelines (n 34), Guideline 18.

has for instance applied a due diligence analysis in cases where the entire violation was committed by State organs.[61]

Due diligence can be defined more generally as a requirement to *take reasonable measures to avoid reasonably foreseeable human rights violations*. What is expected of States depends on the obligation in question and the specific context to which it applies. Indeed, there is not a single standard of due diligence that applies to all primary norms, as it has a different content according to the specific area of law to which it is applied.[62] Nevertheless, the due diligence standard applies if 'the duty-bearing State had foreseen or ought to have (reasonably) foreseen the (risk of) harm and had the (reasonable) capacity to intervene.'[63] The due diligence standard is particularly relevant for obligations under Article 2(1) ICESCR, which links States' obligation to realise socio-economic rights to their available resources and recognises that they must be realised progressively. In other words, to some extent what can be expected of States varies according to their economic circumstances and available resources. Thus, whereas the due diligence standard never permits non-compliance with the absolute and non-derogable prohibition of torture, it accepts that Global South States may achieve lower levels of realisation of socio-economic rights without breaching their obligations under international human rights law. Therefore, with regard to socio-economic rights, 'it is important to distinguish the inability from the unwillingness of a State party to comply' with its obligations.[64] On the one hand, a State which is unwilling to use the maximum of its available resources to realise socio-economic rights is in violation of its obligations under the ICESCR.[65] On the other hand, resource constraints or other factors may render a State unable to comply fully with its obligations under the ICESCR, although it may be willing to do so. At a general level, given the disparities in available resources between the Global South and the Global North, sponsor States are likely to have more far-reaching obligations than partner States.

Importantly, the occurrence of a human rights violation is separate from the State's compliance with the due diligence standard. If a State failed to comply with the due diligence standard although no violation occurred, it still breached its obligations under international human rights law. Vice versa, if a human rights violation occurred despite the fact that the State acted with due diligence, it did not breach its obligations under international human rights law. The CESCR confirmed that a State's failure to comply

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61 Seibert-Fohr (n 51) 683. See for instance ECtHR, *McCann v UK* App No 18984/91 (27 September 1995) paras 211–213; ECtHR, *Makaratzis v Greece* App No 50385/99 (20 December 2004) para 71; ECtHR, *Andronicou and Constantinou v Cyprus* App No 25052/94 (9 October 1997) paras 187–88.

62 Stephens and French (n 51) 4, 20 and 22.

63 Besson (n 53) 5.

64 CESCR, General Comment 12, para 17; CESCR, General Comment 14, para 47; CESCR, 'General Comment No 15 on the Right to Water' (20 January 2003) UN Doc E/C.12/2002/11, para 41; see also CESCR, 'General Comment No 18 on the Right to Work' (24 November 2005) UN Doc E/C.12/GC/18, para 32.

65 CESCR, General Comment 14, para 47; CESCR, General Comment 15, para 41; see also CESCR, General Comment 18, para 32.

with the due diligence standard can breach its obligations under the ICESCR even if other causes have also contributed to the occurrence of the violation.[66]

Ultimately, two questions must be answered to determine whether a State complied with the due diligence standard:

1. Is a human rights violation reasonably foreseeable?
2. Did the State take reasonable measures to avoid it?

Each question corresponds to one of the requirements inherent in the due diligence standard: knowledge and ability.[67] As regards the *first question*, the due diligence standard only requires a State to act or withhold from acting if a human rights violation is *reasonably foreseeable*. If the harm is not reasonably foreseeable, the State has no obligation to take reasonable measures to avoid it. In that case, the State did not breach its obligations under international human rights law even if it did not take any measures. The 'reasonable foreseeability' requirement is well-established in international human rights law. The CESCR established that the responsibility of the State can be engaged 'even if the State had not foreseen that a violation would occur, provided such a violation was reasonably foreseeable.'[68] Likewise, the HRC held that States' obligation to ensure the right to life 'extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.'[69] At the regional level, the ECtHR also established that a State incurs obligations under the ECHR when it knew or should have known about a risk of human rights violations.[70] Causation indirectly plays a role in the standard of reasonable foreseeability: the closer the causal link between a State's conduct and a human rights violation, the more foreseeable it is. In other words, the closeness of the causal connection between a State and a human rights violation influences the scope of consequences that a State must take into account when acting. This does not mean, however, that a State necessarily incurs obligations when there is a sufficiently close causal link between a State's conduct and an *actual* human rights violation. Rather, under the due diligence standard, an obligation exists when there is a causal link between a State's conduct and a *reasonably foreseeable* violation. As noted earlier, whether the human rights violation itself occurs is irrelevant when determining whether the State complied with the due diligence standard.

The *second question* concerns a State's *ability* to take measures to avoid human rights violations: what measures are considered reasonable depends on the State's ability or capacity to take them.[71] It only requires answering if the answer to the

66 CESCR, General Comment 24, para 32.

67 See Vassilis P Tzevelekos and Elena Katselli Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) 86 Nordic Journal of International Law 427, 469.

68 CESCR, General Comment 24, para 32.

69 HRC, General Comment 36, para 7; see also paras 21 and 22.

70 See for example ECtHR, *Osman v UK* [GC] App No 23452/94 (28 October 1998) para 116; ECtHR, *Opuz v Turkey* App No 33401/02 (9 June 2009) para 131.

71 See Ferstman (n 53) 483.

first question is positive, since a State only incurs obligations regarding reasonably foreseeable violations. If a violation is reasonably foreseeable and the State did not take reasonable measures to avoid it, it failed to comply with its obligations under international human rights law. However, if a human rights violation is reasonably foreseeable and the State took reasonable measures, it complied with the due diligence standard, even if the violation materialises. In the *Genocide* case the ICJ held that the obligation to prevent genocide requires States 'to employ all means reasonably available to them, so as to prevent genocide so far as possible.'[72] It also confirmed that a State's capacity to influence is relevant when assessing whether a State complied with the due diligence standard.[73] Various human rights monitoring bodies have recognised that the due diligence standard requires States to take reasonable measures to avoid human rights violations. Under the ICESCR, 'a State party would be in breach of its obligations under the Covenant where the violation reveals a failure by the State to take reasonable measures'.[74] The HRC similarly held that States parties to the ICCPR have 'a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life (…).'[75] The IACtHR established that the State 'has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal' to investigate and remedy such violations.[76] Likewise, States' obligations under the ECHR 'must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.'[77] Therefore, when faced with a risk of harm, States must 'take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'[78]

More generally, the reasonableness element that plays a role in both the knowledge and the ability requirement is not exclusive to the due diligence standard. Rather, it echoes a more general criterion that is prevalent in international human rights law. Indeed, reasonableness is often used to assess compliance with States' obligations under international human rights law.[79] For instance, the standard of review under the ICESCR is the reasonableness standard.[80] Article 8(4) Optional Protocol to the ICESCR

72 ICJ, *Genocide* para 430.

73 Ibid.

74 CESCR, General Comment 24, para 32.

75 HRC, General Comment 36, para 21 (reference omitted).

76 IACtHR, *Velásquez-Rodríguez* para 174.

77 ECtHR, *Osman* para 116.

78 Ibid.

79 UN Human Rights Council, 'The Use of the "Reasonableness" Test in Assessing Compliance with International Human Rights Obligations' (1 February 2008) UN Doc A/HRC/8/WG.4/CRP.1.

80 CESCR, Statement on the Obligation to Take Steps to the 'Maximum of Available Resources', paras 8 and 11; see also Brian Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 Human Rights Law Review 275; Rodrigo Uprimny, Sergio Chaparro Hernández and Andrés Castro Araújo, 'Bridging the Gap: The Evolving Doctrine on ESCR and "Maximum Available Resources"' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019) 652.

thus states that 'the Committee shall consider the reasonableness of the steps taken by the State Party'.[81] Domestic States have likewise used the reasonableness test to assess governmental policies regarding socio-economic rights.[82] Reasonableness also plays a role in the principle of non-discrimination.[83]

In the context of cooperative migration control, both partner and sponsor States can have obligations towards people on the move affected by such measures.[84] The fact that multiple States can have obligations towards the same person raises the twin questions of how the multiplicity of duty-bearers relates to a single human rights violation and how the due diligence standard applies to situations involving multiple duty-bearers. More specifically, three issues arise. First, the existence of obligations under international human rights law depends on what treaties States have ratified. Each State involved in cooperative migration control has ratified various human rights instruments, often resulting in similar obligations arising from multiple sources. For instance, Mexico has overlapping obligations under international instruments like the ICCPR and ICESCR, on the one hand, and regional instruments like the ACHR and the Protocol of San Salvador on the other hand. In addition, treaties that protect certain categories of people on the move, such as the CRC and the ICRMW, impose similar obligations on States. In other words, a State may have obligations towards people on the move affected by cooperative migration control under various treaties, whose scope of protection may overlap but also differ in certain aspects. Furthermore, not all States involved in cooperative migration control have ratified the same treaties, which further complicates the assessment. For instance, while Mexico is a party to most international and regional human rights instruments, the USA has not acceded to the ICESCR nor most other human rights treaties.[85] Second, the scope of obligations under the same treaty can vary between States, since according to the due diligence standard it depends on what each State can reasonably be expected to do. As regards socio-economic rights, this varies according to their economic circumstances and available resources. In other words, cooperative migration control can give rise to situations where multiple States have varying obligations under multiple treaties. Third, the existence of an obligation and a State's compliance with such an obligation are two different things: the fact that

81 On the CESCR's reasonableness assessment under the Optional Protocol to the ICESCR see Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42 Human Rights Quarterly 48.

82 See for instance Constitutional Court of South Africa, *Grootboom and others v Oostenberg Municipality and others* (2000) 3 BCLR 277 (CC); Constitutional Court of South Africa, *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC). For a discussion of the South African Constitutional Court's use of the reasonableness test see Griffey (n 80) 311–17; Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (CUP 2018) 150–165.

83 See Section 5 below.

84 See Section 6 below.

85 The USA has ratified the ICCPR, CAT and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, and it has signed the ICESCR, CEDAW, CRC, CRPD and ACHR.

a State has certain obligations does not necessarily mean that it complies with these obligations in practice.

This raises the question whether and how the obligations of one State affect those of another State. In the context of this study, this question is particularly relevant as regards the obligations of sponsor States: to what extent does the non-realisation of the socio-economic rights of people on the move by a partner State affect the assessment of what harm is reasonably foreseeable and what reasonable measures a sponsor State can take? At a general level, containing people on the move in partner States in the Global South with limited available resources is likely to lead to reasonably foreseeable violations of their socio-economic rights and hence require sponsor States to take reasonable measures to prevent them. The due diligence standard may require Sponsor States to cooperate as a matter of priority with partner States that have a good track record in terms of socio-economic rights. Moreover, the non-realisation of the socio-economic rights of people on the move by partner States can have multiple causes, which in turn affects what exactly can be expected of sponsor States. First, it is possible that a partner State has *no obligations* because it did not ratify treaties protecting socio-economic rights.[86] For instance, Nauru neither signed nor ratified the ICESCR. Second, a partner State can be *unable* to realise the socio-economic rights of people on the move, for instance due to a lack of resources. Indeed, many partner States, like Guatemala, are unable to realise socio-economic rights more generally. In that case, provided a partner State complied with the due diligence standard, it complied with its obligations, even if the scope of these obligations is minimal in light of its limited available resources. Third, a partner State can be able but *unwilling* to realise the socio-economic rights of people on the move. In that case it fails to take measures that it can reasonably be expected to take and does not comply with its obligations, for instance because it fails to use available resources to realise at least the core-socio-economic rights of people on the move. Therefore, what 'reasonable measures' one can expect sponsor States to take depends on the issue why a partner State does not realise the socio-economic rights of people on the move. The due diligence standard could thus require sponsor States to advocate for a partner State to accede to the ICESCR, to provide funding and assistance when partner States are unable to realise the socio-economic rights of people on the move in partner States, or to use their influence to encourage unwilling partner States to comply with their obligations.

In addition to the availability of resources, the partner State's sovereignty is a factor that determines what reasonable measures can be expected of sponsor States. Sponsor States' obligations to realise the socio-economic rights of people on the move in partner States can conflict with the duty not to interfere in the sovereign order of another State.[87] For instance, if a partner State is unwilling rather than unable to realise the

86 It remains unclear to what extent socio-economic rights have reached customary status and hence bind States that have not ratified relevant human rights treaties. See Chapter IV, Section 1.

87 See Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012) 290–91. On the commercialisation of sovereignty see also Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 39–42.

socio-economic rights of people on the move, it may refuse funding and assistance offered by sponsor States. Likewise, while sponsor States can encourage partner States to ratify treaties protecting the socio-economic rights of people on the move and comply with their obligations, they cannot oblige them to do so. The relationship between a sponsor State and a partner State may further determine to what extent the latter's sovereignty limits the obligations of the former. Indeed, as Australia is able to exercise more influence over Nauru than Indonesia, it is conceivable that Indonesia's sovereignty poses a greater obstacle than Nauru's.[88]

Moreover, the due diligence standard only requires sponsor States to take *reasonable* measures to realise the socio-economic rights of people on the move in partner States, regardless whether such measures suffice to realise their rights in practice. It is possible that the respective obligations of partner and sponsor States do not 'cover' the content of a right, resulting in a gap in human rights protection. In other words, the question whether there has been a human rights violation is different from the question whether States complied with their obligations, as there may be situations where there is a right without a corresponding duty. Thus, 'rights may remain unfulfilled even though duties are met… the enjoyment of rights and the fulfilment of obligations should therefore be considered separately.'[89] Accordingly, this study distinguishes between a breach of an obligation and a violation of a right. A *breach of an obligation* occurs from the perspective of the State: it occurs when the State does not comply with the due diligence standard. A *human rights violation*, on the other hand, takes the perspective of the individual rights-holder. It often corresponds to a breach of an obligation by the State, but this is not necessarily the case. In light of the due diligence standard, and especially where the realisation of the right depends on multiple States, there is not necessarily a one-on-one correspondence between the breach of a State's obligation and the violation of an individual's human rights. A State can breach its obligations by failing to comply with the due diligence standard although there is no a human rights violation. Vice versa, a person can suffer a human rights violation without any State having breached its obligations, provided all States complied with the due diligence standard.

In conclusion, the due diligence standard helps determine the scope of States' obligations under international human rights law. It requires States to take reasonable measures to avoid reasonably foreseeable human rights violations. Thus, two questions must be answered to determine whether a State complied with its obligations: is a human rights violation reasonably foreseeable (knowledge requirement) and did the State take reasonable measures to avoid it (ability requirement)? While the due diligence standard prevents States from incurring an impossible burden, it also creates the possibility for gaps in human rights protection to exist, as the obligations of multiple States may not fully cover the socio-economic rights of people on the move. Furthermore, the concept

88 See Chapter II, Sections 3.1 and 3.2.

89 Sigrun I Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia 2006) 37. See also Mark Gibney, 'Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations' (2011) 3 Global Responsibility to Protect 123.

of core socio-economic rights helps determine the scope of States' obligations towards people on the move.

4. CORE SOCIO-ECONOMIC RIGHTS AND STATE OBLIGATIONS TOWARDS PEOPLE ON THE MOVE

While the due diligence standard helps to delimit the scope of States' obligations in general terms, the core content of socio-economic rights further contributes to determining what minimum effort can be expected of States. It is particularly useful in the context of cooperative migration control where multiple States can have obligations to contribute to the realisation of socio-economic rights. The CESCR developed the concepts of core rights and core obligations in order to help clarify States' obligations under the ICESCR.[90] It has notoriously held in General Comment 3 that:

> a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.[91]

In other words, the CESCR has adopted a baseline perspective in an attempt to establish minimum or core standards of rights protection, below which no person is allowed to fall.[92]

The concept of core has been criticised for its lack of clarity, including its function and relationship to other concepts, such as progressive realisation and the availability of resources.[93] Indeed, the CESCR's approach to core socio-economic rights shifted from 'minimum core content' to 'core obligations'.[94] For instance, the CESCR defined the

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90 Minimum content, core content, essential content and minimum core content are understood to refer to the same concept, referred to as 'core content' throughout this study. Likewise, core obligations and minimum core obligations are understood to refer to the same concept, referred to as 'core obligations'. On core obligations more generally see *inter alia* Audrey R Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 Human Rights Quarterly 23; Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002); Sepúlveda (n 20) 365–70; Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113; Leijten (n 82).

91 CESCR, General Comment 3, para 10.

92 Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 145.

93 Ibid 147; Katharine G Young, 'The Minimum Core of Economic and Social Rights' (n 90) 153–54; Lisa Forman and others, 'Conceptualising Minimum Core Obligations under the Right to Health: How Should we Define and Implement the "Morality of the Depths"?' (2016) 20 The International Journal of Human Rights 531, 540.

94 Lisa Forman and others (n 93) 536.

core content of the right to food as the 'availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;' and the 'accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.'[95] Yet later general comments define core *obligation*s of States rather than the core *content* of the right.[96] This shift seems to imply that the core content of a right is realised if States comply with their corresponding core obligations.

A particular issue concerns the CESCR's inconsistence as regards the nature of core obligations.[97] In certain pronouncements it reiterated its recognition that States can, as a matter of principle, justify non-compliance with core obligations.[98] However, it has also repeatedly held that States' core obligations are non-derogable.[99] Many experts and scholars share the latter interpretation.[100] The absence of a derogation clause in the ICESCR has further been interpreted as meaning that the suspension of socio-economic rights is not permitted.[101] A more nuanced interpretation suggests that core obligations corresponding to basic subsistence rights which are inherently linked to the non-derogable right to life, such as the rights to be free from hunger, basic health care, clothing and basic shelter, are non-derogable, while labour rights may be derogable.[102] If we accept that, under the due diligence standard, a State must only take reasonable measures to avoid reasonably foreseeable human rights violations, the lack of available resources can justify non-compliance with core obligations. This in turn raises the question to what extent the corresponding core content of the right is flexible and dependent on the State's capacity. The core is premised on the assumption that its realisation is affordable for all States. The realisation of the right to water, for instance, 'should be feasible and practicable, since all States parties exercise control over a broad

95 CESCR, General Comment 12, para 8.

96 CESCR, General Comment 14, para 43; CESCR, General Comment 15, para 37; CESCR, General Comment 18, para 31; CESCR, 'General Comment No 23 on the Right to Just and Favourable Conditions of Work' (27 April 2016) UN Doc E/C.12/GC/23, para 65.

97 See Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (OUP 1995) 143; Daniel Moeckli, 'Interpretation of the ICESCR: Between Morality and State Consent' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (OUP 2018) 64–65.

98 CESCR, 'General Comment No 19 on the Right to Social Security' (4 February 2008) UN Doc E/C.12/GC/19, para 60; CESCR, Statement on the Obligation to Take Steps to the 'Maximum of Available Resources', para 6.

99 CESCR, General Comment 14, para 47; CESCR General Comment 15, para 40; CESCR, Statement on Poverty and the ICESCR, paras 16 and 18; CESCR, Statement on Duties of States Towards Refugees and Migrants, para 10.

100 See for instance Maastricht Guidelines (n 34), Guideline 9. See also Eibe Riedel, Gilles Giacca and Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 14. For the opposite view see Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905, 944.

101 Saul, Kinley and Mowbray (n 92) 258.

102 Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights Law Review 557, 599. See also Alston and Quinn (n 22) 216–19.

range of resources, including water, technology, financial resources and international assistance.'[103] Yet the CESCR has also recognised that resource constraints can prevent States from complying with their core obligations:

> In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[104]

Thus, failure to comply with core obligations amounts to a *prima facie* breach of the State's obligations under the ICESCR.[105] While the availability of resources plays a role in determining States' core obligations, the burden of proof is reversed: a State is presumed to have failed to comply with its obligations under the ICESCR if it does not realise core socio-economic rights, unless it can make a convincing case that it lacked resources to do so.[106] In other words, the due diligence standard is more stringent with regard to core obligations.

In the context of cooperative migration control policies, however, two additional issues arise regarding core socio-economic rights. The *first* one concerns the fact that multiple States may have obligations towards people on the move. The CESCR's shift from core content to core obligations seems based on the implicit assumption that each State is responsible for realising the core content of socio-economic rights on its territory. Indeed, most General Comments seem to assume that States' obligations apply principally on their territory.[107] Yet this ignores the fact that other States may also have obligations to contribute to realising socio-economic rights. Therefore, there is not necessarily a direct, one-on-one correspondence between the core content of a right and a State's core obligations. As noted above, the CESCR has clarified that States must seek to realise the core content of socio-economic rights as a matter of priority. The same applies for other States than the territorial State:

> it is particularly incumbent on all those in a position to assist, to provide 'international assistance and cooperation, especially economic and technical' to enable developing countries to fulfil their core obligations. In short, core obligations give rise to national responsibilities for all States and international responsibilities for developed States, as well as others that are 'in a position to assist'.[108]

The CESCR likewise noted with regard to economic sanctions that the international community must do 'everything possible to protect at least the core content of the

103 CESCR, General Comment 15, para 18.
104 CESCR, General Comment 3, para 10.
105 Ibid. See also Maastricht Guidelines (n 34), Guideline 9.
106 De Schutter, 'Introduction' (n 8) xxix.
107 See Section 6.2 below.
108 CESCR, Statement on Poverty and the ICESCR, para 16.

economic, social and cultural rights of the affected peoples'.[109] In other words, the core content of socio-economic rights helps define the scope of the States' territorial and extraterritorial obligations. Both partner States and sponsor States must give priority to the realisation of core socio-economic rights. Various scholars share this view.[110] Nevertheless, as noted in Section 3, the due diligence standard of conduct only requires sponsor and partner States to take reasonable measures to avoid reasonably foreseeable violations. Therefore, depending on the resources available to each State, it is possible that there are no corresponding obligations that fully 'cover' the core socio-economic rights of people on the move, notwithstanding the more stringent standard that applies to core obligations.

The *second* challenge that arises in the context of cooperative migration control concerns the fact that the legal standards developed regarding the core often apply to the population on a State's territory as a whole. This study, however, focuses on State obligations towards a specific group – people on the move – who are not nationals of any of the States involved in migration control. This raises the question to what extent States must realise the core socio-economic rights of these persons in particular. This study suggests that people on the move are in principle entitled to the realisation of their core socio-economic rights, and that States' failure to comply with their core obligations towards them can only be justified if they have made every effort to use all available resources to satisfy, as a matter of priority, those obligations.

The CESCR has confirmed that people on the move are entitled, as a matter of principle, to the realisation of the core content of their rights. When detailing States' core obligations under specific ICESCR provisions, it has repeatedly found that States owe such obligations also to people on the move.[111] More generally, the rights to housing, food and health apply to 'everyone', which presumably includes people on the move.[112] In fact, the CESCR seems reluctant to apply a less stringent standard regarding the non-realisation of core socio-economic rights of people on the move:

> Although States parties to the Covenant should accommodate refugees and migrants' inflows commensurate with the extent of the maximum resources available, they would not, in principle, be justified in restricting the enjoyment of the essential content of the Covenant rights on the basis of a lack of resources, even when confronted with a sudden and quantitatively significant flow of refugees.[113]

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109 CESCR, 'General Comment No 8 on the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (12 December 1997) UN Doc E/C.12/1997/8, para 7.

110 Ashfaq Khalfan, 'Division of Responsibility amongst States' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 322; Wouter Vandenhole and Wolfgang Benedek, 'Extraterritorial Human Rights Obligations and the North-South Divide' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 363.

111 See Chapter IV, Section 3.

112 CESCR, 'General Comment No 4 on the Right to Adequate Housing' (13 December 1991) UN Doc E/1992/23, para 6; CESCR, General Comment 12, para 1; CESCR, General Comment 14, para 1.

113 CESCR, Statement on Duties of States Towards Refugees and Migrants, para 10.

This view finds support in the fact that there is a certain degree of overlap between civil and political rights and socio-economic rights, notably as regards the right to life and the prohibition of torture and other forms of ill-treatment. These rights are not subject to considerations of available resources and progressive realisation in the way that socio-economic rights are. The HRC thus held that:

> Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind (…).[114]

Moreover, the prohibition of torture is absolute[115], non-derogable[116], and there is general agreement that it is both a customary and a *jus cogens* norm.[117] The right to life is also non-derogable[118] although it is not absolute.[119] The HRC has held that it is a norm of customary international law[120], and at least some elements of the right to life may qualify as *jus cogens*.[121] The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has emphasised that the right to life 'applies to both citizens and non-citizens alike on the territory of the State.'[122] In other words, to the extent that the right to life and the prohibition of torture and other forms of ill-treatment overlap with socio-economic rights, they require States to realise these rights at all times, including for people on the move. Whether this also applies to other aspects of core rights remains unclear.

The New York Declaration and Global Compact for Migration can further help clarify the scope of the obligations of partner States towards people on the move. Both instruments are strongly anchored in international human rights law and recognise that States must respect and protect the rights of people on the move.[123] In particular, in

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114 HRC, 'General Comment No 21 on the Humane Treatment of Persons Deprived of their Liberty' (10 April 1992) UN Doc HRI/GEN/1/Rev.1, para 4.

115 Mégret (n 21) 99; Nigel S Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2017) 167.

116 Article 4(2) ICCPR.

117 HRC, 'General Comment No 24 on Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (11 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para 8; Kälin and Künzli (n 35) 70; Rodley (n 115) 167–68.

118 Article 4(2) ICCPR.

119 HRC, General Comment 36, para 10.

120 HRC, General Comment 24, para 8. See also AComHPR, General Comment 3, para 14; UNGA, 'Unlawful Death of Refugees and Migrants' (n 60), para 14; UN Human Rights Council, 'Investigation into the Unlawful Death of Mr Jamal Khashoggi' (n 34) para 193.

121 HRC, General Comment 36, para 68; UNGA, 'Unlawful Death of Refugees and Migrants' (n 60), para 14; UN Human Rights Council, 'Investigation into the Unlawful Death of Mr Jamal Khashoggi' (n 34) para 193.

122 UN Human Rights Council, 'Investigation into the Unlawful Death of Mr Jamal Khashoggi' (n 34) para 355.

123 New York Declaration, paras 5, 6, 11, 16, 22, 26, 41 and 66; Global Compact for Migration, paras 4, 12, 15 and 23. The Global Compact on Refugees, in turn, is 'guided by relevant international human rights instruments', including the ICESCR: Global Compact on Refugees, para 5.

the Global Compact for Migration States 'commit to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services.'[124] During the negotiations, many States noted that they already provided migrants with many rights beyond access to basic services such as health care and education.[125] However, in order to realise their commitments in the Global Compact for Migration, States will draw from a range of actions which are 'considered to be relevant policy instruments and best practices.'[126] This falls short of recognising that all States have specific legal obligations to realise the rights of migrants, and raises the same issue regarding the lack of correspondence between the rights of people on the move on the one hand and the obligations of States on the other hand.

Finally, time also plays a role in determining whether the core content of socio-economic rights has been realised. Non-realisation of core socio-economic rights for a brief period of time, for instance if children cannot attend school for a week in the case of mass influx, is unlikely to amount to a violation of these rights. Yet if such non-realisation persists over longer periods of time, it becomes arbitrary and hence prohibited. This would be the case, for instance, if children cannot attend school for several years.[127] Indeed, although the core is, in principle, not subject to progressive realisation, the duration of rights deprivation is a factor that determines whether the core has been realised or not.

In sum, on the one hand, the foregoing suggests that people on the move are entitled to the realisation at all times of their core socio-economic rights. On the other hand, States' core obligations must accommodate the fact that they may lack sufficient resources. It is thus possible that the States involved in cooperative migration control do not realise the core content of the people on the move while complying with their core obligations. In other words, the possibility exists for the core socio-economic rights of people on the move to remain unrealised because the corresponding obligations of partner and sponsor States do not completely 'cover' the rights in question. However, it is more difficult for States to justify non-compliance with their core obligations. The fact that people on the move are, in principle, entitled to the realisation of their core socio-economic rights, notwithstanding the fact that they are non-nationals, is closely linked to the principle of non-discrimination, which further delimits the scope of States' obligations.

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124 Global Compact for Migration, para 31.

125 Michele Klein Solomon and Suzanne Sheldon, 'The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration' (2018) 30 International Journal of Refugee Law 584, 588.

126 Global Compact for Migration, para 16.

127 The New York Declaration specifies that States committed to ensuring access to education 'within a few months' (paras 32 and 81). The Global Compact on Refugees further provides that '[m]ore direct financial support and special efforts will be mobilized to minimize the time refugee boys and girls spend out of education, ideally a maximum of three months after arrival' (para 68).

5. NON-DISCRIMINATION AND STATE OBLIGATIONS TOWARDS PEOPLE ON THE MOVE

It is a recognised principle under international law that States have the sovereign right to control the entry into and stay of non-nationals on their territory.[128] Yet the States that are allowed to exclude people on the move are also the actors that are tasked with realising human rights. Therefore, there is a tension built into international human rights law between State sovereignty and universal human rights. It is highlighted in the context of migration, as the assumption that States have a sovereign right to exclude non-nationals remains deep-seated.[129] This tension between, on the one hand, the rights of people on the move and, on the other hand, States' sovereign right to control the entry and stay of foreigners on their territory is clearly visible in the ICRMW.[130] It is also visible in the New York Declaration[131] and the Global Compact for Migration[132] and, to some extent, in the Global Compact on Refugees.[133] This raises the question how international human rights law brokers this tension. The principle of non-discrimination provides guidance regarding the extent to which States are allowed to treat people on the move differently on the ground that they are non-nationals.[134] The analysis focuses on discrimination on the ground of nationality, while recognising that other discrimination grounds may also apply to (specific categories of) people on the move.[135]

Discrimination is 'any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the

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128 Among many other examples see: ECtHR, *Abdulaziz, Cabales and Balkandali* para 67; HRC, General Comment 15, para 5; AComHPR, *Union Interafricaine des Droits de l'Homme and others v Angola* Communication No 159/96 (11 November 1997) para 20; IACtHR, *Juridical Condition and Rights of Undocumented Migrants* Advisory Opinion OC-18/03 (17 September 2003) para 119; European Committee of Social Rights, *DCI v the Netherlands* Complaint No 47/2008 (20 October 2009) para 41; Global Compact for Migration, para 15.

129 Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (CUP 2004) 11; Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015) 10.

130 See Articles 34, 35 and 79 ICRMW; see also CMW, General Comment 2, para 13.

131 New York Declaration, paras 21 ('respecting national policies and priorities'), 24 ('Recognizing that States have rights and responsibilities to manage and control their borders (…) States are entitled to take measures to prevent irregular border crossings.') and 42 ('each State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations').

132 Global Compact for Migration, paras 7, 11, 27, 31 and 41.

133 The Global Compact on Refugees underlines the importance of addressing the needs of refugees as well as host communities and societies and to respect the sovereignty of States hosting refugees; see for instance paras 50, 65 and 80.

134 For a detailed discussion of non-discrimination in international human rights law see Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005); on discrimination and the ICESCR see Sepúlveda (n 20) ch VIII.

135 In practice, legal status can be an important ground for discrimination, especially for undocumented people on the move. However, as this study focuses on the broader category of people on the move, it focuses on nationality.

recognition, enjoyment or exercise, on an equal footing, of Covenant rights.'[136] The prohibition of discrimination is included in numerous human rights treaties.[137] The IACtHR has found that the principle of non-discrimination, including on the ground of nationality, is part of customary law and *jus cogens*.[138] However, this view is contested. Commentators have argued that only the right to non-discrimination on the grounds of race, sex and religion has become part of customary international law[139] and that only the prohibition of racial discrimination has acquired *jus cogens* status.[140] It thus remains unclear to what extent the prohibition of discrimination on the ground of nationality is part of customary international law and whether it has reached the status of *jus cogens*. Since all States involved in cooperative migration control have ratified human rights treaties with non-discrimination provisions, the prohibition of discrimination applies in any case by virtue of treaty law.

Article 2(2) ICESCR holds that:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Although it does not explicitly list nationality as a discrimination ground, the CESCR has repeatedly held that the ICESCR prohibits discrimination on grounds of nationality[141] and that the principle of non-discrimination applies to most rights protected by the ICESCR.[142] It prohibits discrimination which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of socio-economic rights.[143] Prohibited discrimination in accessing socio-economic rights amounts to

136 CESCR, 'General Comment No 20 on Non-Discrimination in Economic, Social and Cultural Rights' (2 July 2009) UN Doc E/C.12/GC/20, para 7.

137 See, for example, Articles 2(2) and 3 ICESCR, Articles 2(1) and 26 ICCPR, Article 14 ECHR, Article 24 ACHR, Articles 2 and 3 ACHPR. For an overview see Daniel Moeckli, 'Equality and Non-discrimination' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2017) 151–52.

138 IACtHR, *Juridical Condition and Rights of Undocumented Migrants* paras 100–101.

139 Moeckli, 'Equality and Non-discrimination' (n 137) 152 and references cited there; see also Kälin and Künzli (n 35) 70.

140 Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2017) 73–74; Moeckli, 'Equality and Non-discrimination' (n 137) 152.

141 See CESCR, General Comment 19, para 36; CESCR, General Comment 23, para 65.

142 See for instance CESCR, General Comment 4, para 6; CESCR, General Comment 12, para 18; CESCR, 'General Comment No 13 on the Right to Education' (8 December 1999) UN Doc E/C.12/1999/10, paras 31 and 43; CESCR, General Comment 14, paras 18 and 30; CESCR, General Comment 15, paras 13 and 17; CESCR, General Comment 19, paras 29 and 36.

143 CESCR, General Comment 14, para 18; CESCR, General Comment 15, para 13; CESCR, General Comment 19, paras 29 and 36.

a breach of State obligations under the Covenant.[144] More specifically, as a matter of principle, the ICESCR also applies to non-nationals:

> The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[145]

Likewise, under the ICCPR, 'the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.'[146] Although it remains 'in principle a matter for the State to decide who it will admit to its territory'[147] the HRC has confirmed that 'once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.'[148] Various provisions of the ICRMW also provide that migrant workers and members of their families have access to rights on the basis of equality of treatment with nationals.[149] In principle, then, people on the move are entitled to the realisation of their socio-economic rights.

This does not mean, however, that foreigners have the same rights as nationals, nor that States have the same obligations towards people on the move as towards their own nationals. Indeed, the drafters of the ICESCR did not want Article 2(2) ICESCR to affect States' sovereign right to place conditions on the rights of entry, residence and employment of non-nationals. The interpretive declarations of various States when ratifying the ICESCR indicated that 'they did not interpret Article 2(2) as requiring States to treat foreigners in the same way as nationals in all matters.'[150] The 1985 Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live confirms this: it reaffirms States' right to control the entry and stay of foreigners on their territory.[151] Moreover, only those who are 'lawfully residing' in the territory of a State enjoy socio-economic rights, and these rights are only granted if 'undue strain is not placed on the resources of the State.'[152] In the 2016 New York Declaration, however, States repeatedly recognised that international human rights law

144 CESCR, General Comment 12, para 18; CESCR, General Comment 13, para 59; CESCR, General Comment 14, para 50; CESCR, General Comment 18, paras 32 and 33; CESCR, General Comment 19, para 62; CESCR, General Comment 23, para 77.

145 CESCR, General Comment 20, para 30 (footnotes omitted). See also UN Commission on Human Rights, 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (8 January 1987) UN Doc E/CN.4/1987/17 (annex) para 42.

146 HRC, General Comment 15, para 2.

147 Ibid para 5.

148 Ibid para 6.

149 Articles 25, 26, 28 and 30 ICRMW.

150 Saul, Kinley and Mowbray (n 92) 196–97.

151 Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, art 1.

152 Ibid art. 8.

applies to refugees and migrants and committed themselves to fully respecting and protecting the human rights of all migrants and refugees at all times.[153] Likewise, in the Global Compact for Migration they pledged to 'ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle.'[154] Yet the Global Compact for Migration also 'reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law.'[155] In other words, States have less far-reaching obligations to realise the socio-economic rights of non-nationals than nationals. The CESCR has defined the parameters of what differentiation is permitted as follows:

> Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.[156]

In other words, Article 2(2) ICESCR only prohibits *arbitrary* distinctions based on nationality.[157] The HRC has adopted a similar approach: differentiation of treatment does not constitute discrimination 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'[158] Thus, since socio-economic rights apply to 'everyone', people on the move are in principle entitled to their realisation, and any difference in treatment with nationals must be justified and proportionate to the legitimate objective sought.[159] While a State's available resources can limit the scope of its core obligations, as a matter of principle people on the move are entitled to the realisation of their core socio-economic rights. In the context of migration control, a State could argue that migration control is a legitimate aim for treating irregular people on the move differently from nationals, provided their core socio-economic rights are realised.[160] However, the

153 New York Declaration, paras 5, 6, 11, 16, 22, 26, 41 and 66.

154 Global Compact for Migration, para 15.

155 Ibid.

156 CESCR, General Comment 20, para 13.

157 Saul, Kinley and Mowbray (n 92) 198. See also Sepúlveda (n 20) 384.

158 HRC, 'General Comment No 18 on Non-Discrimination' (10 November 1989) UN Doc HRI/GEN/1/Rev.1, para 13.

159 Elspeth Guild, Stefanie Grant and CA Groenendijk, 'Introduction' in Elspeth Guild, Stefanie Grant and CA Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (Routledge 2018) 5; see also Sepúlveda (n 20) 264, 394; Claude Cahn, 'The Economic, Social and Cultural Rights of Migrants' in Elspeth Guild, Stefanie Grant and CA Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (Routledge 2018).

160 For an overview of State obligations towards people on the move in an irregular situation see OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* (United Nations 2014).

deliberate non-realisation of the core socio-economic rights of people on the move for deterrence purposes is unlikely to qualify as legitimate and proportional.

Furthermore, Article 2(3) ICESCR holds that:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 2(3) is an exception to the prohibition of discrimination in Article 2(2), as it allows developing countries to limit the extent to which they guarantee economic rights to non-nationals.[161] Its purpose was 'to end the domination of certain economic groups of non-nationals during colonial times.'[162] The term 'developing countries' refers to former colonies which gained independence, while 'economic rights' concern rights to participate in economic activity, in particular access to employment.[163] Article 2(3) has not been invoked in practice and has received very little attention by the CESCR and commentators.[164] It is relevant in the context of this study because various partner States, such as Libya and Nauru, are Global South States which are also former colonies. However, Article 2(3) only applies to economic rights and, since it is an exception to Article 2(2) which aimed to redress injustices due to colonialism rather than address migration flows, it should be interpreted narrowly.[165] Therefore, Article 2(3) allows States in the Global South 'to determine the extent to which they will guarantee such rights, without allowing them to deny the enjoyment of such rights entirely.'[166]

The CESCR recently clarified State duties towards refugees and migrants in particular. It confirmed that all people on the move, including asylum seekers, refugees and irregular migrants, should enjoy socio-economic rights.[167] It specified that:

> Any distinction, exclusion, restriction or preference or other differential treatment on grounds of nationality or legal status should therefore be in accordance with the law, pursue a legitimate aim, and remain proportionate to the aim pursued.[168]

The prohibition of discrimination under the ICESCR includes people on the move with irregular status.[169] Under the ICCPR, the enjoyment of human rights must 'be available

161 Saul, Kinley and Mowbray (n 92) 214 and 217.
162 Limburg Principles (n 145), para 43.
163 CESCR, Statement on Duties of States Towards Refugees and Migrants, para 8. See also Saul, Kinley and Mowbray (n 92) 216–17.
164 Saul, Kinley and Mowbray (n 92) 214.
165 Limburg Principles (n 145), para 43. See also Sepúlveda (n 20) 415.
166 CESCR, Statement on Duties of States Towards Refugees and Migrants, para 8.
167 Ibid para 3.
168 Ibid para 5.
169 Ibid para 6.

to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons'.[170]

Non-discrimination also plays a key role in delimiting the scope of States' obligations towards people on the move in other human rights treaties.[171] According to the text of Article 1(2) ICERD, it does not apply to distinctions between citizens and non-citizens.[172] However, the Committee on the Elimination of Racial Discrimination (CERD) has found that differential treatment on the ground of citizenship or immigration status constitutes discrimination if the criteria for the differentiation 'are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.'[173] Likewise, the CRC Committee and the CMW recently confirmed that the principle of non-discrimination applies to all children, including those who are on the move.[174] The committees further specified that any differential treatment of migrant children 'shall be lawful and proportionate, in pursuit of a legitimate aim and in line with the child's best interests and international human rights norms and standards.'[175] This echoes earlier pronouncements by these bodies.[176] Other UN treaty bodies have likewise confirmed that human rights instruments apply to people on the move with irregular status.[177]

Other practice confirms that the prohibition of discrimination applies to people on the move. The HRC and regional treaty bodies have found discrimination on grounds of nationality in a number of individual cases.[178] Domestic courts have confirmed that the prohibition of discrimination on the ground of nationality applies to the socio-economic rights of non-nationals.[179] Moreover, the New York Declaration reaffirms the

170 HRC, General Comment 31, para 10.

171 See for instance Articles 25, 26, 28 and 30 ICRMW, which provide that migrant workers and members of their families have access to rights on the basis of equality of treatment with nationals; Committee on the Elimination of Racial Discrimination (CERD), 'General Recommendation No 30 on Discrimination Against Non-Citizens' (2004) UN Doc CERD/C/64/Misc.11/rev.3; CMW and CRC Committee, 'Joint General Comment No 3 of the CMW and No 22 of the CRC Committee on the General Principles Regarding the Human Rights of Children in the Context of International Migration' (16 November 2017) UN Doc CMW/C/GC/3-CRC/C/GC/22, paras 21–22.

172 Article 1(2) ICERD.

173 CERD, General Recommendation 30, para 4.

174 CMW and CRC Committee, Joint General Comment 3 (CMW) and 22 (CRC Committee), para 9; see also para 21.

175 Ibid para 22.

176 CRC Committee, 'General Comment No 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) UN Doc CRC/GC/2005/6, para 12; CMW, General Comment 2, para 18.

177 Katharine T Weatherhead, 'Irregular Status' in Elspeth Guild, Stefanie Grant and CA Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (Routledge 2018) 36. See for instance CESCR, General Comment 20, para 30; HRC, General Comment 31, para 10; Committee on the Elimination of Discrimination against Women (CEDAW Committee), 'General Recommendation No 26 on Women Migrant Workers' (5 December 2008) UN Doc CEDAW/C/2009/WP.1/R, para 4; CRC Committee, General Comment 6, para 12, CERD, General Recommendation 30, para 7.

178 See De Schutter, *International Human Rights Law* (n 35) 680–85 and references therein.

179 The Constitutional Court of South Africa quashed a provision that was discriminatory because it excluded certain non-citizens from social grant entitlements: Constitutional Court of South Africa,

prohibition of discrimination, albeit not explicitly on the ground of nationality.[180] In the Global Compact for Migration States committed under Objective 15 to provide access to basic services for migrants: '[w]e commit to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services.'[181] The Compact also recognises that 'nationals and regular migrants may be entitled to more comprehensive service provision, while ensuring that any differential treatment must be based on law, proportionate, pursue a legitimate aim, in accordance with international human rights law.'[182] In other words, States recognise that the principle of non-discrimination delimits the extent to which they can restrict their obligations towards people on the move.[183]

A final question concerns the relation between the principle of non-discrimination, the due diligence standard and core socio-economic rights. The core arguably helps operationalise both the prohibition of discrimination and the standard of due diligence as regards States' minimum obligations: a State must seek to realise the core socio-economic rights of people on the move as a matter of priority and in the same way as nationals.[184] Beyond the core, the principle of non-discrimination helps operationalise the due diligence standard with regard to nationality: the reasonable measures that States must take to realise socio-economic rights may only differentiate between people on the move and their own nationals if they are proportionate and serve a legitimate aim. Both the due diligence standard and the principle of non-discrimination thus ultimately help determine whether States comply with their obligations towards people on the move, including as regards the realisation of their core socio-economic rights.

In conclusion, the principle of non-discrimination grants people on the move the same rights, in principle, as nationals. However, when realising socio-economic rights, States have a sovereign right to differentiate between people on the move and their own nationals, provided such limitation is proportionate and serves a legitimate aim. Crucially, the principle of non-discrimination on the ground of nationality allows for more differentiation than on other grounds on account of States' sovereign right to control the entry and stay of foreigners on their territory. Nevertheless, States must always strive to realise at least the core socio-economic rights of people on the move and beyond the core only non-arbitrary limitations of the socio-economic rights of

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Khosa and others v Minister of Social Development and others (2004) 6 BCLR 569 (CC). The German Federal Constitutional Court held that the right to a subsistence minimum also applies to foreigners: 1 BvL 10/10, 1 BvL 2/11, BVerfGE 132, 134, ILDC 2120 (DE 2012) (18 July 2012), paras 63 and 94.

180 New York Declaration, para 13.

181 Global Compact for Migration, para 31.

182 Ibid. Objective 15 further specifies that, to realise this commitment, States will *inter alia* '[e]nact laws and take measures to ensure that service delivery does not amount to discrimination against migrants on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other grounds irrespective of cases where differential provision of services based on migration status might apply' (paragraph a).

183 See also Global Compact for Migration, Objective 16: 'We further commit to strengthen the welfare of all members of societies by minimizing disparities (…)' (para 32).

184 See Craven (n 97) 174.

people on the move are permitted. Ultimately, to what extent the principle of non-discrimination requires a State to realise the socio-economic rights of people on the move depends on the specific circumstances and is addressed further in Chapter IV. Indeed, this issue is particularly relevant for partner States, as they have the primary obligation under international human rights law to realise the socio-economic rights of people on the move on their territory.

6. THE ROLE OF TERRITORY, JURISDICTION, AND 'INTERNATIONAL ASSISTANCE AND COOPERATION' IN DELIMITING STATE OBLIGATIONS

The previous sections discussed how due diligence, core socio-economic rights and non-discrimination help determine the scope of States' obligations. Although the analysis so far recognised that multiple States can have obligations towards people on the move affected by cooperative migration control, it did not address the fact that they are on the territory of partner States. Yet this results in different obligations for partner and sponsor States. Therefore, this section examines the geographical scope of States' obligations under international human rights law. Its starting point is Article 2(1) ICESCR, which provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

While this provision does not specify *whose* rights States must progressively realise, the concepts of jurisdiction, territory and 'international assistance and cooperation' enable us to delineate both partner and sponsor States' obligations towards people on the move.

6.1. THE ROLE OF JURISDICTION

Although Article 2(1) ICESCR does not include the terms 'territory' or 'jurisdiction', the scope of States' obligations under the ICESCR 'has been consistently interpreted in jurisdictional terms'.[185] Indeed, Article 14 ICESCR applies to each State party

[185] Smita Narula, 'International Financial Institutions, Transnational Corporations and Duties of States' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 122; see also Sepúlveda (n 20)

which 'has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge'. Article 2 of the Optional Protocol to the ICESCR clarifies that individuals or groups who are 'under the jurisdiction of a State Party' may submit communications.[186] The ICJ in its *Israeli Wall* opinion confirmed that 'it is not to be excluded that [the ICESCR] applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.'[187] The CESCR's General Comments also clarify that States parties must realise the socio-economic rights of individuals within their jurisdiction.[188] The CESCR has repeatedly held that violations of the obligation to protect 'follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction' against infringements of socio-economic rights.[189] Expert guidelines likewise refer to jurisdiction in the context of socio-economic rights.[190]

The fact that jurisdiction delimits States' obligations under the ICESCR is hardly surprising, considering that many other human rights treaties contain a jurisdiction clause that delineates their scope.[191] Moreover, human rights treaties without a general jurisdiction clause include references to jurisdiction in other provisions.[192] Therefore, jurisdiction delimits the scope of State obligations: if an individual falls under the jurisdiction of a State, the latter is bound by its human rights obligations towards that person. In other words, under international human rights law a State has obligations towards a person if a jurisdictional link exists between her and the State in question.

272–76; Ralph Wilde, 'Dilemmas in Promoting Global Economic Justice through Human Rights Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (OUP 2016) 161.

186 Article 2 Optional Protocol to the ICESCR. Likewise, Article 13 requires States parties to 'take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.'

187 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion (9 July 2004) ICJ Reports 2004, 136, para 112.

188 CESCR, General Comment 13, paras 6(a) and 6(b). See also CESCR, General Comment 14, para 12(b); CESCR, General Comment 15, para 12(c); CESCR, General Comment 18, para 12(b).

189 CESCR, General Comment 14, para 51; CESCR, General Comment 15, para 44(b); CESCR, General Comment 18, para 35.

190 The Maastricht Guidelines specify that violations 'are in principle imputable to the State within whose jurisdiction they occur.' Maastricht Guidelines (n 34) para 16. Principle 9 of the Maastricht Principles (n 34) delimits the scope of States' jurisdiction under the ICESCR, while the Commentary includes more than 60 references to jurisdiction. See Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084.

191 Article 2(1) ICCPR, Article 7 ICRMW, Article 2 CRC, Article 1 ECHR, Article 1(1) ACHR. For a broader discussion of jurisdiction clauses in human rights treaties see Gondek (n 35); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 11–17; Den Heijer (n 87) ch 2; Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2012).

192 For instance, Article 10(2)(b) Protocol of San Salvador requires States parties to extend the benefits of health services to all individuals subject to their jurisdiction. See also European Social Charter (revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS No 163, art 19.

Jurisdiction in international human rights law thus has a different function from jurisdiction in international law. At a general level, in international human rights law jurisdiction serves to answer the question 'regarding which persons does a State have obligations?' In public international law, however, it serves to answer the question 'is the exercise of State power legal?'[193] As noted by various authors, the different functions of jurisdiction in international human rights law and in public international law have important consequences for the protection of human rights.[194] If jurisdiction had the same function in international human rights law as in public international law:

> an absurdity would arise by means of which persons whose rights are affected by an illegal state action would be at a disadvantage in comparison with persons affected by legal state action, as the state could create at will situations in which it would act in contravention of the international law of jurisdiction and at the same time commit human rights violations to which human rights treaties would not be applicable.[195]

Thus, the concept of jurisdiction plays a role in determining the scope of States' obligations under international human rights law, including socio-economic rights. The interdependence and indivisibility of both sets of rights argue in favour of applying jurisdictional doctrines developed in the context of civil and political rights to socio-economic rights.[196] Likewise, territory also plays an important role in delimiting the scope of States' obligations under international human rights law.

6.2. THE ROLE OF TERRITORY

As noted above, although Article 2(1) ICESCR does not mention territory, Article 14 imposes obligations on a State party as regards 'its metropolitan territory or other territories under its jurisdiction'. More generally, the CESCR seems to assume that States' obligations apply principally on their territory. For instance, it has repeatedly held that indicators should cover 'all persons under the territorial jurisdiction of the State party or under its control.'[197] The CESCR's General Comments discuss States' international obligations in a separate section, which suggests that the other obligations

193 See Gondek (n 35) 56.

194 See for instance Gondek (n 35); Milanovic (n 191); Den Heijer (n 87); Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013).

195 Gondek (n 35) 57.

196 Narula (n 185) 123; Den Heijer and Lawson (n 194) 182.

197 CESCR, General Comment 23, para 55; see also CESCR, General Comment 15, para 53; CESCR, General Comment 19, para 75. Likewise, General Comment 24 consistently refers to corporations domiciled 'in the State's territory and/or jurisdiction': CESCR, General Comment 24, paras 26, 27, 31 and 33. See also CESCR, General Comment 23, para 70.

apply on States' territory.[198] Likewise, its concluding observations almost exclusively address economic, social and cultural rights on the territory of the State party.[199]

As a rule, the geographical scope of human rights treaties coincides with a State's territory.[200] As States exercise sovereignty over their territory, it is intuitive that they have human rights obligations towards people on it: States are presumed to wield influence, control or power over persons on their territory.[201] The pronouncements of courts and treaty bodies confirm this. According to the ICJ and ECtHR, jurisdiction is 'primarily territorial'.[202] The ECtHR has further found that jurisdiction 'is presumed to be exercised normally throughout the State's territory'[203], while the IAComHR has held that jurisdiction 'most commonly refers to persons within a state's territory'.[204] In other words, territory plays a role in determining the scope of States' extraterritorial obligations, as international human rights law assumes that a State exercises sovereignty and is hence able to either realise or violate human rights on its territory. More specifically, title to territory creates a rebuttable presumption that a jurisdictional link exists between a State and individuals on its territory, although such a link can also exist between a State and individuals abroad.[205]

Jurisdiction and territory cannot be equated, as it is well established in international human rights law that States can also have obligations towards persons abroad. States' obligations under the ICESCR 'apply both with respect to situations on the State's national territory, and outside the national territory in situations over which States parties may exercise control.'[206] The HRC has adopted a disjunctive interpretation of Article 2(1) ICCPR: States parties have obligations towards 'all persons who may be

198 CESCR, General Comment 12, paras 36–37; CESCR, General Comment 14, paras 38–42; CESCR, General Comment 15, paras 30–36; CESCR, General Comment 18, paras 29–30; CESCR, General Comment 19, paras 52–58; CESCR, General Comment 24, paras 24–37.

199 For an exception see CESCR, 'Concluding Observations on the Fifth Periodic Report of Australia' paras 17 and 18 (on regional processing centres). In its concluding observations regarding sponsor States the CESCR merely mentions levels of official development assistance, without discussing the realisation of socio-economic rights in other countries. See for instance CESCR, 'Concluding Observations on the Sixth Periodic Report of Norway' (2 April 2020) UN Doc E/C.12/NOR/CO/6, para 3; CESCR, 'Concluding Observations on the Third Periodic Report of Slovakia' (14 November 2019) UN Doc E/C.12/SVK/CO/3, para 10.

200 Kälin and Künzli (n 35) 129; Wouter Vandenhole and Willem van Genugten, 'Introduction: An Emerging Multi-Duty Bearer Human Rights Regime' in Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015) 1.

201 Den Heijer (n 87) 80; Besson (n 53) 3.

202 ICJ, *Israeli Wall* para 109; ECtHR, *Al-Skeini* para 131.

203 ECtHR, *Al-Skeini* para 131.

204 IAComHR, *Coard and others v USA* Case No 10.951, Report No 109/99 (29 September 1999) para 37; see also IAComHR, *Alejandre and others v Cuba (Brothers to the Rescue)* Case No 11.589, Report No 86/99 (29 September 1999) para 23.

205 Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020) 167; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *SS and Others v Italy*, and the "Operational Model"' (2020) 21 German Law Journal 385, 397–98.

206 CESCR, General Comment 24, para 10.

within their territory and to all persons subject to their jurisdiction (…) even if not situated within the territory of the State Party.'[207] Indeed, 'it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.'[208] The ICJ and human rights bodies have confirmed that jurisdiction may be exercised outside the national territory.[209] Moreover, the view that extraterritorial obligations form an integral part of a state's human rights obligations is fairly widespread among States.[210] Thus, in principle, a State has human rights obligations towards individuals who are within its territory as well as towards those over which it exercises extraterritorial jurisdiction. There is general agreement among commentators that the key question is not *whether* but rather *under which circumstances* and *to what extent* States have extraterritorial obligations under international human rights law.[211]

As States can exercise jurisdiction – and hence incur obligations – towards persons abroad, the possibility arises that two States have obligations towards the same person: the State on whose territory she finds herself as well as the State that exercises extraterritorial jurisdiction over her. This raises the question how the obligations of multiple States relate to each other. As a general rule, since international human rights law presumes that each State exercises jurisdiction over its territory, each State is the primary duty bearer towards individuals on its territory. By implication, other States can have complementary obligations.[212] Therefore, the starting point of this study is

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207 HRC, General Comment 31, para 10.

