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Control and Responsibility in European Union Migration Law and
Policy – A study of Externalisation and Privatisation

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Contents

I.	Introduction – <i>who and where?</i>	3
II.	Legal Capacity – Control and Legal Responsibility	5
III.	Externalisation and Privatisation	9
3.1	Externalisation.....	9
	UK Domestic Courts and Externalisation.....	11
	The Court of Justice of the EU and Externalisation	12
	The European Court of Human Rights and Externalisation	13
3.2	Privatisation.....	15
	UK Domestic Courts and Privatisation.....	16
	The Court of Justice of the EU and Privatisation	18
	The European Court of Human Rights and Privatisation	20
IV.	Conclusion – Delegating Legal Responsibility	22

I. Introduction – *who and where?*

Member States of the European Union (“Member State(s)” or “the State(s)”), are long associated with seeking to preserve their authority over migration control and border management. At first glance, the externalisation and privatisation of migration control and border management seem to challenge that narrative. Member States have started to embrace migration control and border management procedures which harness the potential of cooperation with third States and which devolve their authority to private actors. Modern border control is now being enforced at either side of the traditional static external border. Migration control and border management are no longer left behind in the airport after landing; they are increasingly being enforced internally. Likewise, the idea that Member State migration control and border management do not occur before getting on a plane to travel to the European Union (“EU” or “the Union”) territory is also proving to be highly questionable. Nowadays, the *who* and *where* of migration control have become increasingly crucial. The questions are: *who* is it that is implementing a specific function or service of migration control? And, *where* is it being implemented? These questions have become decisive in the allocation of legal responsibility for any breach of a migrant’s fundamental rights which occurs during the implementation of migration control and border management.¹

The questions of *who* and *where* reflect the two phenomena that this short paper explores – privatisation² and externalisation.³ Externalisation is the movement of *direct* migration control to outside of the Member States’ territory. The *direct* nature of the implementation is key. A distinction can be made between that external action by a Member State which includes the *direct* involvement of officials of that Member State

¹ It is useful to refer to the Concurring Opinion of Judge Pinto De Albuquerque in *Hirsi Jamaa and Others v. Italy* [GC] 27765/09. Italics are added to highlight the Judge’s opinion on the questions of *who* and *where* respectively: “Immigration and border control is [sic] a primary State function and all forms of this control result in the exercise of the State’s jurisdiction. Thus, all forms of immigration and border control of a State party to the European Convention on Human Rights are subject to the human rights standard established in it and the scrutiny of the Court, regardless of *which personnel* are used to perform the operations and *the place where they take place*.”

² The PhD research upon which this paper is based explores employer sanctions, privatised detention and the privatised removal of migrants as examples of privatised procedures as well as carrier sanctions and externalised and privatised visa issuance which are overarching examples of both privatisation and externalisation.

³ The author’s PhD research examines maritime interdiction, external processing and immigration liaison officers as examples of externalisation.

and that external action which is more *indirect* and does not implicate the Member State as explicitly in the migration control and border management in question.⁴ The latter softer and more indirect action may be termed the external dimension⁵ while the former, direct and hands on control is externalisation. In considering whether the State is legally responsible for a particular action, a court will look at the level and type of *control* that that State holds over the migrant.

‘Privatisation,’ includes any measure that results in a temporary or permanent transfer to the private sector of activities that are normally associated with being a State function or where the nature of an activity is inherently public in that a public body or agency normally implements such tasks.⁶ This definition is purposefully wide in order to fully consider the disparate and unexpected ways in which private actors have become players in migration control and border management. A distinction must also be made within privatisation, between those activities that have been privatised by contract and those which have been privatised on the basis of being forced to comply with rules that have been set out by the State under the threat of sanction.⁷ The distinction is therefore made between the more traditional contractual privatisation and this more innovative enforced type of privatisation. The distinction may be understood in terms of the carrot and the stick – contractual privatisation being the carrot and private actor cooperation under the threat of sanction being the stick. Both the carrot and the stick approaches result in privatised implementation and enforcement but, as will be examined, these alternative avenues may have different implications in terms of determining legal responsibility for the privatised procedure in question.

⁴ This distinction is also made in: Mc Namara. F., Member State Responsibility for Migration Control within Third States – Externalisation Revisited. *European Journal of Migration and Law* 15 (2013) 319-335.

Distinctions within external action has been elsewhere but not in exactly the same terms, see: Rodier. C., DG for external policies of the Union. ‘Analysis of the external dimension of the EU’s asylum and immigration policies’ – summary and recommendations for the European Parliament (2006).

Available at: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/619/619330/619330en.pdf
See also: Costello. C., & Moreno-Lax. V., The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model in Peers. S., Hervey. T., Kenner. J., Ward. A., The EU Charter of Fundamental Rights. Page 1658.

⁵ Readmission agreements, mobility partnerships, the European Neighbourhood Policy etc.

⁶ See: Kritzman-Amir. T., Privatization and Delegation of State Authority in Asylum Systems. *Law & Ethics of Human Rights* Vol. 5(1) (2011). Page 200.

⁷ Forced privatisation which depends upon the threat of sanction to ensure implementation is discussed in: de Lange. T., The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest? *European Journal of Migration and Law* 13 (2011) 185–200.

