

PROTECTING THE RIGHTS OF REFUGEES BEYOND  
EUROPEAN BORDERS



PROTECTING THE RIGHTS  
OF REFUGEES BEYOND  
EUROPEAN BORDERS

Establishing Extraterritorial Legal  
Responsibilities

Lisa HESCHL



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd  
Sheraton House | Castle Park  
Cambridge | CB3 0AX | United Kingdom  
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169  
Email: mail@intersentia.co.uk  
www.intersentia.com | www.intersentia.co.uk

*Distribution for the UK and Ireland:*

NBN International  
Airport Business Centre, 10 Thornbury Road  
Plymouth, PL6 7PP  
United Kingdom  
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331  
Email: orders@nbninternational.com

*Distribution for Europe and all other countries:*

Intersentia Publishing nv  
Groenstraat 31  
2640 Mortsel  
Belgium  
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21  
Email: mail@intersentia.be

*Distribution for the USA and Canada:*

International Specialized Book Services  
920 NE 58th Ave. Suite 300  
Portland, OR 97213  
USA  
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832  
Email: info@isbs.com

Protecting the Rights of Refugees Beyond European Borders. Establishing  
Extraterritorial Legal Responsibilities

© Lisa Heschl 2018

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Artwork on cover: Caroll Lynn Tice - 123RF

ISBN 978-1-78068-614-1

D/2018/7849/16

NUR 828

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

*For all the ones I love*



## PREFACE

In August 2017, several European and African leaders met on the invitation of the French President Macron in Paris in order to develop new strategies and new ways of cooperation to cut migration into Europe from northern Africa in order to resolve the proclaimed ‘migration and refugee crisis’ and to protect the European Union from unwanted migrants.

From the outset, the European migration and asylum policy has been shaped by efforts to establish an efficient migration management system in order to protect the Area of Freedom, Security and Justice from the new security threat ‘irregular migration.’ The extraterritorialisation of immigration control measures beyond actual territorial borders forms part of this strategy. Pre-border control mechanisms composed of administrative, legislative and operational measures, are largely perceived as effective means to channel flows of migrants prior to the borders, avoiding logistical and financial burdens for Member States. From a legal perspective, the shift of borders raises important questions related to the creation of nebulous legal zones where responsibilities for norms related to the protection of refugees may be circumvented by states and other actors involved in migration control activities.

This book tries to reconcile the motives behind extraterritorialisation strategies with their actual legal consequences. It focuses on the examination of the legal frameworks governing situations where a refugee meets state authority in the context of extraterritorial immigration control measures. It approaches the topic from the hypothesis that international and European obligations not only constrain extraterritorial acts of states or specialised agencies, but give rise to concrete responsibilities. The study shows that international, European and human rights law provide for a rather well-equipped ‘tool box’ to hold states responsible for violations of protection norms even if occurring outside the territory of a state or beyond European borders. Furthermore, the study proves as well that the establishment of responsibilities for violations of protection related norms occurring in the context of extraterritorial immigration control measures is a rather theoretical undertaking without major practical implications. Opportunities to invoke responsibilities for human rights violations occurring in the context of extraterritorial immigration control measures are still limited, undermining the effective access to protection for refugees and persons in need of international protection.





## ACKNOWLEDGEMENTS

My first debt is to many colleagues and friends over the last few years who not only helped me to develop my thoughts on refugees, human rights and legal responsibilities but who also encouraged and supported me throughout the whole period. Without all the fruitful debates, their advice and their critique, this publication would not have taken shape.

My thanks go first to Prof. Wolfgang Benedek from the Institute of International Law and International Relations of the University of Graz whose continuous support and inspiration made this research possible. I am further particularly grateful to Prof. Hubert Isak for his comments and advice.

The first ideas for researching the topic were sketched during a research stay at the University of Deusto, Bilbao, Spain. I am thankful for the Marie Curie Early Stage Researcher Fellowship I have been awarded and would like to express my sincere gratitude to Osane Uriarte and her colleagues at the University of Deusto for providing me with such an opportunity.

The next huge share of gratitude is owed to my dear colleagues at the Institute of International Public Law and the European Training and Research Centre for Human Rights and Democracy of the University of Graz. Besides benefitting from the invaluable academic support, the comments and critique of Gerd Oberleitner, Christian Pippan, Stefan Salomon, Kushtrim Istrefi Pia Niederdorfer, Gregor Fischer and Lorin Wagner, I am especially thankful for having the possibility to work with such multi-talented, open-minded, inspirational and intelligent people.

Last but not least, my deepest gratitude goes to my family and closest friends who sustained and encouraged me especially in times when I worked more than we all would have wished.