208 HRC, *Lopez Burgos v Uruguay* Communication No 52/1979 (29 July 1981) para 12(3); HRC, *Celiberti de Casariego v Uruguay* Communication No 56/1979 (29 July 1981) para 10.3.

209 ICJ, *Israeli Wall* para 109; ICJ, *Congo v Uganda* paras 216–19; Committee against Torture, General Comment 2, para 16; ECtHR, *Al-Skeini* para 131; IAComHR, *Coard* para 37; IACtHR, *The Environment and Human Rights* para 74; AComHPR, General Comment 3, para 14.

210 Monika Heupel, 'How do States Perceive Extraterritorial Human Rights Obligations? Insights from the Universal Periodic Review' (2018) 40 Human Rights Quarterly 521.

211 See for instance Den Heijer (n 87) 18; Françoise Hampson, 'The Scope of the Extraterritorial Applicability of International Human Rights Law' in Geoff Gilbert, Françoise Hampson and Clara Sandoval Villalba (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge 2011) 158–59; Ralph Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 641. For a contrary view see Michael J Dennis and Andre M Surena, 'Application of the ICCPR in Times of Armed Conflict and Military Occupation: The Gap between Legal Theory and State Practice' (2008) 6 European Human Rights Law Review 714 as well as Nigel Rodley, 'The Extraterritorial Reach and Applicability in Armed Conflict of the ICCPR: A Rejoinder to Dennis and Surena' (2009) 5 European Human Rights Law Review 628.

212 Khalfan (n 110) 331; Vandenhole and Benedek (n 110) 335; Marlies Hesselman, 'Sharing International Responsibility for Poor Migrants: An Analysis of Extra-Territorial Socio-Economic Human Rights Law' (2013) 15 European Journal of Social Security 187, 191; Takhmina Karimova, 'The Nature and Meaning of "International Assistance and Cooperation" under the International Covenant on Economic, Social and Cultural Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 176; Vandenhole and Van Genugten (n 200) 5. For a contrary view see Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP

the presumption that partner States that host people on the move have the primary obligation to realise their socio-economic rights. Provided they exercise jurisdiction over them, sponsor States can also have obligations towards people on the move, which are complementary to the obligations of the partner State. In terms of due diligence, on the one hand, more is expected of partner States than sponsor States on account of the former's territorial jurisdiction and sovereignty. On the other hand, since partner States have less available resources, the scope of their obligations may be more limited than the comparatively wealthier and more developed sponsor States. Moreover, while in general territorial States are the primary duty bearers and other States only have complementary obligations, in specific instances an extraterritorial State may exercise so much control that its obligations are no longer merely complementary.[213] Furthermore, both the concepts of jurisdiction and territory fail to account for the reference to international assistance and cooperation in Article 2(1) ICESCR, which nevertheless plays an important role in determining the scope of States' obligations in the context of cooperative migration control.

6.3. THE ROLE OF 'INTERNATIONAL ASSISTANCE AND COOPERATION'

Article 2(1) ICESCR requires States to 'take steps, individually and through international assistance and co-operation' in order to progressively realise economic, social and cultural rights. Various provisions in the ICESCR and its Optional Protocol also refer to international assistance and cooperation.[214] Therefore, limiting States' obligations to people within their jurisdiction fails to account for the element of international assistance and cooperation in the ICESCR. Indeed, the CESCR held that States' extraterritorial obligations under the ICESCR 'follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction.'[215] Moreover, other treaties mention obligations of international assistance and cooperation in the context of socio-economic rights. For instance, the CRC and the CRPD, which include both civil and political and economic, social and cultural rights, include a provision similar to Article 2(1) ICESCR only with regard to the latter set of rights.[216] Likewise, the ACHR and Protocol of San Salvador

2007) 184; Arne Vandenbogaerde, *Towards Shared Accountability in International Human Rights Law* (Intersentia 2016) 296.

213 For instance, in *Ilaşcu* the territorial State, Moldova, had less far-reaching obligations than Russia which acted extraterritorially: ECtHR, *Ilaşcu and others v Moldova and Russia* [GC] App No 48787/99 (8 July 2004). See also Chapters V and VII.

214 Articles 11(2), 15, 22 and 23 ICESCR and Article 14 Optional Protocol to the ICESCR.

215 CESCR, General Comment 24, para 27. See also Maastricht Principles (n 34), principles 3 and 4.

216 Article 4(2) CRPD provides: '[w]ith regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are

require States parties to adopt measures both domestically and through international cooperation to progressively realise socio-economic rights.[217]

Thus, any conceptualisation of States' obligations to realise socio-economic rights must include international assistance and cooperation. More specifically:

> the obligations of international cooperation for economic, social and cultural rights require something beyond obligations derived from the 'extraterritorial' reach of a human rights convention. They call for *proactive* steps through international cooperation in securing economic, social and cultural rights globally rather than obligations attached reactively, i.e. based on the potential impact of a state's activities on the people in foreign countries.[218]

In order to account for this dimension of State obligations, we must recognise that the ICESCR imposes different kinds of obligations that result in different dimensions of extraterritorial obligations.[219] Therefore, this study proposes that international human rights law imposes two types of obligations on States parties with regard to socio-economic rights. The *first* corresponds to the exercise of jurisdiction: human rights obligations apply when a State exercises jurisdiction.[220] They are *direct obligations*, as they are owed by a State to a specific individual within its jurisdiction, both on its territory and abroad. In other words, the State is the duty-bearer and the individuals within its jurisdiction are the rights-holders. When they are outside the State's territory, this type of obligations has also been referred to as 'extraterritorial obligations *stricto sensu* (where there is a prior link between the individual and the State)'.[221] As noted above, the scope of a State's *extraterritorial* direct obligations differs from its *territorial* direct obligations on account of its territorial sovereignty. The presumption is that partner States have the primary obligation to realise the socio-economic rights of people on the move on their territory, while sponsor States' direct extraterritorial obligations only exist if there is a jurisdictional link between the sponsor State and a person on the move; they are complementary to partner States' obligations.

The *second* type of extraterritorial obligations under international human rights law consists of States' obligations of international assistance and cooperation. They are also referred to as *global obligations*.[222] Unlike direct obligations, they do not require

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immediately applicable according to international law.' Article 4 CRC provides that '[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.' See also Articles 23(4), 24(4) and 28(3) CRC.

217 Article 26 ACHR and Article 1 Protocol of San Salvador.

218 Salomon, *Global Responsibility for Human Rights* (n 212) 76 (emphasis in original).

219 Raible (n 205) 72.

220 Narula (n 185) 120.

221 Vandenbogaerde (n 212) 304.

222 Ibid. This study uses the terms 'obligations of international assistance and cooperation' and 'global obligations' interchangeably. See also Principle 8(b) of the Maastricht Principles (n 34) which refers to 'obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.'

a prior jurisdictional link.[223] Indeed, there is no direct relationship between a State as duty-bearer and an individual as rights-holder: global obligations are not owed to individuals in a particular State and the latter have no claim against States which do not comply with their global obligations.[224] Rather, the international community as a whole has an obligation to assist States which lack sufficient resources to comply with their own obligations to realise socio-economic rights, including partner States that host people on the move. Partner States, in turn, can invoke the right to receive international assistance and cooperation from the international community on behalf of people on the move on their territory.[225] The nature, scope and content of global obligations remain unclear.[226] Moreover, various Global North States have contested their legally binding nature, arguing that they are only moral obligations.[227] In other words, States' global obligations require further clarification.

In theory, all States have global obligations. However, in practice, States in the Global North have more resources available to contribute to international efforts to realise socio-economic rights globally. Therefore, the Global North has more obligations in that regard than the Global South.[228] The CESCR thus specified that the obligation to provide international assistance and cooperation 'is particularly incumbent upon those States which are in a position to assist others in this regard.'[229] Developing countries, in turn, have an obligation to seek and accept international assistance and cooperation.[230] Accordingly, the premise underlying the present analysis is that sponsor States like the USA, Australia and EU Member States are giving States, while partner States like Turkey, Nauru and Guatemala are receiving States of international assistance and cooperation.[231] The CESCR held that:

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223 Den Heijer and Lawson (n 194) 184.

224 Besson (n 53) 8. See also Ashfaq Khalfan and Ian Seiderman, 'Extraterritorial Human Rights Obligations: Wider Implications of the Maastricht Principles and the Continuing Accountability Challenge' in Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015) 38.

225 Salomon makes the same argument regarding the right to development: Salomon, *Global Responsibility for Human Rights* (n 212) 198. In fact, partner States have an obligation to seek and accept international assistance and cooperation if they lack sufficient resources to realise the socio-economic rights of people on the move. See Chapter IV, Section 2.1.

226 Malcolm Langford, Fons Coomans and Felipe Gómez Isa, 'Extraterritorial Duties in International Law' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 112; Karimova (n 212) 165; Margot E Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015) 371; Olivier De Schutter, 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation' in Katharine G Young (ed) *The Future of Economic, Social and Cultural Rights* (CUP 2019) 584–87.

227 Chapter V, Section 3.1.

228 Salomon, *Global Responsibility for Human Rights* (n 212) 27.

229 CESCR, General Comment 3, para 14; see also CESCR, General Comment 23, para 66; Principles 33 and 35 Maastricht Principles (n 34). See also Chapter V, Section 3.2.

230 Chapter IV, Section 2.1.

231 Sepúlveda makes a similar distinction: Sepúlveda (n 20) 370.

> International assistance and cooperation are particularly required in order to allow States facing a sudden influx of refugees and migrants to comply with their core obligations as defined above. (…) when confronted by large flows of migrants fleeing conflict or persecution, some States face a heavier burden than others. [The CESCR] sees any measure that States parties adopt to support the realization of the rights of the Covenant on the territory of other States as contributing to the aims of the Covenant.[232]

Therefore, in this study, sponsor States have two types of obligations: they have direct obligations towards people on the move when they exercise jurisdiction over them, and they have global obligations of international assistance and cooperation, which may include the provision of support to partner States hosting people on the move.

As Chapter II illustrated, cooperative migration control often involves sponsor States providing development aid and other forms of support to partner States. In other words, migration control policies themselves involve cooperation and the transfer of resources from the sponsor States in the Global North to partner States in the Global South. This raises the question whether cooperation on migration control could trigger sponsor States' global obligations and, vice versa, whether it can contribute to discharging sponsor States' global obligations. Chapter V further explores the links between cooperative migration control and sponsor States' global obligations of international assistance and cooperation. This study's focus on sponsor States as giving States and partner States as receiving States does not mean, however, that partner States do not have any global obligations.[233] Rather, in light of the disparities in economic development among Global South States, some Global South States may also be giving rather than receiving States in terms of international assistance and cooperation. Nevertheless, both the different levels of development and resources available to sponsor and partner States respectively and the extent of support provided by sponsor States to partner States in the context of cooperative migration control policies justify this study's focus on the global obligations of sponsor States.

Finally, the provision of international assistance and cooperation by one State to another State may itself create a jurisdictional link which, in turn, triggers its direct obligations. Thus, although global obligations are independent from the exercise of jurisdiction, once a sponsor State decides to provide international assistance and cooperation in a specific situation, the act of doing so may trigger direct obligations under international human rights law. This may explain why the CESCR sometimes seems to conflate States' direct extraterritorial obligations, which are triggered by jurisdiction, and their global obligations that amount to international assistance and cooperation. For instance, in various General Comments it uses the typology of obligations to respect, protect and fulfil when discussing States' extraterritorial obligations, which suggests that it interprets the tripartite typology as applying to

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232 CESCR, Statement on Duties of States Towards Refugees and Migrants, para 18.

233 Likewise, Global North States that are sponsor States because they cooperate with Global South States to stem migration flows but also host numerous people on the move themselves, like Italy and Greece, could also be beneficiaries of international assistance and cooperation.

'international assistance and cooperation'.[234] However, the proposition that States have two types of obligations finds support in scholarship[235] and expert guidelines.[236]

7. CONCLUSION

This chapter proposed a conceptualisation of State obligations by analysing, at a general level, various concepts and principles that serve to delimit the scope of States' obligations to realise the socio-economic rights of people on the move. It first explored the relation between socio-economic rights and civil and political rights and showed that each set of rights can be relevant for the other. It then argued that the due diligence standard requires States to take reasonable measures to avoid reasonably foreseeable human rights violations and explained how core socio-economic rights and the principle of non-discrimination further delimit States' obligations towards people on the move. Finally, the concepts of territory, jurisdiction and 'international assistance and cooperation' all play a role in delimiting State obligations regarding socio-economic rights. Thus, bringing together the findings of the previous sections, the obligations of States involved in cooperative migration control towards people on the move can be conceptualised as follows.

First, partner States are presumed to exercise jurisdiction over their territory and therefore have the primary direct obligation to realise the socio-economic rights of people on the move on their territory. They must take reasonable measures to avoid reasonably foreseeable violations of socio-economic rights in accordance with the due diligence standard. Moreover, partner States must seek to comply as a matter of priority with their core obligations, including towards people on the move, and any difference between the latter and nationals of partner States must be proportionate and serve a legitimate aim. *Second*, sponsor States have direct obligations to realise the socio-economic rights of people on the move over which they exercise jurisdiction. While their obligations are complementary to the primary obligations of partner States, they must also comply with the due diligence standard: when there is a jurisdictional link between people on the move and a sponsor State, the latter must take reasonable measures to avoid reasonably foreseeable violations of their socio-economic rights. Core socio-economic rights must receive priority as regards sponsor States' extraterritorial direct obligations, and sponsor States may not differentiate arbitrarily on the ground

234 See for instance CESCR, General Comment 19, paras 53–55; CESCR, General Comment 24, paras 29–37. See also Sepúlveda (n 20) 373–74.

235 See for instance Salomon, *Global Responsibility for Human Rights* (n 212) 182; Gondek (n 35) 295; Narula (n 185); Khalfan and Seiderman (n 224) 15; Vandenbogaerde (n 212).

236 Principle 8 Maastricht Principles (n 34) differentiates between 'obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory' (para a); and 'obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally' (para b).

of nationality. *Third*, in addition to their direct obligations, sponsor States have global obligations of international assistance and cooperation. These are obligations to contribute to the international community's efforts to help realise socio-economic rights in other countries. Partner States, which generally have less resources available and host many people on the move, may benefit from these efforts.

Finally, as noted above, the fact that the due diligence standard delimits States' direct obligations creates a risk of gaps in human rights protection. Moreover, international human rights law presumes that partner States have the primary obligation to realise the socio-economic rights of people on the move on their territory while sponsor States only have complementary direct obligations that depend on the existence of a jurisdictional link. This risks widening the gaps in human rights protection, especially in light of the different levels of development and resources available between partner States in the Global South and sponsor States in the Global North. From the perspective of people on the move, three factors determine to what extent their rights are realised. First, what reasonable measures can the partner State be expected to take to avoid reasonably foreseeable violations of their socio-economic rights, in light of its available resources? Second, to what extent do sponsor States have complementary direct obligations to realise the socio-economic rights in partner States when the latter fail to realise at least their core rights? Indeed, such direct obligations only exist if there is a jurisdictional link and they are delimited by the due diligence standard. They may not complement the obligations of the partner State sufficiently to fully 'cover' the gap created by partner States' non-realisation of the socio-economic rights of people on the move. Therefore, the core socio-economic rights of people on the move in partner States are not realised if sponsor States do not exercise jurisdiction or if the reasonable measures that they are expected to take do not suffice to complement the efforts of the partner State. Third, can and does the international community fill this gap through the provision of international assistance and cooperation? While Chapters IV and V examine in more detail the direct obligations of partner States and sponsor States respectively, Chapter V also addresses the question whether sponsor States' global obligations of international assistance and cooperation can fill these gaps.

CHAPTER IV
THE OBLIGATIONS OF PARTNER STATES

1. INTRODUCTION

While the previous chapter proposed a general conceptualisation of State obligations towards people on the move under international human rights law, this chapter examines the specific obligations of partner States to realise the socio-economic rights of people on the move in the context of cooperative migration control.[1] Section 2 first outlines the scope of partner States' obligations towards people on the move. It does so by examining the role played by the availability of resources and the requirement that rights be progressively realised. In particular, it discusses the obligation to take steps and the extent to which retrogressive measures and limitations of the rights of people on the move are permitted. Section 3, in turn, discusses partner States' obligations with regard to the following rights: the right to an adequate standard of living, health, education, work and social security. Finally, Section 4 offers some concluding thoughts on partner States' obligations towards people on the move.

As the overview in Chapter II revealed that in many situations the core socio-economic rights of people on the move affected by cooperative migration control are not realised, the analysis focuses specifically on their core socio-economic rights and partner States' corresponding core obligations. Moreover, it is easier to identify whether the core content of a right is realised in a specific case than whether a State acted with due diligence in light of its available resources and took adequate steps to progressively realise a right.[2] However, as shown in Chapter III, this does not mean that partner States do not have obligations to realise the socio-economic rights of people on the move beyond the core. As it focuses on core socio-economic rights, the analysis takes the ICESCR as its starting point. It compares partner States' obligations towards people on the move under the ICESCR and other relevant instruments, notably the CRC and ICRMW, to illustrate what minimum obligations States have towards people on the move under international human rights law. Where relevant, the analysis points to State obligations under the Refugee Convention, as this instrument applies to those people on the move who are refugees. It further examines to what extent States have endorsed

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1 Although this study focuses on the obligations of partner States, the general findings in this chapter also apply to other States – including sponsor States – that host people on the move.

2 See Audrey R Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 Human Rights Quarterly 23.

the interpretations of the CESCR and other human rights treaty bodies, especially as reflected in the New York Declaration and the Global Compacts.

Indeed, a study of State obligations towards people on the move cannot limit itself to the ICESCR for two reasons. First, not all States involved in cooperative migration control are States parties to the ICESCR. Second, other instruments may also impose obligations on partner States with regard to the socio-economic rights of people on the move. Furthermore, when determining the scope of a State's obligations in a specific case, certain treaties are more relevant than others. Thus, the Revised European Social Charter – and its interpretation by the European Committee of Social Rights – are only directly relevant for Turkey, since other partner States are not members of the Council of Europe. Likewise, the obligations of Nauru, which only ratified very few human rights treaties,[3] are different from the obligations of Mexico, which ratified all major international and regional human rights treaties.[4] Moreover, even where States are bound by multiple treaties, not all treaties are relevant for all people on the move: the CRC only imposes obligations that are relevant to children, whereas the ICRMW only applies to people on the move who are workers.

Finally, the question arises whether partner States have obligations towards people on the move under customary international law. Commentators have argued that core socio-economic rights may be part of customary international law, although the scope of States' customary obligations requires clarification.[5] As noted in Chapter III, there is a certain degree of overlap between socio-economic rights and civil and political rights, notably the right to life and the prohibition of torture and other forms of ill-treatment.[6] The fact that these norms are non-derogable and that the prohibition of torture is both absolute and a norm of *jus cogens* supports the argument that the core socio-economic rights that overlap with these norms have reached customary status. However, socio-economic rights have not yet reached the status of peremptory norms.[7] It also remains unclear to what extent customary norms on socio-economic rights would apply to States' obligations towards non-nationals. In light of the findings

3 Nauru ratified the CEDAW, CAT, CRC and CRPD, and signed the ICERD and ICCPR.

4 Mexico ratified all the major UN human rights treaties and most protocols, as well as most human rights instruments of the Organisation of American States.

5 Sigrun I Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia 2006) 124; Malcolm Langford, Fons Coomans and Felipe Gómez Isa, 'Extraterritorial Duties in International Law' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 67; Margot E Salomon, 'Deprivation, Causation and the Law of International Cooperation' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 270; Eibe Riedel, Gilles Giacca and Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 21. See also for the right to water: Sara De Vido, 'The Right to Water as an International Custom: The Implications in Climate Change Adaptation Measures' (2012) Carbon & Climate Law Review 221, 224–25.

6 Chapter III, Section 2.

7 Janelle M Diller, 'Economic, Social and Cultural Human Rights: The Journey towards Peremptory Norms in International Law' (2018) 36 Nordic Journal of Human Rights 19, 23.

in Chapter III, the contours of an emerging customary norm would probably follow the core of socio-economic rights and the principle of non-discrimination. If this is correct, under customary law, partner States would have the obligation to at least comply with their core obligations towards people on the move, and beyond the core have the same obligations towards people on the move than towards their own nationals to the extent that it is required by the principle of non-discrimination. Given the lack of clarity in this regard, the following analysis focuses predominantly on States' obligations under human rights treaties.

2. THE SCOPE OF PARTNER STATES' OBLIGATIONS TOWARDS PEOPLE ON THE MOVE

Article 2(1) ICESCR requires States parties to 'take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization' of economic, social and cultural rights. Moreover, in principle partner States have the primary obligation to realise the socio-economic rights of individuals on their territory. This section clarifies to what extent partner States have an obligation to progressively realise the socio-economic rights of people on the move on their territory. It first examines what the requirement to use 'maximum available resources' implies in the context of cooperative migration control, before discussing the following elements of the duty of progressive realisation: the obligation to take steps, the prohibition of retrogressive measures, and permitted limitations of the socio-economic rights of people on the move.[8]

2.1. THE AVAILABILITY OF RESOURCES

Article 2(1) ICESCR requires each State party to take steps to realise socio-economic rights 'to the maximum of its available resources'.[9] The starting premise of socio-economic rights was that their realisation would be dependent on available resources,

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8 On the nature of State obligations under the ICESCR in general see Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156; Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (OUP 1995); Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003); Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 133–64; UN Commission on Human Rights, 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (8 January 1987) UN Doc E/CN.4/1987/17 (annex).

9 For a detailed discussion of the doctrine on 'maximum available resources' see Rodrigo Uprimny, Sergio Chaparro Hernández and Andrés Castro Araújo, 'Bridging the Gap: The Evolving Doctrine

and that limited resources justified continued non-fulfilment.[10] The expression 'to the maximum of its available resources' in Article 2(1) ICESCR was intended by the drafters to 'refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.'[11] Therefore, States must seek international assistance and cooperation if complying with their obligations under the ICESCR requires more than the maximum resources available to them.[12] In other words, whether a State sought and accepted international assistance and cooperation is relevant for the question whether it used its maximum available resources: a State cannot justify that it lacks sufficient resources to comply with its core obligations if it does not seek and, if available, accept international assistance and cooperation. Under the right to food, for example, a State claiming that it cannot comply with its obligations under the ICESCR 'has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.'[13] The CRC Committee and the CMW have repeatedly confirmed that States have a duty to seek and accept international assistance and cooperation if necessary to comply with their obligations towards children on the move.[14] States themselves have recognised the importance of international cooperation in realising the rights of people on the move in the New York Declaration and the Global Compacts, echoing the obligations of international assistance and cooperation in Article 2(1) ICESCR.[15]

More generally, the requirement of 'maximum available resources' also points to the prioritisation of resources: how must partner States allocate their limited resources? In general terms, each State has a margin of appreciation 'to determine the optimum use of its resources and to adopt national policies and prioritize certain resource demands over others.'[16] However, this margin is limited:

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on ESCR and "Maximum Available Resources"' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019).

10 Katharine G Young, 'Waiting for Rights: Progressive Realization and Lost Time' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019) 659.

11 CESCR, General Comment 3, para 13; see also CESCR, Statement on the Obligation to Take Steps to the 'Maximum of Available Resources', para 5; Alston and Quinn (n 8) 179; Craven (n 8) 138 and 144; Sepúlveda (n 8) 315.

12 CESCR, General Comment 4, para 10; CESCR, General Comment 11, para 9; CESCR, General Comment 19, para 41; CESCR, General Comment 23, paras 52 and 67. See also Sepúlveda (n 8) 376–77.

13 CESCR, General Comment 12, para 17.

14 CRC Committee, General Comment 6, paras 16, 43, 45 and 47; CMW and CRC Committee, Joint General Comment 3 (CMW) and 22 (CRC Committee), para 51; CMW and CRC Committee, 'Joint General Comment No 4 of the CMW and No 23 of the CRC Committee on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return' (16 November 2017) UN Doc CMW/C/GC/4-CRC/C/GC/23, para 65.

15 New York Declaration, paras 7, 11, 24, 28, 38, 54, 58 and 68; Global Compact for Migration, paras 3, 7, 8, 11, 15, 37, 39 and 42; Global Compact on Refugees, paras 4, 16, 32 and 85; Comprehensive Refugee Response Framework, paras 1 and 9.

16 CESCR, Statement on the Obligation to Take Steps to the 'Maximum of Available Resources', para 12.

> Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. (…) even in times of severe resource constraints, States parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.[17]

Thus, States must use resources effectively and efficiently, without diverting resources allocated to the realisation of socio-economic rights.[18] As seen in Chapter III, in light of the standard of due diligence and the principle of non-discrimination, partner States must, at a minimum, seek to comply with their core obligations towards people on the move, and seek and accept international assistance and cooperation if their own resources are insufficient to do so.

Moreover, '[t]he nature of state obligations varies greatly, depending on the nature and level of its social development, the differences in the needs of individuals, the resources at the disposal of the state, and the different components of the right.'[19] Indeed, the obligations of one partner State may be more far-reaching than another, depending on its available resources and overall obligations. For instance, although Nauru's overall available resources are clearly more limited than Turkey's, it also has to realise the socio-economic rights of fewer people, as both its own population and the number of people on the move it hosts is considerably lower than Turkey's. It is therefore necessary to take into account the specific context when determining whether a partner State complies with its obligations to use the maximum of its available resources.

Furthermore, Chapter II found that cooperative migration control often entails sponsor States providing assistance to partner States, notably in the form of development aid and funding, training and equipment for migration control purposes. This raises the question whether a partner State can comply with its obligation to seek and accept international assistance and cooperation by receiving assistance from sponsor States to stem migration flows.[20] The answer depends on the modalities of specific agreements, especially to what extent they take into account their impact on the rights of those they affect, and what measures they include to mitigate any negative consequences. For instance, the EU-Turkey Statement includes the provision of €6 billion provided by EU Member States to improve the situation for refugees in the field of health, education, infrastructure, food and other living costs.[21] This could signal that Turkey complies with its obligation to seek and accept international assistance and

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17 CESCR, General Comment 3, para 13; see also paras 11 and 12; CESCR, General Comment 14, para 18; CESCR, General Comment 18, para 12(b)(i); CESCR, Statement on the Obligation to Take Steps to the 'Maximum of Available Resources', para 4.

18 Sepúlveda (n 8) 315.

19 Asbjørn Eide, 'Adequate Standard of Living' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2017) 188.

20 Chapter V, Section 3.3 addresses the related question whether sponsor States can discharge their global obligations of international assistance and cooperation by cooperating with partner States on migration control.

21 Council of the European Union, 'EU–Turkey Statement' (18 March 2016) Press Release 144/16, para 6.

cooperation. However, the 2019 US-Mexico agreement to *inter alia* expand the Migrant Protection Protocols along the whole US-Mexico border requires Mexico to 'offer jobs, healthcare and education according to its principles.'[22] It does not seem that the USA is providing assistance to Mexico to discharge these obligations nor that Mexico has requested such assistance.

More generally, whether the assistance that sponsor States provide to partner States in the context of cooperative migration control discharges the latter's obligation to seek and accept international assistance and cooperation depends to a large extent on what assistance is provided: is it aimed at preventing the onward travel of people on the move or at improving their plight? The forms of assistance provided by sponsor States in the context of cooperative migration control focus more on preventing arrivals in their territories than improving living conditions for people on the move contained in the Global South. The question of development aid conditionality plays an important role in this regard. As noted above, in order to justify the non-realisation of the core socio-economic rights of people on the move, a partner State must demonstrate that it lacks sufficient resources to do so. At the same time, cooperative migration control often involves development aid conditionality, as sponsor States condition the provision of development aid to partner States on the latter's cooperation on migration control. Sponsor States also increasingly use development aid itself for migration control purposes, in addition to providing partner States with funding, training and equipment when they cooperate on migration control. Yet such assistance is often aimed at preventing the onward travel of people on the move rather than realising their socio-economic rights.[23] In other words, the fact that a partner State receives development aid or other forms of assistance in the context of cooperative migration control does not necessarily mean that it has more resources available to realise the socio-economic rights of people on the move.

Finally, tying development aid to migration control raises the following question: what if a Global South State agrees to cooperate on migration control because it is dependent on international assistance and cooperation, as is the case for Nauru? Following the exhaustion of its phosphate reserves by Australia, New Zealand and the UK, Nauru faces serious economic problems and remains heavily reliant on Australia. In 2013, for instance, Australia was by far the largest donor of official development assistance to the Oceania region.[24] Australia's overseas development budget for Nauru increased significantly after the 2001 cooperation agreement and it has been estimated that under the current arrangement half of Nauru's gross domestic product comes from the regional processing centre.[25] On the one hand, cooperating with Australia

22 Office of the Spokesperson, 'US-Mexico Joint Declaration' (7 June 2019).

23 Chapter II, Section 3.3.

24 Brian Opeskin and Daniel Ghezelbash, 'Australian Refugee Policy and its Impacts on Pacific Island Countries' (2016) 35(3) Journal of Pacific Studies 73, 84.

25 Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name just as Unlawful?' (2015) 38 UNSW Law Journal 669, 691–92; David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019) 237–38; Nikolas Feith

on migration control enables Nauru to receive development aid and hence better realise the socio-economic rights of its citizens.[26] On the other hand, these same arrangements lead to violations of the socio-economic rights of people on the move transferred to Nauru.[27] Given the asymmetric power relation between Australia and Nauru, the latter is arguably too desperate for money and too dependent on Australia's continued patronage to negotiate on equal terms with Australia.[28] Therefore, one should take into account Nauru's dependence on Australian development aid when determining to what extent it is unable or unwilling to realise the socio-economic rights of people on the move. This depends *inter alia* on the question whether Nauru sought international assistance and cooperation from other States than Australia.[29] In conclusion, partner States like Nauru must use their maximum available resources, including those obtained through international assistance and cooperation, to realise the socio-economic rights of people on the move, although it remains unclear to what extent assistance received for migration control purposes contributes to partner States' available resources for realising socio-economic rights. Moreover, international human rights law further defines partner States' obligations to progressively realise these rights.

2.2. THE PROGRESSIVE REALISATION OF SOCIO-ECONOMIC RIGHTS

While their available resources – including those available through international assistance and cooperation – circumscribe the scope of partner States' obligations, various doctrinal developments clarify their content. In addition to the prohibition of discrimination and the core content of socio-economic rights, discussed in the previous chapter, these include, on the one hand, the obligation to take steps, and, on the other hand, the prohibition of retrogression and limitations on rights, as discussed in the rest of this section.

2.2.1. The Obligation to Take Steps

As noted above, Article 2(1) ICESCR requires each State party to 'take steps (…) to the maximum of its available resources, with a view to achieving progressively the

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Tan, *International Cooperation on Refugees: Between Protection and Deterrence* (PhD thesis, Aarhus University 2019) 49–50.

26 Although Nauru has not ratified the ICESCR, it is likely to have some obligations to realise the socio-economic rights of its citizens under other human rights treaties, notably the CAT and CRC, and possibly under customary international law.

27 See Chapter II, Section 2.2.

28 Savitri Taylor, 'The Pacific Solution or a Pacific Nightmare? The Difference between Burden Shifting and Responsibility Sharing' (2005) 6(1) Asian Pacific Law and Policy Journal 1, 32–33.

29 See Rachel Hammonds and Gorik Ooms, 'Shared Responsibility for the Right to Health (Committee on Economic, Social and Cultural Rights)' in Mark Gibney and Wouter Vandenhole (eds), *Litigating Transnational Human Rights Obligations: Alternative Judgments* (Routledge 2014) 85–89.

full realization' of economic, social and cultural rights.[30] Partner States must use the maximum available resources available to them – including by seeking and accepting international assistance and cooperation – to take steps in order to progressively realise the socio-economic rights of persons on their territory. In other words, lack of resources cannot justify indefinitely deferring taking action to give effect to State obligations under the ICESCR.[31] Progressive realisation can thus be seen as a shorthand for the lapse of time between rights recognition and rights fulfilment.[32] Article 2(1) imposes 'an obligation to move as expeditiously and effectively as possible' towards the full realisation of the rights in question.[33] Progressive realisation requires 'a rational devotion of state effort to achieve rights within the maximum of available resources, in the shortest possible time, while preserving a minimum irreducible core of rights and safeguarding the most vulnerable.'[34] Article 14 ICESCR clearly illustrates this:

> Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.[35]

In other words, a State is expected to have achieved further realisation of socio-economic rights at a moment in time $t + 1$ compared to the moment t. The duty of progressive realisation illustrates the importance of time as a factor in determining rights and obligations: although the full realisation of socio-economic rights may be achieved only progressively, States must take steps towards that goal 'before or within a reasonably short time after ratification.'[36] Indeed, a State's failure to realise socio-economic rights beyond the core content for a relatively short period of time may be acceptable, but prolongation of this situation for longer periods may not. Thus, States' obligations towards people on the move *de facto* increase over time.

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30 For a detailed discussion of the concept of progressive realisation see Olivier De Schutter, 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019).

31 Craven (n 8) 115; Sepúlveda (n 8) 313–14.

32 Young (n 10) 654.

33 CESCR, General Comment 3, para 9; CESCR, General Comment 12, para 14; CESCR, General Comment 13, para 44; CESCR, General Comment 14, para 31; CESCR, General Comment 15, para 18; CESCR, General Comment 18, para 20; CESCR, General Comment 23, para 51.

34 Saul, Kinley and Mowbray (n 8) 2.

35 The CESCR has further specified that the plan 'must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan.' CESCR, 'General Comment No 11 on Plans of Action for Primary Education' (10 May 1999) UN Doc E/C.12/1999/4, para 10.

36 Alston and Quinn (n 8) 166.

The CESCR has sought to clarify what counts as a breach of the obligation to take steps. It has consistently held that the latter is an obligation of immediate effect and that such steps must be 'deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.'[37] A failure to act in good faith to take such steps amounts to a violation of the right in question.[38] Furthermore, the standard of due diligence applies: States parties must take reasonable measures to progressively realise socio-economic rights. The CESCR 'looks at whether implementation is reasonable or proportionate with respect to the attainment of the relevant rights, complies with human rights and democratic principles and whether it is subject to an adequate framework of monitoring and accountability.'[39] For instance, the right to water requires States to take 'the necessary and feasible steps' towards the realization of the right.[40] Under Article 13 ICESCR, States must, at a minimum, 'adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant.'[41] Consequently, a failure to take such steps amounts to a breach of the State's obligations under the ICESCR.[42] This includes, *inter alia*, the failure 'to introduce, as a matter of priority, primary education which is compulsory and available free to all' and 'to take "deliberate, concrete and targeted" measures towards the progressive realization of secondary, higher and fundamental education in accordance with article 13(2)(b)-(d)'.[43] Likewise, the failure to take appropriate steps towards the full realisation of the rights to health, water and social security violates these rights.[44]

To what extent does the fact that people on the move are non-nationals affect what steps States must take to progressively realise their socio-economic rights? The CESCR clarified States' duties towards refugees and migrants as follows:

> Each State is left a certain margin of appreciation to decide which measures it should adopt to progressively realize the rights of the Covenant provided such steps are deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.[45]

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37 CESCR, General Comment 3, paras 1 and 2; CESCR, General Comment 4, para 10; CESCR, General Comment 13, para 42; CESCR, General Comment 14, para 30; CESCR, General Comment 15, para 17; CESCR, General Comment 18, para 19; CESCR, General Comment 19, para 40; CESCR, General Comment 23, para 50.

38 CESCR, General Comment 15, para 40; CESCR, General Comment 19, para 62.

39 CESCR, General Comment 19, para 63; see also CESCR, General Comment 23, para 77. Sepúlveda argues that States must take measures that are reasonable, effective, and produce results compatible with the obligations under the ICESCR, and that they must take into account the means that have proved to be the most effective in ensuring the protection of other human rights. Sepúlveda (n 8) 335–39.

40 CESCR, General Comment 15, para 41.

41 CESCR, General Comment 13, para 52.

42 Ibid para 58.

43 Ibid para 59.

44 CESCR, General Comment 14, para 49; CESCR, General Comment 15, para 43; CESCR, General Comment 19, para 65.

45 CESCR, Statement on Duties of States Towards Refugees and Migrants, para 5.

More generally, while States' margin of appreciation is broader with regard to people on the move than nationals, they must still comply with the standard of due diligence, the principle of non-discrimination and their core obligations. In other words, partner States have an immediate obligation to take steps to progressively realise the socio-economic rights of people on the move. They are allowed to take those steps at a slower pace, provided the difference in speed is proportionate and serves a legitimate aim, and their core rights are realised as a matter of priority. Thus, over time partner States are expected to increase the realisation of the socio-economic rights of people on the move on their territory beyond the core.

Yet a tension exists between this underlying assumption of progress over time and the resource constraints faced by many partner States. On the one hand, the reference to 'progressive realisation' in Article 2(1) ICESCR implies that States' obligations – and hence their ability to realise rights – increase over time. On the other hand, their obligations are circumscribed by their available resources and the standard of due diligence: they are only required to take reasonable measures, in light of their available resources, to take steps in order to progressively realise rights. Indeed, many countries today remain unable to meet their core obligations, notwithstanding the passing of time.[46] In the context of cooperative migration control, some partner States comply with their obligations of progressive realisation better than others. In Turkey, for instance, the increasing rates of school enrolment among Syrian refugees suggest that their rights are being progressively realised.[47] However, the mental and physical health of people on the move in Indonesia and Nauru worsens rather than improves over time because of the poor living conditions and lack of adequate health care.[48] If the maximum available resources diminish over time, or the number of people on the move on their territory increases, it may become difficult, if not impossible, for States to increase or even maintain the level of realisation of their socio-economic rights, as the next section discusses.

2.2.2. Non-retrogression and Limitations

If States have an obligation to progressively realise socio-economic rights, 'it is also reasonable to conclude that they have the obligation of not moving backwards once a certain level of protection has been achieved'.[49] Indeed, 'any deliberately retrogressive measures (…) would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'[50] In other words, there is a strong presumption that retrogressive measures are not permissible

46 Saul, Kinley and Mowbray (n 8) 154. See also Sepúlveda (n 8) 321.
47 Chapter II, Section 2.1.
48 Chapter II, Section 2.2.
49 Uprimny, Chaparro Hernández and Castro Araújo (n 9) 630.
50 CESCR, General Comment 3, para 9.

if a State is able but unwilling to prevent such measures.[51] The CESCR has repeatedly held that:

> If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[52]

Thus, 'instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.'[53] Moreover, retrogressive measures incompatible with the core obligations under the rights to water, health, and just and favourable conditions of work constitute a violation of these rights.[54] The CRC Committee likewise found that Article 4 CRC, like Article 2(1) ICESCR, prohibits retrogressive measures, especially with regard to 'immediate and minimum core obligations'[55], while the Global Compact for Migration explicitly upholds the principle of non-regression.[56] The following factors play a role: whether it concerned the core of socio-economic rights; the existence of other serious claims on the State's limited resources, such as natural disasters or armed conflict; and whether it availed itself of international assistance and cooperation.[57] While deliberately retrogressive measures are prohibited, in the context of cooperative migration control, a significant influx of people on the move into the territory of a partner State can have important consequences for its ability to progressively realise their socio-economic rights and could hence justify retrogressive measures.

Furthermore, in addition to the *prima facie* prohibition of retrogressive measures, Article 4 ICESCR provides that:

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51 CESCR, General Comment 13, para 45; CESCR, General Comment 14, para 32; CESCR, General Comment 15, para 19; CESCR, General Comment 18, para 34; CESCR, General Comment 19, para 42.

52 CESCR, General Comment 14, para 32; CESCR, General Comment 15, para 19; see also CESCR, General Comment 13, para 45; CESCR, General Comment 18, para 21; CESCR, Statement on the Obligation to Take Steps to the 'Maximum of Available Resources', para 9.

53 CESCR, General Comment 4, para 18.

54 CESCR General Comment 14, para 48; CESCR General Comment 15, para 42; CESCR General Comment 23, para 78.

55 CRC, General Comment 19, para 31.

56 Global Compact for Migration, para 15.

57 CESCR, Statement on the Obligation to Take Steps to the 'Maximum of Available Resources', para 10. See also 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2011) 29 Netherlands Quarterly of Human Rights 578, principle 34; Sepúlveda (n 8) 331–32. The OHCHR held that States, when adopting austerity measures, should demonstrate *inter alia*: the existence of a compelling State interest; the necessity, reasonableness, temporariness and proportionality of the austerity measures; the exhaustion of alternative and less restrictive measures; the non-discriminatory nature of the proposed measures; protection of a minimum core content of the rights; and genuine participation of affected groups and individuals in decision-making processes. OHCHR, 'Report on Austerity Measures and Economic and Social Rights' (2013) para 15.

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 4 determines what limitations on rights are permissible. Limitations concern 'a state's power to restrict the provision or protection of a right in order to pursue some other, countervailing, weightier public interest.'[58] They differ from progressive realisation, which concerns 'the state's capacity to implement rights in the context of its maximum available resources.'[59] Accordingly, 'a right may be limited at any point on the spectrum along which that right is being progressively realized'.[60] In other words, Article 4 does not cover insufficient available resources.[61] While little guidance is available from the *travaux préparatoires* and CESCR output on what limitations are permissible, arbitrary limitations on rights are prohibited.[62] More specifically, the requirement in Article 4 ICESCR that socio-economic rights may only be limited 'in so far as this may be compatible with the nature of these rights' suggests that their core cannot be limited.[63] Furthermore, as rights can only be limited 'for the purpose of promoting the general welfare in a democratic society', States cannot limit the rights of people on the move for deterrence purposes.[64] Likewise, under this test, migration control can only justify limiting the socio-economic rights of people on the move if it can be demonstrated that it promotes general welfare.[65] Thus, if a partner State is unwilling rather than unable to realise the socio-economic rights of people on the move for deterrence purposes, it breaches its obligations under international human rights law.

Partner States *prima facie* breach their obligations under international human rights law if they fail to realise the core socio-economic rights of people on the move. Yet cooperative migration control challenges the underlying assumption that partner States that fail to progressively realise their socio-economic rights are unwilling rather than unable to do so. Indeed, as a result of migration control, partner States in the Global South can host significant numbers of people on the move, such as Turkey which

58 Saul, Kinley and Mowbray (n 8) 247.

59 Ibid.

60 Ibid.

61 Alston and Quinn (n 8) 194; Sepúlveda (n 8) 279.

62 Limburg Principles (n 8) para 49; Saul, Kinley and Mowbray (n 8) 242.

63 See Limburg Principles (n 8) paras 47 and 56; Sepúlveda (n 8) 281; Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights Law Review 557, 579–84.

64 See Sepúlveda (n 8) 282–83; Müller (n 63) 570–75.

65 Sepúlveda suggested that a State can only reduce or cut social welfare benefits to asylum seekers if it faces economic constraints and there is a demonstrable necessity to limit the enjoyment of their socio-economic rights, and diminishing or withdrawing welfare benefits must be the final resort. Sepúlveda (n 8) 283. See Chapter III, Section 5 for similar considerations under the principle of non-discrimination.

hosts some 3.6 million Syrian refugees. The combination of large groups of people on the move and limited available resources suggests that the assumption that partner States can realise their core socio-economic rights is not always warranted. Likewise, the obligation for partner States to take steps to progressively realise these rights and the *prima facie* prohibition of retrogressive measures may prove untenable in certain situations, for instance in case of mass influx. In the context of cooperative migration control, it is conceivable that a significant increase in the number of people on the move hosted by a partner State justifies retrogressive steps, provided it complies with the due diligence standard and the principle of non-discrimination in doing so. The situation of people on the move in Indonesia illustrates this, as their plight worsened after Australia cut IOM funding in 2018, depriving many of shelter and basic health care.[66] Indonesia could argue that it does not breach its obligations under the ICESCR notwithstanding the retrogression in the realisation of their rights to housing and health, provided it can demonstrate that it lacks sufficient available resources to comply with its core obligations towards its own nationals as well as people on the move and that it complied with the standard of due diligence and the principle of non-discrimination.

In sum, then, if a partner State is unwilling rather than unable to realise at least the core socio-economic rights of people on the move, it breaches its obligations under international human rights law. Whether a State is unable or unwilling depends on various factors, including its use of the maximum available resources and its request for and acceptance of international assistance and cooperation. However, assistance received in the context of migration control does not necessarily increase a partner State's ability to realise the socio-economic rights of people on the move. Moreover, although a partner State's failure to take steps to progressively realise these rights and retrogression *prima facie* breaches its obligations under international human rights law, certain situations, such as mass influxes combined with limited resources, may nevertheless justify the non-realisation of the core socio-economic rights of people on the move. That is only the case if the State complies with the due diligence standard and the principle of non-discrimination. Having established the scope of partner States' obligations towards people on the move at a general level, the next section discusses their obligations regarding specific socio-economic rights.

3. PARTNER STATES' OBLIGATIONS REGARDING SPECIFIC SOCIO-ECONOMIC RIGHTS

While the previous section discussed the scope of partner States' obligations *in abstracto*, the rest of this chapter examines their obligations regarding the following rights in turn: the right to an adequate standard of living; the right to health, the right to education, the right to work and rights at work; and the right to social security.

66 Chapter II, Section 3.3.2.

The following overview reflects developments in the CESCR's approach to core socio-economic rights and States' core obligations. In particular, the CESCR increasingly addresses States' obligations towards (certain categories of) non-nationals and the focus shifts over time from the core content of rights to increasingly detailed core obligations of States and violations of the latter. Therefore, the fact that partner States' obligations are more detailed with regard to one right than another may reflect the moment in time when the standards in question were developed rather than differences that are inherent to the norms themselves.

3.1. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

Article 11(1) ICESCR provides for 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.' Various other human rights instruments also recognise State obligations to realise this right. For instance, it is implicit in the right to life and the prohibition of torture,[67] while Article 27(3) CRC provides that:

> States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

This obligation includes children on the move, and States should 'take measures to ensure an adequate standard of living in temporary locations, such as reception facilities and formal and informal camps'.[68] Women migrant workers are likewise entitled to the right to be free from poverty and to an adequate standard of living.[69] Moreover, in the New York Declaration States 'committed to providing humanitarian assistance to refugees so as to ensure essential support in key life-saving sectors, such as health care, shelter, food, water and sanitation.'[70] The Comprehensive Refugee Response Framework refers to the provision of adequate, safe and dignified reception conditions, 'including by providing access to adequate safe drinking water, sanitation, food, nutrition, shelter, psychosocial support and health care, including sexual and reproductive health'.[71] The Global Compact on Refugees also recognises that food and

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67 See Chapter III, Section 2.

68 CRC Committee, General Comment 6, para 44; see also CMW and CRC Committee, Joint General Comment 4 (CMW) and 23 (CRC Committee), paras 49–50.

69 CEDAW Committee, General Recommendation 26, para 6.

70 New York Declaration, para 80.

71 Comprehensive Refugee Response Framework, para 5(c); see also paras 5(g) (putting in place measures which uphold refugees' human rights), 7(a) (providing prompt, safe and unhindered access to humanitarian assistance for refugees) and 13(b) (expanding opportunities for refugees to access *inter alia* livelihood opportunities).

nutrition are priority basic needs and requires efforts to facilitate access by refugees to sufficient, safe and nutritious food.[72] In other words, partner States must provide people on the move, notably refugees, with an adequate standard of living.

Various instruments provide specific guidance on various elements of the right to an adequate standard of living, especially as regards the rights to housing, food and water. Thus, the *right to adequate housing* derives from the right to an adequate standard of living.[73] It is 'the right to live somewhere in security, peace and dignity.'[74] The core content of this right consists of the following elements: legal security of tenure; availability of services, materials, facilities and infrastructure; location; habitability; affordability; accessibility; and cultural adequacy.[75] Although the CESCR did not specify the corresponding core obligations of States, the definition of the core content implies that if a partner State does not realise these elements for people on the move, it fails *prima facie* to comply with its obligations under the ICESCR. The CERD also recommended that States adopt measures to guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens.[76] Although the Revised European Social Charter excludes irregular migrants from its provisions[77], the European Committee of Social Rights, applying a teleological interpretation, found that States parties are required 'to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction.'[78] The ICRMW, however, only grants access to housing and protection against exploitation in respect of rents to migrant workers and members of their families who are documented or in a regular situation.[79] Likewise, States parties to the ICRMW only have to take measures to ensure that living conditions of migrant workers and members of their families *in a regular situation* 'are in keeping with the standards of fitness, safety, health and principles of human dignity.'[80] Finally, the Refugee Convention, while not specifying the content of the right to housing, requires States to accord refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally under the same circumstances.[81] In sum, then, people on the move are entitled to the realisation of their core right to housing, although States may have more obligations towards certain people on the move, especially refugees, than others, notably those in an irregular situation.

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72 Global Compact on Refugees, para 80; see also paras 78 and 79.
73 CESCR, General Comment 4, para 1.
74 Ibid para 7.
75 Ibid para 8.
76 CERD, General Recommendation 30, para 32.
77 Paragraph 1 of the Appendix provides that '(…) the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned (…).'
78 European Committee of Social Rights, *DCI* paras 36 and 64.
79 Article 43(1)(e) ICRMW.
80 Article 70 ICRMW.
81 Article 21 Refugee Convention.

The *right to adequate food* is embodied in Article 11(1) ICESCR and in Article 11(2) ICESCR, which recognises the fundamental right of everyone to be free from hunger. The core of the right to adequate food includes two elements: the 'availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;' and the 'accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.'[82] States have a corresponding core obligation to take the necessary action to mitigate and alleviate hunger, even in times of natural or other disasters.[83] Furthermore, '[e]very State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.'[84] In other words, the right to food is violated 'when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.'[85] The CESCR recently confirmed that the core obligation to secure freedom from hunger applies to people on the move.[86] Moreover, if refugees live in a partner State where a rationing system exists, they are entitled to the same treatment as nationals.[87] In conclusion, a partner State breaches its core obligation when people on the move do not have access to the minimum essential food which is sufficient, nutritionally adequate and safe, unless it can demonstrate that it is unable to comply with this obligation for reasons beyond its control and that it has unsuccessfully sought to obtain international support.[88]

Finally, the *right to water* 'clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.'[89] It entitles everyone to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.'[90] The CESCR has defined States' core obligations with regard to the right to water, which are non-derogable,[91] in great detail. These include *inter alia* the obligations: to ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease; to ensure the right of access to water and water facilities and services on a non-discriminatory basis; to ensure physical access to water facilities or services that provide sufficient, safe and regular water that are at a reasonable distance from the household and without prohibitive waiting times; and to ensure personal security is not threatened when having to physically access water.[92] States should also give special attention to the right to water of *inter alia*

82 CESCR, General Comment 12, para 8.
83 Ibid para 6.
84 Ibid para 14.
85 Ibid para 17.
86 CESCR, Statement on Duties of States Towards Refugees and Migrants, para 9.
87 Article 20 Refugee Convention.
88 CESCR, General Comment 12, para 17.
89 CESCR, General Comment 15, para 3.
90 Ibid para 2.
91 Ibid para 40.
92 Ibid para 37.

'refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.'[93] Thus, States parties to the ICESCR should take steps to ensure that people on the move 'have access to adequate water whether they stay in camps or in urban and rural areas' and that refugees and asylum seekers 'should be granted the right to water on the same conditions as granted to nationals'.[94] States must comply with their core obligations towards refugees and migrants, which includes guaranteeing access to water to satisfy basic needs.[95] If a partner State fails to do so, it *prima facie* breaches its obligations under the ICESCR.

In sum, partner States have an obligation to realise the core of the right to an adequate standard of living, especially as regards refugees and people on the move who have a regular status. Yet the lived reality for many people on the move affected by cooperative migration control is that these rights are not realised in practice. For instance, detention conditions in Libya fall well below international standards, as a result of which the core rights to housing, food and water are often not realised.[96] In order to determine whether Libya complied with its obligations under the ICESCR, we must examine whether it used the maximum available resources, including those available through international assistance and cooperation, to realise at least the core socio-economic rights of people on the move, in accordance with the due diligence standard and the principle of non-discrimination. If Libya is unable to comply with its core obligations towards people on the move notwithstanding its best efforts to do so, it complied with its obligations. However, if a detailed analysis of the circumstances shows that Libya is able but unwilling to realise at least the core socio-economic rights of people on the move, it breached its obligations under the ICESCR. It is likely that the dire conditions in many Libyan detention centres breach Libya's obligations under other human rights treaties to which it is a party.[97] Where the plight of people on the move in Libya also violates their civil and political rights, notably the right to life and the prohibition of torture and other forms of ill-treatment, the assessment whether Libya complied with its obligations is likely to be more straightforward, as it does not depend on available resources and progressive realisation.

Likewise, the living conditions at the RPC in Nauru are so dire that they have been found to amount to cruel, inhuman and degrading treatment.[98] Nauru's treaty

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93 Ibid para 16.

94 Ibid para 16(f). Para 16(g) recommends that '[p]risoners and detainees are provided with sufficient and safe water for their daily individual requirements', which is relevant for people on the move in detention.

95 CESCR, Statement on Duties of States Towards Refugees and Migrants, para 9. Although specific circumstances such as limited resources and a mass influx of people on the move could justify non-compliance with core obligations, the CESCR held that the adoption of retrogressive measures incompatible with these core obligations violates the right to water: CESCR, General Comment 15, para 42.

96 See Chapter II, Section 2.1.

97 Libya has ratified the ICCPR, CAT, CRC, ICRMW and CRPD as well as the ACHPR and the African Charter on the Rights and Welfare of the Child.

98 Chapter II, Section 2.2.

obligations towards people on the move are arguably limited to those imposed by the treaties it has ratified. For instance, as Nauru is not a party to the ICESCR nor the ICRMW, it does not incur any obligations towards people on the move under these instruments. However, under the CRC Nauru must realise the socio-economic rights of children on the move and under CAT it must ensure that no people on the move live in circumstances that amount to cruel, inhuman or degrading treatment. In addition, if it can be demonstrated that socio-economic rights have reached the status of custom, Nauru could be found to breach obligations to realise the core socio-economic rights of people on the move under customary international law.