The research question is two-fold: Does the control that Member States retain over implementation, despite having privatised and/or externalised that migration control or border management procedure, represent control to a level whereby Member States can still ensure the implementation of national policy goals and *determine* outcomes for the migrant? If so, can legal responsibility be attached to the Member State for that control? The hypothesis of the paper is that externalisation and privatisation can, in certain circumstances, contribute to the Member State maintaining its control while simultaneously removing legal responsibility from itself. In this way, Member States have been able to insert a *distance*⁸ between migration control and legal responsibility for that control. The answer to the research questions will allow an informed opinion to be passed as to whether the aforementioned *distance* has indeed been inserted between migration control and legal responsibility for that control. The challenge for this paper is thus to construct a conceptual basis by which control and legal responsibility may be reasonably measured (Section II) and to contemplate that control in the context of the judicial framework of the Member States (Section III) – the domestic courts of a Member State, the Court of Justice of the EU (“CJEU”) and the European Court of Human Rights (“ECtHR”). The final section of this paper (Section IV) seeks to draw a conclusion as to Member State control and legal responsibility for that externalised and/or privatised control.

II. Legal Capacity – Control and Legal Responsibility

In legal terms, control and legal responsibility for that control, have been abstract and ill-defined concepts from which it has been difficult to draw concrete conclusions. A strict definitional approach, which is a clear test for ascertaining control, or establishing the absence of control, is too strict an approach to take. This paper rather takes the approach of developing a definition which allows for the categorisation of control. Categorising control provides a more nuanced approach to the fact that Member State control is not be a black and white issue in which absolute control either exists or does not exist. Control may be categorised firstly on the basis of whether it satisfies the definition of control

⁸ The concept of distance has been considered in similar contexts previously. For example, see: Kritzman-Amir. T., Privatization and Delegation of State Authority in Asylum Systems. *Law & Ethics of Human Rights* Vol. 5(1) (2011).

(below) and secondly, on the basis of the legal responsibility that arises as a result of that type of control.

‘Control’ in the present context is the extent to which a Member State is able to ensure the implementation of national policy goals and to determine outcomes for migrants through the contracting, coercion or acquiescence of private actors and/or third States. ‘Effective’ control is a control which satisfies this definition and gives rise to legal responsibility for the State. Examining jurisprudence from the various courts is the best guidance as to whether the State has an ‘effective’ control⁹ or not for privatised and/or externalised procedures. That jurisprudence’s oftentimes high threshold in establishing ‘effective’ control means that procedures that are still capable of determining outcomes and ensuring the implementation of national policy goals for migrants may not qualify as being an ‘effective’ control and thus the State will not have legal responsibility. Such control, that can be very considerable but which does not engage the ‘effective’ control threshold is termed here as ‘determinative’ control. The distinctions made in the introduction within both privatisation and externalisation are relevant here. Privatisation that is enforced on a private actor through the threat of sanction, as opposed to the more traditional contracted privatisation, can provide States with determinative control and therefore not reach the ‘effective’ control threshold, that tipping point upon which the State will be found to be legally responsible by the courts. Those procedures that have been privatised by contract will be more likely to be found to be an ‘effective’ control on the basis of the existence of a contract but this is not a foregone conclusion either. Similarly, externalisation is capable of determining outcomes for migrants and may not engage the fundamental rights obligations of a State. It is only the external dimension that does not provide the State with an effective *or* a determinative control. The external dimension only consists of securing the cooperation of a third State.

⁹ ‘Effective’ control as a concept is perhaps most famously considered by the Strasbourg Court in examining whether extraterritorial jurisdiction had been engaged or not. Here it is used in the context of both externalisation and privatisation.

The ‘Effective’ control test first came to prominence with the Northern Cyprus cases: *Cyprus v Turkey* 6780/74 and 6950/75.

Legal responsibility¹⁰ for a particular migration control or border management procedure in the current context refers to the success of proceedings brought against the Member State, by a migrant who has experienced a breach of his/her fundamental rights. In other words, legal responsibility entails the vindication of a migrant's rights by a court. The three court settings that are examined in this paper – the UK domestic courts, the CJEU or the ECtHR – oftentimes set a high threshold for 'effective' control. The procedures which have been externalised or privatised therefore ask difficult legal questions of the EU Member States' domestic courts, the CJEU and the ECtHR.¹¹ The procedures in question have been adopted by Member States, oftentimes with facilitation from the Union through harmonising legislation.¹² Procedures such as the privatised detention and return of migrants are relevant for privatisation while immigration liaison officers and maritime interdiction are examples of externalised procedures. Still other procedures, such as carrier sanctions and the privatised and externalised issuance of visas combine both phenomena.

Delegation refers to the transfer of authority from the State to another actor, with the expectation that the delegate (or "agent") will use that authority to achieve the goals of the other party (the "principal").¹³ There is no evidence to suggest that the delegation to a private actor or the delegation into an externalised setting is any different from this classic formulation of delegation by the State. Among the most pertinent questions that classic State delegation poses are: Why has the principal delegated part of its

¹⁰ Consideration of legal responsibility for both externalisation and privatisation has been examined before. For externalisation, see: Brouwer. E., *Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States in Ryan B., & Mitsilegas. V., Extraterritorial Immigration Control : Legal Challenges* (2010).

For privatisation, see: Gibney. M., *Beyond the Bounds of Responsibility: Western States and Measures to Prevent the Arrival of Refugees*. (2005) *Global Migration Perspectives*. No. 22.

¹¹ Space constraints dictate that the detail of privatised and/or externalised procedures will not be examined in this paper. As stated in n 2 and 3 supra, the research on which this paper is based considers procedures including the use of immigration liaison officers, the potential external processing of asylum seekers and maritime interdiction (externalisation). It also considers the privatised detention and return of migrants and employers sanctions (privatisation). Carrier sanctions and privatised and externalised Visa issuance are considered to overlap between privatisation and externalisation.