Lisa Heschl



# CONTENTS

<i>Preface</i> .....	vii
<i>Acknowledgements</i> .....	ix
<i>Table of Cases</i> .....	xv
<i>Table of Treaties, Instruments and Legislation</i> .....	xxi
<i>List of Abbreviations</i> .....	xxix
<b>Chapter 1. Introduction</b> .....	1
1. Background .....	1
2. Objectives and Scope .....	7
3. Outline .....	9
<b>Chapter 2. The External Dimension of the European Migration and Asylum Policy.</b> .....	13
1. Introduction .....	13
2. The European Migration and Asylum Policy .....	16
3. The External Dimension: A Strategy for the European Migration and Asylum Policy .....	20
3.1. The External Dimension of the EU's Migration and Asylum Policy .....	20
3.2. Shifting the Borders .....	33
3.2.1. Introduction .....	33
3.2.2. The Extraterritorialisation of Migration Control Measures .....	36
4. Conclusions .....	43
<b>Chapter 3. Extraterritorial Immigration Control Measures by EU Member States</b> .....	47
1. Responsibility under Human Rights Law .....	50
1.1. Introduction .....	50
1.2. 'Jurisdiction' under International Law .....	53
1.3. 'Jurisdiction' under Human Rights Law .....	57
1.3.1. 'Jurisdiction' under International Law vs 'Jurisdiction' under Human Rights Law .....	57

1.3.2.	‘Jurisdiction’ as a Result of Control over Territory . . . . .	63
1.3.3.	‘Jurisdiction’ as a Result of Control over Individuals . . . . .	69
1.3.3.1.	Broad Understanding of the Personal Model of Jurisdiction . . . . .	70
1.3.3.2.	Narrow Understanding of the Personal Model of Jurisdiction . . . . .	73
1.4.	Jurisdiction and Extraterritorial Immigration Control Measures: The <i>Hirsi</i> Case . . . . .	80
1.4.1.	Facts . . . . .	81
1.4.2.	Jurisdiction . . . . .	82
1.4.3.	Norms in Question . . . . .	85
1.4.3.1.	Art 3 ECHR: Direct and Indirect <i>Refoulement</i> . . . . .	85
1.4.3.2.	Art 4 Protocol 4 ECHR and Art 13 ECHR . . . . .	89
1.5.	Contextual Approach to the Nature of Obligations . . . . .	94
1.5.1.	Introduction . . . . .	94
1.5.2.	Positive Human Rights Obligations . . . . .	96
1.5.3.	The Principle of Due Diligence as a Threshold for Positive Human Rights Obligations . . . . .	101
1.5.4.	The Extraterritorial Application of Positive Human Rights Obligations . . . . .	106
2.	Responsibility under International Law . . . . .	111
2.1.	Introduction . . . . .	111
2.2.	Complicity under International Law . . . . .	113
2.3.	Complicity under Human Rights Treaties . . . . .	119
2.4.	Complicity and Extraterritorial Immigration Measures . . . . .	120
2.5.	Legal Consequences of Complicity in Extraterritorial Immigration Control Measures . . . . .	122
2.6.	Invoking Responsibility for Violations of Human Rights in the Course of Extraterritorial Immigration Control Measures . . . . .	127
3.	Conclusions . . . . .	132
 <b>Chapter 4. Extraterritorial Immigration Control Measures by Frontex . . . . .</b>		<b>141</b>
1.	Introduction . . . . .	141
2.	Development . . . . .	144
3.	The Role and Powers of Frontex . . . . .	147
3.1.	Regulation (EC) No 2004/2007: The Frontex Founding Regulation . . . . .	147
3.2.	Regulation (EC) No 863/2007: The Rabbit Regulation . . . . .	151
3.3.	Regulation (EU) No 1168/2011: Strengthening Frontex and Human Rights . . . . .	154

3.4.	Regulation (EU) No 2016/1624: The European Border and Coast Guard Agency .....	159
3.5.	Regulation (EU) No 656/2014/EU: Frontex Maritime Border Operations.....	166
4.	Frontex as Actor in the EU's External Relations.....	172
4.1.	Delegation of Powers.....	175
4.2.	Working Arrangements.....	178
5.	The Extraterritorial Application of EU Law .....	181
5.1.	General Remarks .....	181
5.2.	The Extraterritorial Application of the CFREU.....	187
5.3.	The Extraterritorial Application of the CEAS .....	193
5.4.	The Extraterritorial Application of the SBC.....	197
5.4.1.	Introduction.....	197
5.4.2.	Content of the SBC in Relation to the External Borders....	201
5.4.3.	The Territorial Scope of the SBC.....	203
6.	Control and Accountability of Frontex Operations .....	206
6.1.	Political Control and Accountability.....	208
6.2.	Legal Control and Accountability .....	212
6.2.1.	Introduction.....	212
6.2.2.	Frontex before the CJEU (Art 263 TFEU).....	214
6.2.3.	Frontex and National Courts.....	218
7.	Conclusions.....	220
 <b>Chapter 5. Summary of Findings and Conclusions .....</b>		<b>223</b>
1.	Point of Departure .....	223
2.	Establishing Extraterritorial Responsibility .....	225
3.	The Right to Have Rights.....	230
 <i>Bibliography.....</i>		<i>233</i>
<i>Index.....</i>		<i>251</i>
<i>About the Author.....</i>		<i>255</i>