3.2. THE RIGHT TO HEALTH

The right to an adequate standard of living is closely related to the right to the highest attainable standard of physical and mental health embodied in Article 12(1) ICESCR. It is 'a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.'[99] States' core obligations include *inter alia* the obligation to: ensure the right of access to health facilities, goods and services on a non-discriminatory basis; ensure access to the minimum essential food which is nutritionally adequate and safe; ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; and provide essential drugs.[100] Furthermore, the following obligations are of comparable priority: to ensure reproductive, maternal and child health care; to provide immunisation against the major infectious diseases occurring in the community; to take measures to prevent, treat and control epidemic and endemic diseases; and to provide education and access to information concerning the main health problems in the community.[101] According to the CESCR, the adoption of retrogressive measures incompatible with States' non-derogable core obligations constitutes a violation of the right to health.[102] It recently confirmed that the obligation to guarantee access to essential drugs also applies to people on the move[103] and that 'States parties have a duty to respect the right to health by ensuring that all persons, including migrants, have equal access to preventive, curative and palliative health services, regardless of their legal status and documentation.'[104] Moreover, '[a]ll persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency

99 CESCR General Comment 14, para 9.

100 Ibid para 43.

101 Ibid para 44.

102 Ibid paras 47–48. As noted above, provided they are not deliberate, in certain circumstances retrogressive measures that breach a State's core obligations could be justified. However, the CESCR's wording suggests the opposite: '[t]he adoption of any retrogressive measures incompatible with the core obligations under the right to health, (…) constitutes a violation of the right to health' (para 48).

103 CESCR, Statement on Duties of States Towards Refugees and Migrants, para 9.

104 Ibid para 12. See also CESCR General Comment 14, para 34; Stefano Angeleri, 'The Impact of the Economic Crisis on the Right to Health of Irregular Migrants, as Reflected in the Jurisprudence of the

medical care.'[105] However, it remains unclear to what extent 'preventive, curative and palliative health services' overlap with 'primary and emergency medical care' and what the contours are of the right to health for irregular migrants.[106]

Other international instruments confirm that partner States have certain minimum obligations towards people on the move but their exact scope remains unclear. The CERD recommended that States adopt measures to refrain from denying or limiting non-citizens' access to preventive, curative and palliative health services.[107] Article 28 ICRMW provides that migrant workers and members of their families, including those with irregular status, 'have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals'.[108] The CMW has interpreted this as encompassing the same core obligations as under the ICESCR, namely primary health care as well as preventive, curative and palliative health services.[109] Under the CRC, children on the move are entitled to the same access to health care as children who are nationals, which includes all health services, both preventive and curative; mental, physical or psychosocial care; access to essential medicines; and immunisation against the major infectious diseases.[110] Furthermore, States that receive a high number of people on the move should ensure that appropriate protection services, including psychosocial and legal counselling, support and rehabilitation, are provided for persons with disabilities.[111] Finally, at the regional level, the European Committee of Social Rights held that foreign nationals are entitled to medical assistance, even if they have an irregular status, notwithstanding their exclusion from the scope of the Revised European Social Charter.[112] Thus, while all treaty bodies seem to agree that people on the move have the right to access certain basic services, the exact contours of this right remain blurred.

In practice, a large majority of States report that they provide non-nationals equal access to essential or emergency health care, regardless of their immigration status.[113] Indeed, among the commitments that apply to both refugees and migrants, the New York Declaration mentions 'the importance of addressing the immediate needs of

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UN Committee on Economic, Social and Cultural Rights' (2017) 19 European Journal of Migration and Law 165.

105 CESCR, General Comment 19, para 37.

106 Klaus Kapuy, *The Social Security Position of Irregular Migrant Workers: New Insights from National Social Security Law and International Law* (Intersentia 2011) 26.

107 CERD, General Recommendation 30, para 36.

108 See also CMW, General Comment 2, para 72.

109 Ibid paras 72–73.

110 Ibid para 72; CRC Committee, General Comment 6, para 46; CMW and CRC Committee, Joint General Comment 4 (CMW) and 23 (CRC Committee), paras 54–55.

111 Committee on the Rights of Persons with Disabilities, 'General Comment No 6 on Equality and Non-Discrimination' (26 April 2018) UN Doc CRPD/C/GC/6, para 73.

112 European Committee of Social Rights, *FIDH v France* Complaint No 14/2003 (8 September 2004) para 32. See also Kapuy (n 106) 119–20.

113 UN Department of Economic and Social Affairs, 'International Migration 2019: Report' (2019) UN Doc ST/ESA/SER.A/438, 36.

persons who have been exposed to physical or psychological abuse while in transit upon their arrival, without discrimination and without regard to legal or migratory status or means of transportation.'[114] States also committed to complying with their obligations under the CRC, and to work to provide for *inter alia* basic health and psychosocial development of children on the move.[115] With regard to refugees, States further committed to 'ensure that the basic health needs of refugee communities are met and that women and girls have access to essential health-care services.'[116] In the Global Compact for Migration States confirmed that they have obligations with regard to the right to health of migrants.[117] They can comply with these obligations *inter alia* by incorporating the health needs of migrants in national and local health care policies and plans;[118] providing access to health care services, including mental health, for unaccompanied and separated children;[119] and providing access to basic health care in detention.[120]

In sum, the core obligations under the right to health overlap with States' core obligations under the right to an adequate standard of living, but also include access to essential drugs and to health facilities, goods and services. There seems to be a consensus among treaty monitoring bodies and States that the latter have to grant people on the move access to at least basic health care and that they have more far-reaching obligations towards children and refugees. However, in practice many people on the move affected by cooperative migration control do not have access to basic health care. For instance, urban refugees in Indonesia have access to community health clinics for free but need to pay for anything beyond basic first aid, while a NGO referral system focuses on emergency and life-saving interventions, leaving a gap for non-urgent medical needs.[121] Australia's funding cuts to the IOM, which provided health care to people on the move in Indonesia, further exacerbate the risk that they cannot access adequate medical care.

3.3. THE RIGHT TO EDUCATION

Article 13 ICESCR recognises the right of everyone to education. The CESCR has elaborated in detail on its normative content.[122] States' core obligations include the obligations:

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114 New York Declaration, para 26.
115 Ibid para 32; see also para 59.
116 Ibid para 83. See also Comprehensive Refugee Response Framework, para 13(b) and Global Compact on Refugees, paras 72–73.
117 See for instance Global Compact for Migration, para 22(i).
118 Ibid para 31(e).
119 Ibid para 23(f).
120 Ibid para 29(f) and (h).
121 Gemima Harvey, 'Beyond Limbo, Building Lives: Livelihood Strategies of Refugees and Asylum Seekers in Java, Indonesia' (2019) Refugee Law Initiative Working Paper No 38, 13.
122 CESCR General Comment 13, paras 4–30.

> to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with 'minimum educational standards' (art. 13(3) and (4)).[123]

States parties to the ICESCR 'are obliged to prioritize the introduction of compulsory, free primary education.'[124] Failure to do this amounts to a violation of Article 13 ICESCR.[125] Moreover, the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals.[126] The obligation to provide primary education for all is an immediate duty of all States parties[127] and children on the move have a right to receive education.[128]

Other treaty bodies have also paid considerable attention to the right to education of non-nationals.[129] There is a consensus that partner States have at least the obligation to ensure that children on the move have access to free and compulsory primary education.[130] Indeed, the right of all children to free and compulsory primary education is recognised across numerous international and regional instruments.[131] In addition, various instruments include more far-reaching obligations. Thus, the CRC grants all children on the move full access to all levels and all aspects of education on the basis of equality with nationals.[132] The ICRMW guarantees children of migrant workers the right of access to education on the basis of equality of treatment with nationals, including to secondary education and to public pre-school educational institutions or schools.[133] States must ensure that children in detention have access to education.[134] The Refugee Convention grants refugees the same treatment as nationals regarding elementary education, and it grants them treatment as favourable as possible, and

123 Ibid para 57.
124 Ibid para 51.
125 Ibid para 59.
126 Ibid para 34. See also Sepúlveda (n 8) 261.
127 CESCR, General Comment 13, para 51.
128 CESCR, Statement on Duties of States Towards Refugees and Migrants, paras 6, 8 and 9.
129 Saul, Kinley and Mowbray (n 8) 1124–28 and references cited there.
130 The CMW found that 'the right to education is guaranteed to all migrant children, regardless of their migration status, in all regional human rights systems.' CMW, General Comment 2, para 11.
131 See for instance Article 13(2)(a) ICESCR; Article 28(1)(a) CRC; Article 24(2) CRPD; Article 16 Protocol San Salvador; see also Article 30 ICRMW and CMW, General Comment 2, para 75; Article 17(2) Revised European Social Charter; Article 2 Optional Protocol to the ECHR; Article 11 African Charter on the Rights and Welfare of the Child; Article 22 Refugee Convention; CERD, General Recommendation 30, para 30; *Yean and Bosico v Dominican Republic*, para 185.
132 CRC, General Comment 6, para 41; CMW and CRC Committee, Joint General Comment 4 (CMW) and 23 (CRC Committee), paras 59–60.
133 Article 30 ICRMW; CMW, General Comment 2, para 75.
134 CMW, General Comment 2, para 44; CRC Committee, General Comment 6, para 63; Global Compact for Migration, para 29(h).

not less favourable than accorded to aliens generally with regard to other aspects of education, such as access to studies.[135] The New York Declaration repeatedly mentions children's right to education, albeit with more detailed obligations towards refugee children.[136] In the Global Compact for Migration States further committed to:

> Provide inclusive and equitable quality education to migrant children and youth, as well as facilitate access to lifelong learning opportunities, including by strengthening the capacities of education systems and by facilitating non-discriminatory access to early childhood development, formal schooling, non-formal education programmes for children for whom the formal system is inaccessible, on-the-job and vocational training, technical education, and language training, as well as by fostering partnerships with all stakeholders that can support this endeavour.[137]

In sum, partner States have at least a core obligation to ensure that children on the move have access to free, compulsory primary education, and must probably also grant them full access to all levels and all aspects of education on the basis of equality with nationals. In practice, nine out of ten governments worldwide have implemented measures to provide migrants equal access to public education, including public primary schools and secondary schools.[138] Yet, as Chapter II illustrated, partner States do not always comply with their obligations under the right to education. Thus, in partner States across the globe children on the move do not have access to education, including Turkey, Indonesia and Mexico.[139]

3.4. THE RIGHT TO WORK AND RIGHTS AT WORK

A distinction must be made between the right *to* work and rights *at* work of people on the move. Although States have a duty to ensure the right of access to work, Article 2(3) ICESCR allows partner States in the Global South to determine to what extent they guarantee the economic rights of non-nationals.[140] Therefore, partner States do not have a core obligation to grant people on the move access to their labour market.[141] Indeed,

135 Article 22 Refugee Convention.

136 States will work to provide for the education of all children on the move and are 'determined to ensure that all children are receiving education within a few months of arrival, and [they] will prioritize budgetary provision to facilitate this' (para 32). They reaffirmed their commitment to provide access to basic education of migrant children (para 59). Their commitments towards refugee children, on the other hand, include providing quality primary and secondary education in safe learning environments for all refugee children; supporting early childhood education for refugee children; and promoting tertiary education, skills training and vocational education (paras 81–82). See also Global Compact on Refugees, paras 68–69 and Comprehensive Refugee Response Framework, para 13(b).

137 Global Compact for Migration, para 31(f).

138 UN Department of Economic and Social Affairs, 'International Migration 2019: Report' (n 113) 37.

139 Chapter II, Section 2.

140 See Chapter III, Section 5.

141 With regard to the sub-category of refugees, the CESCR has held that 'States parties should enact legislation enabling refugees to work (…).' CESCR, General Comment 23, para 47(i).

there is no general, unqualified right for foreigners to seek or obtain work in another state and international law provides an objective and reasonable basis for differentiating between citizens and non-citizens, on the basis that it permits States to restrict labour market access by non-citizens.[142] The ICRMW reflects this, as it recognises that States may impose various restrictions and conditions on migrant workers' right to freely choose their remunerated activity.[143] In other words, partner States are allowed to restrict access to their labour market to non-citizens.

The right *to* work is defined in Article 6(1) ICESCR as the right of everyone to the opportunity to gain her living by work which she freely chooses or accepts.[144] It is not an absolute and unconditional right to gain employment, but rather requires work to be decent.[145] States' core obligations under Article 6 ICESCR include the obligation to ensure non-discrimination and equal protection of employment, and to ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity.[146] The right to work is closely related to other socio-economic rights, especially the right to an adequate standard of living, as earning money enables a person to pay for the provision of her basic needs such as food, water and housing where the latter are not provided for by the State.[147] The Refugee Convention details the rights of refugees as regards wage-earning employment, self-employment, liberal professions and labour legislation and social security.[148] The New York Declaration, however, only 'encourage[s] host Governments to consider opening their labour markets to refugees.'[149]

As regards rights *at* work, Article 7 ICESCR recognises the right to the enjoyment of just and favourable conditions of work. Such conditions must ensure fair wages and equal remuneration for work of equal value without distinction of any kind; a decent living; safe and healthy working conditions; equal opportunity to be promoted to an appropriate higher level; and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.[150] States parties' core obligations under Article 7 ICESCR require them *inter alia* to: guarantee through law the exercise of the right without discrimination of any kind, including as to nationality; establish minimum wages that are non-discriminatory and non-derogable; and introduce and enforce minimum standards in relation to rest, leisure, reasonable

142 Saul, Kinley and Mowbray (n 8) 315.
143 Article 52 ICRMW.
144 Articles 7 and 8 ICESCR are also relevant for a full understanding of the right to work. See also CESCR, General Comment 23.
145 CESCR General Comment 18, paras 6–7.
146 Ibid para 31.
147 See Craven (n 8) 194.
148 Articles 17–19 and 24 Refugee Convention.
149 New York Declaration, para 84. See also Comprehensive Refugee Response Framework, para 13(b) and Global Compact on Refugees, paras 70–71. On refugees' right to work under international law see Amanda Gray Meral, 'Assessing the Jordan Compact One Year On: An Opportunity or a Barrier to Better Achieving Refugees' Right to Work' (2019) 33 Journal of Refugee Studies 42, 43–48.
150 Article 7 ICESCR, paras (a)-(d).

limitation of working hours, paid leave and public holidays.[151] Deliberately retrogressive measures that are incompatible with core obligations under Article 7 ICESCR violate the right to just and favourable conditions of work.[152] The right to the enjoyment of just and favourable conditions of work applies to all workers in all settings, including refugee workers and migrant workers.[153] Refugee workers and migrant workers, especially those who are undocumented, are vulnerable to exploitation, discrimination and abuse, including long working hours, unfair wages and dangerous and unhealthy working conditions.[154] Therefore, States should ensure that they enjoy treatment that is no less favourable than for nationals.[155] The CESCR has further held that States may have to adopt specific measures of protection for the benefit of undocumented workers.[156] Other human rights instruments and the Global Compact for Migration reflect this, as they do not grant people on the move a right *to* work, but require States to guarantee just and favourable conditions of work and equal treatment with nationals *at* work.[157] For instance, the ICRMW recognises that all migrant workers 'shall enjoy treatment not less favourable than that which applies to nationals of the State of employment'.[158]

In sum, partner States do not have an obligation to open up their labour markets to people on the move, although people on the move who are workers are entitled to just and favourable conditions of work on an equal footing with nationals and partner States hosting them have a core obligation to realise that right.[159] In practice, however, many people on the move affected by cooperative migration control policies do not have access to work. In Indonesia for instance people on the move are not allowed to work, while Guatemala and Turkey restrict their access to the labour market. This is particularly problematic when the State does not provide for their basic needs, as it jeopardises their access to an adequate standard of living. Moreover, even when they have limited access to the labour market, they are often vulnerable to exploitation. Thus, people on the move in Mexico and Turkey are often employed irregularly and do not

151 CESCR, General Comment 23, para 65.

152 Ibid para 78. The CESCR also held that a State may never justify retrogressive measures in relation to aspects of the right to just and favourable conditions of work that are subject to immediate or core obligations: ibid para 52. However, as noted above, provided they meet specific requirements, in certain circumstances retrogressive measures that breach a State's core obligations could be justified. See also n 102.

153 CESCR, General Comment 23, para 5.

154 Ibid paras 47(e) and 47(i).

155 Ibid.

156 CESCR, Statement on Duties of States Towards Refugees and Migrants, para 13.

157 Articles 25 and 26 ICRMW; Joint General Comment 4 (CMW) and 23 (CRC Committee), paras 45–46; CERD, General Recommendation 30, paras 33–35; IACtHR, *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* para 160; Global Compact for Migration, Objective 6: '[f]acilitate fair and ethical recruitment and safeguard conditions that ensure decent work', see Global Compact for Migration, para 22.

158 Article 25 ICRMW.

159 See also Saul, Kinley and Mowbray (n 8) 317: a worker's illegal status cannot 'be invoked as an excuse for failing to provide humane and dignified conditions of work, exposing illegal workers to exploitation and abuse.'

benefit from just and favourable conditions of work, especially compared to nationals, and child labour remains a problem.[160]

3.5. THE RIGHT TO SOCIAL SECURITY

Article 9 ICESCR provides that '[t]he States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.' The right to social security complements the right to work, as it enables people to live in dignity even when they are unable to work and their basic needs are not provided for by the State. It is particularly important in the context of cooperative migration control since people on the move do not have an absolute right of access to work.[161] Monitoring bodies have thus found that States have an obligation to provide emergency social assistance to migrants in cases of necessity or extreme poverty and vulnerability.[162]

States' core obligations under Article 9 ICESCR require the State party to 'ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.'[163] If this is not possible, the State should select a core group of social risks and contingencies.[164] Core obligations further require States to ensure the right of access to social security systems or schemes on a non-discriminatory basis, and to respect existing social security schemes and protect them from unreasonable interference.[165] A State's failure to comply with its core obligations, including through the adoption of deliberately retrogressive measures incompatible with these obligations, violates the right to social security.[166] However, a State can justify its failure to meet its core obligations due to a lack of available resources, provided it can demonstrate that 'every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations.'[167]

Although the CESCR recently addressed the issue of people on the move's access to social security benefits, it did not identify any core obligations that States have towards them.[168] The only exception is the entitlement of all people on the move to primary and

160 See Chapter II, Section 2.

161 It has been argued that, unlike the right to work, the right to social security is a social rather than an economic right. Riedel, Giacca and Golay (n 5) 9. If this is correct, Article 2(3) ICESCR does not apply to the right to social security.

162 CMW, General Comment 2, para 70; Joint General Comment 4 (CMW) and 23 (CRC Committee), paras 45–46; CERD, General Recommendation 30, para 71.

163 CESCR, General Comment 19, para 59(a).

164 Ibid.

165 Ibid paras 59(b)-(c).

166 Ibid paras 64 and 65.

167 Ibid para 60.

168 CESCR, Statement on Duties of States Towards Refugees and Migrants, para 15.

emergency medical care.[169] Likewise, the only clear obligation that the ICRMW places on States parties is to ensure that migrant workers and members of their families 'shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties.'[170] In other words, the scope of States' obligations is determined more by their legislation, international agreements and by the principle of non-discrimination than by the core rights of people on the move. Finally, the Refugee Convention entitles refugees to the same treatment as nationals with regard to public relief and assistance as well as social security, subject to some limitations.[171] However, the New York Declaration and Global Compacts do not recognise a right to access social security.[172] Although a majority of States report measures to provide non-nationals equal access to social security programmes, most States do so only to those with legal immigration status.[173]

In sum, although the applicable legal standards are in need of further clarification, it is likely that partner States must grant people on the move access to social security where this is needed to realise the core content of other rights, especially the right to an adequate standard of living.[174] This is the case if they do not have access to work and the State does not directly provide for their basic needs. The plight of people on the move in Indonesia, who are neither allowed to work nor have other means to satisfy their basic needs, illustrates the importance of social security for the realisation of other core socio-economic rights, notably the right to an adequate standard of living.

4. CONCLUSION

The availability of resources and the duty to take steps to progressively realise their socio-economic rights delimit partner States' obligations towards people on the move. Various doctrinal developments clarify their scope. States must use their maximum available resources, including those available through international assistance and cooperation, to comply in priority with their core obligations. They have an immediate obligation to take steps to increase the level of realisation of socio-economic rights over time, and any retrogression or limitation must be justified, especially as regards the core content of obligations. Yet migration flows can challenge the underlying presumption

169 See Section 3.2 above.

170 Article 27(1) ICRMW. See also Article 24(1)(b) for States' obligations towards people on the move who are refugees.

171 Articles 23 and 24 Refugee Convention.

172 The New York Declaration only mentions the development of national strategies for the protection of refugees 'within the framework of national social protection systems, as appropriate' (para 83). The Global Compact for Migration only addresses the establishment of mechanisms for the portability of social security entitlements and earned benefits (Objective 22). The Global Compact on Refugees does not address social security.

173 UN Department of Economic and Social Affairs, 'International Migration 2019: Report' (n 113) 37.

174 On irregular migrant workers' access to social security see Kapuy (n 106).

of progressive realisation of socio-economic rights. Indeed, partner States' limited available resources may prevent them from realising the core rights of people on the move and from increasing the level of rights realisation over time, notably in situations of mass influx. Moreover, assistance received in the context of cooperative migration control, considering its focus on stemming migration flows, does not necessarily increase partner States' available resources to realise the socio-economic rights of people on the move.

States have largely similar obligations under the ICESCR and other human rights instruments as human rights treaty bodies seek to align their interpretation of State obligations towards people on the move. Thus, the CMW held that human rights treaties are complementary and mutually reinforcing and that a State's obligations under the ICRMW 'must be read with respect to the core human rights treaties and other relevant international instruments to which it is a party.'[175] Treaty monitoring bodies tend to adopt a teleological interpretation in order to expand the protection of the rights of non-nationals, especially irregular migrants.[176] This raises the question whether such interpretations do not go beyond a legitimate interpretation.[177] However, partner States endorsed the New York Declaration and the Global Compacts, which overall seem to agree with the treaty bodies' interpretations. Yet there are also divergences in the obligations imposed by various instruments. The scope of protection of the ICRMW, which grants more rights to regular than to irregular migrant workers and members of their families, is often narrower than the ICESCR.[178] The CRC, on the other hand, goes beyond the ICESCR, as it has been interpreted as requiring States to grant children on the move full access to all levels and all aspects of education and health care on the basis of equality with nationals.

Ultimately, the assessment whether partner States comply with their obligations under international human rights law depends on what specific obligations they are bound by: States that have ratified human rights treaties including provisions on socio-economic rights, especially the ICESCR, probably have more far-reaching obligations towards people on the move than States that have not done so. Nevertheless, the overlap between various rights, especially between civil and political rights and economic, social and cultural rights, as well as the possibility that certain elements of socio-economic rights have reached customary status, limit the extent to which such differences can exist. In other words, the scope of a partner State's obligations only depends to a limited extent on which treaties it has ratified.

175 CMW, General Comment 2, para 7.

176 For instance CERD, General Recommendation 30, para 3 holds that States have 'an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law' notwithstanding the fact that Article 1(2) ICERD explicitly states that '[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.'

177 Kapuy (n 106) 171.

178 CMW, General Comment 2, paras 8 and 10.

Furthermore, the plight of people on the move in partner States illustrates the indivisibility and interdependence of human rights. The CESCR has repeatedly held that the realisation of a particular socio-economic right is indispensable for the exercise of other human rights.[179] Indeed, as illustrated by the RPC in Nauru, poor living conditions can cause or exacerbate illnesses, which are further aggravated by the lack of access to adequate health care.[180] Likewise, if people on the move have no access to work nor to social security, their right to an adequate standard of living is jeopardised. In other words, the realisation of various socio-economic rights is often interrelated. In particular, the rights to work and to social security are crucial to the right to an adequate standard of living in situations where the latter is not provided for directly by the State.

Yet the overview of partner States' obligations under specific socio-economic rights also revealed differences between rights. Thus, the 'size' of the core content and the clarity of its contours vary per right. On the one hand, the right to education clearly requires partner States to at least grant children on the move access to compulsory, free primary education. Although it remains unclear what exactly the core content of the right to health includes, it is clear that it covers access to basic health care. More generally, the CESCR's pronouncements suggest that core obligations regarding the rights to water, food, health and just and favourable conditions of work apply to people on the move in the same way as nationals. However, States' obligations are both less clear and less far-reaching as regards the rights to work and to social security of people on the move, which complicates the assessment of whether States complied with these obligations.

Finally, as a matter of practice, many partner States do not comply with their core obligations: many people on the move do not have access to an adequate standard of living and health care, children do not attend school, and many adults cannot work under just and favourable conditions. Differences also exist between partner States: overall, the plight of people on the move in Turkey is better than in Libya for instance. To what extent partner States' failure to comply with their core obligations towards people on the move can be justified by the lack of sufficient resources depends on the circumstances, including the international assistance and cooperation provided by the international community. Since the extent to which partner States realise the socio-economic rights of people on the move affects the obligations of sponsor States, the next chapter turns to the latter.

179 See for example CESCR, General Comment 4, para 1; CESCR General Comment 12, para 4; CESCR General Comment 13, para 1; CESCR General Comment 14, para 1; CESCR General Comment 15, para 1; CESCR General Comment 18, para 1.

180 Chapter II, Section 2.2.

CHAPTER V
THE OBLIGATIONS OF SPONSOR STATES

1. INTRODUCTION

While the previous chapter examined the obligations of partner States that host people on the move in the context of cooperative migration control, this chapter focuses on the obligations of sponsor States. Starting from the presumption that extraterritorial States have complementary obligations to realise human rights, it addresses the following question: to what extent do sponsor States have obligations to complement partner States' efforts to realise at least people on the move's core socio-economic rights? Chapter III found that Sponsor States have two types of extraterritorial obligations as regards socio-economic rights: direct obligations towards people abroad over whom they exercise jurisdiction and global obligations of international assistance and cooperation. This chapter analyses both types of obligations in turn.

Section 2 first examines sponsor States' direct extraterritorial obligations. It discusses three models of extraterritorial jurisdiction developed in the context of civil and political rights: the spatial model, the personal model, and the effects model. It then argues that the functional model, which finds support in legal standards on socio-economic rights as well as civil and political rights, offers the best conceptualisation of States' extraterritorial human rights obligations in the context of cooperative migration control. The functional model proposes that a State exercises jurisdiction when it can take reasonable measures to avoid reasonably foreseeable human rights violations. Section 2 also discusses whether and to what extent sponsor States have direct obligations to realise the socio-economic rights of people on the move affected by cooperative migration control.

As extraterritorial jurisdiction doctrines have largely developed under instruments protecting civil and political rights like the ICCPR and the ECHR, legal standards developed under these instruments form a logical starting point for the analysis of sponsor States' direct extraterritorial obligations. Because the ECtHR has the most voluminous and detailed case law on extraterritorial jurisdiction, the latter plays an important role in clarifying States' direct extraterritorial obligations. Yet as a matter of binding law, the ECtHR's case law is only relevant for European sponsor States and Turkey. Moreover, the ECtHR's approach to extraterritorial jurisdiction is more

restrictive than that of the HRC or IACtHR.[1] Therefore, the analysis includes the output of other courts and human rights monitoring bodies, especially the CESCR, HRC, IACtHR, IAComHR and AComHPR, and points out distinctions where relevant.

Section 3, in turn, discusses sponsor States' global obligations. The analysis draws on the CESCR's general comments, scholarship and State practice, notably the Global Compacts for Migration and on Refugees. As global obligations remain contested and their contours unclear, the analysis starts by examining their status, nature and scope under international law. It then explores the relation between the support that sponsor States provide to partner States for migration control purposes and their global obligations under international human rights law. More specifically, it seeks to answer the following questions: can cooperative migration control policies trigger sponsor States' global obligations? Vice versa, to what extent can sponsor States discharge their global obligations by cooperating with partner States on migration control?

2. SPONSOR STATES' DIRECT EXTRATERRITORIAL OBLIGATIONS

The concepts of effective control, power and authority play an important role in determining whether a State exercises extraterritorial jurisdiction, as regards both socio-economic and civil and political rights. The CESCR has linked jurisdiction to the concepts of control and authority[2], while the HRC found that States parties to the ICCPR must respect and ensure ICCPR rights 'to anyone within the power or effective control of that State Party'.[3] Pronouncements of regional human rights courts and treaty bodies likewise link jurisdiction to the exercise of control, power or authority.[4] Expert guidelines on socio-economic rights also relate a State's jurisdiction to 'situations over which it exercises authority or effective control'.[5] Extraterritorial jurisdiction doctrines have primarily developed under instruments like the ICCPR, ECHR and ACHR, and hence focus on situations involving violations of civil and

1 Wouter Vandenhole, 'The "J" Word: Driver or Spoiler of Change in Human Rights Law?' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 414; Başak Çali, 'Has "Control over Rights Doctrine" for Extra-territorial Jurisdiction come of Age? Karlsruhe, too, has Spoken, now it's Strasbourg's Turn' (*EJIL: Talk!* 21 July 2020).

2 CESCR, Comment 24, para 27: 'an actor domiciled in its territory and/or under its jurisdiction, and thus under its control or authority'. The CESCR had previously held that indicators should cover 'all persons under the territorial jurisdiction of the State party or under its control.' See CESCR, General Comment 23, para 55; see also CESCR, General Comment 15, para 53; CESCR, General Comment 19, para 75.

3 HRC, General Comment 31, para 10.

4 ECtHR, *Al-Skeini* paras 137–38; IACtHR, *The Environment and Human Rights* para 81; IAComHR, *Victor Saldaño v Argentina* Report No 38/99 (11 March 1999) para 19; AComHPR, General Comment 3, para 14.

5 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2011) 29 Netherlands Quarterly of Human Rights 578, principle 9(a).

political rights. However, models of jurisdiction developed with civil and political rights in mind rarely explicitly account for economic, social, and cultural rights.[6] Therefore, commentators have been critical of applying jurisdictional doctrines developed with regard to civil and political rights to socio-economic rights. They argue that such interpretations fail to account for the ways in which States can impact the socio-economic rights of persons in other countries.[7] Yet the fact that cooperative migration control can have a detrimental effect on the socio-economic rights of people on the move as well as their civil and political rights shows that a convincing model of States' extraterritorial jurisdiction must account for both sets of rights. Indeed, if we accept their interdependence and indivisibility, and the overlap between, for instance, the right to life and the right to an adequate standard of living, our account of extraterritorial jurisdiction must apply to both sets of rights. Thus, this study's focus on socio-economic rights can complement jurisdictional doctrines developed predominantly in the context of civil and political rights violations. Accordingly, this section first reviews existing models of extraterritorial jurisdiction in light of their applicability to socio-economic rights and cooperative migration control, before discussing the functional model in more detail and examining sponsor States' jurisdiction in the context of cooperative migration control.

2.1. TRADITIONAL MODELS OF EXTRATERRITORIAL JURISDICTION

The two predominant models of extraterritorial jurisdiction, the spatial and the personal models, reflect the fact that jurisdictional doctrines in international human rights law developed predominantly in cases concerning transnational law enforcement and military operations.[8] Some scholars have also identified a third approach: the effects model. The following discusses the three models, including their relevance for socio-economic rights in the context of cooperative migration control.[9]

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6 Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020) 2.

7 See for instance Sigrun Skogly and Mark Gibney, 'Introduction' in Sigrun Skogly and Mark Gibney (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 2; Smita Narula, 'International Financial Institutions, Transnational Corporations and Duties of States' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 125; Arne Vandenbogaerde, *Towards Shared Accountability in International Human Rights Law* (Intersentia 2016) 5.

8 See for instance ECtHR, *Banković*; ECtHR, *Öcalan v Turkey* [GC] App No 46221/99 (12 May 2005); ECtHR, *Al-Skeini*; ECtHR, *Medvedyev and others v France* [GC] App No 3394/03 (29 March 2010); ECtHR, *El-Masri v Macedonia* [GC] App No 39630/09 (13 December 2012); HRC, *López Burgos*; ICJ, *Congo v Uganda*.

9 Literature on extraterritorial jurisdiction largely endorses the terms 'spatial model', 'personal model' and (to a lesser extent) 'effects model'. See for instance Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) ch IV; Paolo Ronchi, 'The Borders of Human Rights' (2012) 128 Law Quarterly Review 20; Stefanos Xenofontos, 'Recent Developments in the Extraterritorial Scope of Application of the ECHR in the Aftermath of *Jaloud v the Netherlands*

2.1.1. The Spatial Model

It is broadly accepted that States exercise jurisdiction when they exercise effective control over territory abroad, which includes occupation in the context of armed conflict.[10] The ICJ and HRC have thus found that human rights treaties apply when a State exercises effective control over territory abroad.[11] The ECtHR has likewise established that a State exercises jurisdiction when, as a consequence of military action, it 'exercises effective control of an area outside that national territory (…) whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration'.[12] Its case law on Transdniestria further suggests that Russia's exercise of decisive influence over the Moldovan Republic of Transdniestria (MRT) is sufficient to trigger its extraterritorial obligations under the ECHR:

> the 'MRT', set up in 1991–92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event (…) survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.[13]

When States exercise effective control over territory abroad, they have the same scope of obligations towards people under their extraterritorial jurisdiction as towards people on their territory. In the case of *Congo v Uganda*, the ICJ addressed human rights violations committed by Ugandan troops while they occupied Congolese territory. It found that Uganda had failed to meet its obligations under international human rights law on account of the violations committed by its troops and its failure to protect the civilian population from human rights violations.[14] Likewise, the ECtHR established that, where a State exercises effective control over an area, it has the obligation to

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[2014]' (2016) 4 Legal Issues Journal 119; Vandenhole (n 1) 414; Nikolas Feith Tan, *International Cooperation on Refugees: Between Protection and Deterrence* (PhD thesis, Aarhus University 2019) 126–45.

10 For a detailed discussion and criticism of the spatial model see Milanovic (n 9) 127–73.

11 See ICJ, *Israeli Wall* paras 102–13; ICJ, *Congo v Uganda* paras 215–20; ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)* Order (Provisional Measures) (15 October 2008) ICJ Reports 2008, 353, para 109; HRC, 'Concluding Observations on the Third Periodic Report of Israel' (3 September 2010) UN Doc CCPR/C/ISR/CO/3, para 5.

12 ECtHR, *Al-Skeini* para 138. See also ECtHR, *Catan and others v Moldova and Russia* [GC] Apps Nos 43370/04, 8252/05 and 18454/06 (19 October 2012) paras 106–07 and 122–23.

13 ECtHR, *Ilaşcu* para 392. The Court has followed this line of reasoning in later cases concerning Transdniestria and the Nagorno-Karabakh conflict. See ECtHR, *Catan*; ECtHR, *Ivanţoc and others v Moldova and Russia* App No 23687/05 (15 November 2011); ECtHR, *Mozer v Moldova and Russia* [GC] App No 11138/10 (23 February 2016); ECtHR, *Turturica and Casian v Moldova and Russia* Apps Nos 28648/06 and 18832/07 (30 August 2016); ECtHR, *Chiragov and others v Armenia* [GC] App No 13216/05 (16 June 2015).

14 ICJ, *Congo v Uganda* paras 211 and 220. See also ICJ, *Israeli Wall* para 112.

secure 'the entire range of substantive rights set out in the Convention'.[15] The above also applies to socio-economic rights. The ICJ thus found that Israel was bound by the ICESCR in the Occupied Palestinian Territories.[16] Indeed, a State's obligations under the ICESCR apply to all territories and populations under its effective control[17] and a State has obligations to respect, protect and fulfil rights when it exercises control outside its national territory.[18]

In sum, when a State exercises effective control over an area, it exercises extraterritorial jurisdiction and has the same scope of obligations as on its own territory. The threshold of effective control over territory is high: it 'allows many human rights abuses to slip through the cracks.'[19] This is particularly true with regard to socio-economic rights, as there are many ways for a State to affect the socio-economic rights of persons abroad that do not require it to exercise effective control over territory, such as economic sanctions.[20] Moreover, the threshold of effective control is rarely met in the context of cooperative migration control. The involvement of sponsor States is often more remote and limited to people transfers, the provision of funding, equipment and training, the sharing of information, and the use of diplomatic relations and development aid conditionality. Sponsor States generally fall short of exercising effective control over an area abroad, with the possible exception of extraterritorial asylum processing, as in the case of the USA and its US naval base at Guantánamo Bay in Cuba.[21] The lease agreement with Cuba specifies that 'the United States shall exercise complete jurisdiction and control over and within said areas'.[22] Likewise, the HRC noted with regard to the RPCs in Papua New Guinea and Nauru that 'the significant levels of control and influence exercised by [Australia] over the operation of the offshore RPCs, including over its establishment, funding and service provided therein, amount to such effective control.'[23] However, applying the spatial model to places like Guantánamo Bay or the RPCs on Nauru and Manus Island raises the question of what counts as an 'area'. According to Milanovic, when applying the spatial model to ever

15 ECtHR, *Al-Skeini* para 138; see also ECtHR, *Cyprus v Turkey* [GC] App No 25781/94 (10 May 2001) para 77.

16 ICJ, *Israeli Wall* para 112.

17 CESCR, 'Concluding Observations on the Second Periodic Report of Israel' (23 May 2003) UN Doc E/C.12/1/Add.90, para 31.

18 CESCR, General Comment 24, para 10. See also Principle 18 of the Maastricht Principles (n 5) which holds that '[a] State in belligerent occupation or that otherwise exercises effective control over territory outside its national territory must respect, protect and fulfil the economic, social and cultural rights of persons within that territory.'

19 Milanovic (n 9) 119.

20 See for instance CESCR, General Comment 8. See also Skogly and Gibney (n 7) 2; Narula (n 7); Vandenbogaerde (n 7) 5.

21 For a detailed discussion of the USA's obligations towards people held at Guantánamo Bay see Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (CUP 2015) chs 5 and 6.

22 Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations (signed 16 February 1903 (Cuba) and 23 February 1903 (US)) US-Cuba Treaty Series No 418, art III.

23 HRC, 'Concluding Observations on the Sixth Periodic Report of Australia' (1 December 2017) UN Doc CCPR/C/AUS/CO/6, para 35.

smaller areas and places, it eventually collapses into the personal model of control over individuals.[24] Indeed, as the next section shows, other treaty bodies seem to apply the personal rather than the spatial model of jurisdiction to the RPCs in Papua New Guinea and Nauru.

2.1.2. The Personal Model

A State can also exercise extraterritorial jurisdiction and hence incur obligations under international human rights law when it exercises control and authority over persons abroad.[25] Building on existing case law, the ECtHR in *Al-Skeini* identified three general principles applicable to the personal model of extraterritorial jurisdiction. *First*, the most well-established trigger of a State's jurisdiction over persons on the territory of another State is the *use of physical force by State agents*.[26] This is the case when State agents detain an individual abroad[27] and when they kill a person abroad without previous arrest and detention.[28] The HRC established that States exercise jurisdiction over 'those within the power or effective control of the forces of a State Party acting outside its territory'.[29] This includes arrest and detention abroad.[30] Likewise, the scope of 'territory' under Article 2 CAT includes 'situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.'[31] In the Americas, various decisions of the IAComHR confirm that a State exercises jurisdiction over persons who are subject to its authority and control, even when they are not on its territory.[32] In sum, extraterritorial violations of civil and political rights such as killing, arresting, abducting and detaining people trigger a State's extraterritorial jurisdiction. Given the general absence of 'boots on the ground' in the context of cooperative migration control, State agents of sponsor States are unlikely to exercise physical force over people on the move in partner States.

According to the ECtHR, the *second* form of extraterritorial jurisdiction triggered by State agent authority and control concerns *the exercise of public powers*. Thus, a State exercises extraterritorial jurisdiction when, 'through the consent, invitation or

24 Milanovic (n 9) 171.

25 For a detailed discussion and criticism of the personal model see ibid 173–209.

26 ECtHR, *Al-Skeini* para 136.

27 Ibid. See also ECtHR, *Öcalan* para 91; ECtHR, *Medvedyev* para 67; ECtHR, *Al-Saadoon and Mufdhi v UK* App No 61498/08 (2 March 2010) para 140; ECtHR, *Hassan v UK* [GC] App No 29750/09 (16 September 2014) para 76.

28 ECtHR, *Issa and others v Turkey* [Admissibility] App No 31821/96 (30 May 2000) para 71; ECtHR, *Isaak v Turkey* [Admissibility] App No 44587/98 (28 September 2006) 21.

29 HRC, General Comment 31, para 10.

30 HRC, General Comment 35, para 63. See also HRC, *López Burgos* para 13; HRC, *Celiberti de Casariego* paras 10–11.

31 Committee against Torture, General Comment 2, para 16.

32 IAComHR, *Coard* para 37; IAComHR, *Alikhani v USA* Petition No 4618/02, Report No 63/05 (12 October 2005); IAComHR, *Ameziane v USA* Petition P-900–08, Report No 17/12 (20 March 2012). See also IAComHR, *Brothers to the Rescue* para 25; IAComHR, *Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba)* (12 March 2002) 41 ILM 532 (2002).

acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government'.[33] Other treaty bodies have so far not recognised the exercise of public powers as a trigger of extraterritorial jurisdiction. Moreover, the ECtHR requires that 'the acts in question are attributable to [the extraterritorially acting State] rather than to the territorial State'.[34] This high threshold suggests that the exercise of public powers only triggers the jurisdiction of sponsor States in a very narrow set of circumstances.[35] Nevertheless, various scholars have argued that sponsor States' involvement in cooperative migration control policies can amount to an exercise of public powers that triggers their jurisdiction.[36] In particular, the case of *SS v Italy*[37] that is currently pending before the ECtHR concerns the rescue of a migrant boat by the Libyan Coast Guard and the return of its passengers to Libya. Moreno-Lax argues that Italy's involvement in the operative capacities of the Libyan Coast Guard fits the public powers doctrine because Italy assumed State functions normally pertaining to Libya on the basis of their 2017 MOU and related decisions of the joint commission that it established.[38] However, as regards socio-economic rights, the requirement that the conduct in question be attributed exclusively to Italy can present an obstacle to establishing Italy's jurisdiction, since it is difficult to argue that the non-realisation of the socio-economic rights of people on the move in Libya is attributable only to Italy.

Finally, the ECtHR identified a *third* approach under the personal model of jurisdiction, which concerns *the acts of diplomatic and consular agents*. It held that 'the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others.'[39] This includes, for instance, the acts of diplomatic and consular agents towards a State's own nationals abroad.[40] This approach has no extensive support in existing case law.[41] While it is of limited relevance to violations of socio-economic rights in the context of cooperative migration control, it confirms that the exercise of legal authority over persons abroad can also trigger a State's jurisdiction.

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33 ECtHR, *Al-Skeini* para 135.

34 Ibid.

35 Tan (n 9) 139.

36 Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 269; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *SS and Others v Italy*, and the "Operational Model"' (2020) 21 German Law Journal 385, 411.

37 *SS and others v Italy* App No 21660/18 (communicated 26 June 2019).

38 Moreno-Lax (n 36) 411.

39 ECtHR, *Al-Skeini* para 134.

40 EComHR, *X v Germany* App No 1611/62 (25 September 1965); EComHR, *X v UK* App No 7547/76 (15 December 1977); HRC, *Vidal Martins v Uruguay* Communication No 57/1979 (23 March 1982); HRC, *Lichtensztejn v Uruguay* Communication No 77/1980 (31 March 1983); HRC, *Varela Nuñez v Uruguay* Communication No 108/1981 (22 July 1983); HRC, *Pereira Montero v Uruguay* Communication No 106/1981 (31 July 1983).

41 For an exception see EComHR, *M v Denmark* App No 17392/90 (14 October 1992).

Furthermore, under the personal model, the scope of the obligations of the extraterritorially acting State depends on the particular circumstances of the situation. Although the ECtHR had rejected that idea in *Banković*,[42] it notoriously held in *Al-Skeini* that:

> whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual.[43]

In other words, States' extraterritorial obligations can be 'divided and tailored'.[44] For instance, in *Al-Skeini* and *Jaloud*, the ECtHR took into account the difficult circumstances in Iraq when determining whether the UK and the Netherlands respectively had breached their obligation to investigate under Article 2 ECHR.[45] UN treaty bodies have adopted a similar understanding of the scope of jurisdiction and State obligations. In various cases involving Uruguay's refusal to deliver a passport to its citizens living abroad the HRC noted that:

> The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is 'subject to the jurisdiction' of Uruguay *for that purpose*. Moreover, a passport is a means of enabling him 'to leave any country, including his own', as required by article 12 (2) of the Covenant. It therefore follows from the very nature of the right that, in the case of a citizen resident abroad *it imposes obligations both on the State of residence and on the State of nationality.*[46]

Likewise, in a case concerning the freezing of pension rights of retired Senegalese soldiers who had served in the French army, 'the authors are not generally subject to French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights.'[47] In the *Marine I* case, Spain had rescued a migrant boat in international waters and disembarked the passengers in Mauritania, while those who refused voluntary repatriation were detained in Mauritania under Spanish control.

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42 ECtHR, *Banković* para 75.

43 ECtHR, *Al-Skeini* para 137.

44 Ibid. In *Al-Skeini* the Court in fact held that rights can be divided and tailored but it would be more accurate to hold that, while a person's rights remain the same, State obligations can be divided and tailored according to the context. See also Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857, 879.

45 ECtHR, *Al-Skeini* para 168; ECtHR, *Jaloud v the Netherlands* [GC] App No 47708/08 (20 November 2014) para 226. See also Friederycke Haijer and Cedric Ryngaert, 'Reflections on *Jaloud v the Netherlands*: Jurisdictional Consequences and Resonance in Dutch Society' (2015) 19 Journal of International Peacekeeping 174.

46 HRC, *Vidal Martins* para 7 (emphasis added); see also HRC, *Lichtensztejn* para 8.3; HRC, *Varela Nuñez* para 6.1; HRC, *Pereira Montero* para 5.

47 HRC, *Ibrahima Gueye v France* Communication No 196/1985 (3 April 1989) para 9.4.

The Committee against Torture ruled that the alleged victims were subject to Spanish jurisdiction *insofar as* the complaint was concerned.[48] Thus, whereas the spatial model imposes the same scope of obligations on States exercising jurisdiction extraterritorially than on their territory, the personal model only requires them to realise the rights that are relevant to the situation.

In the context of cooperative migration control, various bodies have found that Australia exercises effective control over people on the move held at the RPCs on Nauru and Manus Island. The CESCR held that Australia 'continues to be accountable for the treatment of asylum seekers in the regional processing centres, over whom it exercises effective control, including through funding the centres and hiring companies to provide services.'[49] The Committee against Torture found that Australia exercises effective control over the people held at the offshore processing centres on Nauru and Manus 'because inter alia they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice'.[50] The Special Rapporteur on the Human Rights of Migrants shares this view.[51] In sum, the personal model of jurisdiction seems applicable to people transfers to offshore processing centres. However, it is more difficult to argue that other forms of cooperation, such as the provision of funding, training and equipment, the sharing of information, and the use of diplomatic relations and development aid, amount to the exercise of control and authority over people on the move in partner States. Yet these more remote forms of cooperation can have an impact on their socio-economic rights, which suggests that the effects model may be better suited to the migration control context.

2.1.3. The Effects Model

While both the spatial and personal models are well established, various scholars have identified a third model of extraterritorial jurisdiction: the effects model.[52] The

48 Committee against Torture, *Marine I* para 8.2.

49 CESCR, 'Concluding Observations on the Fifth Periodic Report of Australia' (11 July 2017) UN Doc E/C.12/AUS/CO/5, para 18.

50 Committee against Torture, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia' (23 December 2014) UN Doc CAT/C/AUS/CO/4–5, para 17.

51 UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Australia and the Regional Processing Centres in Nauru' (24 April 2017) UN Doc A/HRC/35/25/Add.3, para 73.

52 On the effects model see Peter Vedel Kessing, 'Transnational Operations Carried out from a State's Own Territory: Armed Drones and the Extraterritorial Effect of International Human Rights Conventions' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017); Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 European Journal of International Law 581; Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) 20 European Journal of Migration and Law 373, 381–85; Işıl Karakaş and Hasan Bakırcı, 'Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International*

recognition that the extraterritorial effects of conduct that takes place on a State's territory can trigger its obligations reflects a wider doctrine in public international law.[53] Thus, extraterritorial jurisdiction can be triggered by 'acts that a state controls and carries out on its own territory, leading to a human rights violation on the territory of another state.'[54] Indeed, the CESCR found that States parties to the ICESCR must refrain from acts or omissions that interfere, either directly or indirectly, with the realisation of socio-economic rights in other countries.[55] For instance, they should refrain at all times from embargoes or similar measures that endanger socio-economic rights[56] and they should ensure that their actions as members of international organisations take due account of socio-economic rights.[57] The HRC has also expressed its concern about the extraterritorial effects of State conduct.[58] At the regional level, the ECtHR repeatedly held that 'acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction'.[59] It established that Turkey exercised jurisdiction in several cases concerning incidents in Cyprus whereby Turkish troops shot the victims who were in or next to the buffer zone.[60] In other cases it seemed to assume that a State exercised

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Law (OUP 2018) 116–17; Tan (n 9) 44–45; Lisa-Marie Komp, *Border Deaths at Sea under the Right to Life in the European Convention on Human Rights* (PhD thesis, Vrije Universiteit Amsterdam 2020) ch 3.

53 See for instance ICJ, *Corfu Channel*; Ad Hoc International Arbitral Tribunal, *Trail Smelter (United States v Canada)* (11 March 1941) 3 UNRIAA 1905.

54 Kessing (n 52) 87. See also Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2012) 251–252; Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen, 'Introduction: Human Rights in an Age of International Cooperation' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 10.

55 CESCR, General Comment 19, para 53; CESCR, General Comment 23, para 69.

56 CESCR, General Comment 12, para 37; CESCR, General Comment 14, para 41; CESCR, General Comment 15, para 32.

57 CESCR, General Comment 13, para 56; CESCR, General Comment 14, para 39; CESCR, General Comment 15, para 36; CESCR, General Comment 19, para 58; CESCR, General Comment 23, para 71.

58 For instance, the HRC has urged the USA to take measures to ensure that its surveillance activities conform to its obligations under the ICCPR 'to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity, regardless of the nationality or location of the individuals whose communications are under direct surveillance': HRC, 'Concluding Observations on the Fourth Report of the United States of America' (23 April 2014) UN Doc CCPR/C/USA/CO/4, para 22(a). See also HRC, 'Concluding Observations on the Second Periodic Report of the Islamic Republic of Iran' (3 August 1993) UN Doc CCPR/C/79/Add.25, para 9 (a State issuing a fatwa authorising the killing of a person outside its territory may amount to a violation of the ICCPR).

59 ECtHR, *Hirsi* para 72. See also ECtHR, *Banković* para 67; ECtHR, *Al-Skeini* paras 131 and 133; ECtHR, *Drozd and Janousek v France and Spain* App No 12747/87 (26 June 1992) para 91; ECtHR, *Loizidou v Turkey* [Admissibility] App No 15318/89 (23 March 1995) para 62; ECtHR, *Loizidou v Turkey* [Merits] App No 15318/89 (18 December 1996) para 52. In *Ilaşcu*, the ECtHR noted that a State could breach its obligations under the ECHR 'on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction': *Ilaşcu* para 317.

60 ECtHR, *Andreou v Turkey* [Admissibility] App No 45653/99 (3 June 2008); ECtHR, *Solomou v Turkey* [Admissibility] App No 36832/97 (18 May 1999); ECtHR, *Isaak*; ECtHR, *Panayi v Turkey* App No

jurisdiction over passengers of a ship outside its extraterritorial waters through the actions of its own vessels, although it fell short of exercising effective control over them.[61] The IACtHR also found that a State exercises jurisdiction 'if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory.'[62] Moreover, formal or legal acts, such as an administrative decision or court judgment, can have 'a direct impact on persons abroad owing to the existence of a legal connection between the state and the person to whom the action is addressed.'[63] Den Heijer noted that in various cases the ECtHR applied the ECHR to executive or adjudicative measures which were directed at persons abroad.[64] Besson likewise identified a 'procedural' approach to jurisdiction that emerged in recent ECtHR case law: a State exercises jurisdiction over persons abroad through procedural or legal means, for instance, in the context of judicial proceedings or a transnational arrest warrant.[65]

For extraterritorial effects to trigger jurisdiction, however, there must be a sufficiently close causal link between the State conduct and the violation. The EComHR case of *Tugar v Italy*, in which an Iraqi national had stepped on an anti-personnel mine of Italian origin in Iraq, illustrates the importance of this requirement:

> the applicant's injury can not [sic] be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible 'indiscriminate' use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered. It follows that the 'adverse consequences' of the failure of Italy to regulate arms transfers to Iraq are 'too remote' to attract the Italian responsibility.[66]

45388/99 (27 October 2009). See also *Pad*, where Iranian men were killed by shooting from a Turkish military helicopter in the border area: ECtHR, *Pad and others v Turkey* [Admissibility] App No 60167/00 (28 June 2007) para 54.

61 ECtHR, *Xhavara v Italy* [Admissibility] App No 39473/98 (11 January 2001); ECtHR, *Women on Waves v Portugal* App No 31276/05 (3 February 2009).

62 IACtHR, *The Environment and Human Rights* para 104(h); see also paras 81 and 95.

63 Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2010) 141. See for instance EComHR, *X and Y v Switzerland* Apps Nos 7289/75 and 7349/76 (14 July 1977) 73, para 2. See also ECtHR, *Nada v Switzerland* [GC] App No 10593/08 (12 September 2012).

64 Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012) 41. See for instance ECtHR, *Haydarie and others v the Netherlands* App No 8876/04 (20 October 2005); ECtHR, *Kovačič and others v Slovenia* Apps Nos 44574/98, 45133/98 and 48316/99 (9 October 2003); ECtHR, *Minasyan and Semerjyan v Armenia* App No 27651/05 (23 June 2009); ECtHR, *Zouboulidis v Greece (nº 2)* App No 36963/06 (25 June 2009).

65 Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' (2020) 9(1) ESIL Reflections 1, 4. See for instance ECtHR, *Romeo Castaño v Belgium* App No 8351/17 (9 July 2017) para 42. See also ECtHR, *Markovic and others v Italy* App No 1398/03 (14 December 2006) paras 54–56; ECtHR, *Big Brother Watch and others v UK* Apps Nos 58170/13, 62322/14 and 24960/15 (13 September 2018) para 271; ECtHR, *Güzelyurtlu and others v Cyprus and Turkey* [GC] App No 36925/07 (29 January 2019) para 188; ECtHR, *Makuchyan and Minasyan v Azerbaijan and Hungary* App No 17247/13 (26 May 2020) paras 47–52.

66 EComHR, *Tugar v Italy* App No 22869/93 (18 October 1995) 3–4.

Likewise, in the case of *Ben El Mahi and others v Denmark*, the applicants, who were based in Morocco, felt offended and discriminated by cartoons published in a Danish newspaper, yet the ECtHR ruled that there was no jurisdictional link between the applicants and Denmark.[67] In a recent decision concerning Belgium's refusal to grant humanitarian visas to a Syrian family, the ECtHR further specified that '[t]he mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory'.[68] According to the Court, 'the mere fact that an applicant brings proceedings in a State Party with which he has no connecting tie cannot suffice to establish that State's jurisdiction over him'.[69]

In sum, under the effects model of jurisdiction States can have obligations towards people abroad without exercising effective control. Such obligations are triggered by the extraterritorial effects of State conduct, but there must be a sufficiently close link between the individual and the State. This approach is well suited to violations of socio-economic rights, as a State can have an impact on the enjoyment of socio-economic rights in another State without exercising effective control. The effects model can apply to various forms of cooperative migration control to which the personal and spatial models are unlikely to apply, such as the sharing of information, the provision of funding, training and equipment, and the use of diplomatic relations and development aid. However, by focusing exclusively on effects, this model downplays the fact that extraterritorial acts can also trigger a State's jurisdiction. Moreover, as it is less developed than the spatial and personal models, it remains unclear what amounts to a sufficiently close causal link. Given the limitations of the three models examined so far, the next section examines whether the functional model of jurisdiction offers a more promising account of sponsor States' obligations in the context of cooperative migration control.