¹² Examples of where the Union has facilitated the adoption of migration control and/or border management instruments in this context: Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officer's network; Council Directive 2001/51/EC of 28th of June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (Carrier Sanctions Directive).

¹³ Cox. A., and Posner. E., *Public Law and Legal Theory Working Paper. Delegation in Immigration Law*. John M. Olin Law & Economics Working Paper (2011) No. 572. Page 4.

competence? Does the agent behave as expected? If it does not then what resources can the principal utilise to ensure the compliance of the agent?¹⁴ That Member States delegate border management and migration control procedures to another actor is, in itself, quite remarkable when it is considered how jealously guarded Member States have traditionally been with regard to retaining total control over access to their territory.¹⁵ The surprise at a delegation of procedures in an area so coveted by the State as migration control and border management is partly based upon the legal assumption that a State cannot delegate its legal responsibility away from itself. The assumption in the externalisation context is that the law does not allow Member States to perform in another State that for which they would be liable for inside their own territory.¹⁶ Equally, in the context of privatisation, it is commonly held that Member States cannot escape legal responsibility by delegating a function or a service to a private actor.¹⁷ The existence of a ‘determinative’ control of the migrant as a result of an externalised and/or privatised procedure would certainly buck those assumptions.

A sense of where the courts in London, Luxembourg and Strasbourg locate the threshold of ‘effective’ control can be garnered through an examination of their jurisprudence. The legal capacity of the case to be heard is of course crucial in examining whether or not an action has breached the rights of a migrant. The frustration of the complainant’s legal capacity on the basis of externalisation can occur through a court’s consideration of extraterritorial jurisdiction. Legal responsibility will not be established if, as a preliminary matter, a court finds that it lacks the necessary jurisdiction to examine the case. A complainant’s legal capacity can also be hampered through privatisation if the court, again as a preliminary issue, finds that the privatisation in question has been complete and the private actor’s actions which lead to an alleged breach of fundamental

¹⁴ See: Guiraudon. V., *De-nationalizing Migration Control* in Guiraudon. V., & Joppke. C., *Controlling a New Migration World* (2001)

¹⁵ Stetter. S., *Regulating Migration: Authority Delegation in Justice and Home Affairs*. *Journal of European Public Policy*. (2000) 7:1, 80-103. Page 80.

¹⁶ See: Brouwer. E., *Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States* in Ryan B., & Mitsilegas. V., *Extraterritorial Immigration Control: Legal Challenges* (2010). Page 217. Quoting Lawson. R., ‘*Life After Bankovic: On the Extraterritorial Application of Human Rights Treaties*’ (2004) Coomans. F., and Kamminga. MT., (2004) *Extraterritorial Application of Human Rights Treaties*. Page 136.

¹⁷ See: Ziemele. I., *Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies* (2009) EUI Working Paper. Available at: <http://cadmus.eui.eu/handle/1814/11409>

rights cannot be attributed to the State. While alternative actions against a private actor may well be possible, this paper concerns itself with establishing the absence or presence of State legal responsibility. This paper now turns to examining how well the aforementioned judicial framework can respond to the challenges posed by externalisation and privatisation.

III. Externalisation and Privatisation

In the globalised world of the 21st century, privatisation and externalisation present new and challenging questions for the courts. Innovative forms of private actor involvement in governance are challenging the traditional thinking on privatisation. The Dutch Scientific Council on Government Policy has argued that, as a result of the increased complexity of a globalised society, regulators feel that they no longer have the necessary knowledge to make rules and lack the capacity to check for compliance.¹⁸ The implication is that the State *needs* private actors in order to govern effectively. Similarly, externalisation has become much more pervasive recently and is certainly not limited to the extreme example of off-shore processing that often comes to mind when someone refers to the externalisation of migration control or border management. This section will make a cursory examination of how the challenges of privatisation and externalisation have been handled in the courts of a Member State (the UK), in the CJEU and in the ECtHR.

3.1 Externalisation

As stated in the introduction, externalisation is the movement of migration control and border management to outside the Member State's territory. The distinction made between externalisation and the external dimension represents the division between those procedures that utilise State officials in their implementation and those procedures that do not include State officials in their implementation.¹⁹ The distinction is made with one eye

¹⁸ See: de Lange. T., The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest? *European Journal of Migration and Law* 13 (2011) 185–200. Page 186.

¹⁹ The external dimension was also defined in Garlick. M., The EU Discussions on Extraterritorial Processing: Solution or Conundrum? *Int J Refugee Law* (September/December 2006) 18 (3-4): 601-629. Page 611.

See also: Gil-Bazo. MT., The Practice of Mediterranean States in the context of the European Union's

on how Courts, and especially the ECtHR, have approached the external action of States. In considering whether the State is legally responsible for a particular action, a court will be inclined to look at the type of *control* that that State holds over the migrant. An externalised procedure will necessitate a stronger and more direct type of control than a procedure of the external dimension which only provides the State with a weak control over the situation in question. On that basis, externalisation is more interesting as it begs more questions of legal responsibility for this stronger form of external control.