# TABLE OF CASES

## PERMANENT COURT OF INTERNATIONAL JUSTICE

SS 'Lotus' (*France v. Turkey*), 7 September 1927 PCIJ, Series A No 10 .....54–56

## INTERNATIONAL COURT OF JUSTICE

<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)</i> , 26 February 2007, I.C.J. Reports 2007, p. 43 .....	98–99, 102–103, 107, 114, 116–117, 125
<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)</i> , 15 October 2008, I.C.J. Reports 2008, p. 70 .....	107–108
<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)</i> , 19 December 2005, I.C.J. Reports 2005, p. 168 .....	63–64, 67, 126
<i>Avena and Other Mexican Nationals (Mexico v. United States of America)</i> , 31 March 2004, I.C.J. Reports 2004, p. 12 .....	126
<i>Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)</i> , 5 February 1970, I.C.J. Reports 1970, p. 3 .....	128
<i>Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)</i> , 9 April 1949 I.C.J. Reports 1949, p. 4 .....	89
<i>East Timor (Portugal v. Australia)</i> , 30 June 1995, I.C.J. Reports 1995, p. 90 .....	128–129, 131
<i>Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)</i> , 3 February 2012, I.C.J. Reports 2012, p. 99 .....	124, 126
<i>LaGrande (Germany v. United States of America)</i> , 27 June 2001, I.C.J. Reports 2001, p. 466 .....	125–126
<i>Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)</i> , 10 October 2002, I.C.J. Reports 2002, p. 303 .....	126
<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia</i> , Advisory Opinion, 21 June 1971, I.C.J. Reports 1971, p. 16 .....	60, 66
<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</i> , Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, p. 136 .....	60, 63, 65, 67
<i>Legality of the Threat or Use of Nuclear Weapons</i> , Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 226 .....	63
<i>Pulp Mills on the River Uruguay (Argentina v. Uruguay)</i> , 20 April 2010, I.C.J. Reports 2010, p. 14 .....	101
<i>Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)</i> , 20 July 2012, I.C.J. Reports 2012, p. 422 .....	131

## COURT OF JUSTICE OF THE EUROPEAN UNION

<i>Ahlström v. Commission (Wood Pulp I)</i> , Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, 27 September 1988, ECLI:EU:C:1988:447. . . . .	183–184
<i>Boukhalfa v. Germany</i> , Case C-214/94, 30 April 1996, ECLI:EU:C:1996:174 . . . . .	186
<i>Commission v. Council (ERTA)</i> , Case 22/70, 31 March 1971, ECLI:EU:C:1971:32. . . . .	215
<i>Commission v. France</i> , Case 167/73, 4 April 1974, ECLI:EU:C:1974:35 . . . . .	185
<i>Commission v. Ireland (Sea Fisheries)</i> , Case C-101/76, 16 February 1978, ECLI:EU:C:1978:29 . . . . .	184–185
<i>Council v. Front Polisario</i> , Case C-104/16 P, 13 September 2016, ECLI:EU:C:2016:677, Opinion of AG Wathelet . . . . .	192
<i>France v. Commission</i> , Case C-327/91, 9 August 1994, ECLI:EU:C:1994:305 . . . . .	176
<i>Frayeh Halaf v. Darzhavna Agentsia</i> , Case C-528/11, 30 May 2013, ECLI:EU:C:2013:342 . . . . .	187
<i>IBM v. Commission</i> , Case C-60/81, 11 November 1981, ECLI:EU:C:1981:264. . . . .	215
<i>‘Les Verts’ (Parti écologiste) v. Parliament</i> , Case 294/83, 23 April 1986, ECLI:EU:C:1986:166 . . . . .	213
<i>Lopes da Veiga v. Staatssecretaris</i> , Case 9/88, 12 July 1989, ECLI:EU:C:1989:346 . . . . .	185–186
<i>Meroni v. High Authority</i> , Case C-9/56, 13 June 1958, ECLI:EU:C:1958:7. . . . .	175, 178
<i>Mugraby v. Council and Commission</i> , Case C-581/11 P, 12 July 2012, ECLI:EU:C:2012:466 . . . . .	190, 193
<i>N.S. v. Secretary of State and M.E. et al. v. Refugee Applications Commissioner</i> , Joined Cases C-411/10 and C-493/10, 21 December 2011, ECLI:EU:C:2011:865. . . . .	3, 87, 170
<i>Parliament v. Council</i> , Case C-355/10, 5 September 2012, ECLI:EU:C:2012:516. . . . .	168–169
<i>Plaumann v. Commission</i> , Case 25-62, 15 July 1963, ECLI:EU:C:1963:17. . . . .	216
<i>Pringle v. Ireland</i> , Case C-370/12, 27 November 2012, ECLI:EU:C:2012:756 . . . . .	190
<i>R.L. Aldewereld v. Staatssecretaris</i> , Case C-60/93, 29 July 1994, ECLI:EU:C:1994:271 . . . . .	185
<i>SARL Prodest v. Caisse Primaire d’Assurance Maladie de Paris</i> , Case 242/83, 12 July 1984, ECLI:EU:C:1984:278 . . . . .	185–186
<i>Spain v. Eurojust</i> , Case C-160/03, 15 March 2005, ECLI:EU:C:2005:168. . . . .	213
<i>UK and Northern Ireland v. Council</i> , Case C-77/05, 18 December 2007, ECLI:EU:C:2007:803 . . . . .	199
<i>UK and Northern Ireland v. Council</i> , Case C-137/05, 18 December 2007, ECLI:EU:C:2007:805 . . . . .	199