2.2. THE FUNCTIONAL MODEL OF JURISDICTION

None of the three models discussed above are able to account for all the ways in which a State can affect human rights extraterritorially. The spatial and personal models are ill suited to address the more immaterial or incidental ways in which States can affect socio-economic rights.[70] The effects model of jurisdiction, for its part, is less developed and does not account for human rights violations caused by States' extraterritorial conduct, while it remains unclear what causal link is required. More specifically,

67 ECtHR, *Ben El Mahi and others v Denmark* [Admissibility] App No 5853/06 (11 December 2006) 8.

68 ECtHR, *MN* para 112.

69 Ibid para 123; ECtHR, *Abdul Wahab Khan v UK* [Admissibility] App No 11987/11 (28 January 2014) para 28.

70 See Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 190–91.

none of these models apply easily to the involvement of sponsor States in cooperative migration control: most contemporary forms of cooperation fall short of exercising effective control abroad, and a single act or decision of a sponsor State rarely causes a violation of socio-economic rights.[71] Yet at the same time it is clear that the conduct of sponsor States can have a negative impact on the socio-economic rights of people on the move. Notably, the aggregate effect of the coexistence of various migration control measures results in people on the move staying in partner States where their socio-economic rights are often jeopardised.

A fourth model of extraterritorial jurisdiction, the functional one, which builds on the three models discussed above, seems promising in this regard. While it is less developed than the spatial and personal models, it nevertheless finds support in existing case law, pronouncements of human rights monitoring bodies, and soft law standards. Under this approach, a State's obligations are closely linked to its power and ability to have an impact on someone's human rights: 'power entails obligations'.[72] An obvious criticism of this approach is that it can entail limitless obligations for States: it risks turning a mere capacity to harm someone into a duty not to harm her and into a right of that person not to be harmed.[73] Yet the functional model of jurisdiction does not impose on States the obligation to realise human rights extraterritorially merely because they theoretically have the capacity to do so. States cannot be expected to fulfil the human rights of all individuals everywhere.[74] Rather, they only have human rights obligations insofar as it can reasonably be expected of them. Therefore, this study proposes that *a State exercises jurisdiction when it can take reasonable measures to avoid reasonably foreseeable human rights violations*. In other words, the due diligence standard determines both whether States have obligations towards an individual and their scope. A State exercises jurisdiction when it is in a situation in which it is capable

71 Skogly and Gibney (n 7) 6.

72 Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 152. Scheinin likewise argues that 'facticity creates normativity' and Lawson that 'control entails responsibility': Martin Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 75; Rick Lawson, 'Life after *Banković*: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 86; Vassilis P Tzevelekos and Elena Katselli Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) 86 Nordic Journal of International Law 427, 458 ('Reality, i.e. the *de facto* links between a state and a situation necessitating protection for the safeguarding of important rights, turns into law'). On the relation between power and responsibility more generally see André Nollkaemper, 'Power and Responsibility' in Adriana Di Stefano (ed), *A Lackland Law? Territory, Effectiveness and Jurisdiction in International and EU Law* (Giappichelli 2015).

73 Besson (n 65) 6. See also ECtHR, *Banković* para 75; ECtHR, *MN* para 123; ECtHR, *Abdul Wahab Khan* para 27.

74 See for instance Sigrun I Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia 2006) 203; Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 377; Milanovic (n 9) 219–20.

of affecting human rights abroad, whether by withholding from committing an act that could cause harm, or by taking action to prevent harm that would otherwise occur. Thus, knowledge and ability, rather than effective control, help determine when a State exercises extraterritorial jurisdiction and what the scope of its obligations is.[75]

Although, like the effects model, the functional model is less developed than the spatial and personal models, existing case law 'leaves room for an understanding that it is not the fact that the affected person has been directly affected or placed under the effective control of a state, but rather the relationship of the state with a particular set of circumstances being of such a unique nature' that triggers its obligations under international human rights law.[76] Indeed, the spatial, personal and effects models of jurisdiction each contain some elements that can be considered 'functional'. For instance, the ECtHR's application of the 'decisive influence' standard for the spatial model in *Ilaşcu* entails a recognition that a lower level of control than 'effective control' over an area is sufficient to trigger State obligations.[77] Moreover, the ECtHR's case law on Transdniestria requires the territorial State 'to take the diplomatic, economic, judicial or other measures *that it is in its power to take*' to secure the rights of persons on its territory who are (also) under the jurisdiction of another State.[78] In other words, what is expected of a State depends on what it is able to do. Likewise, under the personal model of jurisdiction, the fact that obligations can be 'divided and tailored' according to the circumstances suggests that obligations are linked to a State's ability to realise human rights. Finally, the fact that not only the exercise of physical force but also executive or adjudicative measures can trigger jurisdiction under the effects model implies that treaty bodies have at least adopted elements of a functional approach to jurisdiction.

The functional model is particularly well-suited to socio-economic rights, whose realisation is less dependent on effective control than many civil and political rights. It is therefore unsurprising that it finds support in CESCR pronouncements: extraterritorial obligations 'arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law (…) and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.'[79] Activities undertaken within a State's jurisdiction should not deprive another country of the ability to realise socio-economic rights for persons in its jurisdiction.[80] States parties must take the necessary steps to prevent

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75 See Chapter III, Section 3.

76 John Cerone, 'Out of Bounds? Considering the Reach of International Human Rights Law' (2006) New York University Center for Human Rights and Global Justice Working Paper 5, 32; Den Heijer (n 64) 48. See also the following cases: ECtHR, *Isaak*; ECtHR, *Ilaşcu*; ECtHR, *Treska v Albania and Italy* [Admissibility] App No 26937/04 (29 June 2006); ECtHR, *Manoilescu and Dobrescu v Romania and Russia* [Admissibility] App No 60861/00 (3 March 2005); ICJ, *Georgia v Russia*.

77 See ECtHR, *Ilaşcu* para 392 and Section 2.1.1 above.

78 ECtHR, *Ilaşcu* para 331 (emphasis added). See also ECtHR, *Ivanţoc*; ECtHR, *Catan*; ECtHR, *Mozer*; and ECtHR, *Turturica and Casian*.

79 CESCR, General Comment 24, para 28.

80 CESCR, General Comment 15, para 31.

third parties from violating socio-economic rights in other countries, if they are able to influence them.[81] The CESCR adopted the due diligence standard to determine the scope of States' obligations:

> a State party would be in breach of its obligations under the Covenant where the violation reveals a failure by the State to take *reasonable measures* that could have prevented the occurrence of the event. The responsibility of the State can be engaged in such circumstances even if other causes have also contributed to the occurrence of the violation, and even if the State had not foreseen that a violation would occur, provided such a violation was *reasonably foreseeable*.[82]

The CESCR further noted that States are not allowed to remain passive where an actor under their jurisdiction 'harmed the rights of others in other States, or where conduct by such an actor may lead to foreseeable harm being caused.'[83] However, States are only required to do so for actors which they are in a position to influence.[84]

Other monitoring bodies also seem to have adopted the functional model of jurisdiction. In particular, General Comment 36 of the HRC requires States to:

> take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and *reasonably foreseeable* impact on the right to life of individuals outside their territory (…) are consistent with article 6 (…).[85]

Moreover, 'a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.'[86] This standard differs from the spatial and personal models since it does not require the State to exercise control over the territory or person but rather over *the person's enjoyment of human rights*.[87] The HRC applies the due diligence standard, as States exercise jurisdiction over 'persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and *reasonably foreseeable* manner.'[88] This suggests that in General Comment 36 the HRC endorses a functional

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81 CESCR, General Comment 14, para 39; CESCR, General Comment 15, para 33; CESCR, General Comment 19, para 54; see also CESCR, General Comment 20, para 14; CESCR, General Comment 23, para 70; CESCR, General Comment 24, para 26.

82 CESCR, General Comment 24, para 32 (footnotes omitted, emphasis added).

83 Ibid para 27.

84 CESCR, General Comment 14, para 39; CESCR, General Comment 15, para 33; CESCR, General Comment 19, para 54; see also Maastricht Principles (n 5) principles 24 and 26.

85 HRC, General Comment 36, para 22 (emphasis added).

86 Ibid para 63.

87 See Marko Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (2020) 20 Human Rights Law Review 1, 20–21. See also Çali (n 1).

88 HRC, General Comment 36, para 63 (emphasis added); see also para 22 (n 85).

approach to the extraterritorial application of human rights treaties.[89] Only a few sponsor States raised objections to this formulation, which is consistent with the HRC's established practice.[90] Indeed, it had observed earlier that jurisdiction refers to the relationship between the individual and the State in relation to a human rights violation.[91] Therefore, 'a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction.'[92] The UN Special Rapporteur on extrajudicial, summary or arbitrary executions recently also endorsed the functional model of jurisdiction.[93]

In Europe, the functional model was arguably first advanced by the applicants in the *Banković* case.[94] The ECtHR rejected it in a decision that has been widely criticised, and later ECtHR case law has moved closer to a functional understanding of jurisdiction.[95] The ECtHR thus accepted in *Al-Skeini* that obligations can be 'divided and tailored'.[96] In his Concurring Opinion, Judge Bonello argued that jurisdiction 'arises from the mere fact of having assumed those obligations *and from having the capability to fulfil them* (or not to fulfil them).'[97] Other ECtHR judges endorsed a similar approach.[98] The German Constitutional Court seems to have applied the functional model of jurisdiction in a recent case[99], while there are indications that other regional regimes have also adopted the functional model of jurisdiction.[100] More generally, various sets

89 Milanovic (n 87) 20–21.

90 Daniel Møgster, 'Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR' (*EJIL: Talk!* 27 November 2018).

91 HRC, *López Burgos* para 12.2.

92 HRC, *Munaf v Romania* Communication No 1539/2006 (30 July 2009) para 14.2.

93 UN Human Rights Council, 'Annex to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Investigation into the Unlawful Death of Mr Jamal Khashoggi' (19 June 2019) UN Doc A/HRC/41/CRP.1, paras 357–69.

94 ECtHR, *Banković* paras 47 and 75.

95 Ibid paras 59–61. See for instance Alexandra Rüth and Mirja Trilsch, '*Banković v Belgium* (Admissibility)' 97 American Journal of International Law (2003) 168; Matthew Happold, '*Banković v Belgium* and the Territorial Scope of the European Convention on Human Rights' (2003) 3 Human Rights Law Review 77; Ralph Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?' (2005) European Human Rights Law Review 115; Erik Roxstrom, Mark Gibney and Terje Einarsen, 'NATO Bombing Case (*Banković et al v Belgium et al*) and the Limits of Western Human Rights Protection' (2005) 23 Boston University International Law Journal 55; Milanovic (n 9).

96 See Section 2.1.2 above. De Boer for instance notes that in *Hirsi* and *Al-Skeini* the ECtHR applied a 'functional-test-disguised-as-an-effective control-test' to cases of extraterritorial jurisdiction. Tom de Boer, 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection' (2014) 28(1) Journal of Refugee Studies 118, 129.

97 ECtHR, *Al-Skeini* Concurring Opinion of Judge Bonello, para 11 (emphasis in original).

98 ECtHR, *Assanidze v Georgia* [GC] App No 71503/01 (8 April 2004) Concurring Opinion of Judge Loucaides, 52; ECtHR, *Ilaşcu* Partly Dissenting Opinion of Judge Loucaides, 139; ECtHR, *Hirsi* Concurring Opinion of Judge Pinto de Albuquerque, 75–76; ECtHR, *Sargsyan v Azerbaijan* [GC] App No 40167/06 (16 June 2015) Concurring Opinion of Judge Yudkivska, 88–89.

99 Çali (n 1).

100 See for instance IACtHR, *The Environment and Human Rights* para 120; AComHPR, *SERAC* paras 52 and 53; AComHPR, General Comment 3, para 14.

of human rights principles relevant for socio-economic rights reflect the functional model.[101]

The approach proposed in this study finds widespread support in scholarship across both sets of human rights.[102] Gondek argues that the relevant factors to determine the scope of extraterritorial obligations include 'the ability to influence the situation of the person in question and the ability of the state party to prevent the violation from happening.'[103] Khalfan similarly finds that a State's extraterritorial obligations to fulfil socio-economic rights depend on its available resources and its ability to influence.[104] Hampson recognises that 'the extra-territorial applicability of human rights law does or should depend on the relationship between an act for which a state is responsible and the (foreseeable) harm resulting from that act.'[105] According to Moreno-lax, while proximate and predictable results must be taken into account when planning and executing State action, utterly accidental and unpredictable outcomes are insufficient to establish jurisdiction.[106] Moreover, various authors apply a reasonableness test when delimiting the scope of States' extraterritorial obligations.[107]

In conclusion, under the functional model of jurisdiction, a State exercises extraterritorial jurisdiction when it can take reasonable measures to avoid reasonably foreseeable human rights violations. The due diligence standard thus defines both the circumstances that create a jurisdictional link and the scope of States' obligations when such a link exists. Various courts and human rights treaty bodies seem to endorse this approach which builds on the spatial, personal and effects models. Importantly, the

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101 Maastricht Principles (n 5) principles 9(b), 9(c), 13, 15 and 25(d). According to the Guiding Principles on Extreme Poverty and Human Rights, States must avoid conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conduct assessments of the extraterritorial impacts of laws, policies and practices: UN Human Rights Council, 'Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights' (18 July 2012) UN Doc A/HRC/21/39, para 92.

102 See for instance Lawson (n 72); Scheinin (n 72); Cerone (n 76); Gondek (n 74); Françoise Hampson, 'The Scope of the Extraterritorial Applicability of International Human Rights Law' in Geoff Gilbert, Françoise Hampson and Clara Sandoval Villalba (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge 2011); Gammeltoft-Hansen, *Access to Asylum* (n 72) 124–25; Michael Duttwiler, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' (2012) 30 Netherlands Quarterly of Human Rights 137; Den Heijer (n 64) ch 2; Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 Law & Ethics of Human Rights 47; Vandenbogaerde (n 7) 255; Moreno-Lax (n 36). For a contrary view see Besson (n 65); Raible (n 6) 94–100.

103 Gondek (n 74) 376.

104 Ashfaq Khalfan, 'Division of Responsibility amongst States' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 321.

105 Hampson (n 102) 171.

106 Moreno-Lax (n 36) 406.

107 See for instance Lawson (n 72) 120; Cerone (n 76) 32; Shany (n 102) 67; Cedric Ryngaert, 'Jurisdiction: Towards a Reasonableness Test' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013).

functional model is applicable to situations concerning economic, social and cultural rights as well as civil and political rights. As the next section discusses, it encompasses remote forms of cooperation between sponsor and partner States which more traditional models of jurisdiction struggle to capture, and is hence particularly relevant in the context of migration control.

2.3. SPONSOR STATE JURISDICTION IN THE CONTEXT OF COOPERATIVE MIGRATION CONTROL

Whether a sponsor State exercises jurisdiction and what the scope of its obligations is depends not only on what model of jurisdiction one applies but also on the circumstances of the case. Various factors, including the form of cooperation with partner States, determine whether and to what extent a sponsor State has obligations towards people on the move in partner States. As a general rule, the more closely involved a sponsor State is in the plight of people on the move in partner States, the more likely it is to have obligations towards them. However, an important distinction exists between the involvement of sponsor States in stopping migration flows and in realising the socio-economic rights of people on the move. The causal link between the conduct of sponsor States and the violation of the socio-economic rights of people on the move is often less clear than for certain (civil and political) rights which can be directly violated by cooperative migration control policies, such as the principle of *non-refoulement* and the right to leave. It is therefore less likely that sponsor States must take reasonable measures to prevent reasonably foreseeable violations of socio-economic rights of people on the move, as these are often only indirectly affected by cooperative migration control. The extent to which different forms of cooperation can trigger the obligations of sponsor States illustrates this.

As regards *people transfers*, the causal link between the conduct of sponsor States and the plight of people on the move in partner States is relatively close. As noted above, there is broad agreement that Australia exercises effective control and hence jurisdiction over people on the move transferred to the RPCs in Nauru and Manus Island, either under the spatial or the personal model.[108] Under a functional approach, it is arguable that Australia failed to take reasonable measures to realise the socio-economic rights of people on the move in Nauru, although it was reasonably foreseeable that their socio-economic rights, including their right to health, would not be realised. Indeed, Australia not only willingly transferred people on the move to unsuitable conditions but also failed to improve these conditions or transfer people to Australia when needed for medical reasons.[109] In other words, Australia did not comply with the due diligence standard.

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108 Sections 2.1.1 and 2.1.2 above.

109 See for instance, with regard to children: Australian Human Rights Commission, *BK, CO and DE*; Susanna Dechent, Sharmin Tania and Jackie Mapulanga-Hulston, 'Asylum Seeker Children in Nauru:

The *provision of training, equipment and funding* to partner States for migration control purposes probably falls short of the required level of control for the spatial or personal model of jurisdiction, although it could trigger sponsor States' jurisdiction under the effects or functional model. The provision of training, equipment and funding can arguably lead to reasonably foreseeable violations of the socio-economic rights of people on the move insofar as it entails their containment in partner States where their socio-economic rights are not realised. In such cases, the due diligence standard requires sponsor States to take reasonable measures to avoid such violations. Yet this would run counter to the deterrence rationale that underlies many cooperative migration control policies. For instance, it is arguable that 'Australia is using whatever power it has to influence the Indonesian government in a way that actually encourages and enables deprivation of rights.'[110] Moreover, Australia recently reduced the funding it provides to the IOM to accommodate people on the move in Indonesia. Likewise, it can be argued that it is reasonably foreseeable that the implementation of the Migrant Protection Protocols by the USA leads to people on the move living in dire conditions in makeshift camps along the US-Mexico border. Yet the USA did not take reasonable measures to remedy this, since it does not provide any assistance to Mexico for the realisation of the socio-economic rights of people on the move.

While the *sharing of information* does not trigger a sponsor State's jurisdiction under the spatial or personal model, it could do so under the effects and functional models. For instance, in 2017 Italy launched Operation *Nauras*, which includes the stationing of a warship in Tripoli harbour, to *inter alia* coordinate patrol and sea rescue operations. The Italian authorities thus transmit distress calls to the Libyan Coast Guard and communicate with other actors on their behalf.[111] Moreno-lax argues that Italy's operative involvement with the Libyan Coast Guard, combined with its political and financial involvement, triggers its jurisdiction.[112] The case of *SS v Italy*, which is currently pending before the ECtHR, will help clarify this issue.[113] However, it leaves unanswered the question to what extent coordinating the Libyan Coast Guard triggers Italy's obligations as regards the socio-economic rights of people on the move returned to Libya. If we accept that it is reasonably foreseeable that they will be detained in dire conditions in Libyan detention centres, the due diligence standard of conduct requires Italy to take reasonable measures to avoid this. Yet Italy fails to prevent returns to Libya, since it supports the Libyan Coast Guard. It is also arguable that Italy fails to take reasonable measures to improve the plight of people on the move returned and detained in Libya, as illustrated by the severity of the abuse and the lack of improvement in their

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Australia's International Human Rights Obligations and Operational Realities' (2019) 31 International Journal of Refugee Law 83.

110 Savitri Taylor, 'Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but no Responsibility?' (2010) 33 UNSW Law Journal 337, 353.

111 Moreno-Lax (n 36) 394–95.

112 Ibid 396.

113 See also Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strasbourg?' (2018) 20(4) European Journal of Migration and Law 396; Moreno-Lax (n 36).

situation. In other words, under the functional model, Italy could be found to exercise jurisdiction and breach its obligations under international human rights law.

Finally, the question arises whether the use of *diplomatic relations and development aid conditionality* can be sufficient to establish a jurisdictional link between sponsor States and people on the move in partner States. Here also, given the lack of effective (physical) control, it is more likely to do so under the effects and functional models than under the spatial and personal models. More specifically, under the functional model, the use of diplomatic relations and development aid conditionality could trigger a sponsor State's extraterritorial jurisdiction if it leads to reasonably foreseeable violations of the socio-economic rights of people on the move which the sponsor State could take reasonable measures to avoid. On the one hand, in the case of the USA and Mexico, it is difficult to argue that the threat of imposing import tariffs leads to reasonably foreseeable violations of the socio-economic rights of people on the move in Mexico: the causal link is likely to be too weak. On the other hand, the USA signed a safe third country agreement with Guatemala while simultaneously cutting its development aid to that country.[114] It is arguable that these two parallel developments could lead to reasonably foreseeable violations of the socio-economic rights of people transferred under the agreement, which the USA did not take reasonable measures to avoid. However, as the USA has not ratified the ICESCR nor other human rights treaties with provisions on socio-economic rights, it remains unclear to what extent it has extraterritorial obligations towards people on the move abroad regarding socio-economic rights. It has been suggested that:

> there is an emerging consensus about the customary nature of at least a negative extraterritorial obligation of all States to respect ESC rights, when their actions have an impact outside their territory. It is more difficult to affirm the customary character of positive extraterritorial obligations, although the weight of international law seems to be moving in that direction.[115]

Yet even if it could be demonstrated that customary law imposes extraterritorial obligations on States in the field of economic, social and cultural rights, it is unclear that it would also bind the USA. Indeed, as it contests the extraterritorial applicability of human rights treaties[116], the USA could claim to have persistently objected to this rule. In sum, it remains difficult to determine whether the use of diplomatic relations and development aid conditionality can trigger sponsor States' jurisdiction.

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114 Tim McDonnell, 'Trump Froze Aid to Guatemala. Now Programs Are Shutting Down' *NPR* (17 September 2019).

115 Malcolm Langford, Fons Coomans and Felipe Gómez Isa, 'Extraterritorial Duties in International Law' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 73.

116 The USA contests that the ICCPR applies extraterritorially: see US Department of State, 'US Observations on Human Rights Committee General Comment 31' (27 December 2007). See also US Department of State, 'US Observations on UNHCR Advisory Opinion on Extraterritorial Application of *Non-Refoulement* Obligations' (28 December 2007).

More generally, States can interfere with the realisation of socio-economic rights in other countries by concluding international agreements. States parties to the ICESCR should ensure that socio-economic rights are given due attention in international agreements and take steps to ensure that such instruments do not adversely impact socio-economic rights.[117] A State's failure to take into account its obligations regarding socio-economic rights when entering into agreements with other States breaches its obligations under the ICESCR.[118] In the context of cooperative migration control, this implies that sponsor States can breach their obligations under international human rights law if they fail to take into account the reasonably foreseeable adverse impact of migration control agreements on socio-economic rights, even if they do not exercise effective control over people on the move.[119] Thus, in order for sponsor States to comply with the due diligence standard, they should ensure that human rights provisions are included in migration control agreements.[120]

However, even where agreements include human rights safeguards, as in the case of the agreements between Italy and Libya[121] and between Australia and Nauru[122], it is not always sufficient to ensure that the rights of people on the move are realised. Ferstman for instance shows that the risk assessments carried out by the EU and the United Kingdom regarding their support to Libya do not comply with the due diligence standard.[123] More specifically, with regard to socio-economic rights, what 'reasonable measures' must sponsor States take when they exercise jurisdiction in the context of cooperative migration control? While the precise scope of a sponsor State's obligations towards people on the move depends on the circumstances of the case, at a general level

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117 CESCR, General Comment 12, paras 36 and 56; CESCR, General Comment 13, para 56; CESCR, General Comment 14, para 39; CESCR, General Comment 15, para 35; CESCR, General Comment 19, paras 56–57; CESCR, General Comment 23, para 72.

118 CESCR, General Comment 12, para 19; CESCR, General Comment 14, para 50; CESCR, General Comment 15, para 44(c); CESCR, General Comment 18, para 33; CESCR, General Comment 23, para 79; see also 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 Human Rights Quarterly 691, para 15(j).

119 Taylor (n 110) 351; see also Rachel Hammonds and Gorik Ooms, 'Shared Responsibility for the Right to Health (Committee on Economic, Social and Cultural Rights)' in Mark Gibney and Wouter Vandenhole (eds), *Litigating Transnational Human Rights Obligations: Alternative Judgments* (Routledge 2014) 90–91; Moreno-Lax (n 36) 415.

120 Taylor (n 110) 353.

121 The MOU provides in Article 5 that '[t]he Parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements to which the two Countries are parties.' 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).

122 Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues (signed 3 August 2013), art 17. See also Chapter II, Section 3.3.1.

123 Carla Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German Law Journal 459.

they should aim to realise at least their core socio-economic rights.[124] In other words, under the functional model of jurisdiction, if a reasonably foreseeable consequence of migration control agreements is that people on the move are contained in partner States where their core socio-economic rights are not realised, sponsor States must take reasonable measures to mitigate these negative effects. In light of the power and resources asymmetry between rich, powerful sponsor States in the Global North and comparatively poorer and weaker partner States in the Global South, the reasonable measures that can be expected of the former are likely to go beyond including human rights provisions in migration control agreements.

The coexistence of multiple migration control measures is important: while one migration control measure may be insufficient to create a jurisdictional link between a sponsor State and a person on the move, the aggregate of multiple measures could trigger its jurisdiction. The functional model of extraterritorial jurisdiction is well-suited to capture this aspect of cooperative migration control, as it does not rely exclusively on the exercise of effective (physical) control abroad nor on the effects of a specific measure. Indeed, the parallel implementation of multiple migration control measures can ultimately prevent people on the move from leaving the Global South altogether, where they are at a higher risk of suffering violations of their socio-economic rights. Furthermore, the extent to which sponsor States influence the circumstances of their stay in partner States helps determine what can be expected of them under the due diligence standard. The more influence they exercise over the fate of people on the move and hence the closer the causal link, the more likely it is that human rights violations are reasonably foreseeable and the more sponsor States can reasonably be expected to do to prevent such violations.[125] Italy's involvement in Libya illustrates this: although the sharing of information with the Libyan Coast Guard may not suffice on its own to create a jurisdictional link, Italy's overall involvement, which also includes the provision of funding, training and equipment, could trigger its jurisdiction.

The sovereignty of partner States plays a role in this regard: it is a factor that determines what reasonable measures can be expected of sponsor States.[126] The challenge for sponsor States is to design cooperative migration control policies that reconcile their human rights obligations towards people on the move with the sovereignty of partner States.[127] This challenge could be particularly difficult to meet in cases where partner States are unwilling to realise the socio-economic rights of people on the move because they fear becoming a 'cul-de-sac' as onward travel to the Global North becomes impossible. In such situations sponsor States could face the following dilemma. On the one hand, in order to comply with their obligations under international human rights law, they must contribute to realising the socio-economic rights of people on the move in partner States, while, on the other hand, they seek to

124 Chapter III, Section 4.

125 See Vladislava Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21 German Law Journal 436, 439 and 457.

126 Chapter III, Section 3.

127 Den Heijer (n 64) 290–91.

maintain partner States' willingness to cooperate. Indeed, partner States become increasingly aware of their bargaining power and are not always willing implementers of migration control policies that benefit sponsor States.[128] As a result, despite providing funding, support and other incentives, sponsor States cannot simply impose their strategies on partner States, but may face open refusal and more subtle forms of noncompliance.[129] For instance, unlike Papua New Guinea and Nauru, Indonesia and Malaysia do not depend on Australian aid and are therefore less willing to cooperate with Australia on migration control unless it serves their own domestic interests.[130] Sponsor States may thus face considerable challenges in complying with their obligations under international human rights law while at the same time successfully cooperating with partner States to stem migration flows.

Furthermore, the existence of sponsor States' extraterritorial obligations towards people on the move depends on their treaty obligations. As noted above, it remains unclear whether and to what extent the USA has obligations towards people on the move in Mexico and Guatemala. The analysis is different for EU Member States, which have ratified many human rights treaties, including the ICESCR. In other words, whether sponsor States breach their obligations towards people on the move affected by cooperative migration control depends on their conduct and on what obligations they incur under international human rights law: the same conduct may trigger obligations for one State but not another. Notwithstanding these differences, all sponsor States could incur some extraterritorial obligations under civil and political human rights treaties or customary international law, especially the *jus cogens* prohibition of torture. In other words, like for partner States, the scope of a sponsor State's obligations only depends to a limited extent on which treaties it has ratified.[131]

Finally, a key incentive for sponsor States to engage in cooperative migration control policies is to avoid establishing jurisdiction and hence obligations over people on the move by enlisting the help of other States to intercept them. Yet the foregoing showed that these policies may trigger their jurisdiction – and hence their obligations towards people on the move. In other words, the very policies that are designed to avoid establishing a jurisdictional link between a sponsor State and a person on the move may in fact establish such a link. However, not all cooperative migration control policies necessarily trigger the jurisdiction of sponsor States and, if they do, their obligations are less far-reaching than if the affected people on the move had reached their territory, since international human rights law presumes that partner States that host people on the move on their territory have the primary obligation to realise their socio-economic rights. Therefore, although cooperative migration control policies do not necessarily

128 Antje Missbach and Melissa Phillips, 'Introduction: Reconceptualizing Transit States in an Era of Outsourcing, Offshoring, and Obfuscation' (2020) 3 Migration and Society 19, 23–27.

129 Antje Missbach and Gerhard Hoffstaedter, 'When Transit States Pursue Their Own Agenda: Malaysian and Indonesian Responses to Australia's Migration and Border Policies' (2020) 3 Migration and Society 50, 64.

130 Ibid 50ff.

131 See Chapter IV, Section 4.

enable sponsor States to escape their obligations altogether, by proactively preventing people on the move from reaching their territory they nevertheless succeed in limiting the scope of their obligations towards them.

In conclusion, whether sponsor States exercise jurisdiction over people on the move in partner States – and hence incur direct obligations towards them – depends on the circumstances of the case and on the model of extraterritorial jurisdiction that one applies. It is more likely that cooperative migration control measures trigger sponsor State jurisdiction under the effects and functional models than under the more established spatial and personal models. Under the functional model, to the extent that cooperative migration control policies are designed to contain people on the move in partner States where it is reasonably foreseeable that the core of their socio-economic rights is not realised, sponsor States must take reasonable measures to prevent or mitigate this. This may run counter to the deterrence rationale that underlies many cooperative migration control policies, which suggests that sponsor States are often unwilling rather than unable to contribute to the realisation of the socio-economic rights of people on the move affected by such policies. As the next section shows, the same holds true for sponsor States' global obligations of international assistance and cooperation.

3. SPONSOR STATES' GLOBAL OBLIGATIONS IN THE CONTEXT OF COOPERATIVE MIGRATION CONTROL

In addition to direct obligations towards people on the move who are within their jurisdiction, sponsor States also have global obligations of international assistance and cooperation that do not depend on the existence of a jurisdictional link. Instead, global obligations rest on the international community as a whole, and sponsor States must contribute to the international community's efforts to realise socio-economic rights worldwide. Partner States, in turn, can be among the recipients of such international assistance and cooperation. Unlike direct obligations, sponsor States do not owe global obligations to specific individuals. Rather, partner States act as a conduit through which global obligations can be channelled: sponsor States must provide international assistance and cooperation to partner States in order to contribute to the latter's ability to realise the socio-economic rights of people on the move on their territory.[132] This lack of a clear correspondence between people on the move as rights-holders and sponsor States as duty-bearer raises various questions as regards the status, nature and scope of these obligations. Moreover, the central role of cooperation both in migration control policies and in the recently concluded Global Compacts suggests a

[132] Salomon proposes a similar conceptualisation of the right to development: Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP 2007) 119.

link between cooperative migration control and obligations of international assistance and cooperation. Accordingly, this section first discusses the nature of States' global obligations of international assistance and cooperation before addressing the following two questions: can cooperative migration control trigger obligations of international assistance and cooperation? And vice versa, can sponsor States discharge their global obligations through cooperation on migration control?

3.1. INTERNATIONAL ASSISTANCE AND COOPERATION IN INTERNATIONAL HUMAN RIGHTS LAW

Global obligations of international assistance and cooperation are anchored in international law.[133] According to Article 1(3) of the UN Charter the purposes of the UN include: '[t]o achieve international co-operation in solving international problems of an 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'. Furthermore, Article 55 UN Charter provides that the UN shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Under Article 56, all UN members 'pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'[134] In other words, under the UN Charter States have an obligation to take joint and separate action, in cooperation with the UN, to realise socio-economic rights, although its content remains unclear.[135]

Multiple human rights treaties include obligations of international assistance and cooperation. Crucially, Article 2(1) ICESCR requires each State party to take steps 'individually and through international assistance and co-operation'. Various provisions in the ICESCR and its Optional Protocol also refer to international assistance and cooperation.[136] Other human rights instruments protecting economic, social and cultural rights likewise impose obligations of international assistance and cooperation

133 For an extensive discussion of States' obligations of international assistance and cooperation to realise human rights see Skogly (n 74); Salomon, *Global Responsibility for Human Rights* (n 132).

134 Article 56 UN Charter.

135 Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (OUP 1995) 146; Skogly (n 74) 77; see also Salomon, *Global Responsibility for Human Rights* 66–71.

136 Articles 11(2), 15, 22 and 23 ICESCR and Article 14 Optional Protocol.

on States.[137] The Universal Declaration of Human Rights,[138] human rights treaties protecting civil and political rights,[139] and various soft law instruments[140] further include numerous references to inter-State cooperation and assistance. In other words, it is clear that human rights obligations, especially as regards socio-economic rights, include an element of international assistance and cooperation.[141] However, it remains unclear what this entails exactly, notwithstanding the CESCR's attempts to clarify State obligations in this regard.[142]

References to international assistance and cooperation in international law raise two questions in particular: is it a legally binding or only a moral obligation; and does it entail an obligation to transfer resources from one specific State to another? While the drafting history of the ICESCR and other human rights instruments confirms that States took the role of international assistance and cooperation for granted in the realisation of socio-economic rights, it does not imply a bilateral obligation to transfer resources. Skogly thus demonstrates that:

> The treaties that contain references to international assistance and cooperation clearly envisage that states other than the nation state itself become involved in the process of fulfilling the commitment of the treaties. This was also confirmed by the *travaux préparatoires*. (…) none of these provisions were seen as controversial during the drafting

137 See for instance Article 4(2) CRPD; Articles 4, 23(4), 24(4) and 28(3) CRC; Preamble to the ACHPR; Article 26 ACHR; Article 1 Protocol of San Salvador; Article 8(1) Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) (adopted 9 June 1994, entered into force 3 May 1995) 33 ILM 1534 (1994).

138 Articles 22 and 28 Universal Declaration of Human Rights.

139 See for instance Article 9 CAT, Articles 14, 15 and 25(3) ICPED.

140 See for instance Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the UN Charter, UNGA Res 2625 (XXV) (24 October 1970) para 1; Article 3(3) Declaration on the Right to Development; Vienna Declaration and Programme of Action; UN Millennium Declaration, UNGA Res 55/2 (8 September 2000) paras 4 and 26. For a detailed discussion see Salomon, *Global Responsibility for Human Rights* (n 132) 71–83.

141 Some authors suggest that international cooperation is legally binding beyond treaty law because it is a general principle of international law or a customary norm of international law. See for instance Salomon, *Global Responsibility for Human Rights* (n 132) ch 4; Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 Human Rights Law Review 1, 16. For a more cautious approach see Gondek (n 74) 324 ('it has possibly a character of general principle of international law').

142 See for instance Coomans (n 141) 34; Langford, Coomans and Gómez Isa (n 115) 112; Takhmina Karimova, 'The Nature and Meaning of "International Assistance and Cooperation" under the International Covenant on Economic, Social and Cultural Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 165; Margot E Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015) 371; Olivier De Schutter, 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019) 584–87.

> process, but rather it was taken for granted that the relevant provisions could not be implemented without international assistance and cooperation.[143]

Nevertheless, on the basis of the ICESCR's drafting history 'it is difficult, if not impossible, to sustain the argument that the commitment to international cooperation contained in the Covenant can accurately be characterized as a legally binding obligation upon any particular state to provide any particular form of assistance.'[144] Rather, the general consensus was that 'developing States were entitled to ask for assistance but not claim it as a legal right.'[145]

Subsequent practice seems to confirm that, while international assistance and cooperation plays a role in the realisation of human rights, it does not imply an obligation to transfer resources from a specific State to another. The CESCR took the view that States have legal obligations as regards international assistance and cooperation.[146] However, it uses the term 'should' rather than 'must' when addressing States' obligations of international assistance and cooperation, which creates confusion as to their binding nature.[147] Nevertheless, experts and commentators tend to agree that the obligation of international assistance and cooperation is legally binding.[148] Indeed, the CESCR recalled States' obligation to take joint and separate action to achieve the full realisation of socio-economic rights.[149] It has also found that States parties to the ICESCR have 'a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons.'[150] As regards the right to health, 'given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem.'[151]

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143 Skogly (n 74) 205.

144 Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156, 191.

145 Craven (n 135) 149.

146 CESCR, General Comment 3, para 14. See also Maastricht Principles (n 5) principle 28; Magdalena Sepúlveda, 'Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 24 Netherlands Quarterly of Human Rights 271, 278.

147 CESCR, General Comment 12, paras 36–39; CESCR, General Comment 14, paras 39–40; CESCR, General Comment 15, paras 31 and 34; CESCR, General Comment 18, para 30; CESCR, General Comment 19, paras 55–56; CESCR, General Comment 23, paras 67 and 73; CESCR, General Comment 24, paras 34, 35 and 37. See also Coomans (n 141) 21.

148 See for instance Skogly (n 74) 205; Gondek (n 74) 327; Maastricht Principles (n 5) principle 33; Langford, Coomans and Gómez Isa (n 115) 62–65.

149 CESCR, General Comment 12, para 36; CESCR, General Comment 14, para 38; CESCR, General Comment 15, para 30; CESCR, General Comment 18, para 29; CESCR, General Comment 19, para 52. See also CESCR, General Comment 13, para 56.

150 CESCR, General Comment 12, para 38; see also CESCR, General Comment 14, para 40.

151 CESCR, General Comment 14, para 40.

While the Global South tends to agree that States have an obligation to provide international assistance and cooperation, the Global North contests the legally binding nature of this obligation.[152] More specifically, Global North States have persistently objected to the existence of bilateral obligations to provide international assistance and cooperation.[153] For instance, during the negotiations for the Optional Protocol to the ICESCR various Global North States argued that obligations of international assistance and cooperation are of a moral rather than legal character.[154] Yet States have also made commitments to act internationally in order to realise socio-economic rights in numerous documents, such as the Declaration on the Right to Development and the UN Millennium Declaration. This could signal a trend towards the inclusion of obligations of international assistance and cooperation in customary international law, while the fact that States repeatedly affirm their commitment to assisting developing countries makes it more difficult for Global North States to insist that they have persistently objected to such an evolution.[155]

In sum, neither States nor UN treaty bodies have accepted the proposition that any given State has an obligation to provide specific assistance to any other State.[156] However, they accept, at a general level, the existence of obligations of international assistance and cooperation.[157] Not all elements of these obligations enjoy the same degree of recognition. In particular, there is a resistance, especially on the part of Global North States, to any implication of a legally binding duty in terms of transfer of resources.[158] Therefore, international human rights law does not grant individuals whose socio-economic rights are not realised a right to receive international assistance and cooperation from a specific State. Rather, global obligations of international assistance and cooperation rest on the international community as a whole, including not only States but also other actors such as UN agencies and other international organisations.[159] This understanding of international assistance and cooperation leaves many questions unanswered, including how to assign global obligations among the

152 Salomon, *Global Responsibility for Human Rights* (n 132) 98–99; Langford, Coomans and Gómez Isa (n 115) 62–65.

153 Langford, Coomans and Gómez Isa (n 115) 73.

154 Sepúlveda, 'Obligations of International Assistance and Cooperation' (n 146) 273; Coomans (n 141) 17; Karimova (n 142) 165.

155 Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27 Human Rights Quarterly 755, 778; see also Skogly (n 74) 142–43; Salomon, *Global Responsibility for Human Rights* (n 132) 92–100.

156 Alston (n 155) 777. See also Ashfaq Khalfan and Ian Seiderman, 'Extraterritorial Human Rights Obligations: Wider Implications of the Maastricht Principles and the Continuing Accountability Challenge' in Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015) 38.

157 Langford, Coomans and Gómez Isa (n 115) 112; Karimova (n 142) 192.

158 See Karimova (n 142) 192.

159 Article 22 ICESCR; Article 14 Optional Protocol to the ICESCR; CESCR, General Comment 2; CESCR, General Comment 8, para 7; CESCR, General Comment 11, paras 9 and 11; CESCR, General Comment 12, para 40; CESCR, General Comment 13, para 60; CESCR, General Comment 14, paras 63–65; CESCR, General Comment 15, para 60; CESCR, General Comment 18, para 53; CESCR,

members of the international community. The next section addresses this issue in the context of migration control.

3.2. CAN COOPERATIVE MIGRATION CONTROL TRIGGER OBLIGATIONS OF INTERNATIONAL ASSISTANCE AND COOPERATION?

If we accept that States have global obligations to contribute to the international community's efforts to realise socio-economic rights, it remains unclear how to assign such obligations among the various members of the international community. In other words, who has an obligation to provide international assistance and cooperation to a State that lacks sufficient resources to realise socio-economic rights?[160] Determining whether certain members of the international community have an obligation to contribute to realising socio-economic rights in a specific situation is important in order to establish whether global obligations have been discharged or not. Indeed, the lack of clarity surrounding States' obligations of international assistance and cooperation is problematic because it makes it impossible to determine when a State breached these obligations:

> The duty of States to seek international support loses much of its significance in the absence of clear duties of other States, or of international agencies, to provide such support as may be requested. Such obligations, however, still remain 'imperfect', in the sense that they are too diffuse and general: both the duty-bearers and the content remain vague and contested, making such obligations unenforceable unless and until they are further clarified.[161]

Thus, it remains difficult to determine whether a State complies with its obligations of international assistance and cooperation 'because there is a paucity of judicial elucidation as to what directives would indicate that a given state was required to act in a particular situation, and how, in order to contribute to fulfilling socio-economic rights in the world.'[162] In other words, although obligations of international assistance and cooperation are not discretionary, 'unless we begin to see delineated what is required, when, and by which state(s), they may as well be voluntary.'[163]

General Comment 19, paras 82–84; CESCR, General Comment 23, paras 68 and 76. See also Alston (n 155) 777.

160 See Marlies Hesselman, 'Sharing International Responsibility for Poor Migrants: An Analysis of Extra-Territorial Socio-Economic Human Rights Law' (2013) 15 European Journal of Social Security 187, 198.

161 De Schutter (n 142) 584.

162 Margot E Salomon, 'How to Keep Promises' (n 142) 371; see also Khalfan and Seiderman (n 156) 41. For an example of criteria that could be used to delimit States' global obligations see Khalfan (n 104) 325–28.

163 Margot E Salomon, 'How to Keep Promises' (n 142) 385.

Nevertheless, various elements suggest that especially sponsor States may have global obligations to contribute to the realisation of the socio-economic rights of people on the move in partner States. As noted in Chapter III, the obligation of international assistance and cooperation is particularly incumbent on States in the Global North.[164] Indeed, the CESCR has repeatedly held that '[e]conomically developed States parties have a special responsibility for, and interest in, assisting developing countries in this regard.'[165] Furthermore, international cooperation plays a key role in the New York Declaration and in the Global Compacts.[166] The New York Declaration includes commitments to support States hosting people on the move, especially refugees.[167] The principles of responsibility- and burden-sharing and solidarity, which are closely related to international cooperation, play an important role in both Compacts.[168] More specifically, States committed to support each other and to assist all States in fulfilling the commitments in the Global Compact for Migration.[169] Under the Global Compact on Refugees, States committed to provide support to States hosting refugees.[170] Moreover, the Global Compacts include references to different national realities, capacities and levels of development.[171] They thus echo the CESCR in acknowledging that the contributions that States make to international efforts to realise the socio-economic rights of people on the move depend on the availability of resources. Under the Global Compact for Migration, States further strive to reinforce *inter alia* their engagement in North-South cooperation and assistance.[172]

In the context of migration control, the obligation to provide international assistance and cooperation could be seen to rest more heavily on sponsor States that cooperate with partner States than on other Global North States on account of their cooperation. The previous section showed that, as a matter of *lex lata*, a Global South

164 Chapter III, Section 6.3.

165 CESCR, General Comment 14, para 40; CESCR, General Comment 15, para 34; CESCR, General Comment 19, para 55; CESCR, General Comment 23, para 67.

166 New York Declaration, paras 7, 11, 24, 28, 38, 54, 58 and 68; Global Compact for Migration, paras 3, 7, 8, 11, 15, 37, 39 and 42; Global Compact on Refugees, paras 4, 16, 32 and 85; Comprehensive Refugee Response Framework, paras 1 and 9.

167 The commitments that apply to both refugees and migrants are worded cautiously: States will 'consider appropriate support to strengthen, at their request, capacity-building for countries that receive large movements of refugees and migrants' (para 26) and prioritise budgetary provision to facilitate support to host countries in order to facilitate access to education for children on the move (para 32). The commitments for refugees, on the other hand, are worded more strongly: States commit to providing support to host countries to ensure essential support in key life-saving sectors, education and basic health needs of refugees (paras 80, 81 and 83).

168 Global Compact on Refugees, paras 1, 3, 4, 5 and 16; Global Compact for Migration, paras 9, 11, 14 and 39. See also New York Declaration, paras 11 and 68; Comprehensive Refugee Response Framework, para 1.

169 Global Compact for Migration, paras 39 and 39(d).

170 Global Compact on Refugees, paras 7, 32, 49 and 50; Comprehensive Refugee Response Framework, paras 1, 5, 6 and 8.

171 Global Compact on Refugees, paras 1, 4, 32 and 50; Global Compact for Migration, paras 15 and 41. See also New York Declaration, paras 8, 21 and 68; Comprehensive Refugee Response Framework, paras 5 and 13.

172 Global Compact for Migration, para 42.

State cannot claim that a specific Global North State has an obligation to provide it with international assistance and cooperation. However, cooperation on migration control can be seen to establish certain ties between specific sponsor and partner States which could justify assigning obligations of international assistance and cooperation to the former. This is particularly true when the implementation of cooperative migration control agreements takes place within a broader bilateral relationship, sometimes including colonial ties. If we accept that a sponsor State's involvement in cooperative migration control can, under certain circumstances, establish a jurisdictional link and hence trigger direct obligations towards people on the move affected by these policies, it should *a fortiori* be sufficient to assign stronger global obligations to sponsor States than other States. Furthermore, the causal link between sponsor States' involvement in cooperative migration control and the violations of the socio-economic rights of many people on the move in partner States justifies assigning obligations of international assistance and cooperation to sponsor States. In other words, if a State's conduct contributes to human rights violations abroad, it seems logical to expect that particular State rather than others to provide international assistance and cooperation to mitigate the negative effects of its own conduct. Indeed, although causation is not a requirement for the existence of global obligations, it can help assigning such obligations to specific States.[173] Finally, cooperation on migration control often already involves transferring resources from the sponsor State to the partner State, for instance through the provision of funding, training and equipment or development aid. In other words, it is possible that through cooperative migration control measures sponsor States in the Global North provide *de facto* international assistance and cooperation to partner States in the Global South.

If we accept that obligations of international assistance and cooperation rest primarily on the sponsor State which cooperates on migration control with a given partner State, by implication the former's global obligations include the provision of aid and assistance to the partner State in question. In other words, sponsor States' contribution to the international community's efforts should at least include the provision of aid and assistance to the partner State with which they cooperate on migration control. Sepúlveda recognised that, although donor countries in the Global North should not discriminate between recipient countries and assistance should not be determined by geopolitical considerations, situations where there are historical or cultural ties between two countries can justify preferential treatment.[174] Likewise, Khalfan argues that a State has limited discretion in deciding which State or group of States it must assist when it is the only State that has the capacity to assist another State to realise core socio-economic rights.[175] In other words, capacity serves as a basis for assigning obligations.[176] Accordingly, Global North States have common but

173 See Sepúlveda, 'Obligations of International Assistance and Cooperation' (n 146) 297; Skogly (n 74) 165; Margot E Salomon, 'How to Keep Promises' (n 142) 372–75.

174 Sepúlveda, 'Obligations of International Assistance and Cooperation' (n 146) 292.

175 Khalfan (n 104) 322.

176 Margot E Salomon, 'How to Keep Promises' (n 142) 376.

differentiated obligations, the scope of which depends on sponsor States' leverage and ability to provide international assistance and cooperation.[177] Taylor thus argues that 'Australia has an obligation to provide ICESCR rights to the asylum seekers caught by the [regional cooperation arrangements with Indonesia and Papua New Guinea] to the extent that no other actor does.'[178] Arguably, while a sponsor State that cooperates with a partner State on migration control may not be the only State able to assist that partner State in realising socio-economic rights, it will often be in a privileged position to do so. Therefore, the existence of cooperative migration control policies can arguably justify that sponsor States give priority to partner States that host people on the move when contributing to the international community's efforts of international assistance and cooperation.

This points to the question of the relation between sponsor States' direct and global obligations. As noted in Section 2, a sponsor State incurs direct obligations if its cooperation on migration control triggers a jurisdictional link between itself and people on the move. If the same cooperation can also trigger its global obligations, it could incur both direct and global obligations in parallel. Likewise, the provision of international assistance and cooperation by one State to another State may itself create a jurisdictional link which, in turn, triggers its direct obligations.[179] Nevertheless, the two types of obligations should not be conflated for two reasons. First, sponsor States' direct and global obligations are of a different nature. While direct obligations imply a direct relationship between a duty-bearer (the sponsor State) and a rights-holder (a person on the move), global obligations rather entail a relation between sponsor States and partner States, as the provision of international assistance and cooperation enables partner States to realise the socio-economic rights of people on the move. In practice, the same conduct can discharge both types of obligations, since ultimately they both require sponsor States to contribute to realising the socio-economic rights of people on the move. Second, establishing the existence of a jurisdictional link between a sponsor State and people on the move in partner States can be challenging, especially if one applies the spatial or personal rather than the effects or functional model of extraterritorial jurisdiction. As regards global obligations, however, it can be easier to argue that, at a more general level, sponsor States must provide international assistance and cooperation to partner States with which they cooperate to enable them to realise the socio-economic rights of people on the move. In other words, a sponsor State could incur global obligations without incurring direct obligations.

Furthermore, international assistance and cooperation is particularly necessary where the territorial State cannot realise core socio-economic rights.[180] Indeed, the CESCR has repeatedly held that international assistance and cooperation is particularly

177 Compare with Salomon's approach to the right to development: Salomon, *Global Responsibility for Human Rights* (n 132) 193.

178 Taylor (n 110) 356.

179 Chapter III, Section 6.3.

180 Hesselman (n 160) 198.

needed in order to enable developing countries to fulfil their core obligations.[181] The 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights require States to 'prioritize core obligations to realize minimum essential levels of economic, social and cultural rights' when fulfilling these rights extraterritorially.[182] This suggests that global obligations are closely linked to the core obligations of receiving States.[183] Thus, in the context of migration control, obligations of international assistance and cooperation may arise – especially for sponsor States – when partner States do not have sufficient resources to realise the core socio-economic rights of people on the move.[184]

In conclusion, while global obligations to provide international assistance and cooperation to partner States hosting people on the move rest on the international community as a whole, in order to determine whether they have been complied with we must assign them to specific States. This study suggests that they could be assigned to sponsor States that cooperate with a given partner State on migration control on account of that very cooperation. If this proposition is correct, cooperative migration control measures could trigger both the direct and global obligations of sponsor States. While such obligations can overlap in terms of the sponsor State conduct that discharges both types of obligation, they are different in nature, as direct obligations are owed to people on the move themselves – provided there is a jurisdictional link – while global obligations could entitle partner States to receive international assistance and cooperation to realise the socio-economic rights of people on the move on their territory. In any event, the foregoing discussion also raises the question whether sponsor States can discharge their global obligations through cooperation on migration control, which the next section seeks to answer.

3.3. CAN SPONSOR STATES DISCHARGE THEIR GLOBAL OBLIGATIONS THROUGH COOPERATION ON MIGRATION CONTROL?

The flip side of the relation between cooperative migration control and international assistance and cooperation concerns the question whether sponsor States can discharge their global obligations by cooperating on migration control.[185] As noted above, such cooperation often involves the transfer of resources from the Global North to the Global South, through the provision of funding, training and equipment or development

181 CESCR, General Comment 14, para 45; CESCR, General Comment 15, para 38; CESCR, General Comment 19, para 61. See also Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 370.

182 Maastricht Principles (n 5) principle 32. See also Khalfan (n 104) 322.

183 Sepúlveda, 'Obligations of International Assistance and Cooperation' (n 146) 277.

184 See Coomans (n 141) 23; Karimova (n 142) 190.

185 Chapter IV, Section 2.1 addresses the related question whether a partner State can comply with its obligation to seek and accept international assistance and cooperation by receiving assistance from sponsor States to stem migration flows.

aid. This suggests that cooperation on migration control could itself qualify as the provision of international assistance and cooperation by sponsor States to partner States. For instance, notwithstanding its shortcomings, the Jordan Compact, which involves cooperation between Jordan, the European Union and international financing institutions, has the potential to discharge obligations of international assistance and cooperation under the ICESCR and contribute to realising the socio-economic rights of refugees in Jordan.[186] Therefore, this section examines the scope and content of sponsor States' global obligations and discusses to what extent their cooperation with partner States to stem migration flows can contribute to discharging these obligations.