Extraterritorial jurisdiction is a significant hurdle for any complainant who alleges a violation of his/her human rights within a third State or even on the high seas. As will be discussed below, the ECtHR has clarified extraterritorial jurisdiction in the context of migration control and border management on the high seas. However, the nature of maritime interdiction of migrants is now such that there are many variables which could increase or decrease the control of a Member State in the eyes of the Court. The CJEU awaits clarifying case-law for the extraterritorial jurisdiction of the Charter but has the potential to be a positive force for a broad interpretation of extraterritorial jurisdiction. The courts in the UK have a very narrow, territorial based, interpretation of jurisdiction in the context of migration control and border management as their main precedent for a decade now but the winds of change are blowing through those courtrooms as well. Finally, mention should be made of the possible influence of “*compulsory*” powers in the courts i.e. powers such as the authority to detain, the use of force and restraint. The exercise of those powers have often been interpreted as signifying the exercise of jurisdiction but one might well ask, is control any less ‘*effective*’ than a procedure that includes compulsory powers if it is still capable of ensuring the implementation of national policy goals and of determining crucial outcomes for migrants?

Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited Int J Refugee Law (September/December 2006) 18 (3-4): 571-600.

Finally, see also: Lavenex. S., Shifting Up and Out: The Foreign Policy of European Immigration Control. West European Politics (2006) Vol 29(2), 329: “The external dimension consists of the mobilisation of third countries to control migration flows into Europe.”

UK Domestic Courts and Externalisation

The UK courts have had an interesting run of case-law over the past few years in the field of externalisation. In the context of migration control and border management, that case-law is dominated and overshadowed by what has become known as the *Roma Rights Case* or the *Prague Airport Case*.²⁰ The case concerned Roma people who were travelling from the Czech Republic to the UK with the intention of claiming asylum upon arrival. Their journey was interrupted by the actions of British Immigration Liaison Officers who were working in Prague Airport. The House of Lords, as it then was, found that the control exerted by British Immigration Liaison Officers in Prague airport in preventing the appellant's journey had not engaged the UK's jurisdiction. Lord Bingham of Cornhill spoke on the principle that an individual who presents themselves at the border of another State as an applicant of asylum should not be turned away from that border. The Lord stated: "...that principle ...cannot avail the appellants, who have not left the Czech Republic nor presented themselves, save in a highly metaphorical sense, at the frontier of the United Kingdom."²¹ It is that metaphorical border which prevailed in the *Roma Rights Case* and the UK's obligation to accept asylum applications was adjudged not to have been breached.

A broader understanding of extraterritorial jurisdiction has emerged in case-law with regard to UK military action in Iraq. In *Smith (and Others) v MOD*,²² the UK Supreme Court are argued to have taken a '*functional approach*,' similar to recent rulings from Strasbourg on the UK's military presence in Iraq.²³ The case concerned the death of British soldiers in Iraq and could be argued to have gone even further than the Strasbourg Court's high-water mark case of *Al-Skeini*²⁴ which will be examined below. In *Smith* the Supreme Court found that Britain were no longer exercising public powers which had been the basis of establishing extraterritorial jurisdiction under *Al Skeini*. Instead, the Court held unanimously that the UK exercised extraterritorial jurisdiction over the

²⁰ Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants) [2004] UKHL 55.

²¹ Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants) [2004] UKHL 55. Paragraph 26.

²² Smith (and Others) v MOD [2013] UKSC 41.

²³ See: *Al-Skeini and Others v UK*, 55721/07; *Al-Jedda v. UK*, 27021/08.

²⁴ *Al-Skeini and Others v UK*, 55721/07.

soldiers at the time of their deaths based on the authority and control which the UK, through the chain of military command, had over the individuals.²⁵

It must be stated that the relationship between a person serving in the armed forces and answerable to a chain of command intrinsically linked to that State obviously represents a higher level of State control than the presence of an Immigration Liaison Officer for example, notwithstanding the fact that an Immigration Liaison Officer could be responsible for denying access to EU territory to an asylum seeker. It is therefore difficult to definitively assert whether a narrow territorially bound, *Roma Rights Case* approach or a broad, *'functional,' Smith* case interpretation would be applied to establishing extraterritorial jurisdiction for the type of control involved in externalised migration procedures.

The Court of Justice of the EU and Externalisation

The CJEU has not ruled on the extraterritorial applicability of the Charter of Fundamental Rights.²⁶ Article 47 of the Charter guarantees that *“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy...”* No territorial limitation has been included in the Charter. In this context it is interesting to consider the field of application of the Charter under its Article 51. Article 51 states that the Charter applies whenever the institutions, bodies, offices and agencies of the Union exercise their powers or when the Member States *“are implementing EU law.”* Costello and Moreno-Lax state that the Court has now clarified that the Charter applies as the general principles did, that is, whenever Member States *“act within the scope of Union law.”*²⁷ There is the potential for a big impact for the CJEU on any migration control exerted by the Member States together or apart as they implement Union law. The involvement of any Union agency in procedures beyond the Union’s territory would also be in question. This is especially relevant for Frontex in the context of its coordination of

²⁵ Holcroft-Emmess. N., *Extraterritorial Jurisdiction under the ECHR – Smith (and Others) v MOD* (2013) Oxford Human Rights Hub (2013). Available at: <http://ohrh.law.ox.ac.uk/extraterritorial-jurisdiction-under-the-echr-smith-and-others-v-mod-2013/>

²⁶ Charter of Fundamental Rights of the European Union (2000/C 364/01).

²⁷ Costello. C., & Moreno-Lax. V., *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model* in Peers. S., Hervey. T., Kenner. J., Ward. A., *The EU Charter of Fundamental Rights*. Page 1680.

sea operations.²⁸ Clarification from the CJEU will be needed to fully set out the implications of the Charter's omission of a stipulation bounding jurisdiction to the territorial scope.