## GENERAL COURT OF THE EUROPEAN UNION

<i>Air France v. Commission</i> , Judgment of the Court of First Instance, Case T-3/93, 24 March 1993, ECLI:EU:T:1994:36 . . . . .	215
<i>Front Polisario v. Council</i> , Judgment of the General Court, Case T-512/12, 10 December 2015, ECLI:EU:T:2015:953. . . . .	191–192
<i>Mugraby v. Council and Commission</i> , Order of the General Court, Case T-292/09, 6 September 2011, ECLI:EU:T:2011:418. . . . .	190–191, 193
<i>Sogelma v. EAR</i> , Judgment of the Court of First Instance, Case T-411/06, 8 October 2008, ECLI:EU:T:2008:419. . . . .	213, 217
<i>Tillack v. Commission</i> , Judgment of the Court of First Instance, Case T-193/04, 4 October 2006, ECLI:EU:T:2006:292. . . . .	215



## EUROPEAN COURT OF HUMAN RIGHTS

<i>A v. UK</i> , no 100/1997/884/1096, 23 September 1998	104
<i>Abdolkhani and Karimnia v. Turkey</i> , no 30471/08, 22 September 2009	92
<i>Al-Jedda v. UK</i> , no 27021/08, 7 July 2011	95
<i>Al-Saadoon and Mufdhi v. UK</i> , no 61498/08, 2 March 2010	79–80, 84–85, 227
<i>Al-Skeini and others v. UK</i> , no 55721/07, 7 July 2011	65, 67–68, 75, 77–79, 82
<i>Banković and others v. Belgium and 16 contracting States</i> , no 52207/99, 12 December 2001	55, 58–60, 65, 67, 69, 71–73, 75–77, 79–80, 94–95, 100, 110, 134
<i>Behrami and Behrami v. France</i> , no 71412/01, 2 May 2007	71
<i>Ben El Mahi and Others v. Denmark</i> , no 5853/06, 11 December 2006	69
<i>Catan and Others v. Moldova and Russia</i> , nos 43370/04, 8252/05 and 18454/06, 19 October 2012	111
<i>Chahal v. UK</i> , no 22414/93, 15 November 1996	87
<i>Chiragov and others v. Armenia</i> , no 13216/05, 16 June 2015	134
<i>Čonka v. Belgium</i> , no 51564/99, 5 February 2002	92–93
<i>Cyprus v. Turkey</i> , no 25781/94, 10 May 2001	59, 63, 67
<i>Drozd and Janousek v. France and Spain</i> , no 12747/87, 26 June 1992	112–113
<i>Georgia v. Russia</i> , no 38263/08, 13 December 2011	124
<i>Grey v. Germany</i> , no 49278/09, 24 May 2014	94, 136
<i>Gül v. Switzerland</i> , no 23218/94, 19 February 1996	94
<i>Hirsi Jamaa and others v. Italy</i> , no 27765/09, 23 February 2012	49, 80–93, 105–106, 116, 121, 135–136, 170–171, 188, 231
<i>Ilașcu and others v. Moldova and Russia</i> , no 487887/99, 8 July 2011	100–101, 108–111
<i>Ireland v. UK</i> , no 5310/71, 18 January 1978	124
<i>Isaak v. Turkey</i> , no 44587/98, 24 June 2008	108
<i>Issa and others v. Turkey</i> , no 31821/96, 16 November 2004	67, 74, 77
<i>Jabari v. Turkey</i> , no 40035/98, 11 October 2000	87
<i>Jaloud v. The Netherlands</i> , no 47708/08, 20 November 2014	134
<i>Kılıç v. Turkey</i> , no 22492/93, 28 March 2000	104–105
<i>L.C.B. v. UK</i> , no 14/1997/799/1001, 9 June 1998	105
<i>Loizidou v. Turkey</i> , no 15318/89, (preliminary objections) 23 March 1995	59, 64, 66, 133
<i>Loizidou v. Turkey</i> , no 15318/89, 18 December 1996	59, 64, 66, 133
<i>M.S.S. v. Belgium and Greece</i> , no 30696/09, 21 January 2011	3, 19, 79, 81, 87, 153, 170, 188
<i>Manoilescu and Dobrescu v. Romania and Russia</i> , no 60861/00, 3 March 2005	111
<i>Markovic and others v. Italy</i> , no 1398/03, 14 December 2006	69
<i>Medvedyev and others v. France</i> , no 3394/03, 29 March 2010	74, 77, 79–80, 82, 226
<i>Öcalan v. Turkey</i> , no 46221/99, 12 May 2005	74, 77
<i>Osman v. UK</i> , no 23452/94, 28 October 1998	104
<i>Pad and Others v. Turkey</i> , no 60167/00, 28 June 2007	74, 77
<i>Saadi v. Italy</i> , no 37201/06, 28 February 2008	87
<i>Saramati v. France, Germany and Norway</i> , no 78166/01, 2 May 2007	71
<i>Soering v. UK</i> , no 14038/88, 7 July 1989	119, 121
<i>Treska v. Albania and Italy</i> , no 26937/04, 29 June 2006	111
<i>X and Y v. The Netherlands</i> , no 8978/80, 26 March 1985	104
<i>Xhavara and others v. Italy and Albania</i> , no 39473/98, 11 January 2001	87, 89, 112