The CESCR has repeatedly held that States parties should facilitate the realisation of socio-economic rights in other countries[187], for instance by facilitating access to food.[188] As regards their scope, obligations of international assistance and cooperation are subject to available resources, like States' direct obligations under the ICESCR.[189] Each State should contribute by providing disaster relief and humanitarian assistance in times of emergency 'in accordance with its ability'[190] and 'to the maximum of its capacities.'[191] Likewise, States should facilitate the realisation of socio-economic rights in other countries 'depending on the availability of resources'.[192] Therefore, as noted earlier, global obligations rest primarily on the Global North.[193]

In terms of content, the CESCR's doctrinal work suggests that international assistance and cooperation consists of three elements: financial aid, technical assistance and cooperation, and material aid. First, obligations of international assistance and cooperation include the *transfer of financial resources*. Article 2(1) ICESCR requires each State party to take steps 'individually and through international assistance and co-operation, *especially economic* and technical'.[194] Thus, international assistance and cooperation is a tool for States to maximise available resources for realising socio-economic rights.[195] With regard to the right to housing, for instance, States providing as well as those receiving international assistance and cooperation 'should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed.'[196] Under Article 14 ICESCR, the international community has an obligation to assist where a State party 'is clearly lacking in the *financial resources* and/or expertise required'.[197] The CESCR also refers

186 Amanda Gray Meral, 'Assessing the Jordan Compact One Year On: An Opportunity or a Barrier to Better Achieving Refugees' Right to Work' (2019) 33 Journal of Refugee Studies 42.
187 CESCR, General Comment 15, para 34; CESCR, General Comment 19, para 55.
188 CESCR, General Comment 12, para 36.
189 Salomon, *Global Responsibility for Human Rights* (n 132) 101. See also Chapter III, Section 6.3.
190 CESCR, General Comment 12, para 38.
191 CESCR, General Comment 14, para 40.
192 CESCR, General Comment 15, para 34; CESCR, General Comment 19, para 55; see also CESCR, General Comment 23, para 67; Maastricht Principles (n 5) principle 31.
193 See Salomon, *Global Responsibility for Human Rights* (n 132) 27.
194 (emphasis added).
195 CESCR, General Comment 23, para 66.
196 CESCR, General Comment 4, para 19.
197 CESCR, General Comment 11, para 9 (emphasis added).

to financial or economic aid or assistance with regard to various other socio-economic rights.[198] Many cooperative migration control policies include the transfer of financial resources, either directly in order to implement cooperative migration control policies, or indirectly through development aid conditionality. This suggests that such policies may serve to discharge sponsor States' obligations of international assistance and cooperation. However, funding is often dedicated to preventing the onward movement of people on the move rather than contributing to realising their socio-economic rights. This is illustrated by the considerable amounts transferred from sponsor States like the USA and Australia to partner States like Mexico, Indonesia and Nauru, without resulting in improved living conditions for people on the move. Indeed, US funding for Mexico includes more than twice as much for border control than for the work of UNHCR and IOM, while Australia cut IOM funding that helped realise the socio-economic rights of people on the move in Indonesia without stopping its assistance to border control efforts in Indonesia.[199]

The second aspect of international assistance and cooperation consists of *technical assistance and cooperation*. This derives not only from the wording of Article 2(1) ICESCR but also from Article 23 ICESCR, which specifies that international action includes 'the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study'. In other words, international assistance and cooperation is also a means of transferring knowledge and technology.[200] As noted above, under Article 14 ICESCR, the international community has an obligation to assist where a State party 'is clearly lacking in the financial resources and/or *expertise* required'.[201] Likewise, one way for States to facilitate the realisation of the right to social security in other countries is through the provision of technical assistance.[202] The realisation of the right to just and favourable conditions of work, in turn, requires States to *inter alia* provide technical assistance and technology transfer.[203] As a matter of practice, sponsor States provide technical assistance and cooperation to partner States in the context of cooperative migration control policies, for instance by providing training and equipment or by sharing information. As noted above, it is debatable whether they can discharge their obligations of international assistance and cooperation through cooperative migration control, given that the support provided is often geared towards preventing arrivals in sponsor States rather than improving the plight of people on the move in partner States.

Finally, the third aspect of international assistance and cooperation consists of *providing material aid*. The CESCR thus repeatedly refers to the need to provide 'the

198 CESCR, General Comment 14, para 40; CESCR, General Comment 15, para 34; CESCR, General Comment 19, para 55; CESCR, General Comment 23, para 67.
199 Chapter II, Section 3.4.
200 CESCR, General Comment 23, para 66.
201 CESCR, General Comment 11, para 9 (emphasis added).
202 CESCR, General Comment 19, para 55.
203 CESCR, General Comment 23, para 67.

necessary aid when required.'[204] As noted above, States parties to the ICESCR have a joint and individual responsibility to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and displaced persons.[205] The most vulnerable or marginalised groups should be given priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid.[206] Furthermore:

> [f]ood aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.[207]

More generally, the CESCR has repeatedly found that international assistance should be sustainable, culturally appropriate and consistent with the ICESCR and other human rights standards.[208] While the assistance provided by sponsor States tends to serve migration control purposes, it sometimes includes the provision of material aid. However, it is often insufficient to realise people on the move's core socio-economic rights. For instance, although Italy agreed to provide material aid to address the plight of people on the move in Libya, their situation remains dire.[209] While the Facility for Refugees in Turkey may be a way for EU Member States to discharge part of their obligations of international assistance and cooperation, its efficiency and effectiveness could be improved.[210] Moreover, the provision of material aid is arguably more likely to trigger a jurisdictional link – and hence sponsor States' direct obligations – than more indirect forms of assistance, such as funding. Accordingly, sponsor States' desire to avoid incurring obligations towards people on the move may account for their preference for more remote forms of assistance.

The commitments made by States under the two Global Compacts reflect the doctrinal developments identified above: both instruments refer to the transfer of financial resources, to technical assistance and cooperation, and to the provision

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204 CESCR, General Comment 12, para 36; CESCR, General Comment 15, para 34; under the right to health States should also 'facilitate access to the necessary aid when required': CESCR, General Comment 14, para 39.

205 CESCR, General Comment 12, para 38; CESCR, General Comment 14, para 40.

206 CESCR, General Comment 14, para 40. See also CESCR, General Comment 12, para 38 ('Priority in food aid should be given to the most vulnerable populations.') and CESCR, General Comment 15, para 34 ('In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water.').

207 CESCR, General Comment 12, para 39.

208 CESCR, General Comment 15, para 34; CESCR, General Comment 19, para 55; CESCR, General Comment 23, para 67. See also Maastricht Principles (n 5) principle 32.

209 Chapter II, Sections 2.1 and 3.3.2.

210 European Court of Auditors, 'The Facility for Refugees in Turkey: Helpful Support, but Improvements Needed to Deliver More Value for Money' (2018) Special Report No 27/2018.

of material aid. While the New York Declaration focuses on financial aid, the Comprehensive Refugee Response Framework also includes other forms of support.[211] The Global Compact on Refugees repeatedly refers to the international community's contribution of 'financial, material and technical assistance'[212] and of 'resources and expertise', including for realising refugees' socio-economic rights.[213] In the Global Compact for Migration, States committed to strengthening international cooperation and global partnerships for safe, orderly and regular migration *inter alia* by providing financial and technical assistance and contributing technical, financial and human resources.[214] Yet the actions listed under Objective 15, which concerns access to basic services for migrants, do not include any references to international cooperation or to the provision of financial resources, technical assistance and cooperation, or material aid to States hosting migrants.[215] This discrepancy between State commitments under the two Global Compacts suggests that States may be more willing to contribute to the realisation of the socio-economic rights of refugees than other people on the move.

A related question of particular importance in the context of this study concerns the impact of international assistance and cooperation on human rights, since official development assistance can negatively impact human rights.[216] Therefore, States parties to the ICESCR must take the effects of their assistance into account and ensure that it does not violate socio-economic rights.[217] Skogly thus proposes that donor States should take reasonable measures to ensure that the assistance is used in a manner consistent with human rights.[218] Indeed, it is arguable that the due diligence standard also applies to the provision of international assistance and cooperation. However, the assistance provided in the context of migration control focuses on stemming migration flows rather than realising the socio-economic rights of people on the move and may in fact cause human rights violations. The CRC Committee and the CMW held that:

> in all international, regional or bilateral cooperation agreements on border management and migration governance, the impacts of such initiatives on children's rights should be duly considered and adaptations made as necessary to uphold the rights of the child. The Committees are concerned by the increase in bilateral or multilateral cooperation agreements that focus on restricting migration, which have demonstrably negative impacts on children's rights, and instead urge cooperation that facilitates safe, orderly and regular migration with full respect for human rights.[219]

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211 New York Declaration, paras 74 and 75; Comprehensive Refugee Response Framework, paras 6 and 8.
212 Global Compact on Refugees, paras 18, 21, 23, 27, 55 and 68.
213 Ibid paras 52, 54, 68, 70, 72, 78 and 80.
214 Global Compact for Migration, paras 39(a), 39(d) and 43.
215 Ibid para 31.
216 Rolf Künnemann, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 223.
217 Skogly (n 74) 193–94.
218 Ibid 192.
219 CMW and CRC Committee, Joint General Comment 3 (CMW) and 22 (CRC Committee), para 50.

In other words, there is a significant risk that cooperative migration control policies do not comply with sponsor States' obligations under international human rights law because the assistance and cooperation provided risks contributing to violations of the socio-economic rights of people on the move rather than remedying them.[220]

The design and implementation of contemporary cooperative migration control policies by sponsor States risks running counter to States' commitments under the Global Compact for Migration, which aims to facilitate safe, orderly and regular migration.[221] Actions to address and reduce vulnerabilities in migration include 'review[ing] relevant policies and practices to ensure they do not create, exacerbate or unintentionally increase vulnerabilities of migrants'.[222] States also recognised that immigration detention must not be promoted as a deterrent.[223] In the New York Declaration States likewise committed to 'consider reviewing our migration policies with a view to examining their possible unintended negative consequences.'[224] Nevertheless, many cooperative migration control policies risk having a negative impact on the rights of people on the move. In other words, there is a tension between measures implemented by sponsor States on the one hand and their obligations under international human rights law and their commitments under the Global Compact for Migration on the other hand. This tension reflects sponsor States' reluctance to recognise that they have obligations under international human rights law towards people on the move who are not refugees.[225]

In conclusion, international assistance and cooperation consists of three elements: financial aid, technical assistance and cooperation, and material aid. Sponsor States' obligations to provide international assistance and cooperation depend on their available resources and the standard of due diligence applies. The assistance provided by sponsor States in the context of cooperative migration control can contribute to discharging their obligations of international assistance and cooperation if it contributes to the realisation of the socio-economic rights of people on the move in partner States. As cooperative migration control policies aim to stem irregular migration flows, sponsor States' assistance tends to focus on preventing onward movement rather than realising the rights of people on the move affected by such policies. Although sponsor States could, in theory, discharge part of their global obligations by cooperating with partner States on migration control, contemporary cooperative migration control measures, which focus on preventing arrivals and avoiding obligations rather than realising rights, often fail to do so.

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220 See also Hammonds and Ooms (n 119) 93–94.

221 Global Compact for Migration, paras 11 and 13; see also New York Declaration, para 16.

222 Ibid para 23(a).

223 Ibid para 29(c).

224 New York Declaration, para 45.

225 Chapter I, Section 4.5. The lack of commitment to the Global Compact for Migration among various sponsor States and the fact that no Global North State has ratified or even signed the ICRMW support this. See also Antoine Pécoud, 'The Politics of the UN Migrant Workers Convention' in Alan Desmond (ed), *Shining New Light on the UN Migrant Workers Convention* (Pretoria University Law Press 2017).

4. CONCLUSION

This chapter examined sponsor States' obligations to realise the socio-economic rights of people on the move affected by cooperative migration control. These obligations are twofold, although in some cases the same conduct can contribute to triggering as well as discharging both types of obligations. *First*, if there is a jurisdictional link between a person on the move and a sponsor State, the latter may have direct obligations under international human rights law towards the former. While different models of extraterritorial jurisdiction exist, the functional model best captures the forms of involvement of sponsor States and their impact on people on the move in the context of cooperative migration control. Under this model, a State exercises jurisdiction when it can take reasonable measures to avoid reasonably foreseeable human rights violations. In other words, the due diligence standard of conduct determines, in a particular situation, whether a State has any direct obligations and, if it does, what their scope is. As there is often a relatively weak causal link between the conduct of sponsor States and the violations of the socio-economic rights of people on the move, not all forms of cooperation create a jurisdictional link. In general, however, if sponsor States are unwilling rather than unable to take into account the socio-economic rights of people on the move affected by cooperative migration control policies, they breach their obligations under international human rights law. Indeed, while cooperative migration control policies are designed at least in part to avoid sponsor States incurring obligations, the fact that they engage in such policies may in itself establish a jurisdictional link between them and people on the move in partner States.

Second, sponsor States have global obligations to contribute to the international community's efforts to provide international assistance and cooperation to States that lack the resources necessary to realise socio-economic rights, including partner States in the Global South that host people on the move. While the exact status, nature and scope of these obligations remain unclear and contested, cooperation on migration control could justify assigning such obligations to sponsor States. It can be argued that sponsor States that contribute to violations of the socio-economic rights of people on the move in partner States should provide international assistance and cooperation to mitigate the negative effects of their policies. Vice versa, can cooperation on migration control be a way for sponsor States to discharge their global obligations? As the principal aim of cooperative migration control policies is to prevent people on the move from reaching sponsor States in the Global North, they are not designed primarily to discharge the latter's obligations under international human rights law. Nevertheless, the analysis revealed parallels and possible synergies between cooperative migration control and States' obligations. Cooperative migration control inherently involves cooperation between States, while international human rights law and the Global Compacts require States to cooperate in order to realise the rights of people on the move. Therefore, shifting the aim of cooperation from preventing onward movement to realising rights could transform cooperative migration control policies so as to enable sponsor States

to comply with their obligations of international assistance and cooperation. In other words, cooperative migration control has the potential to contribute to realising the human rights of people on the move.

Furthermore, sponsor States seem reluctant to recognise that they have obligations towards people on the move who are not refugees. This reflects a wider difference between the Global North and the Global South as regards international human rights law. Indeed, States parties to the ICRMW are almost exclusively States of origin in the Global South, while destination States in the Global North remain reluctant to accept normative standards regarding migrants' rights.[226] The controversy surrounding the Global Compact on Migration in many sponsor States likewise illustrates the Global North's reluctance to recognise that irregular migrants have rights. Moreover, a parallel distinction applies to obligations of international assistance and cooperation. Global South States, who are primarily recipients, tend to agree with the view that such obligations are legally binding, while Global North States, who are primarily providers of international assistance and cooperation, tend to contest this view. In other words, the differences between the Global North and Global South's acceptance of international human rights norms is at least in part motivated by States' self-interest. Finally, the scope of the obligations of sponsor States under international human rights law has important implications for their responsibility for violations of the socio-economic rights of people on the move affected by cooperative migration control, as discussed in the following chapters.

226 Pécoud (n 225) 37.

CHAPTER VI
STATE RESPONSIBILITY AND COOPERATIVE MIGRATION CONTROL

1. INTRODUCTION

The previous chapters examined the obligations of partner and sponsor States under international human rights law. In this chapter the analysis shifts to the issue of responsibility and the legal framework widens to include not only international human rights law but also the law on State responsibility. Thus, while the previous chapters focused on the first sub-question, Chapters VI and VII focus on the second sub-question: how does international law assign responsibility for violations of the socio-economic rights of people on the move where multiple States are involved in migration control? More specifically, this chapter builds on the study's earlier findings in order to answer the following question: when do partner and sponsor States incur responsibility under international law for violations of the socio-economic rights of people on the move affected by cooperative migration control? It thereby lays the foundation for discussing issues of shared responsibility in Chapter VII.

In order to address issues of responsibility, this chapter and the next are premised on the existence of violations of the socio-economic rights of people on the move affected by cooperative migration control. In other words, the analysis applies only to situations where their rights – notably their core socio-economic rights – are not realised. Indeed, if there are no human rights violations there is no need to establish responsibility for them.[1] Although cooperative migration control policies do not necessarily lead to violations of socio-economic rights, Chapter II demonstrated that they often entail a risk of such violations, since they aim to contain people on the move in the Global South. Therefore, the following analysis is relevant for most, if not all, cooperative migration control policies.

Section 2 examines, at a general level, under which circumstances a State incurs responsibility under international law and explores the relation between the concepts of responsibility, attribution and jurisdiction. Section 3 then discusses to what extent *partner States* can incur responsibility for the non-realisation of the socio-economic rights of people on the move affected by cooperative migration control. Section 4, in

[1] Cooperative migration control policies may also breach other obligations, for instance under international refugee law or under the law of the sea, but these are not addressed in this study.

turn, examines under what circumstances *sponsor States* can incur responsibility in the same context. The analysis includes not only their direct responsibility for breaches of their obligations under international human rights law but also their derived responsibility under the law on State responsibility. Finally, Section 5 offers some concluding thoughts on State responsibility in the context of cooperative migration control.

2. STATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS

This section examines under which circumstances a State incurs responsibility under international law. It provides the backdrop for discussing the responsibility of partner and sponsor States in the rest of this chapter. It first discusses the rules on State responsibility in international law and their applicability to international human rights law, before analysing the role of jurisdiction and attribution in determining state responsibility for human rights violations.

2.1. STATE RESPONSIBILITY AND INTERNATIONAL HUMAN RIGHTS LAW

The dominant approach to responsibility in international law relies on the notion of independent responsibility.[2] The ICJ held that the fundamental principle governing the law of international responsibility is that 'a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.'[3] Furthermore, in the *Tehran Hostages* case, the ICJ found that it must, first, 'determine how far, legally, the acts in question may be regarded as imputable to the Iranian State'; and, second, 'consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.'[4] The principle of independent responsibility underlies the ARSIWA.[5] Article 1 ARSIWA provides that '[e]very internationally wrongful act of a State entails the international responsibility of that State.' It thus embodies the basic principle that each State is responsible for its own wrongful conduct.[6] Article 2 ARSIWA, in turn, holds that:

2 André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 Michigan Journal of International Law 359, 381.

3 ICJ, *Genocide* para 406. See also Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012) 62 and references cited there.

4 ICJ, *United States Diplomatic and Consular Staff in Tehran* Judgment (24 May 1980) ICJ Reports 1980, 3, para 56.

5 ARSIWA Commentary 64, para 1.

6 James Crawford, *State Responsibility: The General Part* (CUP 2013) 51.

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
> (b) constitutes a breach of an international obligation of the State.

In other words, a State incurs international responsibility when it commits an internationally wrongful act: the conduct is attributable to it and constitutes a breach of an international obligation of that State. The ARSIWA belong to the law on State responsibility, which is a set of secondary norms that apply to the primary norms of international law.[7] They reflect customary rules[8] concerning 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.'[9] In other words, the ARSIWA represent 'the modern framework of state responsibility.'[10] The Draft Articles on the Responsibility of International Organisations[11] (ARIO) complement the ARSIWA in that they address the responsibility of international organisations and the responsibility of a State for the conduct of an international organisation.[12] Articles 3 and 4 ARIO also embody the principle that 'responsibility = attribution of conduct + breach of obligation'.[13] Nevertheless, the ARIO are less authoritative than the ARSIWA, as there is less practice and they are not supported by a similar degree of scholarly consensus.[14]

The foregoing raises the question whether and how the principle of independent responsibility, and the rules on State responsibility more generally, apply to international human rights law. As noted above, the rules on State responsibility are secondary norms that apply to primary norms of international law, such as international human rights law. Some discussion exists regarding the applicability of the law on State responsibility to human rights norms.[15] However, the ICJ's case law confirms that at

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7 Ibid 64–65.

8 Chapter I, Section 4.2.

9 ARSIWA Commentary 31, para 1.

10 Crawford (n 6) 45.

11 International Law Commission, 'Draft Articles on the Responsibility of International Organisations' in International Law Commission, 'Report of the International Law Commission on the Work of its 63rd Session' (2011) UN Doc A/66/10.

12 ARIO Commentary 2, para 1.

13 Article 3 ARIO holds that '[e]very internationally wrongful act of an international organization entails the international responsibility of that organization.' Article 4 ARIO states that

> There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
>
> (a) is attributable to that organization under international law; and
> (b) constitutes a breach of an international obligation of that organization.

14 ARIO Commentary 3, para 5; Stian Øby Johansen, 'Dual Attribution of Conduct to both an International Organisation and a Member State' (2019) 6 Oslo Law Review 178, 180–81.

15 See for instance Sigrun I Skogly, 'Causality and Extraterritorial Human Rights Obligations' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 234; Wouter Vandenhole, 'Shared Responsibility of Non-State Actors: A Human Rights Perspective' in Noemi Gal-Or, Cedric

least some rules on State responsibility apply to human rights.[16] Likewise, the ECtHR applies the principle of independent responsibility: it assigns responsibility 'on the basis of separate assessments of the conduct of each contributing entity.'[17] For instance, in the case of *MSS v Belgium and Greece*, an Afghan asylum seeker was returned from Belgium to Greece under the EU Dublin Regulation; in Greece he suffered ill-treatment and risked return to Afghanistan.[18] The ECtHR found that both States incurred responsibility for breaching their respective obligations under the ECHR: Belgium for failing to verify how asylum legislation was applied in practice in Greece and exposing the applicant to detention and living conditions that amounted to degrading treatment in Greece; and Greece on account of the applicant's detention and living conditions and the deficiencies in the asylum procedure.

Furthermore, Article 2 ARSIWA refers to 'conduct consisting of an action or omission'.[19] This raises the question how actions or omissions under the law on State responsibility correspond to the tripartite typology of obligations to respect, protect and fulfil in international human rights law, and what implications the distinction has for State responsibility. Under international human rights law, obligations to respect, protect and fulfil often apply in parallel, and ultimately the due diligence standard determines whether a State was unable or rather unwilling to realise socio-economic rights.[20] Likewise, under the law on State responsibility the combination of an action and an omission can trigger responsibility.[21] In fact, what can be described as an act can also be labelled as an omission, namely the failure to take adequate measures to ensure that a State organ does not commit the act in question.[22] The rest of this chapter will show that the distinction between action and omission, like the distinction between obligations to respect, protect and fulfil, is of limited relevance in the context of this study. Just like a State can breach its direct obligations under international human rights law because of a combination of failures to respect, protect and/or fulfil rights, it can incur responsibility because of a combination of acts and omissions. Except where the distinction is relevant,[23] the analysis refers to the (non-)realisation of the socio-economic rights of people on the move and possible breaches of States' direct obligations in general terms, without specifying whether it concerns an obligation to respect, protect or fulfil, nor whether it amounts to an act or omission.

Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill 2015).

16 James Crawford and Amelia Keene, 'Interpretation of the Human Rights Treaties by the International Court of Justice' (2020) 24 The International Journal of Human Rights 935, 948. See for instance ICJ, *Genocide* paras 460–63; ICJ, *Diallo* paras 160–61.

17 Maarten den Heijer, 'Shared Responsibility before the European Court of Human Rights' (2013) 60 Netherlands International Law Review 411, 416.

18 See also Chapter III, Section 2.

19 See also Article 15 ARSIWA; likewise see Articles 4 and 13 ARIO.

20 See Chapter III, Sections 2 and 3.

21 ARSIWA Commentary 35, para 4.

22 Anja Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?' (2017) 60 German Yearbook of International Law 667, 685.

23 See notably Section 3 below.

In the context of this study, then, a partner or sponsor State commits an internationally wrongful act and hence incurs responsibility when conduct that is attributable to it breaches its obligations under international human rights law. This form of responsibility can be called 'direct responsibility'[24], as the State incurs responsibility for its own conduct in respect of its own obligations.[25] The obligations in question concern both its direct obligations to realise the socio-economic rights of people on the move within its jurisdiction, and – for sponsor States – global obligations of international assistance and cooperation. Thus, a partner State can incur direct responsibility for failing to comply with its direct obligations, while a sponsor State can incur direct responsibility for failing to comply both with its direct obligations and with its global obligations.[26] Finally, a State can only incur responsibility if it breaches an obligation under international human rights law. Yet this study distinguishes between a *breach of an obligation* and a *violation of a right*. Indeed, a human rights violation can take place without any obligation being breached.[27] Since a State can only incur responsibility if there is a breach of an obligation, it is possible for a *human rights violation* to occur without an *internationally wrongful act* taking place and hence without a State incurring responsibility.[28]

2.2. THE ROLE OF JURISDICTION AND ATTRIBUTION IN DETERMINING STATE RESPONSIBILITY

Applying the rules of State responsibility to international human rights norms has caused both confusion and controversy among adjudicators and scholars, especially in situations where States act extraterritorially. This is due, at least in part, to confusion surrounding the concepts of responsibility, attribution and jurisdiction. This may stem from the fact that some courts have addressed issues of attribution as part of their jurisdictional analysis, although it is now generally accepted that they are separate concepts which each have a different purpose.[29] The ECtHR's understanding and application of these notions has been particularly criticised.[30] For instance, the

24 See for instance Nikolas Feith Tan, *International Cooperation on Refugees: Between Protection and Deterrence* (PhD thesis, Aarhus University 2019) 159 and 175.

25 ARSIWA Commentary 34, para 6.

26 Sponsor States can also incur derived responsibility for their conduct in relation to an internationally wrongful act committed by a partner State. See Section 4.3 below.

27 See Chapter III, Section 3.

28 Chapter VII, Section 4 discusses this in detail.

29 See for instance ECtHR, *Catan* para 115.

30 Aurel Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in *Jaloud v Netherlands*: Old Problem, New Solutions?' (2014) 53 Military Law and the Law of War Review 287; Jane M Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v Netherlands*' (2015) 62(3) Netherlands International Law Review 407; Friederycke Haijer and Cedric Ryngaert, 'Reflections on *Jaloud v the Netherlands*: Jurisdictional Consequences and Resonance in Dutch Society' (2015) 19 Journal of International Peacekeeping 174; Işıl Karakaş and Hasan Bakırcı, 'Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions

ECtHR's reasoning in the case of *Jaloud v the Netherlands* has caused considerable confusion. The case concerned the fatal shooting of the applicant's son by a Dutch soldier at a checkpoint in Iraq. The Court first found that the Dutch troops were neither placed at the disposal of any foreign power nor under the exclusive direction or control of any other State.[31] It then held that Jaloud's death occurred within the jurisdiction of the Netherlands.[32] The Court further recalled that 'the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law'.[33] Finally, it found that the facts were capable of giving rise to the responsibility of the Netherlands under the ECHR because they derived from alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities.[34] Judges Spielmann and Raimondi, however, argued in a Separate Opinion that there was 'no need to examine the non-issue of "attribution", which is completely separate from the question of "jurisdiction".'[35] Scholarly opinion on how to interpret the Court's approach is equally divided.[36] Milanovic thus argued that the ECtHR correctly addressed two distinct attribution issues separately (jurisdiction-establishing conduct and violation-establishing conduct).[37] Sari, on the other hand, contended that the ECtHR conflated the two attribution questions because it wrongly assumed that the same standards govern the attribution of jurisdiction and the attribution of wrongful conduct.[38] More generally, the relation between the concepts of jurisdiction, responsibility and attribution has led to extensive debates, as scholars have proposed various understandings of these concepts and the relation between them.[39] The

of Extraterritorial Jurisdiction and State Responsibility' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018) 132–33; Marko Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018); James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018).

31 ECtHR, *Jaloud* para 151.

32 Ibid 152.

33 Ibid para 154.

34 Ibid para 155.

35 Ibid, Concurring Opinion of Judge Spielmann, Joined by Judge Raimondi, para 7.

36 See for instance Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility' (n 30); Rooney (n 30); Haijer and Ryngaert (n 30); Milanovic, 'Jurisdiction and Responsibility' (n 30) 103–107.

37 Milanovic, 'Jurisdiction and Responsibility' (n 30) 103–107.

38 Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility' (n 30) 293.

39 See for instance Francesco Messineo, 'Gentlemen at Home, Hoodlums Elsewhere? The Extra-territorial Exercise of Power by British Forces in Iraq and the European Convention on Human Rights' (2012) 71 Cambridge Law Journal 15; Martin Scheinin, 'Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013); Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 154; Cedric Ryngaert, 'Jurisdiction: Towards a Reasonableness Test' in Malcolm Langford and others

notions of jurisdiction, responsibility and attribution are particularly important in the context of this study, notably as regards the question whether sponsor States can incur responsibility for violations of the socio-economic rights of people on the move affected by cooperative migration control. It is therefore important to disentangle them.

On its face, the law on State responsibility does not require a State to exercise *jurisdiction* in order to incur responsibility under international law.[40] However, jurisdiction delimits the scope of States' direct obligations under international human rights law.[41] It plays a role when determining whether a State breached its direct obligations, which is one of the requirements for State responsibility. The issue of jurisdiction – where relevant – thus falls under Article 2(b) ARSIWA: it determines whether an obligation exists.[42] In other words, under international human rights law jurisdiction *can* be a requirement for establishing State responsibility.[43] Yet jurisdiction is not a *necessary* requirement for State responsibility, as sponsor States' global obligations do not require the existence of a jurisdictional link. Moreover, under the law on State responsibility States can also incur derived responsibility for human rights violations that occur outside their jurisdiction.[44] Some scholars have proposed a different conceptualisation of the relation between jurisdiction and State responsibility. Scheinin for instance argues that the notion of jurisdiction is a shorthand expression for certain elements of the attribution question.[45] Vandenbogaerde, in turn, interprets jurisdiction as 'attribution of obligations', which he distinguishes from attribution of conduct.[46] Nevertheless, the understanding that jurisdiction – where relevant – is an element of the question whether a State breached its international obligations receives widespread support in the literature.[47]

(eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013); Vassilis P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 Michigan Journal of International Law 129; Rooney (n 30); Miles Jackson, *Complicity in International Law* (OUP 2015) ch 8; Arne Vandenbogaerde, *Towards Shared Accountability in International Human Rights Law* (Intersentia 2016) 211–25; Milanovic, 'Jurisdiction and Responsibility' (n 30); Crawford and Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' (n 30).

40 Scheinin thus notes that the word jurisdiction is not mentioned at all in the ARSIWA. Scheinin (n 39) 216. See also Tzevelekos (n 39).

41 Chapter III, Section 6.3.

42 Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 46.

43 For instance, in the context of the ECHR, which includes a jurisdiction clause in Article 1, the ECtHR found that the exercise of jurisdiction 'is a condition *sine qua non* in order for that State to be held responsible for acts or omissions attributable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention': *MN* para 97. See also ECtHR, *Al-Skeini* para 130; ECtHR, *Güzelyurtlu* para 178.

44 See Section 4.3 below.

45 Scheinin (n 39) 215. See also Ryngaert (n 39) 199.

46 Vandenbogaerde (n 39) 221–25.

47 See for instance Rick Lawson, 'Life after *Banković*: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 86; Den Heijer, *Europe and Extraterritorial*

Attribution of conduct, in turn, is 'the process by which international law establishes whether the conduct of a natural person or other such intermediary can be considered an "act of state".'[48] In other words, while jurisdiction concerns the relation between a person and a State, attribution concerns the relation between a given conduct and a State. The attribution question, embodied in Article 2(a) ARSIWA, is thus a different one from the jurisdiction question, which concerns State obligations under Article 2(b) ARSIWA. Attribution becomes an important issue when the conduct in question is not that of a State organ but a private actor, or in situations where it is unclear which entity the conduct should be attributed to. This is the case in situations involving multiple actors, such as the secondment of national troops to peace missions.[49] Likewise, attribution raises complex issues in the context of the RPC in Nauru, whose operation involves Australian, Nauruan and private actors.[50]

In light of the above, we must address various issues when determining whether a State incurs responsibility for human rights violations under international law.[51] They involve the primary norms of international human rights law as well as the secondary rules on State responsibility. More specifically, the following four questions can play a role when determining whether a State committed an internationally wrongful act:

1. Is the conduct that allegedly triggers jurisdiction attributable to the State?	2. Does the conduct that is attributable to the State trigger its jurisdiction?
3. Is the conduct that allegedly breaches an international obligation of the State attributable to it?	4. Does the conduct that is attributable to the State breach its obligations?

Table 1. Responsibility questions (general)

Asylum (n 3) 58; Messineo (n 39); Katarzyna Urszula Gałka, 'The Jurisdiction Criterion in Article 1 of the ECHR and a Territorial State: Considerations Inspired by the *Sargsyan v Azerbaijan* Case' (2015) 17 International Community Law Review 474; Milanovic, 'Jurisdiction and Responsibility' (n 30) 104; Tan (n 24) 159; Patrick van Berlo, *Human Rights Elephants in an Era of Globalisation: Commodification, Crimmigration and Human Rights in Confinement* (Wolf 2020) 244; Conall Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Hart 2020) 5.

48 Crawford (n 6) 113. See also Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 International Law Studies 295.

49 Johansen (n 14) 193–84. See for instance ECtHR, *Behrami v France and Saramati v France, Germany and Norway* [GC] [Admissibility] Apps Nos 71412/01 and 78166/01 (2 May 2007). See also Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' (2008) 8 Human Rights Law Review 151; Heike Krieger, 'A Credibility Gap: The *Behrami and Saramati* Decision of the European Court of Human Rights' (2009) 13 Journal of International Peacekeeping 159; Caitlin A Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami and Saramati* Decision' (2010) 42 New York University Journal of International Law and Politics 501; André Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 Journal of International Criminal Justice 1143.

50 See Sections 3.2.1 and 4.1 below, and Chapter VII, Sections 3.1.1 and 3.2.2. See also Van Berlo, *Human Rights Elephants in an Era of Globalisation* (n 47) 265–79.

51 See also Milanovic, 'Jurisdiction and Responsibility' (n 30) 106.

Table 1 illustrates the role of jurisdiction and attribution in determining State responsibility. The two questions on the top row concern *jurisdiction* and are only relevant when the obligation in question depends on the State's exercise of jurisdiction. They are therefore not applicable to sponsor States' global obligations. Both questions address the same issue but from two different perspectives: under the law on State responsibility (left column), the key question is whether the jurisdiction-establishing conduct is attributable to the State; whereas under international human rights law (right column) the key question is whether the attributable conduct establishes a jurisdictional link. These two questions are closely related and interdependent: if the answer to the first question is negative, there is no need to answer the second question, and vice versa. In both cases the State does not incur responsibility, because at least one of the requirements for State responsibility is not met.

The two questions on the bottom row, in turn, deal with the *breach of an obligation*. They also address the same issue but from two different perspectives: under the law on State responsibility (left column), the key question is whether the obligation-breaching conduct is attributable to the State; whereas under international human rights law (right column) the key question is whether the attributable conduct breaches the State's obligations. In other words, the third question corresponds to the requirement in Article 2(a) ARSIWA, while the fourth question corresponds to the requirement in Article 2(b) ARSIWA. Like the first two questions, the third and fourth questions are closely connected and interdependent: if the answer to one is negative, there is no need to answer the other question, since at least one of the requirements for establishing State responsibility is not met.

In sum, in order to establish that a sponsor or partner State commits an internationally wrongful act, the four questions above must be asked and answered positively – with the exception of sponsor States' global obligations for which the first two questions are not relevant. The order in which these questions are best addressed depends on the circumstances of the case. For partner States the question whether the State exercises jurisdiction over people on the move on its territory is relatively straightforward because international law presumes that a State exercises jurisdiction over its territory.[52] However, this issue is more complicated as regards sponsor States because of the extraterritorial element: the answer to the second question is not always positive. Likewise, when a single State is involved, the attribution question is relatively easy to answer, whereas in situations involving multiple States and actors – as in the case of cooperative migration control – it is not always clear to which State(s) the conduct in question is attributable. Having clarified the role of the key concepts of responsibility, attribution and jurisdiction as well as the relation between them, the rest of this chapter examines the responsibility of partner and sponsor States in the context of cooperative migration control.

52 Chapter III, Section 6.2.

3. THE RESPONSIBILITY OF PARTNER STATES

Partner States incur responsibility under international law for violations of the socio-economic rights of people on the move on their territory if the four questions identified above are answered positively. As they are presumed to exercise jurisdiction over people on the move on their territory, the first two questions – which concern jurisdiction – need not be addressed here because the answer to both questions is presumed to be positive. Moreover, the answer to the last question – which concerns the breach of an obligation – ultimately depends on whether the partner State in question complies with the standard of due diligence and the principle of non-discrimination, and has been addressed in detail in Chapter IV. Therefore, as Table 2 illustrates, the analysis here focuses on the third question: is the conduct that allegedly breaches an international obligation of the State attributable to it?

1. Is the conduct that allegedly triggers jurisdiction attributable to the State?	2. Does the conduct that is attributable to the State trigger its jurisdiction?
3. Is the conduct that allegedly breaches an international obligation of the State attributable to it?	4. Does the conduct that is attributable to the State breach its obligations?

Table 2. Responsibility questions (partner States)

This section shows that the attribution requirement does not create a significant obstacle to assigning responsibility to partner States. More specifically, a partner State can commit an internationally wrongful act on two accounts: it can incur responsibility for the conduct of State organs and for the conduct of non-State actors. The following discusses them in turn.

3.1. RESPONSIBILITY FOR THE CONDUCT OF STATE ORGANS

Under customary international law, a State is responsible for the conduct of persons or entities acting on its behalf.[53] Article 4(1) ARSIWA reflects this principle:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

In other words, the conduct of a State organ is attributable to that State. This includes both *de jure* and *de facto* organs. Indeed, Article 4(2) ARSIWA confirms that an organ includes 'any person or entity which has that status in accordance with the internal law

53 ICJ, *Genocide* para 385.

of the State.' Thus, 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.'[54] The ICJ further held that the test for *de facto* State organs is one of complete dependence and control.[55]

In the context of cooperative migration control, a partner State commits an internationally wrongful act when the conduct of its own organ breaches its obligations under international human rights law towards people on the move, i.e. if it did not seek to realise their socio-economic rights in compliance with the principle of non-discrimination and the due diligence standard. On the one hand, State organs have a negative obligation to respect the rights of people on the move: they must not commit acts that infringe their rights. For instance, a public school or hospital may not deny people on the move access to primary education or emergency health care, and a public housing authority may not forcibly evict them from their home. On the other hand, partner States also have positive obligations to protect and fulfil the rights of people on the move on their territory: they must not commit omissions that infringe these rights. Therefore, a partner State must ensure that private schools and hospitals do not arbitrarily deny access to people on the move, and that private accommodation providers do not forcibly evict people on the move. If State organs provide access to goods, facilities and services that are needed to realise the core socio-economic rights of people on the move, the conduct in question that is attributable to the State concerns the provision of these goods, facilities and services themselves. If private actors provide them, the conduct that is attributable to the State is the regulation of these private actors. How the State chooses to discharge its obligations depends on numerous factors, and hence what conduct is attributable to it depends on the situation.[56] Ultimately, however, the State has the obligation to fulfil at least the core socio-economic rights of people on the move, within its available resources.[57]

For instance, in Libya some people on the move are held in detention centres operated by the DCIM, which falls under the Interior Ministry of the Government of National Accord, although some DCIM facilities are effectively controlled by armed groups. Local armed groups also control a number of other informal centres where people on the move are detained.[58] Thus, Libya could incur responsibility not only because the DCIM did not respect the socio-economic rights of those detained in centres that it operates, but also because it failed to protect people on the move detained in centres controlled by armed groups. Moreover, Libya ultimately incurs

54 ARSIWA Commentary 42, para 11. See also ICJ, *Genocide* paras 386 and 388.

55 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Judgment (27 June 1986) ICJ Reports 1986, 14, para 109; ICJ, *Genocide* para 392.

56 See Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (OUP 1995) 115.

57 See Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 367.

58 Mixed Migration Centre, 'What Makes Refugees and Migrants Vulnerable to Detention in Libya? A Microlevel Study of the Determinants of Detention' (2 December 2019) MMC Research Report 8.

responsibility for not fulfilling the socio-economic rights of people on the move, unless it can demonstrate that it lacks sufficient resources and complies with the principle of non-discrimination and the due diligence standard. In addition, under certain circumstances, Libya could incur responsibility for the conduct of the armed groups themselves as well as its own organs.

3.2. RESPONSIBILITY FOR THE CONDUCT OF NON-STATE ORGANS

As noted above, partner States can commit an internationally wrongful act when they fail to protect people on the move from harm committed by non-State actors. In that case, the conduct that is attributable to the State is the failure to protect, rather than the conduct of the non-State actor. However, a partner State can also incur responsibility for the conduct of the non-State actor itself, provided the conduct is attributable to it. The law on State responsibility and international human rights law include several standards for attributing the conduct of non-State actors to the State: while the rules on State responsibility refer to the exercise of governmental authority and direction and control, international human rights law includes references to acquiescence.

3.2.1. Attribution under the Law on State Responsibility

The ARSIWA include various provisions on attribution of conduct to a State.[59] Two of them are particularly relevant in the context of partner State responsibility. *First*, Article 5 ARSIWA states that:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

This provision 'is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.'[60] For instance, private firms which are contracted to act as prison guards may exercise certain public powers in that capacity.[61] Likewise, airlines may exercise certain public powers in relation to immigration control or quarantine.[62] Therefore, the conduct of an entity that is not a *de jure* or *de facto* State organ under Article 4 ARSIWA can nevertheless be attributed to the State, provided that the requirements in Article 5 ARSIWA are fulfilled.

59 Articles 4–11 ARSIWA.
60 ARSIWA Commentary 42, para 1.
61 Ibid 43, para 2.
62 Ibid.

The *second* situation in which the conduct of a non-State actor is attributable to a State is when the former is directed or controlled by the State. In the *Nicaragua* case, the ICJ thus not only examined whether the *contras* met the threshold of complete dependence required for *de facto* State organs, but also whether the USA 'had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.'[63] In the *Genocide* case, the ICJ confirmed that:

> Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.[64]

This rule is one of customary law and reflected in Article 8 ARSIWA[65], which establishes that:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

In other words, there are two situations in which this rule is applicable. The first one concerns situations where a State instructs a non-State actor to perform a certain conduct, while the second concerns situations where the non-State actor is under the direction or control of the State.[66] In both cases the decisive factor is the factual relationship between the State and the conduct in question.[67] International case law has sought to clarify the applicable standard, referring to 'effective control'[68], 'overall control'[69] and 'effective overall control'.[70] This issue has also received much scholarly attention.[71]

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63 ICJ, *Nicaragua* para 115.

64 ICJ, *Genocide* para 401.

65 Ibid para 398.

66 Crawford (n 6) 144.

67 ARSIWA Commentary 47, para 1.

68 ICJ, *Nicaragua* para 115; ICJ, *Genocide* para 401.

69 In *Tadić* the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the attribution of acts of organised and hierarchically structured groups to a State only requires 'that the group as a whole be under the overall control of the State': ICTY, *Prosecutor v Tadić* Judgment (15 July 1999) ICTY-94–1-A, para 120.

70 ECtHR, *Loizidou* [Merits] para 56; ECtHR, *Cyprus v Turkey* para 77. However, as noted above, the ECtHR seems to confuse attribution and jurisdiction. See also ECtHR, *Ilaşcu* paras 312–19 and 392–94.

71 See for instance Robert McCorquodale, 'Impact on State Responsibility' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights on General International Law* (OUP 2009) 240–46; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 42) 42–45; Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 67–74; Crawford (n 6) 146–56; Mark Gibney, *International Human Rights Law: Returning to Universal Principles* (2nd edn, Rowman and Littlefield 2016), 21–29 and 32–33; Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 European Journal of International Law 563.

In the context of cooperative migration control, whether the conduct of non-State actors could be attributed to partner States under either Article 5 or 8 ARSIWA depends on the specific circumstances. For instance, is the conduct of armed groups controlling Libyan detention centres operated by the DCIM attributable to the Libyan State? It is arguable that such groups exercise elements of the governmental authority of the Libyan State as regards the operation of the detention centres, although it remains unclear whether they are empowered to do so by law, as required under Article 5 ARSIWA. Likewise, it is uncertain whether they do so under the instructions or direction or control of the DCIM and whether the required threshold of control is met for the rule in Article 8 ARSIWA to apply. As regards the attribution of the conduct of private actors involved in the operation of the RPC on Nauru, Van Berlo concludes that the conduct of the Nauru (RPC) Corporation and of staff members of security and garrison service providers, such as the private company Wilson Security, could in certain cases be attributed to Nauru under Article 5 ARSIWA.[72] It is also likely that the conduct of the corporation can be attributed to Nauru on the basis of Article 8 ARSIWA.[73]

3.2.2. Attribution under International Human Rights Law

In addition to the attribution rules discussed above, which belong to the law on State responsibility – and are hence applicable to all fields of international law –, there is some evidence to suggest that under international human rights law the conduct of a non-State actor may also be attributed to a State if the former acts with the acquiescence of the latter. In other words, there may be an attribution rule that is inherent to international human rights law.[74] Indeed, in some cases, human rights courts seem to have adopted a broader approach by attributing the conduct of non-State actors to a State although the requirements of the above-mentioned rules were not met.[75] Notably, in the *Mapiripán* case the Colombian army had enabled a paramilitary group to commit a massacre and later impeded the investigation. The IACtHR observed that attribution of international responsibility must take place in light of the ACHR.[76] Therefore, although the acts themselves had been committed by members of paramilitary groups:

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72 Van Berlo, *Human Rights Elephants in an Era of Globalisation* (n 47) 268–74.

73 Ibid 277–78.

74 Article 55 ARSIWA provides that '[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.' See also Crawford (n 6) 114–15.

75 For a detailed discussion see Jackson (n 39) ch 8; Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016) ch 7; Seibert-Fohr (n 22); Marko Milanovic, 'State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights' (2019).

76 IACtHR, *'Mapiripán Massacre' v Colombia* (Merits, Reparations and Costs) Series C No 134 (15 September 2005) para 107.

> the massacre could not have been prepared and carried out without the collaboration, acquiescence, and tolerance, expressed through several actions and omissions, of the Armed Forces of the State, including high officials of the latter. (…) it clearly follows that both the behavior of its own agents and that of the members of the paramilitary groups are attributable to the State insofar as they in fact acted in a situation and in areas that were under the control of the State.[77]

The Court found that Colombia was responsible because the acts committed by the paramilitary were linked to the actions and omissions of State officials and hence could not be considered mere acts amongst private individuals.[78] In other words, the IACtHR used the standard of 'collaboration, acquiescence, and tolerance' to attribute the conduct of the paramilitary to the State. The IAComHR and IACtHR have applied a similar reasoning in other cases.[79]

Likewise, a possible reading of the Grand Chamber's judgment in *Cyprus v Turkey* proposes that the ECtHR attributes the conduct of private actors to a State on the ground of the latter's acquiescence or connivance. The case concerned human rights violations committed by the separatist authorities of the Turkish Republic of Northern Cyprus. The ECtHR first established that Turkey exercised jurisdiction over Northern Cyprus.[80] It then found that:

> As to the applicant Government's further claim that this 'jurisdiction' must also be taken to extend to the acts of private parties in northern Cyprus who violate the rights of Greek Cypriots or Turkish Cypriots living there, (…) the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention.[81]

This formulation is ambiguous and could be interpreted in two different ways. On the one hand, it could mean that Turkey incurred responsibility because it failed to comply with its (positive) obligation to secure the rights of individuals in Northern Cyprus. On the other hand, it could signify that the Court attributes the conduct of private individuals in which Turkey had 'acquiesced or connived' to Turkey. Various other cases in the ECtHR's case law which refer to 'acquiescence or connivance' seem to do so in the context of a State's positive obligations to realise human rights rather than the attribution of the conduct of private actors to a State.[82] Nevertheless, the ECtHR

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77 Ibid para 120.

78 Ibid para 123.

79 See for instance IAComHR, 'Third Report on the Human Rights Situation in Colombia' (26 February 1999) OAS Doc OEA/Ser.L/V/II.102, para 234; IAComHR, '*Riofrío Massacre*' *v Colombia* Case No 11.654, Report No 62/01 (6 April 2001) paras 48–52; IACtHR, *'White Van' (Paniagua Morales and others) v Guatemala* (Merits) Series C No 37 (8 March 1998) para 91; IACtHR, *'Rochela Massacre' v Colombia* (Merits, Reparations and Costs) Series C No 163 (11 May 2007) para 78.

80 ECtHR, *Cyprus v Turkey* para 80.

81 Ibid para 81.

82 Milanovic, 'State Acquiescence or Connivance' (n 75) 7–8 and cases cited there.

has repeated the formulation in *Cyprus v Turkey* in various judgments, albeit without applying it to the facts of the case.[83]

Moreover, more recent cases on extraordinary rendition seem to use acquiescence or connivance as an attribution standard with regard to the conduct of third state officials. Although these cases concern the attribution of the conduct of a foreign State agent rather than a private actor, they can be read as an endorsement of the acquiescence attribution standard, as illustrated by the case of *El-Masri v Macedonia*.[84] The applicant was arrested, detained *incommunicado* in a hotel room and ill-treated by Macedonian agents before being handed over to CIA agents who tortured him at Skopje airport and transferred him to a CIA-run secret detention facility in Afghanistan where he suffered ill-treatment. The ECtHR held that Macedonia was responsible 'for the inhuman and degrading treatment to which the applicant was subjected while in the hotel, for his torture at Skopje Airport and for having transferred the applicant into the custody of the US authorities, thus exposing him to the risk of further treatment contrary to Article 3 of the Convention.'[85] More specifically, as regards the applicant's ill-treatment by CIA agents at Skopje Airport, the ECtHR held that 'the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities'.[86] This suggests that the ECtHR attributed the conduct of US agents to Macedonia and established the latter's responsibility on that basis. In various other extraordinary rendition cases the Court likewise seems to attribute the conduct of US State agents to European States. Indeed, it has repeatedly held that 'the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities'.[87] In sum, although the ECtHR's case law lacks clarity in this regard, it contains some indications that the conduct of a non-State actor can be attributed to a State when the latter acquiesces or connives in its conduct.[88]

Furthermore, the HRC's decision in *Alzery v Sweden* shows similarities with the ECtHR's extraordinary rendition case law. In this case, the applicant was ill-treated by American and Egyptian agents at a Swedish airport. The HRC held that 'a State

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83 See for instance ECtHR, *Ilaşcu* para 318; ECtHR, *Moldovan and others v Romania (nº 2)* Apps Nos 41138/98 and 64320/01 (12 July 2005) para 94; ECtHR, *Sindicatul 'Păstorul cel Bun' v Romania* [GC] App No 2330/09 (9 July 2013) para 76; ECtHR, *Chiragov* para 81.

84 See Chapter VII, Section 3.2.2. See also Milanovic, 'State Acquiescence or Connivance' (n 75) 9–14.

85 ECtHR, *El-Masri* para 223.

86 Ibid para 206.

87 ECtHR, *Al Nashiri v Poland* App No 28761/11 (24 July 2014) para 452; ECtHR, *Husayn (Abu Zubaydah) v Poland* App No 7511/13 (24 July 2014) para 449; ECtHR, *Nasr and Ghali v Italy* App No 44883/09 (23 February 2016) para 241; ECtHR, *Al Nashiri v Romania* App No 33234/12 (31 May 2018) para 594; ECtHR, *Abu Zubaydah v Lithuania* App No 46454/11 (31 May 2018) para 581.

88 While Milanovic argues that the ECtHR's case law on acquiescence and connivance can be interpreted either as a special attribution rule or a (primary) complicity rule, he favours the latter. Milanovic, 'Special Rules of Attribution of Conduct in International Law' (n 48) 362–66.

party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party'.[89] Finally, the AComHPR found that a State 'can be held responsible for killings by non-State actors if it approves, supports or acquiesces in those acts'.[90] More generally, there may be an emerging rule under international law that connivance can be a ground for attribution of conduct of foreign State agents to the territorial State.[91] It remains unclear, however, whether the acquiescence standard of attribution is also applicable to conduct that occurs outside the State's territory.[92]

Although this approach lacks strong doctrinal foundations, the case law of various courts and human rights bodies suggests that the conduct of a private actor can be attributed to a State if the former acts with the acquiescence of the latter on its territory. To the extent that it is recognised, this rule is broader than those embodied in Articles 5 and 8 ARSIWA. Therefore, applying the acquiescence standard developed by human rights bodies in addition to the rules of attribution in the ARSIWA can increase the likelihood that a State incurs responsibility for the conduct of non-State actors. As noted above, in the context of cooperative migration control it often remains unclear whether the conduct of non-State actors can be attributed to partner States under Article 5 or 8 ARSIWA, while the acquiescence standard is easier to meet. It is thus arguable that the conduct of armed groups controlling Libyan detention centres operated by the DCIM is attributable to the Libyan State because such armed groups act with the DCIM's acquiescence. Likewise, it could be argued that private actors involved in the operation of the RPC in Nauru act with the acquiescence of Nauru.

3.3. CONCLUDING OBSERVATIONS ON THE RESPONSIBILITY OF PARTNER STATES

Partner States can incur responsibility for violations of the socio-economic rights of people on the move on their territory in two ways: either on account of the conduct of their own State organs, or because the conduct of non-State actors is attributable to them. This suggests that the primary norms of international human rights law and the rules on attribution complement each other: if the conduct of a non-State actor itself is not attributable to the State, the latter can nonetheless commit an internationally

89 HRC, *Alzery v Sweden* Communication No 1416/2005 (10 November 2006) para. 11.6.

90 AComHPR, General Comment 3, para 9.

91 Erik Kok, *Indirect Responsibility in the Contemporary Law of State Responsibility* (Prufrock 2018) 113–26. Going even further, Lanovoy proposes, as a matter of *lex ferenda*, to conceive of complicity as an emerging standard of attribution in the law of international responsibility. However, this approach is contested by others. Compare Jackson (n 39) 194–99; Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (n 75) 308–09; Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (n 71); Ilias Plakokefalos, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy' (2017) 28 European Journal of International Law 587.

92 Milanovic, 'State Acquiescence or Connivance' (n 75) 20.

wrongful act if it fails to protect people on the move from harm. In fact, since obligations to respect, protect and fulfil apply in parallel and the (non-)realisation of socio-economic rights rarely depends on a single actor and course of conduct, a partner State can commit multiple internationally wrongful acts. For instance, it can incur simultaneous responsibility for failing to comply with the due diligence standard in regulating the conduct of a non-State actor, and for the conduct of the non-State actor in question.[93] It is thus conceivable that Libya could incur responsibility for the conduct of armed groups that is attributable to it as well as for its failure to protect people on the move from exploitation by these armed groups.

As the realisation of socio-economic rights rarely depends on the specific action or omission of a single person or entity, the issue of attribution is less important than in other studies on migration control which often focus on the attribution of the specific conduct of a given actor.[94] Indeed, the principle of *non-refoulement* or the right to life for instance can be violated if a single border guard refuses entry to a person on the move or mortally wounds her with a gunshot. However, it often takes more than the act or omission of a single person or entity to violate the right to food or water. As the State has the obligation under international law to realise socio-economic rights, it is likely that in many situations the obligation-breaching conduct is ultimately attributable to the State. Therefore, the key question is whether the partner State was unwilling rather than unable to realise the rights of people on the move on its territory. In other words: did it comply with the principle of non-discrimination and the due diligence standard? As the next section discusses, the analysis of the responsibility of sponsor States for violations of socio-economic rights of people on the move is less straightforward.

4. THE RESPONSIBILITY OF SPONSOR STATES

Like partner States, sponsor States can incur responsibility for violations of the socio-economic rights of people on the move affected by cooperative migration control policies. Yet the assessment is more complex, as sponsor States can incur various types of responsibility, for each of which the above considerations regarding the conduct of State organs and non-State actors apply. First, sponsor States can incur direct responsibility when an internationally wrongful act breaches their direct obligations. Second, they can incur direct responsibility when an internationally wrongful act breaches their global obligations of international assistance and cooperation. Third, sponsor States can incur derived responsibility for violations of the socio-economic rights of people on the move in partner States. This section discusses these three possibilities in turn.

93 Seibert-Fohr (n 22) 681–85.

94 See for instance Savitri Taylor, 'Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but no Responsibility?' (2010) 33 UNSW Law Journal 337, 343–47; Melanie Fink, *Frontex and Human Rights: Responsibility in 'Multi-actor Situations' under the ECHR and EU Public Liability Law* (OUP 2018) ch 3; Tan (n 24) 192–99; Van Berlo, *Human Rights Elephants in an Era of Globalisation* (n 47) ch 6.