Costello and Moreno-Lax further argue that the language in the Charter is that of competences, the allocation of power and its application in the context of Union law. The Charter does not speak in terms of territory within which those competences exist and that power must be exercised.²⁹ Whether this means that the Charter is to be applied anytime and anywhere Union law is implemented remains to be decided with certainty by the CJEU. The real question in such circumstances will be what constitutes the implementation of EU law? The implementation of the Carrier Sanctions Directive,³⁰ the Immigration Liaison Officers Directive³¹ and the proposed Frontex Operations at Sea Regulation³² could all potentially engage a Member State's extraterritorial jurisdiction and thus potentially its legal responsibility under the Charter.

The European Court of Human Rights and Externalisation

Since the much maligned *Bankovic* case,³³ the Strasbourg Court has taken progressive steps toward a broader understanding of what can engage a State's Convention obligations. It has now been established that the instant at which control over an area or over people becomes 'effective' or when public power is being wielded (the functional approach mentioned above), is the threshold at which point Member State legal

²⁸ 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) COM(2010) 61 final.

²⁹ Costello, C., & Moreno-Lax, V., *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model* in Peers, S., Hervey, T., Kenner, J., Ward, A., *The EU Charter of Fundamental Rights*. Page 1679.

³⁰ Council Directive 2001/51/EC of 28th of June 2001, supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (Carrier Sanctions Directive).

³¹ Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network (Immigration Liaison Officers Regulation); Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network.

³² 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) COM(2010) 61 final.

³³ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99.

responsibility under the Convention is engaged.³⁴ The situation of the ECtHR mirrors the same struggle averred to above in the UK's domestic courts. It is in the context of military action that extraterritorial jurisdiction has most often been engaged by Member States. It is by no means only in the context of military action that extraterritorial jurisdiction can be established but the Court has on occasion shown hesitation to stray from the territorial based approach to jurisdiction unless it is in the military context.³⁵

The *Hirsi* case provides the latest findings of the ECtHR as to extraterritorial jurisdiction in a migration context.³⁶ In *Hirsi* the Italian *Guardia di Finanza* intercepted migrants bound for Europe in international waters and returned them to Libyan shores. This return consisted of taking the migrants on board the Italian vessel and sailing to Libya and disembarking those migrants there and was found to have engaged the Italians' Convention obligations.³⁷ The Court stated that jurisdiction is primarily territorial³⁸ and underlined the exceptional terms in which extraterritorial jurisdiction must be framed by stating that "*In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra territorially must be determined with reference to the particular facts...*"³⁹

While confirming that the interception of migrants in the high seas and the use of compulsory powers could engage Convention obligations, the same level of 'effective' control which included transferring the migrants to the Italian ship and further transfer to Libya, may struggle to be reproduced in the territories of third States. Perhaps if Member States began to externally process the applications of asylum seekers or if Immigration Liaison Officers exercised a compulsory power of some kind then an 'effective' control over persons, an area or the application of public power may be found to exist. Immigration Liaison Officers, carrier sanctions and other such controls gives rise to powers such as decision making as to access to the EU and an onus to report to Member States but the Strasbourg court, depending on the exact circumstances, would likely look

³⁴ The threshold of 'effective control', see: *Al-Skeini and Others v UK* 55721/07, paragraph 136.

³⁵ See for example: *Öcalan v. Turkey* 46221/99; *Medvedyev and Others*, 3394/03 and *Xhavara and Others v. Italy and Albania*, 39473/98.

³⁶ *Hirsi Jamaa and Others v. Italy* [GC], 27765/09.

³⁷ Just as has happened previously in: *Medvedyev and Others v. France* [GC] 3394/03; and in a migration context in: *Xhavara and Others v. Italy and Albania* 39473/98.

³⁸ *Hirsi Jamaa and Others v. Italy* [GC] 27765/09. Paragraph 71.

³⁹ *Hirsi Jamaa and Others v. Italy* [GC] 27765/09. Paragraph 73.

upon such controls as providing the State with a lesser control than the compulsory powers of detention or the use of physical force. In this way, externalised migration controls within a third State are still awaiting their '*Hirsi moment*'.⁴⁰

3.2 Privatisation

The distinction that has been made in privatisation is an important aid in considering those privatised procedures whose legal responsibility for any breach of fundamental rights that occurs will be attributed to the State and those which have been fully and completely privatised. The distinction is a guide rather than a rule as it is possible that contracted procedures may well still be considered to have been completely privatised as well. Examples of such contracted procedures are the private enforcement of detention and return of migrants. The privatised procedures that have not been contracted for are not the result of a tender for contract and are dependent on sanctions in order to force private actors to implement State priorities. Legal responsibility for such breaches are less likely to be attributed to the State.⁴¹ The distinction is therefore made between contractual privatisation and a type of 'enforced' privatisation.

The ordinary understanding of privatisation is that the State makes a full transfer of sovereign power and ownership of a resource, process or function to a private actor. However, this understanding is not applicable to privatisation in the field of migration control and border management. "*...immigration policy seems an unpromising place to look for evidence of privatisation, if by this one means the retraction of the state.*"⁴² The fact that the State holds entry, exit, residence and citizenship very closely has been a constant since the advent of nation states. Delegation to another authority has thus been characterised as being made only in circumstances in which the State can retain control over the implementation of its policy choices. Despite this control retention, legal responsibility may sometimes be removed. Of course, other elements may attract the

⁴⁰ Mc Namara, F., Member State Responsibility for Migration Control within Third States – Externalisation Revisited. *European Journal of Migration and Law* 15 (2013) 319-335. Page 334.

⁴¹ "*Forces certain responsibilities on employers...*" de Lange argues that different types of privatisation exist – coerced; contracted. Etc. See: de Lange, T., The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest? *European Journal of Migration and Law* 13 (2011) 185–200.