## INTER-AMERICAN COURT OF HUMAN RIGHTS

*Velásquez-Rodríguez v. Honduras*, (Ser. C) No 4, 29 July 1988. . . . . 103

## UN COMMITTEES

*Ahani v. Canada*, UN Doc CCPR/C/80/D/1051/2002, 29 March 2004 . . . . . 132

*Brough v. Australia*, UN Doc CCPR/C/86/D/1184/2003, 17 March 2006 . . . . . 126

*Celiberti de Casariego v. Uruguay*, UN Doc CCPR/C/13/D/56/1979,  
29 July 1981. . . . . 72, 100

*Concluding Observations of the Human Rights Committee: Israel*,  
UN Doc CCPR/C/79/Add.93, 18 August 1998 . . . . . 65

*Concluding Observations of the Committee on Economic, Social and Cultural Rights:*  
*Israel*, UN Doc E/C.12/1/Add.27, 4 December 1998 . . . . . 65

*Dadar v. Canada*, UN Doc CAT/C/35/D/258/2004, 23 November 2005. . . . . 132

*Delia Saldías de Lopez v. Uruguay*, UN Doc CCPR/C/13/D/52/1979,  
29 July 1981. . . . . 61, 72, 100

*J.H.A. v. Spain*, UN Doc CAT/C/41/D/323/2007, 21 November 2008 . . . . . 83–84

*Judge v. Canada*, UN Doc CCPR/C/78/D/829/1998, 5 August 2003 . . . . . 126

*Lobban v. Jamaica*, UN Doc CCPR/C/80/D/797/1998, 16 March 2004 . . . . . 126

*Lopez v. Uruguay*, UN Doc CCPR/C/13/D/52/1979, 29 July 1981 . . . . . 60–61, 72, 100

*Raihmann v. Latvia*, UN Doc CCPR/C/100/D/1621/2007, 28 October 2010 . . . . . 126

## EUROPEAN COMMISSION OF HUMAN RIGHTS

*Cyprus v. Turkey*, nos 6780/74 and 6950/75, 26 May 1975 . . . . . 72

*M v. Denmark*, no 17392/90, 14 October 1992. . . . . 80

*Stocké v. Germany*, no 11755/85, 12 October 1989 . . . . . 72

*Tugar v. Italy*, no 22869/93, 18 October 1995. . . . . 105, 119–120

*Vearncombe v. UK and Germany*, no 12816/87, 18 January 1989 . . . . . 72

*X and Y v. Switzerland*, nos 7289/75 and 7349/76, 14 July 1977 . . . . . 112

*X v. Federal Republic of Germany*, no 1611/62, 25 September 1965 . . . . . 72, 80

*X v. UK*, no 7547/76, 15 December 1977 . . . . . 72, 80

## INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

*Alejandro v. Cuba*, No 11.589, 29 September 1999, Report No 86/99. . . . . 73

*Coard et al. v. United States*, No 10.951, 29 September 1999, Report No 109/99 . . . . . 72