4.1. DIRECT RESPONSIBILITY FOR BREACHES OF DIRECT OBLIGATIONS

As noted above, when human rights obligations require the existence of a jurisdictional link, the jurisdiction question plays a role when determining whether a State incurs responsibility under international law. Therefore, the four questions identified in Section 2.2 must be answered positively for a sponsor State to commit an internationally wrongful act that breaches its direct obligations under international human rights law. Chapter V examined the second and fourth questions in detail and found that the answer to these questions depends on what model of extraterritorial jurisdiction one applies: while it is unlikely that the second question is answered positively under the spatial and personal models, under the effects and functional models it is more likely that a jurisdictional link exists between a sponsor State and people on the move affected by cooperative migration control. Moreover, under the functional model the due diligence standard determines the answer to both the second and the fourth question: sponsor States exercise jurisdiction and breach their human rights obligations when they fail to take reasonable measures to avoid reasonably foreseeable human rights violations. As the previous chapter discussed these questions in detail, the analysis does not address them here.

1. Is the conduct that allegedly triggers jurisdiction attributable to the State?	2. Does the conduct that is attributable to the State trigger its jurisdiction?
3. Is the conduct that allegedly breaches an international obligation of the State attributable to it?	4. Does the conduct that is attributable to the State breach its obligations?

Table 3. Responsibility questions (sponsor States' direct obligations)

As Table 3 illustrates, since an internationally wrongful act requires not only the breach of an obligation but also attribution of conduct, the first and third questions must be answered positively: is the conduct that allegedly triggers jurisdiction attributable to the State, and is the conduct that allegedly breaches an international obligation of the State attributable to it? In practice, the conduct that establishes a State's jurisdiction is often the same as the conduct that breaches the State's obligation.[95] Especially under the functional model of jurisdiction, it is likely that in many cases the jurisdiction-establishing conduct and the obligation-breaching conduct are the same because the standard of due diligence applies both to the existence of a jurisdictional link and to the scope of a State's obligations. Therefore, the first and third questions merge into a single attribution question: is the conduct that established a jurisdictional link and breaches its obligations attributable to the sponsor State?[96]

95 Milanovic, 'Jurisdiction and Responsibility' (n 30) 106.

96 The first and third questions can also merge into a single attribution question under other jurisdictional models, especially the personal model. See ibid.

To be clear, the analysis here does not assume that the involvement of sponsor States in cooperative migration control policies necessarily creates a jurisdictional link between them and the people on the move who are affected by such policies, nor does it presume that sponsor States do not comply with their obligations under international human rights law. Rather, the answer to the second or fourth question is negative if the involvement of a sponsor State is too remote to trigger its jurisdiction or, if a jurisdictional link exists, it complies with its obligations. For instance, it is often difficult to demonstrate that the use of diplomatic relations can create a jurisdictional link, including under the effects or functional model. Likewise, it may be arguable that EU Member States comply with their obligations under international human rights law by assisting Turkey in realising the socio-economic rights of people on the move. In this case it would no longer be necessary to ask the attribution question, since the answer to the fourth question is negative. In other words, the attribution question is only relevant if the answers to the second and fourth question are positive. The rest of this section assumes that is the case, while acknowledging that the analysis below is only relevant for cooperative migration control policies that breach the direct obligations of sponsor States.

At a general level, the decision to engage in cooperative migration control and the conclusion of agreements with partner States is the conduct of State organs and hence attributable to the State.[97] For instance, US State organs, notably the US Department of Homeland Security, signed the cooperative agreements with Guatemala, El Salvador and Honduras.[98] In Europe, the CJEU held that, assuming that the EU-Turkey Statement is an international agreement, it 'would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister.'[99] The 2017 MOU between Italy and Libya was signed by the Libyan President of the Presidential Council and the Italian President of the Council of Ministers.[100] Likewise, the memoranda of understanding between Australia and various partner States in the Asia-Pacific are signed by State organs of the States involved.[101] Thus, as regards the concluding of cooperative migration control agreements itself, the answer to the first and third questions is positive.

Furthermore, States can breach their obligations under international human rights law and hence commit an internationally wrongful act if they fail to take socio-

97 Article 4(1) ARSIWA.

98 US Department of Homeland Security, 'Fact Sheet: DHS Agreements with Guatemala, Honduras and El Salvador' (2019).

99 CJEU, *NF v European Council* T-192/16 (28 February 2017) para 72.

100 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).

101 See for instance Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues (signed 3 August 2013); Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Resettlement of Refugees in Cambodia (signed 26 September 2014).

economic rights into account when concluding migration control agreements with partner States.[102] For instance, Taylor found that the conduct of Australian officials at the Department of Immigration and Citizenship in setting up and maintaining the Regional Cooperation Agreement with Indonesia is attributable to Australia, that this conduct triggered its obligations under the ICESCR, and indicated possible breaches of those obligations.[103] In other words, the conclusion of migration control agreements without sufficient safeguards for the socio-economic rights of people on the move could in itself be sufficient to trigger the responsibility of sponsor States. More specifically, under the functional model, that is the case if the sponsor State in question did not take reasonable measures to avoid reasonably foreseeable violations of the socio-economic rights of people on the move in partner States. Indeed, the failure to comply with the due diligence standard would both be attributable to it and breach its obligations under international human rights law.

The implementation of cooperative migration control measures by sponsor States also tends to lie with State organs. For instance, the US Congress approves American funding for Mexico under the Mérida Initiative.[104] Training of Mexican officials is funded by the US Agency for International Development and provided by the US Immigration and Customs Enforcement's academy.[105] Likewise, the Australian Federal Police and Australian intelligence agencies cooperate with the Indonesian National Police to survey, disrupt and intercept people on the move attempting to travel to Australia via Indonesia.[106] In other words, the conduct that implements migration control agreements is often attributable to sponsor States.

Nevertheless, the involvement of numerous actors in the operation of the RPC in Nauru complicates the issue of attribution of conduct. It involves Australian State organs, private actors contracted by the Australian government, and Nauruan private and State actors.[107] This raises the question to what extent conduct that violates the socio-economic rights of people on the move held at the RPC is attributable to Australia. The conduct of Australian State organs is clearly attributable to Australia following Article 4(1) ARSIWA. Moreover, the conduct of a private actor is attributable to Australia if it exercises elements of Australia's governmental authority or if Australia

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102 See Chapter V, Section 2.3.

103 Taylor (n 94) 350–59.

104 Clare Ribando Seelke, 'Mexico: Evolution of the Mérida Initiative, 2007–2020' (February 2020) Congressional Research Service IF10578.

105 David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019) 140–41.

106 Azadeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 Human Rights Law Review 435, 441.

107 Chapter II, Section 3.3.1. For more details see Patrick van Berlo, 'The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality' (2017) 17 Human Rights Law Review 33; Van Berlo, *Human Rights Elephants in an Era of Globalisation* (n 47) 87–104; Susanna Dechent, Sharmin Tania and Jackie Mapulanga-Hulston, 'Asylum Seeker Children in Nauru: Australia's International Human Rights Obligations and Operational Realities' (2019) 31 International Journal of Refugee Law 83.

instructs, directs or controls its conduct.[108] The conduct of a private actor could arguably also be attributable to Australia if it acted with the latter's acquiescence, although it remains unclear whether this applies extraterritorially. Whether the conduct of private actors active in the RPC in Nauru is attributable to Australia depends on the specific circumstances and may change over time, depending on the shifting realities on the ground. More generally, scholarship is divided about the question whether the conduct of actors operating the RPC in Nauru is attributable to Australia.[109] While more detailed analysis is required, especially regarding the extent to which the conduct of each actor influences the (non-)realisation of the socio-economic rights of people on the move in Nauru, it is at least possible that Australia incurs responsibility for such violations.[110]

The support that Italy provides to the Libyan Coast Guard likewise raises attribution issues. It has been argued that the conduct of the Libyan Coast Guard is attributable to Italy because the latter issues instructions and exercises direction and control over rescue operations.[111] However, the conduct of the Libyan Coast Guard is of less relevance for the realisation of socio-economic rights than the conduct of actors operating the RPC in Nauru. Thus, even if one accepts that the conduct of the Libyan Coast Guard is attributable to Italy, from the perspective of socio-economic rights it is only problematic to the extent that it exposes people on the move to risks of violations of their socio-economic rights upon return to Libya. In other words, there is a weaker causal link between the conduct that is arguably attributable to the sponsor State and the human rights violations. This issue does not arise with regard to rights that are directly violated by Libyan pullback operations, such as the prohibition of *refoulement* and the right to leave.[112] Therefore, with regard to socio-economic rights specifically, it

108 Articles 5 and 8 ARSIWA.

109 Tan suggests that the conduct of private contractors could be attributable to Australia, while Van Berlo contends that the private contractors in Nauru exercise elements of Nauru's rather than Australia's governmental authority. Dechent, Tania and Mapulanga-Hulston seem to agree with Tan. Compare Van Berlo, *Human Rights Elephants in an Era of Globalisation* (n 47) 267; Tan (n 24) 197; Dechent, Tania and Mapulanga-Hulston (n 107) 87.

110 On the attribution of conduct of actors operating the RPC in Nauru see also Chapter VII, Section 3.2.2.

111 Moreno-Lax and Lemberg-Pedersen for instance argue that Italy incurs direct responsibility because the conduct of the Libyan Coast Guard is attributable to it under Article 8 ARSIWA. Violeta Moreno-Lax and Martin Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization' (2019) 56(1) Questions of International Law 5, 28–30.

112 Commentators have paid considerable attention to Italy's responsibility for violations of civil and political rights like the right to leave, the principle of *non-refoulement* and the prohibition of torture in the context of its cooperation with Libya. See for instance Francesca Mussi and Nikolas Feith Tan, 'Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia' in Fiona de Londras and Siobhán Mullally (eds), *Irish Yearbook of International Law 2015* (Vol 10, Hart 2017); Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave any Country: A Right to be Delivered' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia 2018); Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strasbourg?' (2018) 20(4) European Journal of Migration and Law 396; Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless

is worth examining to what extent the conduct of actors that have a more direct impact on these rights is attributable to Italy, such as the DCIM and armed groups operating Libyan detention centres. Evidence shows that important sums of European money destined to improving conditions in Libyan detention centres have been diverted to intertwined networks of armed groups, traffickers and coast guard members who exploit migrants.[113] Yet while the conduct of these actors is more closely related to violations of socio-economic rights of people on the move, it is less clear that it is also attributable to Italy. This is more likely to be the case under the acquiescence standard of attribution sometimes applied by human rights bodies than under the stricter standards of the law on State responsibility, although it remains unclear whether the acquiescence standard applies to conduct beyond a State's territory.

In sum, establishing the responsibility of Italy is more difficult than establishing the responsibility of Australia. In the case of the RPC in Nauru, the conduct that might be attributable to Australia is also the conduct that risks violating the socio-economic rights of people on the move. In the case of Libya, the conduct that is more easily attributable to Italy is less closely connected to violations of socio-economic rights, while conduct that risks jeopardising these rights is less easily attributable to Italy. In other words, it is more difficult to give a positive answer to all four questions. A responsibility gap could thus arise, as Italy contributes to the human rights violations of people on the move in Libya but does not incur any responsibility for them. However, under the functional model of jurisdiction, entering into cooperative migration control agreements could itself amount to an internationally wrongful act if the sponsor State does not comply with the due diligence standard because it fails to take reasonable measures to avoid reasonably foreseeable violations of the socio-economic rights of people on the move. Moreover, as the next section discusses, sponsor States could incur responsibility on account of their global obligations.

4.2. DIRECT RESPONSIBILITY FOR BREACHES OF GLOBAL OBLIGATIONS

Sponsor States could incur direct responsibility when an internationally wrongful act breaches their global obligations of international assistance and cooperation. As Table 4 illustrates, since jurisdiction is not a requirement for these obligations, a sponsor

Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019); Anna Liguori, *Migration Law and the Externalization of Border Controls: European State Responsibility* (Routledge 2019).

113 Maggie Michael, Lori Hinnant and Renata Brito, 'Making Misery Pay: Libya Militias Take EU Funds for Migrants' *AP News* (31 December 2019). See also Global Legal Action Network (GLAN), Association for Juridical Studies on Immigration (ASGI), and Italian Recreational and Cultural Association (ARCI), 'Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's "Support to Integrated Border and Migration Management in Libya" (IBM) Programme' (2020).

State incurs responsibility on this account if the two questions concerning a breach of a State's obligations are answered positively.

~~1. Is the conduct that allegedly triggers jurisdiction attributable to the State?~~	~~2. Does the conduct that is attributable to the State trigger its jurisdiction?~~
3. Is the conduct that allegedly breaches an international obligation of the State attributable to it?	**4. Does the conduct that is attributable to the State breach its obligations?**

Table 4. Responsibility questions (sponsor States' global obligations)

As regards the *third question*, the decision to provide international assistance and cooperation is ultimately made by a State organ and hence attributable to the State.[114] The implementation of such a decision, namely the provision of assistance and cooperation itself, must also be attributable to the sponsor State, in accordance with the rules on attribution discussed above. Whether that is the case depends on the specific circumstances. Especially in the European context, the channelling of assistance and support through instruments such as the EU Trust Fund for Africa and the Facility for Refugees in Turkey can present challenges in this regard.

Since it remains unclear to what extent sponsor States have an obligation to provide international assistance and cooperation to partner States, it is difficult to answer the *fourth question*. The previous chapter suggested that a sponsor State's involvement in cooperative migration control could justify assigning global obligations of international assistance and cooperation to it.[115] If we accept this proposition, the question arises whether the sponsor State complies with these obligations. Although sponsor States can, in theory, discharge part of their global obligations by cooperating with partner States on migration control, contemporary cooperative migration control measures, which focus on preventing arrivals and avoiding obligations rather than realising rights, often fail to do so.[116] It could be argued that sponsor States' failure to provide partner States with international assistance and cooperation that is adequate to realising the socio-economic rights of people on the move amounts to an internationally wrongful act.

In conclusion, direct responsibility for breaches of global obligations does not depend on the existence of a jurisdictional link. Therefore, it is easier to establish than direct responsibility for breaches of direct obligations, for which the jurisdiction requirement can constitute an obstacle. However, it remains difficult to establish whether a sponsor State commits an internationally wrongful act by failing to provide adequate international assistance and cooperation to a partner State. Assigning obligations of international assistance and cooperation to sponsor States that cooperate with partner States on migration control could help overcome this obstacle.

114 Article 4(1) ARSIWA.
115 Chapter V, Section 3.2.
116 Chapter V, Section 3.3.

Furthermore, sponsor States can incur derived responsibility for violations of the socio-economic rights of people on the move contained in partner States.

4.3. DERIVED RESPONSIBILITY

The analysis so far found that both sponsor and partner States can incur direct responsibility if they commit an internationally wrongful act. Yet State responsibility can also arise in relation to the conduct of another State. Indeed, the law on State responsibility recognises the possibility that a State incurs responsibility without the dual requirements of attribution of conduct and breach of an international obligation being met.[117] This form of responsibility has been referred to as derived or derivative.[118] It is particularly relevant for sponsor States: they can incur derived responsibility in relation to partner States' failure to realise the socio-economic rights of people on the move affected by cooperative migration control policies.[119] With regard to direct obligations, a crucial difference between a sponsor State's direct and derived responsibility concerns the jurisdiction requirement: in order to incur derived responsibility, the State's own conduct need not amount to a breach of its human rights obligations and hence, it does not need to exercise jurisdiction. Thus, although a State may not incur *direct responsibility* for breaches of its direct obligations if it does not exercise jurisdiction, it can nevertheless incur *derived responsibility*.[120] This distinction does not apply to direct responsibility for breaches of global obligations, since it likewise does not require a sponsor State to exercise jurisdiction.

This section discusses under what circumstances sponsor States can incur derived responsibility for the violations of socio-economic rights of people on the move affected by cooperative migration control policies. It assumes that the partner State commits an internationally wrongful act.[121] In other words, the premise is that the partner State does not realise the socio-economic rights of people on the move and fails to comply with the due diligence standard and/or the principle of non-discrimination. However, if the partner State does not breach its obligations under international human rights law, the sponsor State cannot incur derived responsibility either. The following discusses three rules of derived responsibility: the provision of aid or assistance (Article 16 ARSIWA), the exercise of direction and control (Article 17 ARSIWA) and coercion (Article 18 ARSIWA).

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117 Articles 16–19 ARSIWA; see also Articles 14–19 and 58–63 ARIO which contain similar provisions.

118 The ARSIWA Commentary mentions 'derived responsibility' (at 65, paras 8 and 9) and 'derivative' (para 7). Other terminology includes indirect, dependent and accessory responsibility. See Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 92 and references cited there.

119 It is also conceivable that partner States that contain people on the move on behalf of sponsor States could incur derived responsibility for aiding or assisting sponsor States in breaching their obligations under international refugee and human rights law. However, as this issue is more relevant for civil and political rights such as the principle of *non-refoulement* and the prohibition of arbitrary detention than for socio-economic rights, it is not addressed in this study.

120 Kok (n 91) 81; Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 100.

121 See ARSIWA Commentary 66, para 5 and 69, para 9.

4.3.1. Complicity

Article 16 ARSIWA stipulates that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> b) the act would be internationally wrongful if committed by that State.

The rule embodied in Article 16 ARSIWA is also referred to as complicity.[122] Although at the time of drafting it 'was seen by some as falling within the "progressive development" part of the ILC's mandate',[123] the ICJ has held that Article 16 reflects a customary rule of international law.[124] Many commentators support this view.[125] Under the complicity rule, a sponsor State is not responsible for the conduct of the partner State but rather for its own conduct in deliberately aiding or assisting the latter in breaching a human rights obligation binding on both States.[126] Arguably, Article 16 ARSIWA 'is formulated to provide for a separate wrong itself'.[127] Therefore, commentators have suggested that it is a hybrid between a primary and secondary norm or even a primary norm of international law.[128] Responsibility for complicity arises if, in addition to the internationally wrongful act of the partner State, the following four requirements are met: the sponsor State provides aid or assistance; there is a sufficiently close link between the aid or assistance provided and the human rights violation; the sponsor State has knowledge of the circumstances of the violation (Article 16(a)); and the conduct would be internationally wrongful if committed by

122 See for instance ARSIWA Commentary 67, para 11. The original work of the International Law Commission referred to complicity: International Law Commission, 'Report of the International Law Commission on the Work of its 30th Session' (1978) UN Doc A/33/10, 102. See Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 93 at n 122. The ICJ and scholars also refer to complicity: see ICJ, *Genocide*; Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge 2011); Jackson (n 39); Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (n 75).

123 Crawford (n 6) 401.

124 ICJ, *Genocide* para 420.

125 See in particular Aust (n 122) 191; Jackson (n 39) 151; Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (n 75) 259. For a more cautious approach see Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 95.

126 ARSIWA Commentary 67, para 10.

127 James D Fry, 'Attribution of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 116.

128 Compare Bernhard Graefrath, 'Complicity in the Law of International State Responsibility' (1996) 29 Revue Belge de Droit International 371, 372; Vaughan Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 Journal of International Law and Diplomacy 1, 4; Aust (n 122) 417; Nollkaemper and Jacobs (n 2) 409; Crawford (n 6) 399; Jackson (n 39) 149; Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (n 75) 323.

that State (Article 16(b)). The rest of this section discusses these requirements in the context of cooperative migration control.[129]

As regards the *first requirement*, it remains unclear what exactly constitutes *aid or assistance*. The ARSIWA commentary mentions as examples 'knowingly providing an essential facility' and 'financing the activity in question' as well as 'provid[ing] material aid to a State that uses the aid to commit human rights violations'.[130] As the notion of 'aid or assistance' is not defined in the ARSIWA, it has been suggested that it can be interpreted broadly, provided the other requirements are interpreted strictly.[131] More remote forms of aid or assistance, such as incitement of wrongful conduct and being an accessory after the fact, probably do not qualify as 'aid or assistance'.[132] In the context of cooperative migration control, most forms of cooperation are likely to qualify as aid or assistance, especially when multiple measures are implemented in parallel. Various scholars thus argue that the sharing of information and the training, funding and equipment provided by EU Member States to Libya and Turkey and by Australia to Indonesia qualify as aid or assistance.[133] Whether more remote forms of involvement, such as the use of diplomatic relations and development aid conditionality, and the conclusion of migration control agreements itself, qualify as aid or assistance is more contentious. On the one hand, Den Heijer and Liguori argue that the provision of aid of a legal or political nature, such as the conclusion of treaties which may facilitate the commission by the other party of a wrongful act, qualify as aid or assistance.[134] Gammeltoft-Hansen and Hathaway, on the other hand, believe that neither failure to prevent a human rights violation nor merely applying diplomatic pressure come under the ambit of aid or assistance.[135] Since most cooperative migration control involves the parallel implementation of various measures, a cumulative assessment of the different forms of support provided by sponsor States is likely to lead to the finding that sponsor States provide aid or assistance to partner States.

The *second requirement* of the complicity rule concerns the *sufficiently close link* between the aid or assistance provided and the internationally wrongful act. The commentary to Article 16 ARSIWA specifies that 'the aid or assistance must be given with a view to facilitating the commission of the wrongful act, *and must actually do so*.'[136] It need not be essential to the performance of the internationally wrongful

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129 For a detailed discussion of complicity in international law more generally see Aust (n 122); Jackson (n 39); Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (n 75).

130 ARSIWA Commentary 66, para 1 and 67, para 9.

131 Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 95; Moreno-Lax and Giuffré (n 112) 101. See also Graefrath (n 128) 374.

132 ARSIWA Commentary 65, para 9. See also Aust (n 122) 197 and 209; Crawford (n 6) 402–03; Jackson (n 39) 153–55.

133 Moreno-Lax and Giuffré (n 112) 101–103; Dastyari and Hirsch (n 106) 438–55.

134 Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 95; Liguori (n 112) 21; see also International Law Commission, 'Report on the Work of its 30th Session' (n 122) 102.

135 Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 279.

136 ARSIWA Commentary 66, paras 3 and 5 (emphasis added).

act: it suffices for it to contribute significantly to it.[137] The required link between the complicit conduct and the principal wrongful act remains unclear.[138] Commentators disagree on what standard is required.[139] This requirement has received limited attention in the context of cooperative migration control policies.[140] This may be due to the fact that most scholarship focuses on civil and political rights, notably the principle of *non-refoulement* and the right to leave: as the main aim of cooperative migration control is to contain people on the move in partner States, there is an evident causal link between the aid or assistance provided by sponsor States and these human rights violations. However, this link is weaker as regards socio-economic rights: it is less clear that, for instance, the provision of boats or scanning equipment and the training of officers contribute to violations of socio-economic rights. Therefore, this requirement deserves more attention with regard to socio-economic rights.

In fact, parallels can be drawn between the complicity rule and international human rights law. Indeed, causation plays a role at both levels of analysis: determining whether a State complies with its direct and global obligations under international human rights law and determining whether it incurs derived responsibility under the law on State responsibility.[141] The closer the link between the conduct of the sponsor State and the violations of socio-economic rights of people on the move, the more likely that State is to incur both direct and derived responsibility. Thus, aid or assistance to partner States engaged in gross or systematic human rights violations could trigger the responsibility of sponsor States, while it is less likely that assistance facilitating only occasional wrongdoing can also be brought under the ambit of Article 16 ARSIWA.[142] Moreover, the simultaneous implementation of multiple migration control measures heightens the likelihood that there is a sufficient causal link.[143]

The *third requirement* concerns the *subjective element* of the complicity rule. Article 16(a) ARSIWA holds that a State incurs derived responsibility if it provides aid or assistance to another State and does so 'with knowledge of the circumstances of the internationally wrongful act'. The commentary suggests that the complicity rule includes two requirements. First, 'the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful'.[144] Second, 'the aid or assistance must be given *with a view*

137 Ibid para 5.

138 Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (n 75) 184.

139 Aust and Jackson argue in favour of a standard of material facilitation, Lanovoy prefers a more general facilitation requirement, and Crawford requires a causative contribution. Compare Aust (n 122) 420; Crawford (n 6) 402; Jackson (n 39) 158; Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (n 75) 185.

140 For limited exceptions see Tan (n 24) 186–87; Dastyari and Hirsch (n 106) 438; Annick Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control?' (2020) 20 Human Rights Law Review 306, 329.

141 See Chapter III, Section 3 and Chapter V, Sections 2.3 and 3.2.

142 Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 101.

143 See Vladislava Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21 German Law Journal 457.

144 ARSIWA Commentary 66, para 3.

to facilitating the commission of that act, and must actually do so'.[145] Therefore, a State incurs responsibility only if 'the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.[146] In other words, does complicity presuppose that the complicit State shares the specific intent of the aided State? In the *Bosnian Genocide* case the ICJ arguably did not provide a clear answer to this question.[147] Most commentators agree that it is not necessary for the complicit State to wish for the outcome of the aided State's internationally wrongful act, and that knowledge of the circumstances of the latter's wrongful act meets the requirement of Article 16(a) ARSIWA.[148] Moynihan thus proposes that wilful blindness does not preclude responsibility and that the correct standard is '[k]nowledge or virtual certainty that the recipient State will use the assistance unlawfully'.[149]

As regards complicity for human rights violations, the ARSIWA commentary recognises that, where the assistance of a State has allegedly facilitated human rights violations by another State, the question is whether the aiding State *was aware of* and *intended to facilitate* the commission of the human rights violations.[150] Although Aust endorses the intent standard as a matter of *lex lata*, he recognises that it may be lowered with regard to human rights violations on account of the predominant due diligence standard in international human rights law.[151] In fact, the latter may help interpret the threshold under Article 16(a) ARSIWA. Indeed, if a sponsor State fails to take reasonable measures to avoid reasonably foreseeable human rights violations, it may be found to be wilfully blind. In other words, the failure to comply with the due diligence standard may, in addition to triggering a sponsor State's direct responsibility, also contribute to a finding of responsibility for complicity.[152]

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145 Ibid (emphasis added).

146 Ibid para 5.

147 The ICJ held that 'whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.' ICJ, *Genocide* para 421. This can be read as the ICJ avoiding to answer the question whether Article 16(a) ARSIWA requires knowledge or intent, as suggested by the terms 'whatever the reply to this question' and 'at the least'. See also Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 97; Jackson (n 39) 212. Other authors have argued that the ICJ interpreted Article 16 ARSIWA as requiring more than knowledge. See Aust (n 122) 236; Crawford (n 6) 407.

148 See for instance Aust (n 122) 420; Crawford (n 6) 407–08; Jackson (n 39) 159–62; Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (n 75) 239–40. The Guiding Principles on Shared Responsibility in International Law favour the lower 'constructive knowledge' standard: André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 European Journal of International Law 15, 42–43.

149 Harriet Moynihan, 'Aiding and Assisting: the Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility' (2018) 67 International & Comparative Law Quarterly 455, 468.

150 ARSIWA Commentary 67, para 9.

151 Aust (n 122) 246–48.

152 Carla Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German Law Journal 459, 471.

In the context of cooperative migration control, scholars are divided as to the applicable standard. Tan for instance concludes that it 'appears to fall somewhere between knowledge of the circumstances of the internationally wrongful act and wrongful intent.'[153] Den Heijer argues that 'it is required that it is *established* that the assisting state *knows* that its aid *will* be put to wrongful use.'[154] According to Gammeltoft-Hansen and Hathaway, a sponsor State can incur responsibility if it 'has at least constructive knowledge that its contributions will aid or assist another country to breach its obligations and chooses to aid or assist notwithstanding such constructive knowledge.'[155] In other words, it is sufficient to establish that the sponsor State knew or ought to have known that its aid would be put to wrongful use. Moreno-Lax and Giuffré, for their part, believe that the complicity rule requires States to be aware that their assistance may foreseeably be used to perform wrongful conduct: it is not necessary that the aid provided be specifically directed towards or essential to the commission of the violation, provided it contributed significantly to it.[156] They find that EU member States' assistance to Libya and Turkey respectively meets this threshold.[157] Dastyari and Hirsch likewise argue that the requirement of Article 16(a) ARSIWA is met as regards the cooperation between Italy and Australia with Libya and Indonesia respectively.[158] In sum, it remains unclear how the subjective element in the complicity rule should be interpreted, although in the context of cooperative migration control policies and human rights violations there seems to be consensus that the relevant standard is lower than intent. It is likely to lie between constructive knowledge of the circumstances and certainty that the recipient State will use the assistance unlawfully.

Furthermore, this study's focus on socio-economic rights highlights the importance of the subjective element of the complicity rule. Indeed, it is relatively easy to demonstrate that sponsor States *knew or should have known* about the risk of violations of socio-economic rights, given the wealth of evidence available about the living conditions of people on the move in the Global South.[159] However, it would be more difficult to show that a sponsor State *intended* this, unless one can prove that cooperative migration control policies are designed to include such violations in order to deter people on the move from attempting to travel to the Global North. In contrast, as cooperative migration control measures aim to stem migration flows, the intent standard is more easily met with regard to human rights norms that are directly relevant for people on the move's mobility, such as the right to leave and the prohibition of arbitrary detention. In the context of the RPC on Nauru, Van Berlo notes that the intent requirement 'can likely be fulfilled where arbitrary deprivation of liberty is the human rights violation in question, but is much less likely to be met where for example

153 Tan (n 24) 191.
154 Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 98 (emphasis in original).
155 Gammeltoft-Hansen and Hathaway (n 135) 280.
156 Moreno-Lax and Giuffré (n 112) 102–103.
157 Ibid 102. On Italy and Libya see also Liguori (n 112) 25–26.
158 Dastyari and Hirsch (n 106) 463–64.
159 See Chapter II, Section 2.

inhuman or degrading treatment, rights to privacy, rights to family life, or health-related rights are at stake.'[160] In any event, the fact that knowledge plays a role both for sponsor States' direct responsibility (through the due diligence standard) and their derived responsibility (as a requirement for complicity) suggests that parallels exist between the secondary rules of the law on State responsibility and the primary norms of international human rights law.

Finally, the *fourth requirement* is that of *opposability*. Article 16(b) ARSIWA requires that 'the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.'[161] The underlying rationale is that 'a State cannot do by another what it cannot do by itself'.[162] In other words, the violation of the socio-economic rights of people on the move must breach an obligation of the sponsor State as well as the partner State. Article 16(b) raises the question whether the sponsor State and the partner State must be bound by norms that have the same source, or whether it is sufficient for them to be bound by the same norm emanating from different sources. Crawford argues that Article 16(b) ARSIWA 'merely requires that the conduct in question would have been internationally wrongful if committed by the assisting state and says nothing about the identity of norms or sources.'[163] Aust agrees that in the case of largely parallel human rights obligations emanating from different sources, such as different regional human rights conventions, the requirement of Article 16(b) is fulfilled.[164] Most scholarship on migration control supports this position.[165]

For many civil and political rights, the opposability requirement does not pose an obstacle to establishing the complicity of sponsor States, as all States involved in cooperative migration control have ratified at least one treaty that embodies these norms, such as the ICCPR, and some norms have reached the status of customary law or even *jus cogens*. As most partner and sponsor States have ratified the ICESCR, often in addition to other treaties containing socio-economic rights provisions such as the CRC, the opposability requirement is rarely problematic for many cooperative migration control policies. Indeed, in those cases there is some overlap in terms of the norms protected by the various treaties, at least as regards certain groups of people on the move, such as children. This is the case for cooperation between Australia and Indonesia[166] and between EU Member States and Libya and Turkey.[167] However, one cannot assume that all States have similar obligations as regards socio-economic rights.

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160 Van Berlo, *Human Rights Elephants in an Era of Globalisation* (n 47) 260.

161 ARSIWA Commentary 66, para 3.

162 Ibid para 6.

163 Crawford (n 6) 410.

164 Aust (n 122) 263–64 and 420. Lanovoy supports Aust's interpretation: Lanovoy, *Complicity and its Limits in the Law of International Responsibility* 249.

165 See for instance Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 96; Gammeltoft-Hansen and Hathaway (n 135) 281; Tan (n 24) 191; Dastyari and Hirsch (n 106) 456; Liguori (n 112) 25.

166 Australia has ratified all main UN human rights treaties, except the ICRMW and the ICPED, while Indonesia has ratified all main UN human rights treaties except for the ICPED which it has signed.

167 EU Member States and Turkey have ratified numerous human rights treaties both at the international level and within the Council of Europe framework.

For instance, Nauru has neither ratified nor signed the ICESCR and the ICRMW, although it is a party to the CRC and CRPD. This raises the question to what extent the non-realisation of the socio-economic rights of people on the move in Nauru amounts to an internationally wrongful act of Nauru: if that is not the case, Australia cannot incur any responsibility under the complicity rule either. In the Americas, the opposite situation arises: partner States such as Mexico and Guatemala are parties to all major human rights treaties both at the international and regional level, while the USA has only ratified a few human rights treaties.[168] Thus, partner States like Mexico and Guatemala are bound by more far-reaching obligations than the sponsor State, which can prevent a finding of responsibility under the complicity rule. In sum, the existence or not of responsibility based on the complicity rule depends on which treaties the partner State and sponsor State have ratified. Derived responsibility, like direct responsibility, ultimately depends on the existence of obligations under international human rights law.

There is also some overlap between norms protecting socio-economic rights and civil and political rights. In particular, the right to life and the prohibition of torture and other forms of ill-treatment protect core elements of socio-economic rights. These norms have a comparatively stronger status in international law, notably the prohibition of torture which has reached the status of *jus cogens*.[169] To the extent that these norms protect socio-economic rights, the opposability requirement is met in any case, either because States have ratified treaties protecting these rights or because of their customary nature. If the plight of people on the move in partner States amounts to a violation of the rights to life and the prohibition of torture and other forms of ill-treatment, a sponsor State can incur responsibility under the complicity rule. If it can be demonstrated that the core content of some socio-economic rights has reached the status of custom, the same applies.

In conclusion, sponsor States can incur derived responsibility under the complicity rule. That is the case if the partner State commits an internationally wrongful act and the requirements of Article 16 ARSIWA are met: the support provided must amount to aid or assistance, there must be a sufficiently close link between the aid or assistance provided and the non-realisation of the socio-economic rights of people on the move in partner States, and the subjective and opposability elements must be fulfilled. Although the contours of the complicity rule need further clarification, various authors argue that cooperative migration control policies can trigger the derived responsibility of sponsor States such as Italy and Australia.[170] Others take a more cautious approach.[171] Indeed,

168 The USA has only ratified the ICCPR, ICERD and CAT; and signed the ICESCR, CEDAW, CRC, CRPD and ACHR.

169 Chapter III, Section 2.

170 See for instance Moreno-Lax and Giuffré (n 112) 101–03; Dastyari and Hirsch (n 106); Liguori (n 112) 25–27.

171 See for instance Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 100–101; Gammeltoft-Hansen and Hathaway (n 135) 276–82; Tan (n 24) 192–99; Van Berlo, *Human Rights Elephants in an Era of Globalisation* (n 47) 279–80.

besides the uncertainty that surrounds the requirements of 'aid or assistance' and the subjective element in Article 16(a) ARSIWA, the foregoing highlighted the challenges as regards socio-economic rights posed by the requirements of a sufficiently close link and opposability. It therefore remains unclear to what extent sponsor States are likely to incur derived responsibility under the complicity rule.

4.3.2. Direction and Control

In addition to providing aid or assistance to a partner State, a sponsor State could incur derived responsibility if it exercises direction and control over a partner State. According to Article 17 ARSIWA:

> A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:
>
> a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> b) the act would be internationally wrongful if committed by that State.

The rule in Article 17 ARSIWA requires clarification and has been conceptualised in various ways. For some commentators, it embodies a rule of attribution of responsibility: under this understanding, responsibility for the internationally wrongful act committed by the partner State is attributed to the sponsor State on account of the direction and control exercised by the latter.[172] Others argue that the rules on derived responsibility are akin to primary obligations under international law.[173] In other words, derived responsibility blurs the distinction between the primary and secondary rules of international law.[174] This study takes the view that, like Article 16, Article 17 ARSIWA embodies a responsibility rule that is similar to a primary rule: a sponsor State can incur responsibility for exercising direction and control over the commission of an internationally wrongful act by a partner State. Yet it differs from the complicity rule, as under the latter provision a sponsor State which provides aid or assistance is responsible for the aid or assistance given rather than for the act itself.[175] Furthermore, while Articles 8 and 17 ARSIWA both refer to 'direction' and 'control', under Article 17 a State can incur responsibility for directing or controlling another State, whereas Article 8 concerns the attribution of the conduct of a non-State actor to the State under Article 2(a) ARSIWA.

The threshold for direction and control is considerably higher than for aid or assistance: Article 17 ARSIWA requires that the sponsor State exercises both direction

172 Fry (n 127).
173 See for instance Nollkaemper and others (n 148) 37; Aust (n 122) 417; Crawford (n 6) 149; Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (n 75) 323.
174 ARSIWA Commentary 65, para 7. See also Crawford (n 6) 339.
175 Ibid 68, para 1.

and control over the wrongful conduct.[176] Control is defined as 'domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern', while direction 'does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind.'[177] Examples include international dependency relationships such as 'suzerainty' or 'protectorate'.[178] The requirements in Article 17(a) and (b) ARSIWA mirror those in Article 16(a) and (b) ARSIWA.[179]

The high threshold of Article 17 ARSIWA makes it more difficult for this rule to apply to cooperative migration control than the complicity rule. Moreno-Lax and Giuffré nevertheless find that EU Member States' cooperation with Libya and Turkey could meet the conditions of Article 17 ARSIWA. They argue that a reciprocal commitment, like the EU-Turkey Statement or Italy's MOU with Libya can constitute a form of direction of Turkey and Libya respectively, because the latter do not have the discretion to carry out conduct that complies with the agreement without constituting an internationally wrongful act.[180] Various other authors, however, contend that this rule is not relevant in the context of cooperative migration control.[181] Indeed, the forms of cooperation that prevail – notably the provision of training, equipment and funding, the sharing of information and the use of diplomatic relations and development aid conditionality – are unlikely to qualify as direction and control. As they are applied in parallel, in theory the aggregate of various forms of cooperation could result in a sufficient level of control being exercised by sponsor States. Nevertheless, insofar as Article 17 ARSIWA requires the sponsor State to exercise direction and control over the wrongful conduct, namely the non-realisation of the socio-economic rights of people on the move, the threshold for Article 17 is unlikely to be met. The conduct that is relevant for the realisation of socio-economic rights often differs from the conduct that prevents the onward movement of people on the move, while the control exercised by sponsor States generally focuses on the latter rather than the former.

4.3.3. Coercion

Finally, a sponsor State could incur derived responsibility if it coerces a partner State into breaching its human rights obligations towards people on the move on its territory. Article 18 ARSIWA provides that:

176 Ibid 69, para 7.
177 Ibid.
178 Ibid 68, para 2.
179 The commentary to Article 17, unlike for Article 16, does not mention intent as a requirement: ARSIWA Commentary 69, para 8.
180 Moreno-Lax and Giuffré (n 112) 104. See also ARIO Commentary 38–39, para 4.
181 See Den Heijer, *Europe and Extraterritorial Asylum* (n 3) 92; Tan (n 24) 184; Van Berlo, *Human Rights Elephants in an Era of Globalisation* (n 47) 280.

> A State which coerces another State to commit an act is internationally responsible for that act if:
>
> (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and
> (b) the coercing State does so with knowledge of the circumstances of the act.

Unlike Articles 16 and 17, under Article 18 ARSIWA the partner State itself does not necessarily incur responsibility because it could invoke coercion as a circumstance precluding wrongfulness.[182] In other words, under this rule, it is possible for the sponsor State to incur responsibility for the breach of the partner State's obligations, while the partner State no longer incurs any responsibility.

Coercion requires '[n]othing less than conduct which forces the will of the coerced State (…), giving it no effective choice but to comply with the wishes of the coercing State.'[183] Serious economic pressure can amount to coercion if it deprives the partner State of any possibility of complying with its obligations.[184] The coercion rule could be relevant to situations where the power balance between the sponsor and partner State is very unequal and where the sponsor State uses its diplomatic relations and/or aid conditionality to enlist the partner State's help. Australia's cooperation with Nauru arguably represents the clearest example that could amount to coercion: it is arguable that Australia coerced Nauru to accept the establishment of the RPC on account of the latter's economic dependence on the former. Recent US negotiations with Mexico and Guatemala also illustrate the relevance of the difference in bargaining power of various partner States. Thus, after the USA threatened to impose import tariffs on Mexico if it did not do more to prevent the arrival of people on the move at the US-Mexico border, Mexico agreed to collaborate with the USA on various points but fell short of signing a safe third country agreement.[185] Guatemala, on the other hand, signed a cooperative agreement with the USA as the latter cut development aid.[186]

However, Article 18 ARSIWA requires that the coercion be exercised *in order to* procure the breach of the partner State's human rights obligations.[187] In other words, in the context of the present study, the coercion must focus on the non-realisation of the socio-economic rights of people on the move rather than on preventing their onward movement. This is more difficult to demonstrate: even in the case of the highly unequal power balance between Australia and Nauru economic pressures are generally unlikely to deprive Nauru of any opportunity to comply with its human rights obligations.[188]

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182 ARSIWA Commentary 70, para 4. See also Article 23 ARSIWA ('Force majeure').
183 Ibid 69, para 2.
184 Ibid 70, para 3.
185 See Doug Palmer, Adam Behsudi and Ted Hesson, 'Trump Drops Tariff Threat on Mexico after Migration Deal Reached' *Politico* (6 July 2019).
186 Tim McDonnell, 'Trump Froze Aid to Guatemala. Now Programs Are Shutting Down' *NPR* (17 September 2019). See also Chapter V, Section 2.3.
187 ARSIWA Commentary 69, para 2.
188 Van Berlo, *Human Rights Elephants in an Era of Globalisation* (n 47) 281.

Only to the extent that violations of socio-economic rights are an integral part of such policies because they are designed to have a deterrent effect could it be argued that sponsor States coerce partner States in breaching their obligations towards people on the move. Likewise, it is arguable that the USA's signing of a cooperative agreement with Guatemala while at the same time cutting its development aid could leave Guatemala no other choice than to fail to realise the socio-economic rights of people on the move. Yet if Guatemala is unable rather than unwilling to realise the socio-economic rights of people on the move due to a lack of resources, it does not breach its obligations under international human rights law. In that case, since Guatemala does not commit an internationally wrongful act, the USA cannot incur derived responsibility either. Therefore, it remains unlikely that the coercion rule in Article 18 ARSIWA applies to cooperative migration control policies.

5. CONCLUSION

A State incurs direct responsibility when it commits an internationally wrongful act: conduct that is attributable to it breaches its obligations under international law. As regards the socio-economic rights of people on the move affected by cooperative migration control, partner States incur responsibility when they fail to comply with the due diligence standard and the principle of non-discrimination. This can occur on account of the conduct of their own State organs, the conduct of non-State actors that is attributable to them, or both. Sponsor States can also incur responsibility in various ways. First, they can incur direct responsibility if they commit an internationally wrongful act that breaches their direct obligations. That is the case if they exercise jurisdiction and do not comply with their obligations. Second, if we accept to assign obligations of international assistance and cooperation to sponsor States that cooperate with partner States on migration control, the former could incur direct responsibility for failing to provide the latter with adequate international assistance and cooperation. Third, they can incur derived responsibility in relation to partner States' failure to realise the socio-economic rights of people on the move. In particular, the complicity rule may give rise to the derived responsibility of sponsor States on account of the aid or assistance that they provide to partner States. It is considerably less likely that sponsor States incur derived responsibility because they either direct and control or coerce a partner State. To what extent a sponsor or a partner State actually incurs responsibility in a specific case depends on numerous factors, including: the plight of people on the move, what treaties a State has ratified, which State and non-State actors are involved, what their respective conduct is and to what extent they contribute to the non-realisation of the socio-economic rights of people on the move. Depending on the circumstances, the same policy may trigger the responsibility of one State but not another.

Furthermore, there are various parallels between international human rights law and the law on State responsibility, as similar concepts play an important role in both fields of international law. For instance, causation and knowledge play a role both under international human rights law and under the complicity rule.[189] Likewise, notions of power, authority and control are relevant for jurisdiction in international human rights law as well as for attribution of conduct and derived responsibility under the law on State responsibility.[190] Thus, the same situation can simultaneously give rise to responsibility on multiple accounts. In other words, the more likely a State is to have obligations under international law and breach them, the more likely it is that it will incur responsibility for human rights violations. Notably, a sponsor State's involvement in cooperative migration control could trigger its direct responsibility because a State organ failed to comply with the due diligence standard, because the conduct of a non-State actor is attributable to it, because it failed to comply with its global obligations, and because its assistance to the partner State triggers its derived responsibility. However, the reverse is also true: if it is unlikely that a State incurs obligations under international human rights law, it is improbable that it will incur responsibility. The parallels between international human rights law and the law on State responsibility may explain the challenges we face when determining the responsibility of sponsor States for violations of the socio-economic rights of people on the move. Indeed, if a sponsor State has no obligations that it can breach, it cannot incur direct responsibility and it is unlikely to incur derived responsibility because the same concepts govern the assigning of obligations under international human rights law and derived responsibility.

Therefore, the secondary rules on State responsibility risk transforming the gaps in human rights protection into responsibility gaps. The discrepancy between rights and obligations identified in international human rights law is transposed into the law on State responsibility: it is possible for the socio-economic rights of people on the move to be violated without any State incurring responsibility. More specifically, the law on State responsibility is unlikely to close any responsibility gaps that risk arising under international human rights law for three reasons. First, an internationally wrongful act can only occur if there is a breach of an obligation. Hence, if there is no breach of an obligation, no direct responsibility can arise. Second, even if there is a breach of an obligation, the threshold for attributing conduct to the State is relatively high, as illustrated by Articles 5 and 8 ARSIWA. Thus, the secondary rules on State responsibility risk exacerbating responsibility gaps, as conduct that breaches a State's human rights obligations is not necessarily attributable to it. Third, while the rules on derived responsibility have the potential to fill these responsibility gaps because they do not depend on the dual requirements of 'attribution of conduct + breach of obligation', they also have relatively high thresholds. As a result, under the law on State

189 See Chapter III, Section 3 and Section 4.3.1 above.
190 See for instance Articles 5, 8 and 17 ARSIWA.

responsibility, it is possible for a State to influence private actors or other States without incurring responsibility.[191]

In the context of international human rights law, to the extent that a State incurs responsibility at all, the nature of primary norms often already provides grounds for establishing its responsibility without having recourse to the secondary rules on State responsibility.[192] For instance, it can be easier to demonstrate that a partner State incurs responsibility for failing to protect people on the move from harm committed by a non-State actor than to prove that the conduct of the non-State actor in question is attributable to the State. Likewise, it may be easier to show that a sponsor State failed to comply with the due diligence standard under international human rights law when entering into a migration cooperation agreement with a partner State than to demonstrate that the requirements of the complicity rule embodied in Article 16 ARSIWA are met.[193] Finally, the foregoing raises the question of how the responsibility of one State relates to that of other States involved in cooperative migration control beyond situations of derived responsibility. The next chapter addresses this issue.

191 André Nollkaemper, 'Power and Responsibility' in Adriana Di Stefano (ed), *A Lackland Law? Territory, Effectiveness and Jurisdiction in International and EU Law* (Giappichelli 2015) 43.

192 See for instance Seibert-Fohr (n 22) 699; see also Aust (n 122) 403.

193 This may explain why the ECtHR interprets ECHR provisions to include positive obligations rather than apply the rules on State responsibility, as noted by various authors. See Maarten den Heijer, 'Shared Responsibility before the European Court of Human Rights' (n 17) 421–27; Crawford and Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' (n 30); Helen Keller and Reto Walther, 'Evasion of the International Law of State Responsibility? The ECtHR's Jurisprudence on Positive and Preventive Obligations under Article 3' (2020) 24 The International Journal of Human Rights 957; Rosana Garciandia, 'State Responsibility and Positive Obligations in the European Court of Human Rights: The Contribution of the ICJ in Advancing towards more Judicial Integration' (2020) 33 Leiden Journal of International Law 177, 180–81.

CHAPTER VII
SHARED RESPONSIBILITY AND COOPERATIVE MIGRATION CONTROL

1. INTRODUCTION

Like the previous one, this chapter focuses on the second sub-question of this study: how does international law assign responsibility for violations of the socio-economic rights of people on the move where multiple States are involved in migration control? Chapter VI discussed the various ways in which a partner or sponsor State can incur responsibility for violations of the socio-economic rights of people on the move affected by cooperative migration control. Except for the derived responsibility of sponsor States, it did not address the question of how the responsibility of one State relates to that of another State. Yet cooperative migration control, by its very nature, involves multiple States and hence raises the question to what extent responsibility is shared between them, if at all. In this chapter, the analysis shifts from the perspective of a single State to a bird's eye view of the responsibility of multiple States involved in cooperative migration control.

The analysis builds on two premises. First, like the previous chapter, it assumes that a violation of the socio-economic rights of people on the move takes place: if there is no violation there is no need to establish responsibility for it. Second, it presumes that more than one State contributes to such a violation. In other words, there is a causal link between the conduct of each State and the non-realisation of the socio-economic rights of people on the move.[1] Indeed, while partner States are primarily responsible for realising the socio-economic rights of people on the move, the involvement of sponsor States in cooperative migration control has an effect on their plight. Although sponsor States' contribution is more important in some cases than in others, at a general level it is arguable that their role in designing and implementing cooperative migration control policies contributes to violations of the socio-economic rights of people on the move affected by such measures. At the very least, sponsor States contribute to violations of the socio-economic rights of people on the move by containing them in partner States in the Global South that often lack sufficient resources to realise their socio-economic

[1] Principle 1(d) of the Guiding Principles on Shared Responsibility in International Law clarifies that '"contribution to injury" means a causal relationship between conduct and injury.' André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 European Journal of International Law 15, 16.

rights. Sponsor States can also have a more direct impact on their rights, for instance when they are involved in the operation of offshore processing centres. We can therefore assume that both sponsor and partner States contribute to violations of the socio-economic rights of people on the move affected by cooperative migration control.

Section 2 first explains how the principle of independent responsibility that dominates international law focuses on the responsibility of a single State, including when multiple States contribute to a human rights violation, as in the case of cooperative migration control. As a result, cooperative migration control policies are likely to only trigger the responsibility of the partner State, notwithstanding the fact that they involve sponsor States. A situation where only one State incurs responsibility for violations of the socio-economic rights of people on the move is referred to as exclusive responsibility. Although shared responsibility between multiple States remains the exception rather than the rule, international law seems to develop towards a better understanding of shared responsibility. Indeed, cooperative migration control can give rise to various constellations of shared responsibility. Section 3 thus focuses on shared responsibility in international law and examines to what extent cooperative migration control can give rise to concurrent and/or joint responsibility. Concurrent responsibility arises when two or more States incur responsibility for separate internationally wrongful acts, while joint responsibility arises when they incur responsibility for the same internationally wrongful act. Section 4, in turn, discusses the possibility that responsibility gaps arise in the context of cooperative migration control. These are situations where the socio-economic rights of people on the move in partner States are not realised, while no State incurs responsibility. Finally, Section 5 offers some concluding thoughts on shared responsibility in the context of cooperative migration control.

2. INDEPENDENT RESPONSIBILITY IN THE CONTEXT OF COOPERATIVE MIGRATION CONTROL

Following the principle of independent responsibility, a State is only responsible for its own wrong, irrespective of its connection to other actors.[2] This principle applies to situations where the responsibility of multiple States is connected.[3] In most cases of collaborative conduct – including cooperative migration control – responsibility is determined following the principle of independent responsibility.[4] Accordingly, 'each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.'[5] In other words, in the case of a plurality of responsible States, the general principle is that each State is separately responsible for the conduct attributable

2 André Nollkaemper, 'The Duality of Shared Responsibility' (2018) 24 Contemporary Politics 524, 526.
3 Erik Kok, *Indirect Responsibility in the Contemporary Law of State Responsibility* (Prufrock 2018) 49.
4 ARSIWA Commentary 64, para 5.
5 Ibid 124, para 1.

to it.[6] The rules on derived responsibility only apply to 'exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.'[7]

International courts have applied the principle of independent responsibility in cases involving multiple States.[8] For instance, in *Corfu Channel*, the ICJ only examined the responsibility of Albania, although the case concerned Albania's failure to notify British warships of the existence of a minefield which had been laid by another State.[9] The *Phosphate Lands on Nauru* case concerned Australia's responsibility for rehabilitating certain phosphate lands mined before Nauruan independence, Australia being one of three States making up the Administering Authority in charge of Nauru. The ICJ found that it could, in principle, consider a claim brought only against Australia.[10] In international human rights law, the ECtHR likewise applies the principle of independent responsibility when addressing cases involving multiple States, as in *MSS v Belgium and Greece*, where it separately examined the responsibility of Belgium and Greece.[11] Its typical approach is 'to isolate the independent conduct of the contracting states concerned and to examine the conformity of that conduct with the state's Convention obligations.'[12]

In the context of cooperative migration control, the principle of independent responsibility can lead to situations of exclusive responsibility, where only one State incurs responsibility. More specifically, if we focus on the responsibility of each State for its own conduct, it is likely that only the *partner State* incurs responsibility for the violations of socio-economic rights of people on the move. Since international human rights law presumes that partner States that host people on the move have the primary obligation to realise their socio-economic rights, a responsibility analysis that focuses only on partner States is likely to find that they bear sole responsibility for the violations of the socio-economic rights of people on the move. Partner States often fail to comply with their core obligations towards people on the move: many people on the move do not have access to an adequate standard of living and health care, children do not attend school, and many adults cannot work under just and favourable conditions. Unless a partner State can demonstrate that it complied with the due diligence standard of conduct and the principle of non-discrimination but that it lacked sufficient resources to realise at least the core socio-economic rights of people on the move, it incurs responsibility. The conduct of other States is irrelevant to determining the partner State's responsibility, except for the question whether it complied with its obligation to seek and accept international assistance and cooperation.

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6 Ibid para 3.
7 Ibid 64, para 5.
8 Nollkaemper (n 2) 526.
9 ICJ, *Corfu Channel* 23.
10 ICJ, *Certain Phosphate Lands in Nauru (Nauru v Australia)* Judgment (26 June 1992) ICJ Reports 1992, 240, para 48.
11 Chapter VI, Section 2.1.
12 Maarten den Heijer, 'Shared Responsibility before the European Court of Human Rights' (2013) 60 Netherlands International Law Review 411, 438.