⁴² Macklin, A., Public Entrance/Public Member, in Cossman B., & Fudge, J., *Privatization, Law and the Challenges to Feminism* (2002).

State to privatisation. Efficiency, money saving, access to specific information or other particular qualities and even political ideology must all be considered as points that can influence whether States privatises activities which, previously, it had always undertaken itself. However, it is important to recognise that while political and moral arguments may be made as to why migration control and border management should remain in public hands, a legal argument may also be made on the basis of a decrease in accountability and legal responsibility which can result in the increased likelihood of breaches of fundamental rights for migrants. Again, “*compulsory*” powers that are normally associated with the powers of the State will be persuasive toward establishing that that particular procedure and its fall-out must be attributed to the State which must therefore assume legal responsibility for any fundamental right that is found to have been breached.

UK Domestic Courts and Privatisation

EU Member States have varying degrees of privatisation in migration control and border management; the UK represents the deep-end of such investment. For this reason, the UK’s domestic courts are a good example of a domestic judicial system which has been challenged by the privatisation of migration control and border management procedures. The overarching research question is aimed at establishing State responsibility and the vindication of a migrant’s rights for a breach of those rights; rather than consideration of alternative avenues toward justice such as tort law. The approach of UK domestic courts to the Human Rights Act is therefore the primary concern here.⁴³ The interpretation given to section 6(3)(b) of the Human Rights Act, which considers the notion of ‘hybrid’ public authorities, is of crucial importance. Section 6(3)(b) provides that a “*public authority*” includes any person, certain of whose functions are those of a public nature. There exists a controversial debate in the UK as to the interpretation that the courts should take of Section 6(3)(b).⁴⁴ The debate revolves around the broad and narrow interpretations that public authorities should have under that provision.

⁴³ The Human Rights Act 1998.

⁴⁴ On the widespread criticism by human rights advocates of the narrow approach taken by the courts to section 6(3)(b) of the Human Rights Act, see: Palmer. E., *Judicial Review, Socio-Economic Rights and the Human Rights Act*. Page 142-143.

The prevailing jurisprudence has afforded private actors which implement public functions, a narrow interpretation.⁴⁵ The Joint Committee on Human Rights of the House of Lords and House of Commons stated in its 2003/2004 report that *the great fear in this regard is that a private actor with “compulsory powers” like the power to detain or the power to use physical force or to restrain may be adjudged as not representing a procedure of the public authority.*⁴⁶ Indeed, those procedures for which the State has contracted a private actor to implement often include such *“compulsory powers.”* However, the Joint Committee reassures on this point: *“We consider that, on the state of the current law, that it is unlikely that these service providers [immigration detention and private prisons] would not be considered public bodies for the purposes of the HRA [Human Rights Act]. However, the status of these individual bodies, and the nature of their powers, are still to be assessed by the Courts. This will take place on a case by case basis.”*⁴⁷

The use of force during removal and the detention of migrants are likely to satisfy the demands of section 6(3)(b) as that section is currently interpreted.⁴⁸ Interestingly, this is so, not as a result of the contract but because those procedures that have been contracted also implement *“compulsory powers.”* In contrast, those procedures that are implemented by private actors under pain of sanction are unlikely to include any *“compulsory powers.”* At the moment, the reach of section 6(3)(b) has been tightly circumscribed, and the section only clearly encompasses regulatory or physically coercive powers.⁴⁹ Procedures such as carrier sanctions and visa issuance, of course are procedures which also have an externalised aspect to their make-up. Notwithstanding

⁴⁵ See: Young, A., *The Human Rights Act 1998, Horizontality and the Constitutionalisation of Private Law* in Ziegler, K., and Huber, P., *Current Problems in the Protection of Human Rights* (2013).

⁴⁶ Joint Committee on Human Rights, House of Lords & House of Commons, *The Meaning of Public Authority under the Human Rights Act*. 9th Report of Session 2006-2007. Page 50.

⁴⁷ Joint Committee on Human Rights, House of Lords & House of Commons, *The Meaning of Public Authority under the Human Rights Act*. 9th Report of Session 2006-2007. Page 26.

Furthermore, while section 6(1) HRA provides direct protection only against core public authorities, the Home Office White Paper 'Rights Brought Home' lists the following traditional public authorities: central government, including executive agencies; local government; the police; immigration; prisons; courts and tribunals themselves ... '.

See also: Clayton, G., *The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control* in Ryan B., & Mitsilegas, V., *Extraterritorial Immigration Control: Legal Challenges* (2010). Page 427.

⁴⁸ *YL v. Birmingham City Council and others* [2007] UKHL 27.

⁴⁹ *YL v. Birmingham City Council and others* [2007] UKHL 27, Baroness Hale. Paragraph 63. See also: Donnelly, CM., *Delegation of Governmental Powers to Private Parties* (2008). Page 269.

externalisation, on the basis of their privatised nature alone, and considering the case-law examined here, section 6(3)(b) will not be engaged by those procedures. Alternative proceedings may still be available to migrants who wish to pursue the State and/or the private actor for an alleged breach in the implementation of these procedures. The UK courts have approached the allocation of legal responsibility on the basis of *the nature of the function involved in implementing the procedure* rather than on the basis of control of the State and institutional proximity of the private actor to the State.⁵⁰ However, if the nature of that function does not include compulsory powers then it will be difficult to have the breach attributed to the State.