*Saldaño v. Argentina*, No 12.254, 11 March 1999, Report No 38/99. . . . . 72

## NATIONAL COURTS

High Court of Australia, *Plaintiff M68-2015 v. Minister for Immigration  
and Border Protection*, [2016] HCA 1, 3 February 2016. . . . . 41

UK Divisional Court, <i>R (on the application of Al-Skeini and others) v. Secretary of State for Defence</i> , [2004] EWHC 2911 (ADMIN), All ER (D) 197 (Dec), 14 December 2004.....	76
UK Court of Appeal, <i>Al-Skeini and Others v. Secretary of State for Defence</i> , [2005] EWCA Civ 1609, 21 December 2005.....	68–69, 75–77
UK House of Lords, <i>R. v. Immigration Officer at Prague Airport</i> , [2004] UKHL 55, 9 December 2004.....	37, 90
— <i>Al-Skeini and others v. Secretary of State for Defence</i> , [2007] UKHL 26, 13 June 2007.....	68–69, 75–77, 82
— <i>R (Gentle) v. The Prime Minister</i> , [2008] 1 AC 1356, 29 April 2008.....	78
UK Supreme Court, <i>R. (on the application of Smith) v. Secretary of State for Defence and Another</i> , [2010] UKSC 29, 30 June 2010.....	78
US Supreme Court, <i>Nishimura Ekiu v. United States</i> , 142 U.S. 651, 18 January 1892.....	13
— <i>Sale v. Haitian Centers Council Inc.</i> , 509 U.S. 155, 113 S. Ct. 2549, 21 June 1993.....	42, 50, 81, 90



# TABLE OF TREATIES, INSTRUMENTS AND LEGISLATION

## LEGISLATIVE ACTS AND TREATIES\*

Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry, OJ L20, 28 January 1976 . . . . .	184
Single European Act, OJ L169, 29 June 1987 . . . . .	17
Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L239, 22 September 2000. . . . .	198
Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985, OJ L187, 10 July 2001. . . . .	3
Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L212, 7 August 2001 . . . .	193, 199
Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L328, 5 December 2002. . . . .	199
Framework Decision 2002/946/JHA of the Council of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L328, 5 December 2002. . . . .	199
Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L158, 30 April 2004 . . . . .	201
Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L349, 25 November 2004 . . . . .	141
Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L105, 13 April 2006 . . . . .	152, 199
Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L199, 31 July 2007 . . . . .	146, 151–152

---

\* In chronological order.

Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 amending Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), as regards the implementing powers conferred on the Commission, OJ L97, 9 April 2008	200
Regulation (EC) No 81/2009 of the European Parliament and of the Council of 14 January 2009 amending Regulation (EC) No 562/2006 as regards the use of the Visa Information System (VIS) under the Schengen Borders Code, OJ L35, 4 February 2009	200
Council Decision (EU) 2010/252 of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L111, 4 May 2010	167–169, 218
Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L304, 22 November 2011	146, 154–159, 162–163, 177, 195, 197, 209–210
Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L337, 20 December 2011	193, 199
Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L180, 29 June 2013	171, 193, 199
Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L180, 29 June 2013	193, 199
Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L180, 29 June 2013	3, 193, 199
Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L180, 29 June 2013	194, 199

Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council OJ L182, 29 June 2013 . . . . .	135, 200
Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L295, 6 November 2013 . . . . .	200
Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (EUROSUR), OJ L295, 6 November 2013 . . . . .	43
Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L189, 27 June 2014. . . . .	82, 135, 166, 169–172, 205–206
Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (1), (2015/C 229/06), OJ C229, 14 July 2015 . . . . .	204
Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), (codification), OJ L77, 23 March 2016 . . . . .	5, 200
Regulation (EU) No 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L251, 16 September 2016. . . . .	147, 159–161, 163, 165, 177, 179, 181, 210, 219

## DOCUMENTS

### EUROPEAN UNION

Austrian Presidency, Strategy Paper on Migration and Asylum Policy to the K4 Committee of the Council, 9809/98, 1 July 1998. . . . .	27
Commission of the European Communities, SEC(91) 1855 final, Communication on immigration, 21.10.1991 . . . . .	14