At the same time, it is often difficult to demonstrate that *sponsor States* incur responsibility for the violation of the socio-economic rights of people on the move in partner States. Indeed, under the principle of independent responsibility, the only question that matters is whether the sponsor State committed an internationally wrongful act: does conduct that is attributable to it breach its own obligations under international human rights law? The previous chapters demonstrated that a sponsor State only has *direct obligations* to contribute to realising the socio-economic rights of people on the move in partner States if it exercises jurisdiction over them. However, as migration control tends to involve remote forms of cooperation, it is unclear whether the conduct of a sponsor State can trigger its jurisdiction. This is more likely to be the case for people transfers than for the provision of funding, training and equipment, information sharing, and the use of diplomatic relations and development aid conditionality. Although the responsibility assessment ultimately depends on the specific circumstances, an interpretation of jurisdiction that requires the sponsor State to exercise effective control abroad is unlikely to trigger its responsibility. While the thresholds are lower under the effects and functional models, they are less developed than the spatial and personal models. Moreover, for a sponsor State to incur responsibility, it must also fail to comply with its direct obligations towards people on the move, which are presumed to be only complementary to the primary obligation of the partner State.

Furthermore, it would be difficult to argue that, as a matter of *lex lata*, sponsor States breach their *global obligations* of international assistance and cooperation on account of the fact that the socio-economic rights of people on the move in partner States are not realised. In principle, global obligations are owed by the international community to partner States. In other words, the lack of a clear correspondence between a sponsor State as duty-bearer and people on the move as rights-holders considerably complicates the assigning of global obligations and hence responsibility. Even if we accept this study's proposition that a sponsor State's involvement in cooperative migration control justifies assigning obligations of international assistance and cooperation to it, it remains unclear what these obligations entail and hence whether they are breached.

Therefore, following the principle of independent responsibility, it is probable that cooperative migration control gives rise to situations of exclusive responsibility in which only partner States incur responsibility for violations of the socio-economic rights of people on the move. On the one hand, partner States are likely to incur responsibility for failing to comply with their core obligations towards people on the move on their territory. On the other hand, sponsor States are unlikely to incur responsibility for the non-realisation of the socio-economic rights of people on the move affected by cooperative migration control policies, notwithstanding their involvement in such policies. Thus, in the Americas, given that the USA has not ratified any convention explicitly protecting socio-economic rights and opposes the idea of extraterritorial jurisdiction, it is probable that only Mexico incurs responsibility for failing to comply with its obligations towards people on the move on its territory.

In theory, the principle of independent responsibility could also lead to the reverse situation of exclusive responsibility, namely one where only a sponsor State incurs

responsibility for the violation of the socio-economic rights of people on the move. However, in practice this situation is unlikely to arise, since international human rights law presumes that the partner State has the primary obligation to realise the socio-economic rights of people on the move on its territory while the sponsor State only has complementary obligations. It requires, first, that the partner State complies with its obligations under international human rights law towards people on the move. In other words, the partner State complies with the due diligence standard and principle of non-discrimination but is unable to realise the core socio-economic rights of people on the move due to a lack of sufficient resources. Second, the sponsor State must incur responsibility for breaching its obligations under international human rights law. This is most likely under the effects or functional model of jurisdiction. For instance, under the functional model, one would have to demonstrate that the sponsor State did not take the reasonable measures that it could be expected to take to avoid violations of the socio-economic rights of people on the move. In other words, the exclusive responsibility of the sponsor State could arise if the partner State is unable rather than unwilling to realise the socio-economic rights of people on the move and the sponsor State exercises jurisdiction but does not comply with its obligations.

The ECtHR's case law on Transdniestria illustrates how a State can incur exclusive responsibility for human rights violations in another State.[13] In the *Ilaşcu* case, the ECtHR found that Moldova and Russia both incurred responsibility for the human rights violations suffered by the applicants.[14] Moldova's responsibility was engaged on account of its failure to discharge its positive obligations[15], while Russia's was engaged on account of the acts committed by Russian soldiers in the context of the Russian authorities' collaboration with the MRT.[16] However, in more recent cases the ECtHR found that Moldova had complied with its obligations under the ECHR.[17] Hence, Russia incurred exclusive responsibility.[18] The *Catan* case is particularly relevant in the context of this study, as it concerned the right to education: the MRT forbade the use of the Latin alphabet in schools, forcibly evicted pupils and teachers from Moldovan/Romanian-language schools, and forced the schools to close down and reopen in different premises. This case thus confirms that it is possible for a State to incur exclusive responsibility for the violation of socio-economic rights of people

13 For a detailed discussion of issues of jurisdiction and responsibility in this line of cases see Lisa-Marie Komp, *Border Deaths at Sea under the Right to Life in the European Convention on Human Rights* (PhD thesis, Vrije Universiteit Amsterdam 2020) 82–96.

14 ECtHR, *Ilaşcu* operative paragraphs 8–15.

15 Ibid para 352.

16 Ibid para 385.

17 ECtHR, *Catan* paras 145–48; ECtHR, *Ivanţoc* para 111; ECtHR, *Mozer* paras 151–55 and 200; ECtHR, *Turturica and Casian* paras 51–54; ECtHR, *Sandu and others v Moldova and Russia* Apps Nos 21034/05 and 7 others (17 July 2018) paras 85–88; ECtHR, *Soyma v Moldova, Russia and Ukraine* App No 1203/05 (30 May 2017) paras 36–39.

18 ECtHR, *Catan* paras 145–50; ECtHR, *Ivanţoc* paras 111 and 144; ECtHR, *Mozer* paras 151–58; ECtHR, *Turturica and Casian* paras 33, 50 and 54; ECtHR, *Sandu* paras 85–90 and 98–102; ECtHR, *Soyma* paras 36–42.

outside its territory.[19] In the context of cooperative migration control policies, it could be argued, for instance, that Nauru, given the economic challenges that it faces and its dependence on Australian development aid, is unable rather than unwilling to realise the rights of people on the move in the RPC, while Australia breaches its direct obligations towards them.

In sum, the principle of independent responsibility which is predominant in international law often assigns exclusive responsibility to partner States, notwithstanding the fact that sponsor States contribute to the violations of socio-economic rights of people on the move. Indeed, the involvement of multiple States in cooperative migration control suggests that several States could incur responsibility, and raises the question how this responsibility would be shared between them. Accordingly, the next section discusses whether and how States can share responsibility for violations of the socio-economic rights of people on the move affected by cooperative migration control.

3. SHARED RESPONSIBILITY IN THE CONTEXT OF COOPERATIVE MIGRATION CONTROL

Notwithstanding the predominance of the principle of independent responsibility, international law recognises the possibility of multiple States incurring responsibility in connection with the same situation. For instance, in situations of derived responsibility, a State can incur responsibility in relation to the conduct of another State because it aided or assisted, directed or controlled, or coerced the other State in committing an internationally wrongful act.[20] Moreover, under Article 1 ARSIWA 'the same conduct may be attributable to several States at the same time.'[21] Article 47(1) ARSIWA further provides that '[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.'[22] In other words, the ARSIWA recognise that States can share responsibility, either for the same internationally wrongful act or because one State incurs derived responsibility in relation to the internationally wrongful act of another.

In recent years scholars have advanced conceptualisations of shared responsibility in international law.[23] Notably, a group of international lawyers with recognised

19 ECtHR, *Catan* paras 148 and 150.

20 See Chapter VI, Section 4.3 and Articles 16–18 ARSIWA.

21 ARSIWA Commentary 34, para 6.

22 Article 48 ARIO includes a similar provision as regards the responsibility of an international organisation and one or more States or international organisations.

23 The SHARES project provided an important contribution to scholarship in this regard: www.sharesproject.nl. See *inter alia* André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 Michigan Journal of International Law 359; André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014); André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015); André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017);

expertise in the field of international responsibility elaborated the Guiding Principles on Shared Responsibility in International Law, which are of an interpretive nature.[24] They build on the existing rules reflected in the ARSIWA and do not distinguish between the codification of existing rules of international law and the progressive development of international law.[25] For instance, Guiding Principle 7 establishes that States can share responsibility in situations of concerted action and the Commentary discusses the EU-Turkey Statement as an example, although neither the ARSIWA nor the ARIO include a provision on responsibility arising out of concerted action.[26] However, as this study seeks to stay closer to the codification end of the spectrum, it does not refer to concerted action as a trigger of shared responsibility. Rather, it uses shared responsibility as a conceptual framework that can help to systematise and clarify a fragmented and poorly understood area of international law.[27] In other words, shared responsibility serves to clarify existing norms rather than create new ones.[28]

Shared responsibility is particularly useful in the context of this study because it accounts for the involvement of multiple States in cooperative migration control. According to the Guiding Principles on Shared Responsibility in International Law, '[t]he commission by multiple international persons of one or more internationally wrongful acts that contribute to an indivisible injury entails shared responsibility.'[29] Therefore, in the context of this study, *shared responsibility arises when multiple States commit one or more internationally wrongful acts that contribute to violations of the socio-economic rights of people on the move affected by cooperative migration control*. Shared responsibility serves to conceptualise the potential discrepancy between,

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Nollkaemper and others (n 1). Other important scholarship on shared responsibility in international law includes: Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge 2011); James Crawford, *State Responsibility: The General Part* (CUP 2013) ch 10 and 12; Miles Jackson, *Complicity in International Law* (OUP 2015). In the field of socio-economic rights key contributions include: Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP 2007); Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015); Arne Vandenbogaerde, *Towards Shared Accountability in International Human Rights Law* (Intersentia 2016).

24 Nollkaemper and others (n 1) 21. On the Guiding Principles on Shared Responsibility in International Law see also Chapter I, Section 4.5.

25 Ibid.

26 Ibid 44–48.

27 For a critical discussion of the limitations of shared responsibility see Nollkaemper (n 2).

28 See Nollkaemper and others (n 1) 20–21 and 44–48.

29 Nollkaemper and others (n 1) 23–24 (principle 2(1)). For similar definitions see Nollkaemper and Jacobs, 'Shared Responsibility in International Law' (n 23) 365–68; André Nollkaemper, 'Introduction' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 6–7; André Nollkaemper and Dov Jacobs, 'Introduction: Mapping the Normative Framework for the Distribution of Shared Responsibility' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015) 2; André Nollkaemper and Ilias Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 3; André Nollkaemper, 'Introduction: Procedural Aspects of Shared Responsibility in International Adjudication' (2013) 4 Journal of International Dispute Settlement 277, 280–81; Nollkaemper (n 2) 528.

on the one hand, human rights violations, and on the other hand, State obligations and responsibility. Indeed, the above conceptualisation of shared responsibility distinguishes between an *internationally wrongful act* – which triggers a State's responsibility – and the *contribution to a human rights violation*: a State can contribute to a human rights violation without committing an internationally wrongful act and hence without incurring responsibility under international law.[30] This builds on the distinction between a violation of a human right and a breach of an obligation of the State:[31] just like an individual can suffer a human rights violation without any State having breached its obligations under international human rights law, so too can a State contribute to a human rights violation without incurring responsibility.

Finally, a sponsor State involved in cooperative migration control can commit an internationally wrongful act by breaching either its direct or its global obligations, as well as incurring derived responsibility for its contribution to violations of the socio-economic rights of people on the move. This suggests that various constellations of shared responsibility are possible, depending on the nature of the sponsor State's responsibility. More specifically, States can incur either concurrent or joint responsibility for violations of the socio-economic rights of people on the move. *Concurrent responsibility* arises when two or more States incur responsibility for separate internationally wrongful acts. *Joint responsibility*, on the other hand, arises when they incur responsibility for the same internationally wrongful act. For the sake of clarity, the analysis in the rest of this section presents a simplified conceptualisation of shared responsibility in the context of cooperative migration control by discussing various constellations of shared responsibility in turn. In practice, however, it is probable that cooperative migration control gives rise to combinations of concurrent and joint responsibility, especially in the European context, where a plurality of EU Member States cooperate with partner States such as Turkey and Libya. The same holds true with regard to global obligations of international assistance and cooperation, which are owed by multiple States, including sponsor States. In other words, assigning responsibility in specific situations is likely to lead to more complex constellations of shared responsibility than depicted here.

3.1. CONCURRENT RESPONSIBILITY IN THE CONTEXT OF COOPERATIVE MIGRATION CONTROL

Concurrent responsibility arises when multiple States incur responsibility for multiple internationally wrongful acts.[32] In other words, in situations of concurrent

30 Vice versa, a State can commit an internationally wrongful act without contributing to a human rights violation. In that case it incurs exclusive responsibility. See also Nollkaemper and others (n 1) 24.

31 Chapter III, Section 3.

32 Various human rights and migration scholars use the term 'concurrent responsibility' in a similar way. See for instance Vassilis P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 Michigan Journal of International Law 129; Nikolas Feith

responsibility, the States involved in cooperative migration control engage in separate conduct that: is attributable to each of them separately; constitutes a breach of an international obligation that rests on them; and contributes to the violation of socio-economic rights of people on the move.[33] The following discusses three potential situations of concurrent responsibility. In the first one, the partner and sponsor State each breach their direct obligations under international human rights law. In the second one, the sponsor State incurs derived responsibility for an internationally wrongful act committed by the partner State. In the last one, sponsor States could incur concurrent responsibility for not complying with their global obligations of international assistance and cooperation.

3.1.1. Concurrent Responsibility for Breaches of Direct Human Rights Obligations

International human rights law recognises the possibility of concurrent responsibility for human rights violations. More specifically, the case law of the ECtHR includes various examples where two States incur responsibility for a human rights violation. The case of *MSS v Belgium and Greece* is an example of concurrent responsibility, as both States were found responsible for separate internationally wrongful acts. Other ECtHR cases likewise gave rise to situations of concurrent responsibility. In the case of *Ilaşcu*, Moldova and Russia both incurred responsibility on account of different conduct. Moldova was responsible for its failure to discharge its positive obligations while Russia was responsible because of its support for and collaboration with the MRT and its failure to prevent and put an end to human rights violations in the MRT.[34] In the case of *Rantsev v Cyprus and Russia*, a Russian victim of human trafficking was found dead in Cyprus. The ECtHR found that Cyprus incurred responsibility because of the failure to conduct an effective investigation into the victim's death, because of its failure to protect her; and on account of the victim's unlawful and arbitrary detention; while Russia was responsible for breaching its procedural obligations to investigate the alleged trafficking.[35] Thus, ECtHR case law confirms that under international human rights law two States can incur concurrent responsibility for separate internationally wrongful acts.

Indeed, it is possible that, by engaging in cooperative migration control, a partner and a sponsor State each breach their direct obligations under international human rights law and hence incur concurrent responsibility. This would be the case if the partner State does not comply with its core obligations towards people on the move on

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Tan, *International Cooperation on Refugees: Between Protection and Deterrence* (PhD thesis, Aarhus University 2019) 177; for a broader understanding see Samantha Besson, 'Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdictions, Duties, and Responsibilities' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018).

33 See Nollkaemper and others (n 1) 17 (principle 4).

34 ECtHR, *Ilaşcu* paras 352 and 393–94.

35 ECtHR, *Rantsev v Cyprus and Russia* App No 25965/04 (7 January 2010) paras 242, 293, 298, 309 and 325.

its territory and cannot demonstrate that it complied with the due diligence standard and the principle of non-discrimination. As that conduct is attributable to it, it commits an internationally wrongful act that contributes to the violation of the socio-economic rights of people on the move. At the same time, the sponsor State's involvement in cooperative migration control can trigger its jurisdiction and hence obligations under international human rights law. Concurrent responsibility can arise if it can be demonstrated that the sponsor State exercises jurisdiction over people on the move and does not comply with its obligations under international human rights law. For instance, under the functional model this would be the case if it did not take reasonable measures to avoid reasonably foreseeable violations of their socio-economic rights. In that case the conduct that contributes to the violation of the socio-economic rights of people on the move, namely the failure to take reasonable measures, is attributable to the sponsor State. Concurrent responsibility arises because the partner and sponsor State each engage in conduct which: is attributable to each of them separately; constitutes a breach of their respective obligations under international human rights law; and contributes to the violation of socio-economic rights of people on the move.

Since this constellation of concurrent responsibility arises if the sponsor State has direct obligations towards people on the move, it is probable that the more direct involvement of sponsor States gives rise to situations of concurrent responsibility. Tan thus finds that people transfers and extraterritorial processing are more likely to give rise to concurrent responsibility than the provision of funding, equipment and training.[36] Van Berlo recognises that Australia and Nauru can incur concurrent responsibility for human rights violations at the RPC because they each committed a separate internationally wrongful act.[37] Yet concurrent responsibility is less likely to arise with regard to Australia's cooperation with Indonesia. Indeed, Taylor finds that it is unlikely that Australia exercises jurisdiction over people on the move in Indonesia, which precludes a finding of concurrent responsibility on this account.[38] However, concurrent responsibility can also arise when the sponsor State incurs derived responsibility in relation to the partner State's conduct.

3.1.2. Derived Responsibility as Concurrent Responsibility

If we accept that the rules on derived responsibility are akin to primary obligations under international law, they can be construed as obligations not to aid or assist, not to direct and control, and not to coerce another State in committing an internationally wrongful act.[39] Therefore, situations of derived responsibility can amount to

36 Tan (n 32) 193 and 195–98.

37 Patrick van Berlo, *Human Rights Elephants in an Era of Globalisation: Commodification, Crimmigration and Human Rights in Confinement* (Wolf 2020) 265–81.

38 Savitri Taylor, 'Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but no Responsibility?' (2010) 33 UNSW Law Journal 337, 358.

39 The Guiding Principles on Shared Responsibility in International Law consider that situations of derived responsibility lead to shared responsibility arising from multiple internationally wrongful acts: Nollkaemper and others (n 1) 37 at para 9. Vandenhole likewise argues that 'the aid or

concurrent responsibility: one State breaches a rule under the law on State responsibility that prohibits certain conduct (Articles 16–18 ARSIWA), while another commits an internationally wrongful act (Article 2 ARSIWA). Article 19 ARSIWA confirms that Chapter IV 'is without prejudice to the international responsibility, under other provisions of the present articles, of the State which commits the act in question, or of any other State.' Nevertheless, a clear difference with concurrent responsibility that arises out of breaches of direct obligations is that derived responsibility can only trigger concurrent responsibility if the principal actor commits an internationally wrongful act. In other words, although they are concurrent, the responsibility of the sponsor and partner State are not independent, unlike in situations of concurrent responsibility that arise out of breaches of two direct obligations.

Situations of complicity can give rise to concurrent responsibility: the sponsor State incurs responsibility for providing aid or assistance, while the partner State incurs responsibility for failing to realise the socio-economic rights of people on the move. Whether concurrent responsibility based on the complicity rule arises in a particular situation depends on numerous factors. At a general level, while various scholars have argued that the complicity rule can apply to cooperative migration control policies, the lack of clarity regarding the applicable standards under Article 16 ARSIWA complicates the assessment, especially concerning violations of socio-economic rights in partner States.[40] It is considerably less likely, however, that cooperative migration control gives rise to concurrent responsibility based on the exercise of direction and control (Article 17 ARSIWA) or coercion (Article 18 ARSIWA) by the sponsor State, as the threshold for these forms of derived responsibility is much higher.[41] Moreover, the constellation of responsibility could be different under the coercion rule than under the complicity rule, as the partner State could claim that the coercion amounted to *force majeure* and hence its conduct would no longer amount to an internationally wrongful act. In that case only the sponsor State would incur responsibility, equating this situation with *de facto* exclusive responsibility.[42]

In any event, similar concepts – notably power, knowledge and causation – govern the determination of State obligations under international human rights law and responsibility under the law on State responsibility. Therefore, it is probable that facts

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assistance, direction and control, and coercion, each constitute a separate internationally wrongful act of themselves': Wouter Vandenhole, 'Shared Responsibility of Non-State Actors: A Human Rights Perspective' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill 2015) 60. Nollkaemper and Jacobs seem to argue – using different terminology – that aid or assistance should be conceived as concurrent rather than joint responsibility: Nollkaemper and Jacobs, 'Shared Responsibility in International Law' (n 23) 396–97 and 368: '[t]o refer to situations of shared responsibility, we also use the term joint responsibility.'

40 Chapter VI, Section 4.3.1.

41 Chapter VI, Sections 4.3.2 and 4.3.3.

42 Under a different understanding of Article 17 ARSIWA, one could also argue that the exercise of direction and control by a sponsor State leads to the attribution of the partner State's responsibility to the sponsor State, which could qualify as joint responsibility. See James D Fry, 'Attribution of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014).

that could lead to concurrent responsibility because the sponsor and the partner State both breached their direct obligations under international human rights law could also lead to concurrent responsibility based on the complicity of the sponsor State. In some cases the conduct that can create a jurisdictional link – and hence trigger direct obligations – such as the provision of training, funding and equipment amounts to aid or assistance under the complicity rule. Thus, there is some overlap between these two forms of concurrent responsibility: the more likely it is that one arises, the more probable it is that the other one is triggered as well. In other words, a single set of facts can give rise to various constellations of responsibility.

3.1.3. Concurrent Responsibility for Breaches of Global Obligations?

The last constellation of concurrent responsibility that could arise in the context of cooperative migration control policies concerns sponsor States' global obligations of international assistance and cooperation. In addition to direct obligations towards people on the move over whom they exercise jurisdiction, sponsor States have global obligations to contribute to the international community's efforts to provide international assistance and cooperation to States that lack sufficient resources to realise socio-economic rights. While the obligation to provide international assistance and cooperation to a specific partner State rests on the international community as a whole, a sponsor State's cooperation on migration control with a given partner State could justify assigning such obligations to that particular sponsor State. The issue of concurrent responsibility for breaches of global obligations includes two aspects, which are discussed in turn. First, can concurrent responsibility arise between a partner State and a sponsor State that breaches its global obligations of international assistance and cooperation, as opposed to its direct obligations towards people on the move? Second, can concurrent responsibility arise between multiple sponsor States for failure to comply with their global obligations?

As regards the *first* issue, concurrent responsibility between a partner State and a sponsor State on account of the latter's breach of its global obligations could arise under certain circumstances. A first prerequisite is for the partner State in question to incur responsibility for the violations of the socio-economic rights of people on the move on its territory. As noted above, this prerequisite is likely to be met. A more difficult question concerns the responsibility of the sponsor State. As noted at the start of this chapter, the premise is that the sponsor State's failure to provide international assistance and cooperation to the partner State contributes to the violation of the socio-economic rights of people on the move. This can be difficult to demonstrate for global obligations because one must show that the sponsor State failed to act where it had a legal obligation to do so, and that this failure contributed to the plight of people on the move. Yet causation through omission is particularly difficult to demonstrate.[43] Furthermore, if

[43] See for instance, in the context of the ECHR, Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 Human Rights Law Review 309.

we accept that cooperation on migration control itself can justify assigning to sponsor States obligations of international assistance and cooperation towards partner States that host people on the move, it could be demonstrated that their failure to provide assistance that is adequate for realising the socio-economic rights of people on the move contributes to their violation.

We can imagine a situation where a sponsor State's failure to provide international assistance and cooperation to the partner State deprives the latter of the necessary resources to realise the core socio-economic rights of people on the move. In that case, the sponsor State could be said to contribute to the violation of socio-economic rights of people on the move. However, since the partner State's lack of sufficient resources limits the scope of its own obligations, one must demonstrate that the partner State committed an internationally wrongful act by not complying with the due diligence standard or the principle of non-discrimination. If the partner State can convincingly show that it lacked sufficient resources to realise the core socio-economic rights of people on the move, it would not incur any responsibility and hence the situation would be one of exclusive sponsor State responsibility. Concurrent responsibility could also arise if the sponsor State's contribution to the violations of the socio-economic rights of people on the move concerned the conditions attached to any assistance it may provide: if the provision of international assistance and cooperation – including that provided for migration control purposes – induces a partner State to not realise the socio-economic rights of people on the move, it could lead to situations of concurrent responsibility. Thus, as a matter of principle, it is possible, albeit not straightforward, for concurrent responsibility to arise when a partner State breaches its direct obligations and a sponsor State breaches its global obligations. Whether that is the case depends on the exact circumstances.

This points to the *second* issue identified above: can concurrent responsibility arise between multiple sponsor States for failure to comply with their global obligations? Indeed, as global obligations rest on the international community as a whole, sponsor States that cooperate with a given partner State are not the only duty-bearers of such obligations. This raises the question how the obligations of States that are in a position to assist relate to each other: does each State have a separate obligation to contribute to the international community's efforts of international assistance and cooperation – and hence does it commit a separate internationally wrongful act if it fails to do so? Or do States have a joint obligation to provide international assistance and cooperation – and hence they commit the same internationally wrongful act?[44] While the first understanding leads to situations of possible concurrent responsibility, the second approach would entail that States could incur joint responsibility.[45]

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44 See also Margot E Salomon, 'Deprivation, Causation and the Law of International Cooperation' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 287.

45 Under this latter understanding, global obligations would be an indivisible shared obligation: a positive obligation of result that obliges all of its bearers to achieve a common result. However, as seen in Chapter V, Section 3.1, global obligations are obligations of conduct rather than result, as they ultimately depend on States' available resources, notwithstanding the fact that they are particularly necessary to realise core socio-economic rights. See Nollkaemper and others (n 1) 32–33.

While Article 56 UN Charter refers to 'joint and separate action' to achieve the purposes set out in Article 55 – including the realisation of socio-economic rights – the CESCR has not yet clarified this issue.[46] However, commentators seem to suggest that States which fail to comply with their global obligations incur concurrent rather than joint responsibility. De Schutter argues that the responsibility of a State 'is not diminished by the mere fact that the result might have been avoided if other States had adopted a different conduct.'[47] According to Salomon, when multiple States are responsible, 'each state is separately responsible for conduct attributable to it and that responsibility is not diminished by the fact that it is not the only responsible state.'[48] Others likewise suggest that a State that commits an internationally wrongful act that contributes to an injury 'should not be able to escape shared responsibility simply because others have already contributed to the same injury.'[49] Thus, it may be the case that Global North States that have global obligations of international assistance and cooperation incur concurrent responsibility when they fail to comply with their global obligations as members of the international community, regardless of their involvement in cooperative migration control.

In conclusion, it remains unclear under what circumstances sponsor States' failure to provide international assistance and cooperation to partner States hosting people on the move gives rise to situations of shared responsibility. Nevertheless, if we accept that cooperation on migration justifies assigning obligations of international assistance and cooperation to sponsor States, two situations of concurrent responsibility could arise: on the one hand between sponsor and partner States, and, on the other hand, between sponsor States and other Global North States that are in a position to assist partner States that host people on the move.

3.2. JOINT RESPONSIBILITY IN THE CONTEXT OF COOPERATIVE MIGRATION CONTROL

Joint responsibility arises when multiple States incur responsibility for a single internationally wrongful act.[50] In situations of joint responsibility, the same conduct: is attributable to multiple States; constitutes a breach of an international human rights

46 The CESCR has sporadically referred to States' 'joint and individual responsibility' to provide disaster relief and humanitarian assistance in times of emergency and to the international community's 'collective responsibility' to address the problem of transmissible diseases. CESCR, General Comment 12, para 38; CESCR, General Comment 14, para 40.

47 Olivier De Schutter, 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019) 586.

48 Margot E Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015) 382.

49 Nollkaemper and others (n 1) 28.

50 Human rights and migration scholars have defined the term 'joint responsibility' in different ways, with some giving it a broader meaning than in this study. Compare for instance Besson (n 32) 171–72; Tan (n 32) 178; Van Berlo (n 37) 258.

obligation of those States; and contributes to the violation of the socio-economic rights of people on the move affected by cooperative migration control policies.[51] It corresponds to the situation envisaged in Article 47 ARSIWA: 'a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them.'[52] International case law and arbitration has recognised the possibility of joint responsibility.[53] Scholarship widely recognises that dual attribution of conduct is possible.[54] Messineo even argues that multiple attribution of conduct is not only possible but often the default rule when States act jointly.[55] Nevertheless, because joint responsibility requires multiple States to carry out the same conduct, it is less likely to occur than concurrent responsibility.[56] In the context of cooperative migration control, two constellations of joint responsibility are possible. First, joint responsibility can arise when multiple sponsor States engage in joint conduct. Second, a sponsor State and a partner State can incur joint responsibility because the conduct of a person or entity is attributable to both of them. The following discusses both constellations in turn.

3.2.1. Joint Responsibility of Multiple Sponsor States

Joint responsibility can arise when several sponsor States engage in joint conduct while cooperating with the same partner State. Indeed, the law on State responsibility recognises that 'two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation.'[57] Yet joint responsibility arises only if the internationally wrongful act consists of a single course of conduct attributable to multiple States: if multiple States closely coordinate their action but engage in separate conduct, the situation is one of concurrent rather than joint responsibility.[58] In other

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51 Nollkaemper and others (n 1) 16–17 (principle 3).

52 ARSIWA Commentary 124, para 3.

53 See for instance Eurotunnel Arbitration, *The Channel Tunnel Group Ltd and France-Manche SA v Secretary of State for Transport of the Government of the UK and Ministre de l'Equipement, des Transports, de l'Aménagement du Territoire, du Tourisme et de la Mer du Gouvernement de la République Française* Partial Award (30 January 2007) 132 ILR 1, paras 165–69; International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* Case No 17, Advisory Opinion (1 February 2011) 11 ITLOS Reports 10, para 192; ICJ, *Phosphate Lands on Nauru* para 48; ECtHR, *Al-Jedda v UK* [GC] App No 27021/08 (7 July 2011) para 80; Court of Appeal in The Hague, *Hasan Nuhanovic v the Netherlands* (5 July 2011) ECLI:NL:GHSGR:2011:BR0132 para 5.9; Supreme Court of the Netherlands, *Hasan Nuhanovic v the Netherlands* (6 September 2013) ECLI:NL:HR:2013:BZ9228 para 3.9.4.

54 See for instance Crawford, *State Responsibility* (n 23) 333; Stian Øby Johansen, 'Dual Attribution of Conduct to both an International Organisation and a Member State' (2019) 6 Oslo Law Review 178, 189; Nollkaemper and others (n 1) 29 at para 3.

55 Francesco Messineo, 'Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 97.

56 See Johansen (n 54) 197.

57 ARSIWA Commentary 124, para 2.

58 Nollkaemper and others (n 1) 32 at para 7.

words, States must 'truly act in concert'.[59] The intensity of cooperation distinguishes joint from concurrent responsibility, since joint responsibility requires a high level of concerted conduct that is attributable to each.[60]

International case law confirms that joint conduct requires a high threshold. For instance, in the *Oil Platforms* case, Judge Simma held that Article 47 ARSIWA 'would apply only if both Iran and Iraq were responsible for a given action – for instance, if Iran had carried out an attack against a ship engaged in treaty-protected commerce, jointly planning and co-ordinating the operation with Iraq.'[61] In the case of *Saddam Hussein v Albania and others*, Iraq's former president had brought a case against all ECHR States parties that took part in the 2003 US-led invasion of Iraq, alleging that they were responsible for his arrest, detention and transfer to the Iraqi authorities and his ongoing trial. The ECtHR ruled that the application was inadmissible *inter alia* because the mere fact that these countries formed part of a coalition with the USA was insufficient to trigger their responsibility, as the impugned conduct was attributable to the USA.[62]

Given the intensity of cooperation required, most cooperative migration control measures are unlikely to trigger joint responsibility. Nevertheless, joint responsibility between sponsor States may be relevant in the European context, where EU Member States often act jointly to stem migration flows from the Global South. For instance, following the CJEU's finding that the EU-Turkey Statement was not concluded between the EU and Turkey but between Turkey and the 27 EU Member States[63], the latter can be said to have acted jointly. The conclusion of the agreement is thus attributable to all Member States, who could incur joint responsibility if it can be demonstrated that they breached their obligations in doing so. For instance, under the functional model of jurisdiction, that would be the case if the assistance they provide to Turkey falls short of the reasonable measures they can be expected to take to avoid reasonably foreseeable violations of the socio-economic rights of people on the move in Turkey.

3.2.2. Joint Responsibility of a Sponsor and a Partner State

In addition to the joint conduct of multiple sponsor States, joint responsibility can also arise between a sponsor and a partner State. This is the case when the conduct that contributes to the violation of the rights of people on the move is attributable to both of them and breaches their respective obligations under international human rights law. Many forms of cooperation on migration control are unlikely to give rise to situations of joint responsibility because the conduct of the partner and sponsor States is too distinct. Indeed, while the partner State has the primary obligation to realise the socio-

59 Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012) 86.
60 Tan (n 32) 182.
61 ICJ, *Oil Platforms (Islamic Republic of Iran v United States of America)* Judgment (6 November 2003) ICJ Reports 2003, 161, Separate Opinion of Judge Simma, para 76.
62 ECtHR, *Saddam Hussein v Albania and others* [Admissibility] App No 23276/04 (14 March 2006) 4.
63 CJEU, *NF v European Council* paras 71–73.

economic rights of people on the move on its territory, the conduct of the sponsor State is often not directly relevant to the realisation of their socio-economic rights, since it rather focuses on preventing their onward movement. Nevertheless, specific instances of cooperation could trigger the joint responsibility of a partner and sponsor State if conduct is attributable to both of them. This includes the conduct of State organs, common organs, and non-State actors, which are discussed in turn below.[64]

First, joint responsibility for the conduct of a *State organ* can arise if the conduct is attributable to the State to which the organ in question belongs as well as to another State and breaches both States' obligations. Under the law on State responsibility, Article 6 ARSIWA specifically addresses situations where the organ of one State is placed at the disposal of another State:

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

In other words, if State A places an organ at the disposal of State B, its conduct is attributable only to State B if the organ acts in the exercise of elements of the governmental authority of State B.[65] As the conduct is attributable only to the receiving State, it does not give rise to joint responsibility. However, the threshold for Article 6 ARSIWA is high:

> Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.[66]

Therefore, Article 6 ARSIWA is unlikely to be relevant in the context of cooperative migration control. Moreover, it is the exception to the rule of multiple attribution.[67] Since the attribution rules can apply simultaneously, they can lead to multiple attribution of conduct and hence joint responsibility.[68] For instance, in situations where the organ of one State acts on the joint instructions of its own and another State, the conduct in question is attributable to both States under the rules of attribution in the ARSIWA.[69]

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64 Nollkaemper and others also identify joint conduct, defined as situations where 'the entire operation is carried out jointly by two or more international persons'. However, as noted above, joint conduct is unlikely to occur in the context of cooperative migration control. Nollkaemper and others (n 1) 31–32. See also Tan (n 32) 182–83 and 199.

65 See also ICJ, *Genocide* para 140.

66 ARSIWA Commentary 44, para 2.

67 Messineo (n 55) 83.

68 Ibid 68–69; Den Heijer, *Europe and Extraterritorial Asylum* (n 59) 89.

69 ARSIWA Commentary 44, para 3.

The decisions of human rights monitoring bodies have confirmed that the conduct of one State's organs can be attributed to another State. In the early case of *X and Y v Switzerland*, the applicant was prohibited from entering Liechtenstein by Switzerland following a bilateral treaty between the two countries. The EComHR found that the conduct of the Swiss police officers was attributable to Switzerland rather than Liechtenstein, because they were not placed at the latter's disposal.[70] However, in the later case of *Drozd and Janousek v France and Spain*, which concerned a conviction by an Andorran Court including a French and Spanish judge, the ECtHR found that the conduct of the French and Spanish judge was attributable to Andorra.[71]

Furthermore, the conduct of a State organ can be attributed to multiple States, as illustrated by the case of *El-Masri*. As noted in Chapter VI, the ECtHR attributed the applicant's torture by CIA agents at Skopje airport to Macedonia.[72] As the conduct of CIA agents is attributable to the USA under Article 4 ARSIWA, the applicant's torture is attributable to both the USA and Macedonia. El-Masri brought a parallel claim against the USA before the IAComHR, which found with regard to his earlier detention in a hotel room that he 'was purportedly kept in the hotel under constant guard by agents of the Macedonian security forces, and those agents were allegedly acting under the direction and control of the U.S. Government, which is the decisive element to establish the jurisdiction of the State over those facts.'[73] This suggests that the conduct of the Macedonian security forces is not only attributable to Macedonia under Article 4 ARSIWA but also to the USA under Article 8 ARSIWA. Moreover, as the IAComHR recognises that this can trigger the USA's jurisdiction, the combined case law of the ECtHR and IAComHR suggests that two States can incur joint responsibility for the same conduct of a State agent.[74] Likewise, in *Alzery v Sweden*, the HRC held that 'the acts complained of, which occurred in the course of performance of official functions in the presence of the State party's officials and within the State party's jurisdiction, are properly imputable to the State party itself, *in addition to* the State on whose behalf the officials were engaged.'[75] This suggests that the HRC recognises that the conduct of a

70 EComHR, *X and Y v Switzerland* 73, para 2. See also ECtHR, *Xhavara*: Italy's conduct was not attributable to Albania. See ARSIWA Commentary 44, para 2 at n 130.

71 ECtHR, *Drozd and Janousek* para 96. See also Messineo (n 55) 86.

72 Chapter VI, Section 3.2.2.

73 IAComHR, *Khaled El-Masri v United States* [Admissibility] Petition No 419–08, Report No 21/16 (15 April 2016) para 24.

74 In addition, the ECtHR found that the Macedonian authorities were responsible for the applicant's detention in Afghanistan because 'they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer' (para 239). The IAComHR, for its part, held that he 'fell within the jurisdiction of the United States, since the US allegedly exercised total and exclusive *de facto* control over the "Salt Pit" prison and the individuals detained there' (para 25). This raises the possibility that both States incur responsibility for El-Masri's detention in Afghanistan, although it remains unclear on what ground the conduct of US agents in Afghanistan is attributable to Macedonia. See also Marko Milanovic, 'State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights' (2019) 9–14.

75 HRC, *Alzery* para 11.6 (emphasis added).

State agent can be attributed to multiple States. Thus, if the conduct of a State organ is attributable to one State under Article 4 ARSIWA and to another State under another rule, such as Article 5 or 8 ARSIWA or the emerging acquiescence standard under international human rights law, joint responsibility can arise, provided the conduct in question breaches the direct obligations of both States.

The *second* way in which joint responsibility between a partner and sponsor State can arise is when two States act through a *common organ* which carries out the conduct in question.[76] A common organ is an individual or entity that acts for the purpose and on behalf of multiple States and which does not have a separate international legal personality.[77] Its conduct is attributable to each State of which it is an organ.[78] Although case law on common organs is very limited, recent decisions can be seen to support the contention that the conduct of a single entity is attributable to multiple States.[79] The early *Hess* case concerned his imprisonment in Spandau prison, which was administered jointly by the four allied powers. The EComHR recognised that the UK acted 'as a partner in the joint responsibility which it shares with the three other Powers.'[80] Although it held that 'the joint authority cannot be divided into four separate jurisdictions'[81], under a functional approach to jurisdiction one could come to a different finding.[82] Beyond international human rights law, judicial decisions confirm that the conduct of common organs can be attributed to multiple States. In *Phosphate Lands on Nauru* the ICJ implicitly recognised the possibility that the conduct of the Administering Authority could be attributed to Australia, the UK and New Zealand and that each State could incur responsibility for its conduct.[83] More recently, the *Eurotunnel* case concerned the loss and damage resulting from attempts by people on the move to reach the UK from France via the Eurotunnel. The arbitral tribunal held that the Intergovernmental Commission overseeing the Channel Tunnel Fixed Link was a joint organ of France and the UK and that both States would be responsible if action taken by this commission resulted in a breach of the Concession Agreement.[84] It found that France and the UK incurred responsibility because they failed to comply with their positive obligations.[85]

Third, in the same way that the conduct of a State organ can be attributed to two States, so too can the conduct of *non-State organs* be attributed to multiple States. Here also, the simultaneous application of attribution rules creates various possibilities of multiple attribution of conduct and hence joint responsibility. For instance, the conduct

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76 ARSIWA Commentary 124, para 2.

77 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 272.

78 ARSIWA Commentary 44, para 3; see also Nollkaemper and others (n 1) 30 at para 5.

79 Messineo (n 55) 73.

80 EComHR, *Hess v UK* [Admissibility] App No 6231/73 (28 May 1975) 74.

81 Ibid.

82 On *Hess* see Den Heijer, *Europe and Extraterritorial Asylum* (n 59) 89–91; Messineo (n 55) 71–72.

83 ICJ, *Phosphate Lands on Nauru* para 48.

84 *Eurotunnel Arbitration* para 179.

85 Ibid para 395(2).

of a non-State actor could be attributed to one State under Article 5 or 8 ARSIWA and to another State following the acquiescence standard under international human rights law.

In the context of cooperative migration control, dual attribution of conduct to a partner and a sponsor State is likely to arise only in specific cases. Indeed, the thresholds for attribution of conduct are high under the law on State responsibility, and while human rights bodies seem to recognise the comparatively lower acquiescence standard of attribution, it remains unclear whether it applies extraterritorially. Moreover, since the conduct in question must breach an obligation of each State, joint responsibility is unlikely to arise. For instance, the operation of the RPC in Nauru involves multiple actors whose conduct could be attributed both to Australia and to Nauru, including Australian State agents, Nauruan State agents, and private actors contracted by Australia. In particular, Australia and Nauru established a joint committee to oversee practical arrangements for the implementation of the MOU, whose conduct could be attributed to both States.[86] More generally, however, although both Australia and Nauru may influence particular conduct, the operation of the RPC does not occur on the basis of the instruction of both States so as to qualify as joint acts.[87]

Likewise, the cooperation between Italy and Libya could give rise to joint responsibility. While the Libyan Coast Guard's conduct is attributable to Libya under Article 4 ARSIWA, it could in parallel be attributable to Italy under Article 8 ARSIWA and hence give rise to joint responsibility.[88] One could also argue that the conduct of the Libyan Coast Guard is attributable to Italy because of the latter's acquiescence and connivance, provided this standard applies extraterritorially. Under the 2017 MOU, Italy and Libya set up 'a mixed committee, composed of the same number of members for both the parties, identifying the priorities in action and the instruments to finance, implement and monitor the commitments undertaken.'[89] It is likely to be easier to demonstrate that the conduct of this joint commission is attributable to both States. However, even if we accept that the conduct of the Libyan Coast Guard or the joint commission is attributable to both Libya and Italy, it remains difficult to demonstrate that pullback operations breach their obligations as regards socio-economic rights, especially in the case of Italy. One could consider whether the conduct of armed groups

86 Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues (signed 3 August 2013) art 22. See also Tan (n 32) 181–82.

87 Van Berlo (n 37) 266–79.

88 Violeta Moreno-Lax and Martin Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization' (2019) 56(1) Questions of International Law 5, 28.

89 Article 3 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). See also Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *SS and Others v Italy*, and the "Operational Model"' (2020) 21 German Law Journal 385, 411.

which control Libyan migrant detention centres but receive Italian and European funding can give rise to joint responsibility. That is the case if their conduct breaches both States' obligations under international human rights law and can be attributed to Libya as well as Italy under multiple attribution rules.

In sum, then, conduct can be attributed to multiple States in various situations, including: common organs, State organs and non-State agents. The simultaneous application of multiple attribution rules enables situations of joint responsibility to arise. Whether that is the case depends on numerous factors, including the legal and factual relation between the person or entity and the States in question, its conduct, and each State's obligations. The high intensity of cooperation that is required for joint responsibility makes it more likely that cooperative migration control triggers concurrent than joint responsibility. Moreover, the requirement that the conduct in question must breach each State's obligation complicates matters further, especially as regards socio-economic rights. Therefore, whether cooperative migration control gives rise to concurrent, joint or exclusive responsibility depends on numerous factors and sometimes a fine line divides one situation from another. For the same reason, depending on the circumstances, it is possible for responsibility gaps to arise.

4. RESPONSIBILITY GAPS IN THE CONTEXT OF COOPERATIVE MIGRATION CONTROL

The foregoing demonstrated that the principle of independent responsibility which is predominant in international law renders situations of exclusive responsibility likely, although various constellations of concurrent and joint responsibility can arise. The principle of independent responsibility also risks creating responsibility gaps where no State incurs responsibility notwithstanding the fact that human rights violations take place.[90] For instance, the case of *Sari v Turkey and Denmark* concerned the length of criminal proceedings consecutively instituted in Denmark and Turkey against a Turkish national for crimes committed in Denmark. The ECtHR examined the responsibility of both States in turn and with regard to their own obligations under the ECHR.[91] Although the length of the procedures was considerably longer than what is permitted under Article 6 ECHR, the ECtHR found that neither State incurred responsibility because their conduct did not independently amount to a wrongful act.[92]

Likewise, in the context of cooperative migration control, it is possible that no State incurs responsibility even though the socio-economic rights of people on the move are not realised, thus resulting in a responsibility gap. Indeed, the respective obligations of

90 See Nollkaemper (n 2) 528; Ashfaq Khalfan and Ian Seiderman, 'Extraterritorial Human Rights Obligations: Wider Implications of the Maastricht Principles and the Continuing Accountability Challenge' in Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015) 38.

91 ECtHR, *Sari v Turkey and Denmark* App No 21889/93 (8 November 2001) paras 89–100.

92 Den Heijer, 'Shared Responsibility before the European Court of Human Rights' (n 12) 424.

partner and sponsor States do not necessarily 'cover' the corresponding rights of people on the move. These potential gaps in human rights protection can in turn translate into responsibility gaps, since States can contribute to violations of their rights without incurring responsibility under international law. A responsibility gap can occur, for instance, if the partner State complies with the standard of due diligence and the principle of non-discrimination but has insufficient resources available to realise the core socio-economic rights of people on the move, while the sponsor State does not exercise jurisdiction over them. Although the sponsor State could still incur responsibility for failing to comply with its global obligations, it is difficult to demonstrate as a matter of *lex lata* that failing to provide adequate assistance and cooperation to a partner State that hosts people on the move constitutes an internationally wrongful act.

Scholars have addressed the issue of responsibility gaps in the context of sea migration, notably regarding the question whether people on the move at risk of drowning at sea have a right to be rescued. The key issue is whether there is a corresponding duty-bearer that has an obligation to rescue them.[93] On the one hand, Tzevelekos and Katselli portray migration as 'overlapping and interlinked jurisdiction of more than one state over the same person and the situation that person is facing'.[94] As a result, multiple States, such as the State of nationality of people on the move and smugglers, and destination and departure States, are duty-bearers, including when migrants are outside their territory, resulting in concurrent responsibility if they fail to comply with the due diligence standard of conduct.[95] In their view, '[e]very state that is factually connected with a situation calling for the protection of fundamental human rights, and especially of life, has a duty to grant protection.'[96] More specifically, '[f]or international human rights law to be effective, state jurisdiction ought to be expanded to circumstances where human life is under risk, such as in the case of transportation of migrants.'[97] Mann, on the other hand, argues that:

> some migrants are not protected by international human rights law. These are migrants who are beyond every state's jurisdiction (whether on the high seas or, as is often the case, in the SAR zone of another disintegrated state) – migrants whose loss of life is not due to a de facto violation of an existing *de jure* duty. They have fallen into a maritime legal black hole.[98]

Thus, as a matter of *lex lata*, one cannot argue that a drowning in the high seas or in the SAR zone of a state that has collapsed, in circumstances when no other actor is present,

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93 For a broader analysis, including the law of the sea, see Seline Trevisanut, 'Is there a Right to be Rescued at Sea? A Constructive View' (2014) 4 Questions of International Law 3.

94 Vassilis P Tzevelekos and Elena Katselli Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) 86 Nordic Journal of International Law 427, 442.

95 Ibid 444–46.

96 Ibid 456.

97 Ibid 460.

98 Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29 European Journal of International Law 347, 357.

is a violation of law.[99] In other words, in such situations there are no obligations that correspond to the right to life of migrants at sea.

This study has demonstrated that such 'legal black holes' do not exist only in the context of sea migration, but can also arise in other migration control contexts. Gaps in human rights obligations arise when all States involved comply with the due diligence standard of conduct and the principle of non-discrimination, yet this is not sufficient to realise socio-economic rights. Moreover, the law on State responsibility risks transforming gaps in obligations into bigger responsibility gaps. Indeed, in order to incur responsibility, not only must a State breach its obligations under international human rights law, but the conduct in question must also be attributable to it, or it must incur derived responsibility. As the thresholds for attribution and derived responsibility are relatively high, various human rights scholars tend to be critical of the law on State responsibility's ability to address human rights violations.[100] A specific issue is its focus on independent responsibility and its struggle to deal with a plurality of actors and duty-bearers.[101] As a result, international law often fails to assign responsibility in situations involving multiple States.

Whether a responsibility gap arises in a specific situation depends on numerous factors, including the conduct of each State involved and what human rights obligations they are bound by. In general, however, responsibility gaps can occur in the context of cooperative migration control. On the one hand, partner States in the Global South often have limited resources available to realise the socio-economic rights of people on the move on their territory and hence more limited obligations towards them. In other words, if partner States comply with the due diligence standard of conduct and the principle of non-discrimination, the 'breach of an obligation' requirement is not met, even when partner States fail to comply with their core obligations. On the other hand, sponsor States design cooperative migration control policies so as to avoid responsibility. The fact that their involvement tends to be remote and aims at preventing onward movement makes it more difficult to demonstrate that they have direct obligations to contribute to realising the socio-economic rights of people on the move. Moreover, as noted above, it is difficult to demonstrate that sponsor States breach their global obligations if they do not provide adequate international assistance and cooperation to the partner States that they cooperate with. Furthermore, a sponsor State cannot incur derived responsibility unless the partner State commits an internationally wrongful act, which increases the likelihood of responsibility gaps arising.

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99 Ibid 367.

100 See for instance Wouter Vandenhole, 'Obligations and Responsibility in a Plural and Diverse Duty-bearer Human Rights Regime' in Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015) 130; Mark Gibney, *International Human Rights Law: Returning to Universal Principles* (2nd edn, Rowman and Littlefield 2016), ch 2.

101 Khalfan and Seiderman (n 90) 39–40; Vandenhole, 'Obligations and Responsibility in a Plural and Diverse Duty-bearer Human Rights Regime' (n 99) 130–32; George Pavlakos, 'Transnational Legal Responsibility: Some Preliminaries' in Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015) 154–55.

A fine line often separates situations of shared or exclusive responsibility from responsibility gaps. For instance, Turkey may be able to demonstrate that it is unable rather than unwilling to realise the socio-economic rights of all people on the move on its territory on account of their great number and its limited resources. In that case, it incurs no responsibility for the non-realisation of their socio-economic rights. At the same time, it could be argued that EU Member States comply with any obligations they may have towards people on the move in Turkey through the implementation of the Facility for Refugees in Turkey. In that case, a responsibility gap arises, as neither Turkey nor the EU Member States incur responsibility, although the socio-economic rights of people on the move in Turkey are not realised. However, a different assessment of the compliance of the EU Member States and Turkey with their respective obligations could lead to a situation of exclusive responsibility of Turkey, joint responsibility of the EU Member States, or concurrent responsibility between Turkey and the joint responsibility of the EU Member States.

More generally, whether one finds that one constellation rather than another arises depends on one's interpretation of relevant norms. As regards Turkey's responsibility, the main question is whether it complies with the due diligence standard of conduct and the principle of non-discrimination in realising the socio-economic rights of people on the move on its territory, which in turn depends on one's interpretation of what measures it can reasonably be expected to take. As regards EU Member States, a key issue is whether they exercise jurisdiction and hence have direct obligations towards people on the move in Turkey. Under the spatial and personal models of jurisdiction this is unlikely to be the case. Moreover, under the functional model, the scope of any extraterritorial obligations the EU Member States may have also depends on what can reasonably be expected of them. Whether EU Member States can incur responsibility for breaching their global obligations of international assistance and cooperation likewise depends on how one understands and delimits these obligations. Following the interpretation proposed in this study, the EU-Turkey Statement could justify assigning to EU Member States obligations to provide Turkey with international assistance and cooperation. In that case, the key question is whether the support provided through the Facility for Refugees in Turkey suffices to discharge these obligations, which in turn depends on how one interprets their scope. Similarly, whether EU Member States incur derived responsibility on account of their complicity with Turkey depends on one's interpretation of the requirements of Article 16 ARSIWA.

In sum, the interaction between the primary norms of international human rights law and the secondary rules of the law on State responsibility creates the possibility of responsibility gaps: situations where the socio-economic rights of people on the move affected by cooperative migration control are violated yet no State incurs responsibility. This is perhaps not surprising if we recall that sponsor States seek to evade their obligations towards people on the move and partner States often have limited resources available to realise their socio-economic rights. Ultimately, however, whether sponsor States, partner States, both or none incur responsibility depends on the circumstances

of each situation and one's interpretation of the applicable legal norms. Therefore, developments in legal interpretation can contribute to reducing the likelihood of responsibility gaps arising. For instance, a shift from the spatial and personal models to the functional model of jurisdiction, or an understanding that Article 16(a) ARSIWA requires constructive knowledge rather than intent, could limit the occurrence and scope of responsibility gaps.

5. CONCLUSION

As the principle of independent responsibility predominates in international law, the responsibility of each State tends to be determined separately. As a result, it is likely that violations of the socio-economic rights of people on the move give rise to the exclusive responsibility of the partner States that host them. The conceptualisation of shared responsibility used in this study enables us to envisage various other constellations of responsibility. Concurrent responsibility arises when two or more States share responsibility for separate internationally wrongful acts. Joint responsibility for the same internationally wrongful act can also arise, although this is less likely, as it requires a high intensity of cooperation, whereas migration control often entails rather loose forms of cooperation. Finally, cooperative migration control can give rise to responsibility gaps in situations where no State is responsible.

Which constellation of responsibility applies in a specific case depends on various factors, including the conduct of the various States and other actors involved, the extent of the obligations of each State under international human rights law, and one's interpretation of the applicable legal norms. Indeed, a thin line sometimes separates the different constellations of responsibility, and similar policies implemented by different States can give rise to different responsibility assessments. In fact, as each State can incur responsibility on various grounds, it is possible for the same factual situation to lead to multiple constellations of shared responsibility. As there is some overlap between primary norms of international human rights law and secondary rules on State responsibility, the fact that a situation triggers a State's responsibility under one constellation increases the likelihood that it does so under another. Thus, it is conceivable that concurrent responsibility between a sponsor State and a partner State could arise because the sponsor State incurs direct responsibility for breaching its direct obligations, direct responsibility for breaching its global obligations, or derived responsibility. In each of these cases, concurrent responsibility arises if the partner State incurs responsibility for not complying with its own obligations to realise the socio-economic rights of people on the move on its territory. However, the opposite is also true: if it is unlikely that one constellation of shared responsibility arises, it is less probable that other constellations of shared responsibility arise. Therefore, State responsibility can be conceived as a spectrum. At one end we find responsibility gaps, while at the other end of the spectrum simultaneous parallel constellations of shared responsibility

can coexist. Moreover, constellations of joint and concurrent responsibility can combine, creating a multiplicity of possible responsibility assessments. Where on the spectrum a particular situation is located depends on each State's conduct in relation to the human rights violations in question: the more closely each State is involved, the more likely it is that they share responsibility.

CHAPTER VIII
CONCLUSION

1. LOOKING BACK: KEY FINDINGS

This study focused on violations of the socio-economic rights of people on the move who are affected by policies whereby sponsor States in the Global North cooperate with partner States in the Global South to stem migration flows. In answering the research questions, it examined multiple issues and came to various conclusions. This section first recalls the key findings of this study, before answering the main research question and examining what considerations one must take into account when applying the assessment framework developed in this study to specific situations.