The Court of Justice of the EU and Privatisation

What is in question here is the implementation and application of Union law pertaining to border management and migration control by the Member State which has incorporated a private actor(s) for that implementation and application. If that implementation and application leads to a breach of a migrant's fundamental rights then that migrant may challenge the Member State in question for having breached the Charter of Fundamental Rights. As was touched upon above, Article 51 of the Charter ensures that it will apply to the Member States only when they are implementing Union law. The Court has distinguished some instances by which the Charter is engaged. Firstly, those measures adopted by a Member State with the intention of applying an EU act, a directive⁵¹ or a regulation⁵², represent the implementation of Union law as per Article 51(1).⁵³ Secondly, where the CJEU establishes that a Member State authority has exercised a discretion that

⁵⁰ See: Donnelly. CM., *Delegation of Governmental Powers to Private Parties* (2008).

See: Palmer. E., *Judicial Review, Socio-Economic Rights and the Human Rights Act*. Page 146.

See also: Joint Committee on Human Rights, House of Lords & House of Commons, *The Meaning of Public Authority under the Human Rights Act*. 9th Report of Session 2003-2004. Paragraph 136.

⁵¹ See for example: Case C-442/00 Caballero [2002].

See: Pech. L., Groussot. X., Thor Petursson. G., *The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication*. Eric Stein Working Paper. Page 5.

⁵² See for example: Case 5/88 Wachauf [1989].

See: Pech. L., Groussot. X., Thor Petursson. G., *The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication*. Eric Stein Working Paper. Page 5.

⁵³ See C-309/96 Annibaldi [1997]. Paragraph 21-23.

See also: C-40/11 Iida [1997]. Paragraph 79.

is vested in it by virtue of EU law.⁵⁴ Thirdly, the Charter is engaged by those measures that have been adopted by a Member State whose subject matter is already governed by provisions of EU primary *or* secondary legislation.⁵⁵

Many privatised procedures – such as the detention of migrants, the return of migrants, carrier sanctions and employer sanctions – have been legislated for at Union level. It is possible to give an opinion as to whether a particular procedure represents the implementation and application of Union law or not by way of reference to CJEU jurisprudence. The detention of migrants is set out by the Reception Directive and by the Returns Directive.⁵⁶ The nature of directives in general is such that it allows the Member State room to manoeuvre in implementation but directives, nonetheless, represent an act of the EU and their implementation is capable of engaging a Member State's legal responsibility under the Charter.⁵⁷

Having established that Union law is being applied, it is left to also ascertain that it is the State that is implementing the procedure in question despite the fact that, *prima facie*, it is a private actor that is tasked with its implementation. While complete horizontal applications, a private actor pursuing another private actor, for a breach of the Charter has by now been accepted by the Court,⁵⁸ this paper concentrates on establishing Member State legal responsibility and the vindication of the fundamental rights of migrants. Decisions and actions of a private actor that breach Union law can be attributed to the State where that actor has been entrusted with carrying out functions of a public character and/or where it is under the decisive control of Member States in circumstances where the breach at issue arises in connection with the exercise of such public

⁵⁴ See: Lenaerts. K., Exploring the Limits of the EU Charter of Fundamental Rights (2012) European Constitutional Law Review, 8, pp 375-403. Page 380

See also: Joined cases C-411/10 and C-493/10, NS v Secretary of State for the Home Department [2011]. Finally, see also: C-4/11 Bundesrepublik Deutschland v Kaveh Puid [2013].

⁵⁵ See: Pech. L., Groussot. X., Thor Petursson. G., The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication. Eric Stein Working Paper. Page 14.

⁵⁶ See especially: Articles 15-17 of the Return Directive. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. See also: Recital 10 of the Reception Directive where detention for migrants is defined. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

⁵⁷ See: Case C-442/00 Caballero [2002]. Paragraph 31.

⁵⁸ See, for example: Case C-176/12 Association de Médiation Sociale v. Union locale des syndicats [2014].

functions.⁵⁹ In such circumstances, a breach of a right that is enshrined in the Charter by a private actor will result in legal responsibility for the Member State that entrusted that private actor with the procedure in question. The CJEU will consider all factors that point toward State control collectively in deciding whether the State has a decisive control through the legislative or contractual design or whether the nature of the procedure is inherently public to the extent that State legal responsibility must follow.

To go back to the distinction previously made between those procedures that have been privatised on the basis of contract and those that have been privatised on the basis of the threat of sanction, the former type are more likely to include “*compulsory powers*” as part of the tasks that have been delegated through contract. On the contrary, the powers involved in discharging those procedures which are being thrust upon the private actor through the threat of sanction are more likely to include decision-making and reporting to the authorities i.e. non-compulsory powers. It is likely that such compulsory powers will be highly influential to the CJEU in deciding that a particular action represents the State or not.

The European Court of Human Rights and Privatisation

The Strasbourg Court has dealt with cases which asked whether or not a State should have legal responsibility for a procedure that is implemented by a private actor which has resulted in a breach of a human right. In the ECtHR, there are two potential ways in which a private actor may become involved in a human rights breach. On the one hand a private actor may act as an agent of the State, and on the other hand, a private actor may become involved as a third party. In the former case, acts of private actors are attributable to the State so that the State is considered to have directly interfered with Convention rights; in the latter case the State can be found to have violated Convention rights by failing to take all reasonable measures to protect individuals against corporate abuse.⁶⁰

⁵⁹ Tomkin, J., Breaches of Union Law by Private Parties: The Consequences of such Breaches and the Circumstances in which they may give rise to State Responsibility (2012) European Network on Free Movement of Workers Thematic Report. Page 26.