— COM(2002) 233 final, Towards integrated management of the external borders of the Member States of the European Union, 7.5.2002 . . . . .	144–145, 199
— COM(2002) 703 final, Integrating migration issues in the EU relations with third countries, 3.12.2002 . . . . .	28
— COM(2002) 718 final, The operating framework for the European Regulatory Agencies, 11.12.2002 . . . . .	174–175
— COM(2003) 687 final, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, 20.11.2003 . . . . .	146, 148
— COM(2005) 59 final, Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.2.2005 . . . . .	207
— COM(2005)184, The Hague Programme: Ten Priorities for the next ten years. The Partnership for European renewal in the field of Freedom, Security and Justice, 10.5.2005 . . . . .	31
— COM(2005) 388 final, Regional Protection Programs, 1.9.2005 . . . . .	195
— COM(2005) 390 final, Migration and development: Some concrete orientations, 1.9.2005 . . . . .	31
— COM(2006) 26 final, Thematic programme for the cooperation with third countries in the areas of migration and asylum, 25.1.2006 . . . . .	36
— COM(2007) 301 final, Green Paper on the future Common European Asylum System, 6.6.2007 . . . . .	35
— COM(2008) 69 final, Preparing the next steps in border management in the European Union, 13.2.2008 . . . . .	42
— COM(2008) 135 final, European agencies – The way forward, 11.3.2008 . . . . .	173
Conclusions of the 3415th Justice and Home Affairs Council Meeting on Future of the Return Policy, 8–9 October 2015 . . . . .	33, 188
Council of the European Union, High-Level Working Group on Asylum and Migration – Adoption of the Report to the European Council in Nice, 13993/00, 29.11.2000 . . . . .	26
— Outcome of the 2396th Justice and Home Affairs Council Meeting 6–7 December 2001, 14581/01, 7.12.2001 . . . . .	198
— Plan for the Management of the External Borders of the Member States of the European Union, 10019/02, 14.6.2002 . . . . .	43, 145–146, 199
— Outcome of the 2768th Justice and Home Affairs Council Meeting, 4–5 December 2006, 15801/06, 5.12.2006 . . . . .	148–149
— European Pact on Immigration and Asylum, 13440/08, 24.9.2008 . . . . .	35–36
— Summary of discussions of the meeting of the JHA Agencies, 11644/08, 9.7.2008 . . . . .	209
European Commission, SEC(2010) 149, Impact Assessment accompanying the Proposal for a Regulation amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), 24.2.2010 . . . . .	141, 148, 155–156, 173
— COM(2010) 61 final, Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), 24.2.2010 . . . . .	141, 154
— COM(2011) 76 final, Evaluation of EU Readmission Agreements, 23.2.2011 . . . . .	23, 27



— COM(2011) 743 final, The Global Approach to Migration and Mobility, 18.11.2011 . . . . .	27, 32–33
— COM(2013) 95 final, Proposal for a Regulation of the European Parliament and the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, 28.2.2013 . . . . .	200
— COM(2013) 97 final, Proposal for a Regulation of the European Parliament and the Council establishing a Registered Traveller Programme, 28.2.2013 . . . . .	200
— COM(2014) 96 final, Report on the implementation of the Global Approach to Migration and Mobility 2012–2013, 21.2.2014 . . . . .	33
— COM(2015) 240 final, European Agenda on Migration, 13.5.2015 . . . . .	20, 33, 36, 160
— COM(2015) 671 final, Proposal for a Regulation of the European Parliament and the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, 15.12.2015 . . . . .	147, 159, 163–164
— COM(2015) 673 final, A European Border and Coast Guard and effective management of Europe’s external borders, 15.12.2015 . . . . .	160–161
European Council, Conclusions of the Edinburgh European Council, 11–12 December 1992, SN 456/1/92 . . . . .	25
— Conclusions of the Tampere European Council, 15–16 October 1999, SN 200/99 . . . . .	14, 22, 24
— Conclusions of the Laeken European Council, 14–15 December 2001, SN 00300/01 . . . . .	144, 198
— Conclusions of the Thessaloniki European Council, 18–19 June 2003, SN 11638/03 . . . . .	29, 146
— Conclusions of the Brussels European Council, 4–5 November 2004, SN 14292/04 . . . . .	29–30
— Global Approach to Migration, 15914/05 CONCL 3, 17.12.2005 . . . . .	15
— Conclusions of the Seville European Council, 21–22 June 2006, SN 13463/02 . . . . .	28, 146
— Conclusions of the Brussels European Council, 21–22 June 2007, SN 11177/1/07 . . . . .	142
— The Stockholm Programme, 2010/C 115/01, OJ C115, 4 May 2010 . . . . .	32, 35, 166
— Conclusions of the Brussel European Council, 18–19 February 2016, EUCO 1/16 . . . . .	166
European Ombudsman, Own-initiative Inquiry concerning Implementation by Frontex of its Fundamental Rights Obligations, OI/5/2012/BEH-MHZ, 6 March 2013 . . . . .	164
— Draft Recommendation of the European Ombudsman in his Own-initiative Inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 9 April 2013 . . . . .	164
— Special Report of the European Ombudsman in Own-initiative Inquiry OI/5/2012/BEH-MHZ concerning Frontex, 7 November 2013 . . . . .	164
— Malta Declaration on the external aspects of migration: addressing the Central Mediterranean Route, 3 February 2017 . . . . .	82
— Conclusions on Libya, 6 February 2017, SN 5321/17 . . . . .	82
European Parliament, Resolution of 12 March 1987 on the right to asylum, A2-227/86 . . . . .	14, 25
— Report on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM(2003) 687 – C5-0613/2003 – 2003/0273(CNS)), A5-0093/2004, 24 February 2004 . . . . .	210