1.1. SUMMARY OF THE MAIN CONCLUSIONS

The study started by examining the plight of people on the move in partner States in the Mediterranean, the Asia Pacific and the Americas. Chapter II demonstrated that many risk suffering violations of their socio-economic rights, such as an inadequate standard of living, lack of access to education and health care, and labour exploitation. Furthermore, States often implement multiple measures in parallel and their centre of gravity shifts from the Global North to the Global South as sponsor States seek to avoid triggering their obligations towards people on the move by increasingly cooperating with partner States. Contemporary forms of cooperation include people transfers; the provision of funding, training and equipment; information sharing; and diplomatic relations and development aid conditionality. Crucially, the relation between violations of the socio-economic rights of people on the move in partner States and cooperative migration control depends on the causal link between the two and the question whether States are unable or unwilling to realise the socio-economic rights of people on the move affected by these policies. The coexistence of multiple measures that results in the containment of people on the move in the Global South is relevant in this regard insofar as it can prevent people on the move from leaving the Global South altogether.

While Chapter II provided the empirical backdrop for the legal analysis, Chapters III to V addressed the first research question: *what is the scope of States' international obligations as regards the socio-economic rights of people on the move in the context of cooperative migration control?* Chapter III proposed a conceptualisation of State

obligations by analysing various concepts and principles that serve to delimit the scope of States' obligations to realise the socio-economic rights of people on the move at a general level. It first sought to transcend the dichotomy between civil and political rights on the one hand and economic, social and cultural rights on the other hand by demonstrating that violations of socio-economic rights can entail violations of civil and political rights and vice versa. Second, the due diligence standard helps determine the scope of States' obligations under international human rights law: it requires States to take reasonable measures to avoid reasonably foreseeable human rights violations. Thus, two questions must be answered to determine whether a State complied with its obligations: is a human rights violation reasonably foreseeable (knowledge requirement) and did the State take reasonable measures to avoid it (ability requirement)? Third, people on the move are, in principle, entitled to the realisation of their core socio-economic rights, which can be defined as the minimum standard of human rights protection under which no person is allowed to fall. Core socio-economic rights are not absolute, as States' corresponding core obligations must accommodate the fact that they may lack sufficient resources to realise core rights. However, it is more difficult for States to justify the non-realisation of the core socio-economic rights of people on the move. Fourth, the principle of non-discrimination prevents States from differentiating between people on the move and their own nationals unless such distinction is proportionate and serves a legitimate aim. States must always strive to realise at least the core socio-economic obligations of people on the move and beyond the core only non-arbitrary limitations of the socio-economic rights of people on the move are permitted.

Finally, Chapter III examined the role of territory, jurisdiction and 'international assistance and cooperation' in delimiting State obligations. It recalled that, under international human rights law, States have obligations towards people within their jurisdiction. While there is a rebuttable presumption that a State exercises jurisdiction on its territory, it can also have obligations towards individuals abroad, provided there is a jurisdictional link between the State and the person in question. Therefore, while the territorial State is presumed to have the primary obligation to realise the human rights of individuals on its territory, other States can have complementary obligations. Article 2(1) ICESCR does not mention either territory or jurisdiction but rather requires States to 'take steps, individually and through international assistance and co-operation'. Thus, with regard to socio-economic rights, a State can have two types of obligations under international human rights law: *direct obligations*, which it owes to persons within its jurisdiction, both on its territory and abroad; and *global obligations*, which entail a duty to contribute to the international community's efforts to provide international assistance and cooperation to those States that lack sufficient resources to realise socio-economic rights.

Partner States are presumed to exercise jurisdiction and hence to have the primary direct obligation to realise the socio-economic rights of people on the move who are on their territory. They must take reasonable measures to avoid reasonably foreseeable

violations of their socio-economic rights in accordance with the due diligence standard. Moreover, partner States must seek to comply as a matter of priority with their core obligations, including towards people on the move, and any difference between the latter and nationals of partner States must be proportionate and serve a legitimate aim. Sponsor States, in turn, only have direct obligations to realise the socio-economic rights of people on the move over whom they exercise jurisdiction. While any such obligations, to the extent that they exist, are presumed to be complementary to the primary obligations of partner States, sponsor States must seek to realise, as a matter of priority, core socio-economic rights, and they may not differentiate arbitrarily on the ground of nationality. In addition to their direct obligations, sponsor States have global obligations of international assistance and cooperation. These are obligations to contribute to the international community's efforts to help realise socio-economic rights in other countries, which may include partner States.

Chapters IV and V built on these findings by examining in detail the obligations of partner and sponsor States respectively. Chapter IV clarified that partner States must use their maximum available resources, including those available through international assistance and cooperation, to comply in priority with their core obligations. They have an immediate obligation to take steps to increase the level of realisation of socio-economic rights over time, and any retrogression or limitation must be justified, especially as regards core socio-economic rights. Yet partner States' limited available resources may prevent them from realising the core socio-economic rights of people on the move and from increasing the level of rights realisation over time, notably in situations of mass influx. Moreover, the 'size' of the core and the clarity of its contours vary. On the one hand, core obligations that are directly relevant for the right to an adequate standard of living, such as the rights to water and food, apply to people on the move in the same way as nationals. Likewise, children on the move must at least have access to compulsory, free primary education, and all people on the move have a right to access basic health care. It is also likely that partner States must grant people on the move access to social security where this is necessary to realise the core content of other rights. On the other hand, partner States do not have a core obligation to grant people on the move access to their labour market, although the right to just and favourable conditions of work applies to people on the move and nationals alike.

Chapter V, in turn, examined the twofold obligations of sponsor States to realise the socio-economic rights of people on the move affected by cooperative migration control. First, if there is a jurisdictional link between a person on the move and a sponsor State, the latter may have *direct obligations* under international human rights law towards the former. While different models of extraterritorial jurisdiction exist, the functional model best captures the forms of involvement of sponsor States and their impact on people on the move affected by cooperative migration control: a State exercises jurisdiction when it can take reasonable measures to avoid reasonably foreseeable human rights violations. In other words, the due diligence standard of conduct determines, in a particular situation, whether a State has any direct obligations

and, if it does, what their scope is. As there is often a weak causal link between the conduct of sponsor States and the violations of the socio-economic rights of people on the move affected by cooperative migration control, not all forms of involvement create a jurisdictional link. However, although cooperative migration control policies are designed at least in part to avoid sponsor States incurring obligations under international human rights law, the fact that they engage in such policies may in itself establish a jurisdictional link between them and people on the move in partner States.

Second, sponsor States have *global obligations* to contribute to the international community's efforts to provide international assistance and cooperation to States that lack the resources necessary to realise socio-economic rights, including partner States in the Global South that host people on the move. Under international human rights law, obligations of international assistance and cooperation are legally binding and not merely moral obligations, although there is no bilateral obligation to transfer resources. Nevertheless, cooperation on migration control could justify assigning to sponsor States an obligation to provide international assistance and cooperation to partner States to enable the latter to realise the socio-economic rights of people on the move affected by cooperative migration control. Thus, sponsor States that contribute to violations of the socio-economic rights of people on the move in partner States would have to provide international assistance and cooperation to mitigate the negative effects of their policies. Vice versa, cooperation on migration control can be a way for sponsor States to discharge their global obligations. As the principal aim of cooperative migration control policies is to prevent people on the move from reaching sponsor States in the Global North, they are not designed primarily to discharge the latter's obligations under international human rights law. Yet they have the potential to do so, provided the assistance contributes to realising the socio-economic rights of people on the move.

Since responsibility is closely linked to obligations, the answer to the second research question builds on the findings above: *how does international law assign responsibility for violations of the socio-economic rights of people on the move where multiple States are involved in migration control?* Chapter VI examined State responsibility in the context of cooperative migration control. It recalled that a State incurs direct responsibility when it commits an internationally wrongful act: conduct that is attributable to it breaches its obligations under international law. In the context of international human rights law, the following questions play a role when determining whether a State incurs responsibility:

1. Is the conduct that allegedly triggers jurisdiction attributable to the State?	2. Does the conduct that is attributable to the State trigger its jurisdiction?
3. Is the conduct that allegedly breaches an international obligation of the State attributable to it?	4. Does the conduct that is attributable to the State breach its obligations?

Table 1. Responsibility questions (general)

In order to determine if a sponsor or partner State incurs direct responsibility, these four questions must be answered positively, with the exception of sponsor States' global obligations for which the first two questions are not relevant.

Partner States can incur responsibility for violations of the socio-economic rights of people on the move on their territory in two ways: either on account of the conduct of their own State organs, or because the conduct of non-State actors is attributable to them. The attribution requirement does not create a significant obstacle to assigning responsibility to partner States, because ultimately they have the primary obligation under international law to realise the socio-economic rights of people on the move on their territory, and they must comply with the due diligence standard and the principle of non-discrimination in doing so. Sponsor States, in turn, can incur responsibility in various ways. First, they can incur direct responsibility if they breach their direct obligations. That is the case if they exercise jurisdiction but do not comply with their obligations under international human rights law. Second, if we accept that cooperation on migration control can justify allocating obligations of international assistance and cooperation to sponsor States that cooperate with partner States, the former could incur direct responsibility for failing to comply with their global obligations. Third, sponsor States can incur derived responsibility in relation to partner States' failure to realise the socio-economic rights of people on the move. In particular, the complicity rule may give rise to the derived responsibility of sponsor States on account of the aid or assistance that they provide to partner States.

Finally, Chapter VII shifted the analysis from the perspective of a single State to a bird's eye view of the responsibility of multiple States involved in cooperative migration control in order to answer the second research question. As the principle of independent responsibility predominates international law, the responsibility of each State tends to be determined separately. As a result, it is likely that violations of the socio-economic rights of people on the move give rise to the exclusive responsibility of the partner States that host them. Indeed, partner States are likely to incur responsibility when they do not realise the core socio-economic rights of people on the move on their territory, whereas the conduct that is attributable to sponsor States only rarely breaches their direct or global obligations as regards the violations of socio-economic rights of people on the move in partner States. Moreover, it is possible that neither the partner State nor the sponsor State incur responsibility for violations of the socio-economic rights of people on the move affected by cooperative migration control, leading to responsibility gaps.

However, other constellations of responsibility are possible. Shared responsibility arises when multiple States commit one or more internationally wrongful acts that contribute to violations of the socio-economic rights of people on the move affected by cooperative migration control. More specifically, concurrent responsibility arises when two or more States share responsibility for separate internationally wrongful acts. Various constellations of concurrent responsibility can arise in the context of cooperative migration control, including: when a sponsor State and a partner State both breach their direct obligations; when a sponsor State incurs derived responsibility in connection with the responsibility of a partner State; and possibly when multiple

sponsor States fail to comply with their global obligations of international assistance and cooperation. Furthermore, cooperative migration control can give rise to joint responsibility, either between multiple sponsor States or between a partner and a sponsor State. Joint responsibility arises when multiple States incur responsibility for a single internationally wrongful act. As it requires a high intensity of cooperation, joint responsibility is less likely to arise than concurrent responsibility, since cooperative migration control often entails rather loose forms of cooperation. Finally, it is possible for the same factual situation to lead to multiple constellations of shared responsibility. Thus, it is conceivable that concurrent responsibility between a sponsor State and a partner State could arise because the sponsor State incurs direct responsibility for breaching its direct obligations, direct responsibility for breaching its global obligations, or derived responsibility. In each of these cases, concurrent responsibility arises if the partner State also incurs responsibility for not complying with its own obligations to realise the socio-economic rights of people on the move on its territory. Moreover, constellations of joint and concurrent responsibility can combine, creating a multiplicity of possible responsibility assessments.

1.2. ANSWERING THE MAIN RESEARCH QUESTION

The foregoing enables us to develop an assessment framework that answers the main research question: to what extent and how do violations of socio-economic rights of people on the move give rise to the international responsibility of States involved in cooperative migration control? This framework, and hence the answer to the question above, consists of three steps. First, the prerequisite for responsibility to arise is met, since violations of the socio-economic rights of people on the move contained in partner States in the Global South are widespread. Moreover, the various States involved in cooperative migration control contribute to these violations in various ways: while the partner States that host people on the move often fail to realise their socio-economic rights, the involvement of sponsor States in the Global North also contributes, to varying degrees, to their plight.

Second, each State involved incurs responsibility under international law if its contribution to the violations in question amounts to an internationally wrongful act. That is the case if conduct that is attributable to it breaches its obligations under international law. *Partner States* are presumed to exercise jurisdiction over their territory and to have the primary obligation to realise the socio-economic rights of people on the move on their territory. As ultimately the State has the obligation to realise socio-economic rights, the attribution question does not pose an obstacle for the responsibility of partner States. Therefore, partner States incur responsibility when they fail to comply with the due diligence standard and the principle of non-discrimination. While the scope of their obligations depends on their available resources and increases over time, they must seek to comply with their core obligations as a matter of priority. In other words, partner States incur responsibility when they are unwilling rather than unable to comply

with their obligation to realise the socio-economic rights of people on the move. *Sponsor States*, for their part, can incur responsibility on various accounts. First, they can incur responsibility if they breach their direct obligations towards people on the move. That is the case if conduct that is attributable to them establishes a jurisdictional link between them and people on the move and breaches their obligations towards the latter. Second, they can incur derived responsibility, for instance because they provide aid and assistance to partner States, provided the latter commit an internationally wrongful act. Third, sponsor States could arguably incur responsibility if it can be demonstrated that they breach their global obligations by failing to provide adequate international assistance and cooperation to partner States. Overall, the closer the involvement of sponsor States in cooperative migration control and the greater the impact of their conduct on the plight of people on the move, the more likely it is that they incur responsibility under international law for violations of their socio-economic rights.

The third step in answering the main research question requires us to examine how the responsibility of one State relates to that of other States. Cooperative migration control can lead to responsibility gaps: situations where the socio-economic rights of people on the move are not realised while neither partner nor sponsor States incur responsibility. However, it is often more likely that the partner State incurs responsibility but not the sponsor State, leading to the exclusive responsibility of the former. Finally, various constellations of shared responsibility can arise. A sponsor State and a partner State could share concurrent responsibility if, in addition to the responsibility of the partner State, the sponsor State incurs either direct responsibility for breaching its direct and/or global obligations or derived responsibility. Multiple sponsor States could also share concurrent responsibility for breaching their global obligations. Although it is less likely to arise, joint responsibility between sponsor States or between a sponsor State and a partner State is conceivable. Moreover, these various constellations of shared responsibility can be combined into more complex ones.

Thus, if we conceive of responsibility as a spectrum, at one end international law enables simultaneous parallel assignments of responsibility and, at the other end of the spectrum, it allows for the existence of responsibility gaps. Constellations of joint and concurrent responsibility can combine, creating a multiplicity of possible responsibility assessments. Indeed, a fine line sometimes separates the different constellations of responsibility. Overall, where on the spectrum a particular situation is located depends on each State's conduct in relation to the human rights violation in question: the more closely each State is involved, the more likely it is that they share responsibility. Which constellation(s) of responsibility arise(s) in a specific case depends on various factors, including the violations of socio-economic rights suffered by people on the move, the conduct of State organs and non-State actors involved, their relation to the States involved, to what extent their conduct contributes to the violation of the socio-economic rights of people on the move, what obligations each State has under international human rights law, and one's interpretation of the applicable legal norms. Therefore, similar policies implemented by different States can give rise to different responsibility assessments.

1.3. APPLYING THE ASSESSMENT FRAMEWORK

The assessment framework proposed above does not suffice to answer *in concreto* the question whether States that cooperate on migration control comply with their obligations under international human rights law and whether they incur responsibility. Rather, it must be applied in specific cases, taking into account the following considerations. First, the assessment whether States that cooperate on migration control comply with their obligations under international human rights law depends on what specific obligations they are bound by. States that have ratified human rights treaties including provisions on socio-economic rights, especially the ICESCR, have more far-reaching obligations towards people on the move than States that have not done so. Therefore, the same situation can lead to different constellations of responsibility depending on what treaties a State is a party to. Nevertheless, the overlap between various rights, especially between core socio-economic rights and civil and political rights such as the right to life and the prohibition of torture and other forms of ill-treatment, as well as the possibility that certain elements of socio-economic rights have reached customary status, limit the extent to which such differences can exist. In other words, the scope of States' obligations only depends to a limited extent on which treaties a State has ratified.

Second, notwithstanding this study's efforts to clarify the relevant international norms, some issues need elucidation. For instance, have core obligations reached the status of customary international law? What are the exact contours of the complicity rule? The legal framework itself needs further clarification before it can be applied in a specific case. Moreover, any assessment ultimately depends on how one interprets certain concepts. For instance, under the due diligence standard, how do we determine what can reasonably be expected of States? Likewise, the principle of non-discrimination allows States to differentiate between people on the move and their own nationals provided such limitation is proportionate and serves a legitimate aim, which raises the question of what counts as 'proportionate' and 'legitimate' in a specific context. Interpretations of international norms can reflect the political context in which they are advanced. Accordingly, different actors in the migration debate could come to different conclusions when applying the assessment framework in a specific situation.

Third, applying the due diligence standard to States' direct human rights obligations precludes abstract determinations of breaches of State obligations, since what is required in specific circumstances depends on a number of factors. In the context of socio-economic rights, a State's available resources play an important role in determining whether it took steps 'to the maximum of its available resources' and whether any non-compliance with core obligations is justified. Yet assessing whether a State used its maximum available resources to progressively realise socio-economic rights requires tools that go beyond legal analysis. This includes empirical methods such as public budget analysis, the achievement possibilities of States, and causality and

diagnostic monitoring.[1] Thus, in order to apply the assessment framework developed in this study in a specific case, we must operationalise the due diligence standard. This requires moving beyond a purely legal analysis and using other methodologies developed to assess State compliance with their human rights obligations, especially in the field of socio-economic rights.

Finally, various other factors play a role when determining whether violations of socio-economic rights of people on the move give rise to the international responsibility of States involved in cooperative migration control. They include: the plight of people on the move, which State and non-State actors are involved in migration control, what their respective conduct is, what their relation is to the various States involved, and to what extent they contribute to the non-realisation of the socio-economic rights of people on the move. However, sufficient information about these factors must be available in order to apply the assessment framework to a specific case. Yet secrecy often surrounds migration control policies and it can be difficult to gather information about what happens in practice.[2] This may complicate the determination of responsibility in a specific situation.

2. LOOKING AGAIN: FURTHER INSIGHTS

In addition to the key findings outlined above, the previous chapters revealed that certain concepts weave like a red thread through this study. More specifically, the following recurrent issues play a role at different levels of analysis: the interaction between international human rights law and the law on State responsibility; assistance and cooperation; causation; and time. This section discusses them in turn.

2.1. INTERACTION BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND THE LAW ON STATE RESPONSIBILITY

As one of the main drivers behind the development of cooperative migration control is the Global North's desire to evade obligations and responsibility for the plight of 'unwanted' people on the move, this study raises the question to what extent it

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1 Olivier De Schutter, 'Introduction' in Olivier de Schutter (ed), *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2013) xxxii-xli. See for instance Eitan Felner, 'Closing the "Escape Hatch": A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights' (2009) 1 Journal of Human Rights Practice 402; Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, *Fulfilling Social and Economic Rights* (OUP 2015); Rodrigo Uprimny, Sergio Chaparro Hernández and Andrés Castro Araújo, 'Bridging the Gap: The Evolving Doctrine on ECSR and "Maximum Available Resources"' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019); Olivier De Schutter, 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019).

2 Chapter II, Section 1.

succeeds in doing so. The previous chapters demonstrated that both the primary norms of international human rights law and the secondary rules on State responsibility constrain sponsor States. More specifically, their involvement in cooperative migration control may in fact trigger the very obligations that they seek to evade. Notably, under the functional model of jurisdiction, a sponsor State could incur direct obligations towards people on the move if it fails to take reasonable measures to avoid reasonably foreseeable violations of their socio-economic rights. Likewise, while the exact nature and scope of global obligations remain unclear, the failure of sponsor States in the Global North to provide adequate international assistance and cooperation to partner States in the Global South that host people on the move could breach their global obligations under international human rights law. There are also indications that the conduct of non-State actors or foreign State agents is attributable to a State when the latter acquiesces in such conduct, at least in a territorial setting. Even where sponsor States do not have any obligations under international human rights law, they could nevertheless incur derived responsibility for aiding or assisting partner States. Thus, the interaction between the primary norms of international human rights law and the secondary rules on State responsibility constrains the extent to which the Global North can cooperate with the Global South to stem migration flows without incurring international responsibility.

More specifically, Global North States face a catch-22 situation: if they do not implement migration control policies, people on the move reach their territories, thereby triggering human rights obligations and possibly responsibility for human rights violations. At the same time, if they act to prevent people on the move from arriving at their borders, they must do so in a way that complies with their direct and global obligations under international human rights law and avoids triggering their derived responsibility. By opting for the second option, sponsor States successfully manage to at least reduce their obligations and limit the possibilities of incurring responsibility. Given the importance of territory and jurisdiction in determining the scope of State obligations, sponsor States succeed to some extent in evading obligations and responsibility: insofar as people on the move remain on the territory of partner States, the latter are the primary duty bearers, and sponsor States have at most a complementary obligation to realise their socio-economic rights. Therefore, international law not only constrains but also facilitates the Global North's attempts to stem migration flows without incurring any obligations or responsibility, since sponsor States can limit their obligations and responsibility by cooperating with partner States.

The analysis in the previous chapters revealed that responsibility is closely linked to obligations: whether a State has obligations towards people on the move is a good predictor of whether it can incur responsibility for violations of their socio-economic rights. In other words, the more likely a State is to have obligations under international law and breach them, the more likely it is that it will incur responsibility for human rights violations. There are various parallels between international human rights law and the law on State responsibility, as both fields rely on concepts such as knowledge

and control. These parallels raise the possibility of assigning responsibility on multiple grounds in a particular case. As the object and purpose of international human rights law is human rights protection, the possibility of multiple assignments of responsibility is desirable, as it reduces the risk of responsibility gaps and impunity. In addition, the primary norms of international human rights law and the secondary rules on State responsibility can complement each other. Indeed, a State can incur responsibility either on account of the conduct of its own State organs, or because the conduct of non-State actors is attributable to them. If the conduct of a non-State actor itself is not attributable to the State, the latter can nonetheless incur responsibility for its own conduct in avoiding human rights violations committed by non-State actors.

However, the close link between responsibility and obligations under international law can also lead to negative outcomes in terms of human rights protection. This study distinguishes between a breach of an obligation by a State and a violation of an individual's right: the latter can occur without the former. Under international human rights law, the due diligence standard requires States to take reasonable measures to avoid reasonably foreseeable human rights violations. There is not necessarily a one-on-one correspondence between the breach of a State's obligation and the violation of an individual's human rights, especially where the realisation of the right depends on multiple States. As a result, a person can suffer a human rights violation without any State having breached its obligations. Moreover, if it is unlikely that a State incurs obligations under international human rights law, it is likewise improbable that it will incur responsibility. The law on State responsibility is unlikely to close any responsibility gaps that risk arising under international human rights law for various reasons. Most importantly, direct responsibility can only arise if there is a breach of an obligation. Gaps in human rights protection are thus transposed to the law on State responsibility: a human rights violation without a corresponding breach of State obligations cannot amount to an internationally wrongful act. In fact, the secondary rules on State responsibility risk exacerbating responsibility gaps. Indeed, conduct that breaches a State's human rights obligations is not necessarily attributable to it, as the relatively high standards for attribution of conduct under Articles 5 and 8 ARSIWA illustrate. Finally, although the rules on derived responsibility could fill potential responsibility gaps because a State can incur derived responsibility without breaching a human rights obligation, their relatively high thresholds make it unlikely that they apply in situations that are not already covered by the primary norms of international human rights law. Therefore, to the extent that a State can incur responsibility at all, the nature of international human rights norms as primary rules often already provides grounds for establishing its responsibility without having recourse to the secondary rules on State responsibility.

Furthermore, while concepts such as knowledge and control govern both international human rights law and the law on State responsibility, there are differences between the two fields. The pronouncements of human rights treaty monitoring bodies suggest that, at least in territorial settings, they apply the relatively low standard of

acquiescence for attribution of conduct rather than the ARSIWA rules. This is in line with the teleological approach adopted by various human rights treaty bodies when interpreting State obligations.[3] It may also explain why the primary norms of international human rights law cover many instances of State responsibility for human rights violations. The law on State responsibility, for its part, contains relatively high standards for attribution of conduct and derived responsibility. Arguably, this is no accident, as States, who are the actors that ultimately make international law, seek to design the law on State responsibility in such a way that it enables them to escape responsibility.[4] More specifically:

> States exercise power over international law-making or particular international institutions, and by influencing the rules of responsibility they can determine whether or not the exercise of a particular type of conduct (including participation in concerted action) engages the responsibility of a state. The ineptitude of international law for dealing with harmful consequences of concerted action serves states and other actors well, by allowing them to engage in blame-avoidance and blame-shifting, thus shielding themselves from responsibility.[5]

In other words, the relatively high thresholds for attribution and derived responsibility under the law on State responsibility can be seen to shield States from responsibility when they act in concert. Nevertheless, as the next section discusses, international law does not remain entirely silent on the issue of cooperation itself.

2.2. ASSISTANCE AND COOPERATION

It comes as no surprise that the concepts of assistance and cooperation play a key role in a study that focuses on cooperation in the context of migration control. In terms of empirical reality, cooperation lies at the very core of cooperative migration control. It also forms the cornerstone of recent instruments such as the New York Declaration and the Global Compacts. As a matter of State practice, cooperation on migration control arguably includes two sides of the same coin. On one side, States cooperate to stem migration flows. Such cooperation is designed to avoid the Global North incurring obligations and responsibility and can lead to violations of the socio-economic rights of people on the move. These violations, in turn, can have a deterrent effect: violations of the socio-economic rights of people on the move in neighbouring partner States can contribute to preventing new migratory movements from countries of origin

3 Chapter I, Section 5.1.

4 See Robert McCorquodale, 'Impact on State Responsibility' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights on General International Law* (OUP 2009) 236; Mark Gibney, *International Human Rights Law: Returning to Universal Principles* (2nd edn, Rowman and Littlefield 2016) 50.

5 André Nollkaemper, 'The Duality of Shared Responsibility' (2018) 24 Contemporary Politics 524, 532.

further upstream. However, violations of socio-economic rights in partner States can also trigger migration flows, as people on the move hope to access better living conditions elsewhere. On the flip side of the coin, the New York Declaration and the Global Compacts rely on cooperation to manage migration flows and the reception of people on the move. Cooperation as envisaged in these instruments can contribute to the realisation of the socio-economic rights of people on the move, which may in turn take away incentives for onward movement and thus contribute to stemming migration flows to the Global North. Indeed, some cooperative migration control policies, such as the EU-Turkey Statement, explicitly include measures whereby sponsor States provide assistance to contribute to realising the socio-economic rights of people on the move in partner States.

Likewise, in international law the concepts of international assistance and cooperation include two aspects. On the one hand, the UN Charter requires States to take joint and separate action, in cooperation with the UN, to realise socio-economic rights. Under international human rights law States have obligations of international assistance and cooperation to contribute to the international community's efforts to realise socio-economic rights in countries that lack sufficient resources to do so. The law on State responsibility, on the other hand, prohibits a State from aiding or assisting another State in committing an internationally wrongful act. In other words, international law obliges States to cooperate to realise rights, but simultaneously prohibits States from cooperating to violate them. More specifically, with regard to the differences in available resources between the Global North and the Global South and the consequent level of realisation of socio-economic rights, international law ultimately requires, to some extent, that the Global North transfers resources to the Global South in order to contribute to the realisation of socio-economic rights, while at the same time prohibiting the transfer of resources that contribute to violations of these rights. Therefore, cooperation on migration control – which involves the transfer of resources from the Global North to the Global South – arguably has the potential to contribute to discharging the Global North's obligations of international assistance and cooperation. Provided it focuses on human rights protection rather than deterrence, such cooperation can have a positive rather than a negative impact on the socio-economic rights of people on the move. More generally, the link between migration control policies and the plight of people on the move illustrates the importance of causation.

2.3. CAUSATION

This study revealed that causation plays an important role when assigning responsibility for human rights violations. Indeed, a key question is to what extent cooperative migration control measures cause violations of socio-economic rights, given that their main aim is to stem migration flows. Unlike the principle of *non-refoulement* and the right to leave, which protect rights that are directly affected by migration control,

violations of socio-economic rights are often an indirect consequence of such measures. On the one hand, it is arguable that there is a weak causal link between migration control measures – and notably the conduct of Sponsor States – and the harm suffered by people on the move. On the other hand, the deterrence rationale that underlies many cooperative migration control policies suggests that at least in some cases both sponsor and partner States may be unwilling rather than unable to realise the socio-economic rights of people on the move. Moreover, it is arguable that cooperative migration control, which is designed to contain 'unwanted' people on the move in partner States in the Global South, inherently risks leading to violations of their socio-economic rights. More specifically, the simultaneous implementation of multiple migration control measures that stem migration flows from the Global South reinforces the causal link with the plight of people on the move affected.

Furthermore, causation plays a role when determining States' obligations and responsibility. It indirectly plays a role under the due diligence standard: the closeness of the causal link between State conduct and a human rights violation influences the scope of consequences that are deemed to be 'reasonably foreseeable'.[6] Consequently, if the causal link is too weak, there are no obligations. Causation plays a similar role in the law on State responsibility, for instance as a requirement under the complicity rule: a State can only incur responsibility for aiding or assisting another one in committing an internationally wrongful act if there is a sufficiently close causal link between the aid or assistance provided and the human rights violation in question. Likewise, a precondition for shared responsibility to arise is the existence of a causal link between State conduct and injury: each State that incurs responsibility must have contributed to the human rights violation.

Thus, there are parallels between the different levels of analysis: the closer the causal link between a State's conduct and the human rights violation, the more likely it is that the State will incur obligations and responsibility under international law. However, the threshold for responsibility under international law does not match contributions to harm in terms of empirical reality, as it is possible for States to contribute to a human rights violation without incurring responsibility. While the standard of due diligence, the functional model of jurisdiction and global obligations of international assistance and cooperation go some way towards encompassing the more remote ways in which States can negatively affect human rights, they fail to entirely close the gap in human rights protection. As noted above, the law on State responsibility's relatively high thresholds further enable States to contribute to harm without incurring any responsibility, leading to potential responsibility gaps.

Finally, the ARSIWA exclude causation from the constitutive elements of State responsibility.[7] According to Article 2 ARSIWA, a State incurs responsibility if

6 See Chapter III, Section 3. On causality and primary norms see also Andrea Gattini, 'Breach of International Obligations' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 30–31.

7 Dávid Miklós Pusztai, *Causation in the Law of State Responsibility* (PhD thesis, Cambridge University, 2017) 13.

conduct is attributable to it and breaches its international obligations. Nevertheless, in practice, causation permeates determinations of responsibility in international law and often forms a condition for responsibility.[8] For instance, international dispute settlement bodies, including human rights treaty bodies, use causation to determine whether the conduct of a non-State actor is attributable to the State.[9] Yet there is no straightforward definition or formula in international law that can determine whether a causal link exists between State conduct and harm caused.[10] Therefore, both scholars and adjudicators should pay more attention to the issue of causation, especially as regards its role in determinations of responsibility under international law. This is particularly true for violations of socio-economic rights, where causation plays a crucial role: they can rarely be reduced to the conduct of a single actor, and omissions can be as harmful as actions.[11] As the realisation of socio-economic rights depends on numerous factors, it raises complex issues of causation. Moreover, where multiple States are involved, the direct causal effect between State conduct and human rights violations may be difficult to establish.[12] Various scholars have examined different ways of determining responsibility for violations of socio-economic rights in situations involving multiple duty-bearers, including not only causation but also other concepts such as capacity, proximity and foreseeability.[13] As this study illustrates, situations of international cooperation call for renewed attention to the issue of causation. The same applies to the role of time.

2.4. TIME

Finally, this study illustrated how the passing of time plays a role at different levels of analysis. At its most obvious, cooperative migration control policies themselves develop over time, in response to the rationales of both partner and sponsor States, changes in migratory patterns and technologies, policy transfers and evolving

8 André Nollkaemper and Ilias Plakokefalos, 'Conclusions: Beyond the ILC Legacy' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 350.

9 Pusztai (n 7) 236.

10 Sigrun I Skogly, 'Causality and Extraterritorial Human Rights Obligations' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 236.

11 Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 183; Skogly (n 10) 253–56.

12 Skogly (n 10) 235.

13 See for instance Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP 2007) ch 5; Skogly (n 10); Margot E Salomon, 'Deprivation, Causation and the Law of International Cooperation' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013).

interpretations of international law. Likewise, numerous cooperation agreements have come to life and died over the past decades. For instance, the cooperation between Italy and Libya and between Australia and Nauru has evolved over time, with episodes of cooperation ending before being rekindled several years later in new forms, with partner States playing an increasingly important role. As forms of cooperation change over time, so does their effect on the socio-economic rights of people on the move. Even where policies remain largely unchanged, their impact nevertheless changes: the passing of time exacerbates the impact of deprivation and lack of perspectives, unless measures are taken to address this. For instance, mental and physical health issues worsen over time, and while a child's inability to attend school for a week is negligible, the inability to access education for years can have a dramatic impact on her life.

International human rights law reflects this: 'waiting is an accepted part of rights realization.'[14] More specifically, the passing of time plays a role in different ways under international human rights law. First, the duration of a certain situation plays a role when determining whether a certain situation amounts to a human rights violation: the duration of rights deprivation must not be disproportionate. In other words, the passage of time can transform an otherwise unchanged situation into a human rights violation. This implies that the obligations of States can increase over time: if a given situation transforms into a violation as time passes, more is expected of States over time. Second, the 'fulfil' element of the tripartite typology of obligations to respect, protect and fulfil suggests that the general level of protection of human rights is expected to increase over time. If we accept that the obligation to fulfil imposes on States the positive obligation to 'take proactive steps to move towards the full realisation of the right',[15] it implies that the level of rights-realisation increases over time. However, as this study has demonstrated, human rights are not necessarily increasingly fulfilled. Third, as regards economic, social and cultural rights, the obligation of progressive realisation explicitly recognises the importance of time in the realisation of human rights. Article 2(1) ICESCR famously requires States to 'take steps (…) with a view to achieving progressively the full realization of the rights recognized'. Yet here also, notwithstanding international human rights law's expectations of progressive realisation of rights, in practice retrogressive measures can be legitimate, for instance in cases of mass influx. Fourth, as people on the move are not nationals of the partner States that host them, the duration of their stay on their territory arguably increases the extent of partner States' obligations towards them. Indeed, the longer a person on the move remains on its territory, the harder it is to argue that differentiating between her and nationals is proportionate and serves a legitimate aim, as required by the principle of non-discrimination. The Refugee Convention reflects this, as States' obligations towards refugees increase as the level of attachment of the refugee to the

14 Katharine G Young, 'Waiting for Rights: Progressive Realization and Lost Time' in Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019) 654.

15 De Schutter (n 1) xvii. See also Chapter III, Section 2.

State increases.[16] Thus, the longer people on the move stay on the territory of a partner State, the more that State must do to progressively realise their rights.

Furthermore, time plays a twofold role at the level of legal interpretation. On the one hand, insofar as international human rights law remains under development, recent interpretations carry more weight than older ones. These considerations also apply to international law more generally and especially to the law on State responsibility: trends in legal interpretations can point towards future developments. On the other hand, the principle of evolutionary interpretation is prevalent in international human rights law: human rights treaties are interpreted 'in the light of present day conditions' rather than according to the situation that prevailed when they were drafted. While trends in legal interpretations and an evolutionary approach to interpretation often increase human rights protection, this is not necessarily the case, as illustrated by recent ECtHR case law on migration control.[17]

In conclusion, the role of time has received insufficient attention in scholarship on socio-economic rights.[18] It deserves more attention, including in international human rights law and international law more generally. Indeed, time plays a role in terms of State practice, people's lived experiences, and interpreting and delimiting State obligations and responsibility. In particular, the question arises to what extent time plays a role in determining States' compliance with the due diligence standard. While this issue has not yet been addressed by scholars, it deserves attention.

3. LOOKING AHEAD: AVENUES FOR FURTHER RESEARCH

Finally, in addition to the issues discussed above which require more attention, such as causation and time, this study has revealed two complementary avenues for further research. First, since 'responsibility as a concept misses the sanction dimension of accountability',[19] the following question arises: what are the implications of this study's findings for issues of accountability? In other words, can the responsible State(s) be held accountable? This study provides a useful starting point for an analysis of the accountability of States involved in cooperative migration control for violations of the socio-economic rights of people on the move. It proposed an assessment framework that not only enables a principled discussion of the responsibility of States in the context of cooperative migration control, but can also be tested through litigation. Its findings

16 James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 154; see also Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 41–43.

17 Chapter I, Sections 5.2.1 and 5.2.2.

18 Young (n 14) 675.

19 Arne Vandenbogaerde, *Towards Shared Accountability in International Human Rights Law* (Intersentia 2016) 37.

regarding the extraterritorial obligations of sponsor States may be particularly useful, in terms of both the functional model of extraterritorial jurisdiction and the suggestion to assign obligations of international assistance and cooperation to sponsor States that cooperate with partner States on migration control. Any analysis of State accountability in the context of cooperative migration control can build on existing literature in various fields, including accountability in the context of migration control;[20] the justiciability of socio-economic rights;[21] and shared responsibility and accountability for human rights violations.[22]

Second, while this study focused on the responsibility of States under international law, it illustrated that cooperative migration control also involves other actors, notably private actors and international organisations like the UNHCR and IOM, as well as the EU and its agencies in the European context. An exhaustive analysis of responsibility and accountability for human rights violations in the context of cooperative migration control should include other actors in addition to States. Accordingly, further research can build on this study by examining to what extent and how other actors than States are involved in cooperative migration control, to what extent they have obligations towards people on the move, and to what extent they can incur responsibility and be held accountable for violations of their socio-economic rights.

20 See Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018); Nikolas Feith Tan, *International Cooperation on Refugees: Between Protection and Deterrence* (PhD thesis, Aarhus University 2019) ch 6; Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311 and other contributions to that special issue.

21 See Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008); Katharine G Young (ed), *The Future of Economic, Social and Cultural Rights* (CUP 2019); Christian Courtis and Magdalena Sepúlveda, 'Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR?' (2009) 27 Nordisk Tidsskrift for Menneskerettigheter 54.

22 See Maarten den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4 Journal of International Dispute Settlement 361; Maarten den Heijer, 'Shared Responsibility Before the European Court of Human Rights' (2013) 60 Netherlands International Law Review 411; Mark Gibney and Wouter Vandenhole (eds), *Litigating Transnational Human Rights Obligations: Alternative Judgments* (Routledge 2014); Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015); Vandenbogaerde (n 19).

POSTSCRIPT: COOPERATIVE MIGRATION CONTROL, SOCIO-ECONOMIC RIGHTS AND THE COVID-19 PANDEMIC

The research for this study covers a period of almost four years, from the fall of 2016 to the summer of 2020. During this time, cooperative migration control policies themselves have continued to evolve, as illustrated by the signing of the Italy-Libya Memorandum of Understanding in 2017, Australia's announcement to cut IOM funding for Indonesia in 2018, and the conclusion of the 2019 US-Guatemala cooperative agreement. As these developments confirm that sponsor States increasingly seek to cooperate with partner States to stem migration flows from the Global South to the Global North, they fit easily within the parameters of this study. Since such developments often have a negative effect on the plight of people on the move in partner States, they confirm that cooperative migration control often leads to violations of the socio-economic rights of people on the move. At the same time, the international legal framework which this study analyses remained largely unchanged: no new major human rights treaties entered into force and no output of courts or human rights bodies was so ground-breaking as to fundamentally change the legal analysis. Moreover, important developments, notably the adoption of the Global Compacts for Migration and on Refugees, largely align with the existing legal framework. In other words, this study could accommodate empirical and legal developments without significantly affecting its main findings.

The question arises, however, to what extent the foregoing applies to the COVID-19 pandemic that unfolded during 2020.[1] Its impact was felt everywhere, from people on the move through policy makers and academics to judges of regional human rights courts. At an empirical level, it is evident that the pandemic has affected the plight of people on the move themselves. In addition to the obvious issues that arise regarding their right to health, their other socio-economic rights have often likewise been affected, be it through school closures or loss of employment.[2] The pandemic has

1 For an early discussion of the implications of the COVID-19 pandemic see E Tendayi Achiume, Thomas Gammeltoft-Hansen and Thomas Spijkerboer, 'Introduction to the Symposium on COVID-19, Global Mobility and International Law' (2020) 114 American Journal of International Law Unbound 312 and other contributions to the same issue; Karima Bennoune, '"Lest we should Sleep": COVID-19 and Human Rights' (2020) 114 American Journal of International Law 666; Martins Paparinskis, 'The Once and Future Law of State Responsibility' (2020) 114 American Journal of International Law 618.

2 See Solon Ardittis and Frank Laczko, 'Introduction: Migration Policy in the Age of Immobility' (2020) X(2) Migration Policy Practice 2 and other contributions to that special issue on 'Covid-19: A New Challenge for Migration Policy'.

also had a direct impact on many migration control measures themselves, ranging from Southern European States refusing to disembark people on the move rescued in the Mediterranean because their ports are not 'safe' to deportations of people on the move, including asylum seekers.[3] These developments, in turn, are likely to impact both the plight of people on the move and the assessment of which State is responsible for violations of their socio-economic rights. As regards the international legal framework, the interpretation of 'what can reasonably be expected of States' under the due diligence standard acquires a new dimension in the context of a pandemic.[4] Finally, the COVID-19 pandemic highlights the importance of international assistance and cooperation: by its very nature the pandemic presents a global challenge that requires partner and sponsor States to cooperate to realise socio-economic rights.

3 Daniel Ghezelbash and Nikolas Feith Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection' (2020) European University Institute Working Paper RSCAS 2020/55, 5–8.

4 See Claire Lougarre, 'The Protection of Non-nationals' Economic, Social and Cultural Rights in UN Human Rights Treaties' (2020) 9 International Human Rights Law Review 252; Brigit Toebes, 'States' Resilience to Future Health Emergencies: Connecting the Dots between Core Obligations and Core Capacities' (2020) 9(2) ESIL Reflections 1.

SUMMARY

Violations of the rights to an adequate standard of living, health and education of people on the move are structural rather than incidental in many regions of the world. In the Global South, such violations are closely linked to efforts by the Global North to stem migration flows from the Global South to the Global North. Indeed, cooperation on migration control between sponsor States in the Global North and partner States in the Global South results in the containment of many people on the move in Global South States with a relatively weak track record in terms of socio-economic rights. Although scholarship pays scant attention to the fact that migration control agreements result in widespread violations of the socio-economic rights of people on the move contained in the Global South, this raises questions as to the responsibility of the various states involved for their plight. Therefore, this study seeks to answer the following question: *to what extent and how do violations of socio-economic rights of people on the move give rise to the international responsibility of States involved in cooperative migration control?* It can be further broken down into two research questions, which structure this study.

First, however, the study starts by examining the plight of people on the move in partner States in the Mediterranean, the Asia Pacific and the Americas. Chapter II demonstrates that many risk suffering violations of their socio-economic rights, such as an inadequate standard of living, lack of access to education and health care, and vulnerability to labour exploitation. Furthermore, States often implement multiple measures in parallel and their centre of gravity shifts from the Global North to the Global South as sponsor States seek to avoid triggering their obligations towards people on the move by increasingly cooperating with partner States. Contemporary forms of cooperation include people transfers; the provision of funding, training and equipment; information sharing; and diplomatic relations and development aid conditionality. Crucially, the relation between violations of the socio-economic rights of people on the move in partner States and cooperative migration control depends on the causal link between the two and the question whether States are unable or unwilling to realise the socio-economic rights of people on the move affected by these policies. The coexistence of multiple measures that results in the containment of people on the move in the Global South is relevant in this regard insofar as it can prevent people on the move from leaving the Global South altogether.

While Chapter II provides the empirical backdrop for the legal analysis, Chapters III to V address the first research question: *what is the scope of States' international obligations as regards the socio-economic rights of people on the move in the context of cooperative migration control?* Chapter III proposes a conceptualisation of State obligations by analysing various concepts and principles that serve to delimit the

scope of States' obligations to realise the socio-economic rights of people on the move at a general level. It first seeks to transcend the dichotomy between civil and political rights on the one hand and economic, social and cultural rights on the other hand by demonstrating that violations of socio-economic rights can entail violations of civil and political rights and vice versa. Second, the due diligence standard helps determine the scope of States' obligations under international human rights law: it requires States to take reasonable measures to avoid reasonably foreseeable human rights violations. Thus, two questions must be answered to determine whether a State complied with its obligations: is a human rights violation reasonably foreseeable (knowledge requirement) and did the State take reasonable measures to avoid it (ability requirement)? Third, people on the move are, in principle, entitled to the realisation of their core socio-economic rights, which can be defined as the minimum standard of human rights protection under which no person is allowed to fall. Core socio-economic rights are not absolute, as States' corresponding core obligations must accommodate the fact that they may lack sufficient resources to realise core rights. However, it is more difficult for States to justify the non-realisation of the core socio-economic rights of people on the move. Fourth, the principle of non-discrimination prevents States from differentiating between people on the move and their own nationals unless such distinction is proportionate and serves a legitimate aim. States must always strive to realise at least the core socio-economic obligations of people on the move and beyond the core only non-arbitrary limitations of the socio-economic rights of people on the move are permitted.

Finally, Chapter III examines the role of territory, jurisdiction and 'international assistance and cooperation' in delimiting State obligations. It recalls that, under international human rights law, States have obligations towards people within their jurisdiction. While there is a rebuttable presumption that a State exercises jurisdiction on its territory, it can also have obligations towards individuals abroad, provided there is a jurisdictional link between the State and the person in question. Therefore, while the territorial State is presumed to have the primary obligation to realise the human rights of individuals on its territory, other States can have complementary obligations. Article 2(1) ICESCR does not mention either territory or jurisdiction but rather requires States to 'take steps, individually and through international assistance and co-operation'. Thus, with regard to socio-economic rights, a State can have two types of obligations under international human rights law: *direct obligations*, which it owes to persons within its jurisdiction, both on its territory and abroad; and *global obligations*, which entail a duty to contribute to the international community's efforts to provide international assistance and cooperation to those States that lack sufficient resources to realise socio-economic rights.

Accordingly, partner States are presumed to exercise jurisdiction and hence to have the primary direct obligation to realise the socio-economic rights of people on the move who are on their territory. They must take reasonable measures to avoid reasonably foreseeable violations of their socio-economic rights in accordance with the due

diligence standard. Moreover, partner States must seek to comply as a matter of priority with their core obligations, including towards people on the move, and any difference between the latter and nationals of partner States must be proportionate and serve a legitimate aim. Sponsor States, in turn, only have direct obligations to realise the socio-economic rights of people on the move over whom they exercise jurisdiction. While any such obligations, to the extent that they exist, are presumed to be complementary to the primary obligations of partner States, sponsor States must seek to realise, as a matter of priority, core socio-economic rights, and they may not differentiate arbitrarily on the ground of nationality. In addition to their direct obligations, sponsor States have global obligations of international assistance and cooperation. These are obligations to contribute to the international community's efforts to help realise socio-economic rights in other countries, which may include partner States.

Chapters IV and V build on these findings by examining in detail the obligations of partner and sponsor States respectively. Chapter IV clarifies that partner States must use their maximum available resources, including those available through international assistance and cooperation, to comply in priority with their core obligations. They have an immediate obligation to take steps to increase the level of realisation of socio-economic rights over time, and any retrogression or limitation must be justified, especially as regards core socio-economic rights. Yet partner States' limited available resources may prevent them from realising the core socio-economic rights of people on the move and from increasing the level of rights realisation over time, notably in situations of mass influx. Moreover, the 'size' of the core and the clarity of its contours vary. On the one hand, core obligations that are directly relevant for the right to an adequate standard of living, such as the rights to water and food, apply to people on the move in the same way as nationals. Likewise, children on the move must at least have access to compulsory, free primary education, and all people on the move have a right to access basic health care. It is also likely that partner States must grant people on the move access to social security where this is necessary to realise the core content of other rights. On the other hand, partner States do not have a core obligation to grant people on the move access to their labour market, although the right to just and favourable conditions of work applies to people on the move and nationals alike.

Chapter V, in turn, examines the twofold obligations of sponsor States to realise the socio-economic rights of people on the move affected by cooperative migration control. First, if there is a jurisdictional link between a person on the move and a sponsor State, the latter may have *direct obligations* under international human rights law towards the former. While different models of extraterritorial jurisdiction exist, the functional model best captures the forms of involvement of sponsor States and their impact on people on the move affected by cooperative migration control. Following this approach, a State exercises jurisdiction when it can take reasonable measures to avoid reasonably foreseeable human rights violations. In other words, the due diligence standard of conduct determines, in a particular situation, whether a State has any direct obligations and, if it does, what their scope is. As there is

often a weak causal link between the conduct of sponsor States and the violations of the socio-economic rights of people on the move affected by cooperative migration control, not all forms of involvement create a jurisdictional link. However, although cooperative migration control policies are designed at least in part to avoid sponsor States incurring obligations under international human rights law, the fact that they engage in such policies may in itself establish a jurisdictional link between them and people on the move in partner States.

Second, sponsor States have *global obligations* to contribute to the international community's efforts to provide international assistance and cooperation to States that lack the resources necessary to realise socio-economic rights, including partner States in the Global South that host people on the move. Under international human rights law, obligations of international assistance and cooperation are legally binding and not merely moral obligations, although there is no bilateral obligation to transfer resources. Nevertheless, cooperation on migration control could justify assigning to sponsor States an obligation to provide international assistance and cooperation to partner States to enable the latter to realise the socio-economic rights of people on the move affected by cooperative migration control. Thus, sponsor States that contribute to violations of the socio-economic rights of people on the move in partner States would have to provide international assistance and cooperation to mitigate the negative effects of their policies. Vice versa, cooperation on migration control can be a way for sponsor States to discharge their global obligations. As the principal aim of cooperative migration control policies is to prevent people on the move from reaching sponsor States in the Global North, they are not designed primarily to discharge the latter's obligations under international human rights law. Yet they have the potential to do so, provided the assistance contributes to realising the socio-economic rights of people on the move.

Since responsibility is closely linked to obligations, the answer to the second research question builds on the findings above: *how does international law assign responsibility for violations of the socio-economic rights of people on the move where multiple States are involved in migration control?* Chapter VI examines State responsibility in the context of cooperative migration control. It recalls that a State incurs direct responsibility when it commits an internationally wrongful act: conduct that is attributable to it breaches its obligations under international law. In the context of international human rights law, the following questions play a role when determining whether a State incurs responsibility:

1. Is the conduct that allegedly triggers jurisdiction attributable to the State?	2. Does the conduct that is attributable to the State trigger its jurisdiction?
3. Is the conduct that allegedly breaches an international obligation of the State attributable to it?	4. Does the conduct that is attributable to the State breach its obligations?

In order to determine if a sponsor or partner State incurs direct responsibility, these four questions must be answered positively, with the exception of sponsor States' global obligations for which the first two questions are not relevant.

Partner States can incur responsibility for violations of the socio-economic rights of people on the move on their territory in two ways: either on account of the conduct of their own State organs, or because the conduct of non-State actors is attributable to them. The attribution requirement does not create a significant obstacle to assigning responsibility to partner States, because ultimately they have the primary obligation under international law to realise the socio-economic rights of people on the move on their territory, and they must comply with the due diligence standard and the principle of non-discrimination in doing so. Sponsor States, in turn, can incur responsibility in various ways. First, they can incur direct responsibility if they breach their direct obligations. That is the case if they exercise jurisdiction but do not comply with their obligations under international human rights law. Second, if we accept that cooperation on migration control can justify allocating obligations of international assistance and cooperation to sponsor States that cooperate with partner States, the former could incur direct responsibility for failing to comply with their global obligations. Third, sponsor States can incur derived responsibility in relation to partner States' failure to realise the socio-economic rights of people on the move. In particular, the complicity rule may give rise to the derived responsibility of sponsor States on account of the aid or assistance that they provide to partner States.

Finally, Chapter VII shifts the analysis from the perspective of a single State to a bird's eye view of the responsibility of multiple States involved in cooperative migration control in order to answer the second research question. As the principle of independent responsibility predominates international law, the responsibility of each State tends to be determined separately. As a result, it is likely that violations of the socio-economic rights of people on the move give rise to the exclusive responsibility of the partner States that host them. Indeed, partner States are likely to incur responsibility when they do not realise the core socio-economic rights of people on the move on their territory, whereas the conduct that is attributable to sponsor States only rarely breaches their direct or global obligations as regards the violations of socio-economic rights of people on the move in partner States. Moreover, it is possible that neither the partner State nor the sponsor State incur responsibility for violations of the socio-economic rights of people on the move affected by cooperative migration control, leading to responsibility gaps.

However, other constellations of responsibility are possible. Shared responsibility arises when multiple States commit one or more internationally wrongful acts that contribute to violations of the socio-economic rights of people on the move affected by cooperative migration control. More specifically, concurrent responsibility arises when two or more States share responsibility for separate internationally wrongful acts. Various constellations of concurrent responsibility can arise in the context of cooperative migration control, including: when a sponsor State and a partner State both breach their direct obligations; when a sponsor State incurs derived responsibility

in connection with the responsibility of a partner State; and possibly when multiple sponsor States fail to comply with their global obligations of international assistance and cooperation. Furthermore, cooperative migration control can give rise to joint responsibility, either between multiple sponsor States or between a partner and a sponsor State. Joint responsibility arises when multiple States incur responsibility for a single internationally wrongful act. As it requires a high intensity of cooperation, joint responsibility is less likely to arise than concurrent responsibility, since cooperative migration control often entails rather loose forms of cooperation. Finally, it is possible for the same factual situation to lead to multiple constellations of shared responsibility. Thus, it is conceivable that concurrent responsibility between a sponsor State and a partner State could arise because the sponsor State incurs direct responsibility for breaching its direct obligations, direct responsibility for breaching its global obligations, or derived responsibility. In each of these cases, concurrent responsibility arises if the partner State also incurs responsibility for not complying with its own obligations to realise the socio-economic rights of people on the move on its territory. Moreover, constellations of joint and concurrent responsibility can combine, creating a multiplicity of possible responsibility assessments.

In sum, the analysis in this study enables us to develop an assessment framework that answers the following question: *to what extent and how do violations of socio-economic rights of people on the move give rise to the international responsibility of States involved in cooperative migration control?* This framework, and hence the answer to the question above, consists of three steps. First, the prerequisite for responsibility to arise is met: violations of the socio-economic rights of people on the move contained in partner States in the Global South are widespread and the various States involved in cooperative migration control contribute to these violations in various ways. Second, each State involved incurs responsibility under international law if its contribution to the violations in question amounts to an internationally wrongful act or (in the case of sponsor States) if it incurs derived responsibility. Finally, the third step requires us to examine how the responsibility of one State relates to that of other States. If we conceive of responsibility as a spectrum, at one end international law enables simultaneous parallel assignments of responsibility and, at the other end of the spectrum, it allows for the existence of responsibility gaps.

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