Available at: file:///C:/Users/fmcnamar/Downloads/ENFM_-_Report_on_breaches_of_Union_law_by_private_parties_-_18_Sept_2012.pdf

⁶⁰ Augenstein, D., State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights (2011) Submission to the Special Representative of the United Nations Secretary General on the issue of Human Rights and Transnational Corporations and Other

The State has an obligation to ensure not only that any part of the State itself does not breach human rights but also to ensure that human rights are not breached generally.

Returning to the distinction made within privatisation between those procedures that have been contracted to a private actor and those which are enforced under pain of sanction, the contractual link would likely lead to the private actor being thought of as an agent of the State. A negative obligation would therefore exist for that private actor, in acting as an “*emanation of the State*,”⁶¹ to refrain from breaching the Convention. By contrast, those procedures that are implemented by a private actor so as to avoid being sanctioned are difficult to classify as being a principal/agent relationship. The infringement of the Convention in that context may be rather considered in the context of a positive obligation of the State to avoid the breach of Convention rights by private actors in general. Non-agency relationships which develop make it more difficult to establish State responsibility. While the State could well be legally responsible for not acting to prevent the breach of the Convention, the procedure itself would still be considered to have been controlled by the private actor and State legal responsibility for that control may not be established.

In establishing agency, the Court has given a broad scope to what this concept entails. The cases of *Costello-Roberts v UK*⁶² and *Van Der Musselle v Belgium*⁶³ are among the most important case-law of the ECtHR in deciding State legal responsibility for rights breaches by a private actor. In the *Costello-Roberts* case a joint partly dissenting opinion elaborated on the impossibility of a parallel system of control in the hands of a private actor which could potentially evade State responsibility when it stated that a State could “*neither shift prison administration to the private sector and thereby make corporal punishment in prisons lawful, nor can it permit the setting up of a system of private schools which are run irrespective of Convention guarantees.*”⁶⁴ In the Strasbourg context then, the aforementioned assumption thus holds true that the State cannot delegate away

Business Enterprises. Page 7. Available at: http://www.academia.edu/1366098/State_Responsibilities_to_Regulate_and_Adjudicate_Corporate_Activities_under_the_European_Convention_on_Human_Rights

⁶¹ Case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority. Paragraph 12.

⁶² Costello-Roberts v UK, 13134/87.

⁶³ Van Der Musselle v Belgium, 8919/80.

⁶⁴ Costello-Roberts v UK, 13134/87. Joint partly dissenting opinion of Judges Ryssdal, Thór Vilhjálmsson, Matscher and Wildhaber. Page 16.

its legal responsibility to a private actor. The distinction between contractual privatisation and forced privatisation is relevant again on this point. Contracted privatisation is more likely to lead to a principal/agent relationship.

IV. Conclusion – Delegating Legal Responsibility

The externalisation and privatisation of crucial migration control and border management procedures can represent a serious challenge to the establishment of legal responsibility for the State. Both ‘effective’ and ‘determinative’ controls are capable of satisfying the definition of control that is used in this paper. However, the latter control type can do so without engaging the legal responsibility of that State. Common to all externalisation and privatisation though is that the State retains the ability to quickly change the terms of the relationship. Externalisation affords the State the opportunity to simply change the terms of reference for its immigration officials acting in an external setting. Privatisation allows the State to set the terms of a contract or to change the reasons for sanction as required.

To a certain extent, all three of the courts either already have, or have the potential to obtain, a high level of protection for migrants who experience a violation of a fundamental right in an externalised setting and/or at the hands of a private actor that is acting on behalf of the State. However, the jurisprudence has oftentimes established a high threshold of ‘effective’ control in both privatisation and externalisation. For both privatisation and externalisation, the use of “*compulsory powers*” such as the use of force and restraint and the detention of a migrant would point toward an ‘effective’ control. That migration control and border management are dependent on such powers in order to be ‘effective’, is a fallacy. Control can be exerted in a very meaningful way through, for example, decision making which denies passage to the EU or through the reporting of key information to the State. This paper argues that such control can be ‘determinative’ and can satisfy the definition of control set out in this paper but is unlikely to engage a State’s legal responsibility. Maritime interdiction and privatised detention can be assumed to represent ‘effective’ controls but an argument can be made that a less obvious but no less relevant ‘determinative’ control can also exist. Having said this, there are also

many incidences in which the court and administrative systems have failed even where compulsory powers have been exercised.⁶⁵

Returning to the questions of delegation raised in the second section, it is clear that the answers in the context of migration control and border management point toward the traditional understanding of delegation. The principal delegates to an agent in the expectation of being able to control that agent. The agent's behaviour remains predictable in the context of migration control and border management and in any case the State retains the ability to change the priorities of externalisation and privatisation when it wishes. By way of conclusion, it may be stated that the judicial framework of Member States is faced with innovative and still-evolving challenges. Externalisation and privatisation represent a development in which control *by* the State has evolved into being control *for* the State. This means that while the State previously engaged legal responsibility when it violated a fundamental right of a migrant, the delegation of procedures has allowed control with the same impact as before without the certainty of legal responsibility. This evasion of judicial censure for the State has been created on the basis of *who* implements those procedures or *where* that implementation takes place. In this way, externalisation and privatisation have led to a distance being inserted between migration control and legal responsibility for that control.

⁶⁵ The stories from the UK of Jimmy Mubenga and Alois Dvorzac are particularly relevant in this regard. See: <http://www.theguardian.com/uk-news/2014/dec/16/jimmy-mubenga-security-guards-trial-death>
See: <http://www.theguardian.com/uk-news/2014/jan/16/harmondsworth-elderly-man-died-handcuffs>