- Resolution of 18 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI)), 2010/ C45 E/07, OJ C45, 23 February 2010 . . . . . 35–36
- Orientation Vote Result on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) (COM(2010)0061 – C7-0045/2010 – 2010/0039(COD)), 2010/0039(COD), 23 March 2011 . . . . . 157–158
- Resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex (2014/2215(INI)), P8\_TA(2015)0422, 2 December 2015 . . . . . 164–165

## UNITED NATIONS (UN)

- Eide A., *The Right to Adequate Food as a Human Right*, Report,  
UN Doc E/CN.4/Sub.2/1983/25 . . . . . 96
- General Assembly, *Responsibility of States for wrongful acts*,  
UN Doc A/RES/56/83, 28.1.2002 . . . . . 51
- HRC, *General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26.5.2004. . . . . 72, 100, 129
- ILC, *Yearbook of the International Law Commission 1966, Vol. I, Part Two*,  
UN Doc A/CN.4/SER.A/1966 . . . . . 51
- *Yearbook of the International Law Commission 1966, Vol. II*,  
UN Doc A/CN.4/SER.A/1966/Add.1 . . . . . 51
- *Yearbook of the International Law Commission 1975, Vol. II*,  
UN Doc A/CN.4/SER.A/1975/Add.1 . . . . . 51, 56
- *Yearbook of the International Law Commission 1978, Vol. II, Part One*,  
UN Doc A/CN.4/SER.A 1978/Add.1, 1978 . . . . . 114
- *Yearbook of the International Law Commission 2001, Vol. II, Part Two*,  
UN Doc A/CN.4/SER.A/2001/Add.1, 2001 . . . . . 112, 116–117, 119,  
123–125, 128
- *Second report on the expulsion of aliens by Special Rapporteur Maurice Kamto*,  
UN Doc A/CN.4/573, 20.7.2006 . . . . . 91
- Security Council, *Question Relating to the Case of Adolf Eichmann*,  
UN Doc S/RES/138 (1960), 23.6.1960 . . . . . 56
- Special Rapporteur on Torture, Manfred Nowak, *Mission to Greece*,  
UN Doc A/HRC/16/52/Add.4, 4.3.2011. . . . . 153
- UNHCR ExCom, *Conclusions No 25*, UN Doc A/37/12/Add.1, 20.10.1982 . . . . . 130
- *Conclusions No 79 on International Protection*, UN Doc A/AC.96/878,  
11.10.1996. . . . . 130
- *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*,  
UN Doc EC/50/SC/CRP.17, 9.6.2000 . . . . . 38–39

## OTHERS

CoE Parliamentary Assembly, The 'left-to-die boat': actions and reactions, Report by the Committee on Migration, Refugees and Displaced Persons, CoE Doc 13532, 9.6.2014 .....	171
CPT, Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009, CPT/Inf (2010) 14, 28.4.2010 .....	88
Inter-American Court of Human Rights, <i>The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75)</i> , OC-2/82, 24 September 1982 .....	57



## LIST OF ABBREVIATIONS

AEDH	Association Européenne pour la défense des Droits de l'Homme
AFSJ	Area of Freedom, Security and Justice
AP	Action Plan
ASR	Articles on Responsibility of States for Internationally Wrongful Acts
CAT	Committee Against Torture Convention Against Torture
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
EASO	European Asylum Support Office
EBCGA	European Border and Coast Guard Agency
EC	European Community
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EEAS	European Union External Action Service
ENP	European Neighbourhood Policy
EP	European Parliament
ESM	European Stability Mechanism
EU	European Union
ExCom	Executive Committee
FRA	Fundamental Rights Agency
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GAM	Global Approach to Migration

GAMM	Global Approach to Migration and Mobility
GRC	Geneva Convention Relating to the Status of Refugees 1951
HLWG	High Level Working Group
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBM	Integrated Border Management
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organization
JHA	Justice and Home Affairs
MS	Member States
OHCHR	Office of the United Nations High Commissioner for Human Rights
OLAF	European Anti-Fraud Office
PCIJ	Permanent Court of International Justice
QMV	Qualified Majority Voting
RABIT	Rapid Border Intervention Team
SBC	Schengen Borders Code
SEA	Single European Act
SIC	Schengen Implementation Convention
TCN	Third Country Nationals
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties