




DIIS · DANISH INSTITUTE FOR INTERNATIONAL STUDIES

# Access to Asylum: International refugee law and the globalisation of migration control

The background of the lower half of the slide is a photograph of a city skyline across a body of water. The skyline includes several buildings, some with red roofs, and a few boats are visible in the water. The text is overlaid on this image.

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# Where do EU's borders begin?





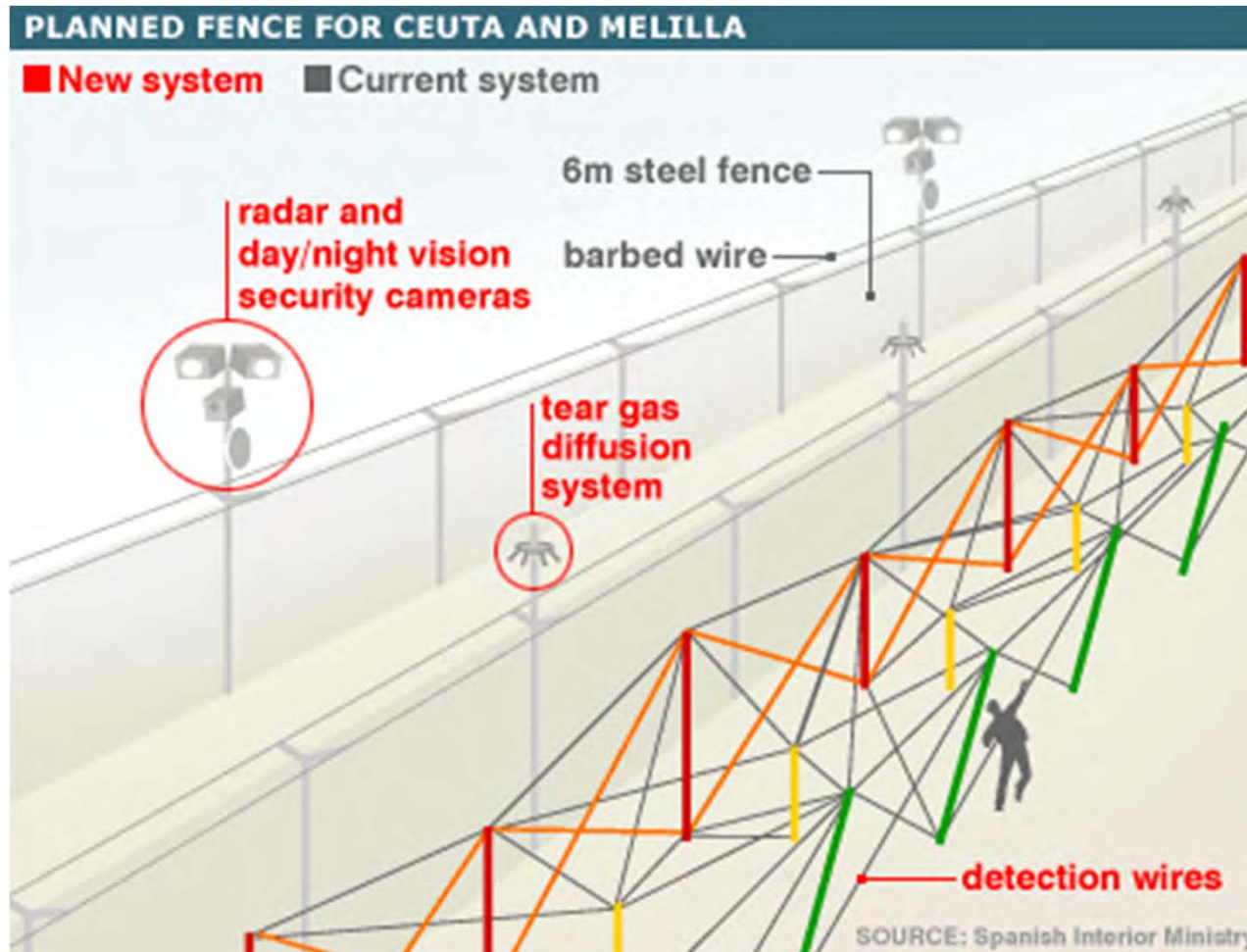
# EU's physical borders







# EU's physical borders





# Offshore migration control:



# Offshoring migration control:







# Privatisation of migration control:





# Privatisation of migration control:







# Privatisation of migration control:



# Outsourcing of migration control:





# International refugee law and the globalisation of migration control:

The legal challenges surrounding offshore, privatised and outsourced migration control

1) The reach of the 1951 Refugee Convention and extraterritorial jurisdiction

1) State responsibility for private conduct

2) Indirect responsibility in cases of inter-state cooperation

3) The relation between the international law on search and rescue at sea and international refugee and human rights law.







# Does the Refugee Convention apply on the high seas?

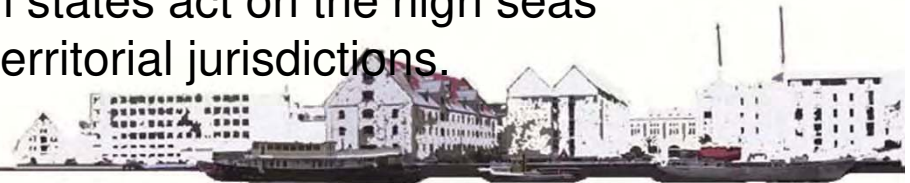
"The non-refoulement principle and the Refugee Convention has no application on the high seas".

Otto Schily, German Minister of Interior

"The drafters...may not have contemplated that any nation would take to the high seas and gather fleeing refugees and return them to the one country they had desperately sought to escape...but because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions towards aliens outside its territory, it does not prohibit such actions."

United States Supreme Court, in *Sale*.

BUT: A systematic analysis shows that at least the non-refoulement principle applies when states act on the high seas and in some cases inside foreign territorial jurisdictions.





# How far do human rights obligations extend?

The concept of jurisdiction ‘must be considered to reflect the ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.’

ECtHR, *Bankovic*

‘a State may also be held accountable for violation of...rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State’

ECtHR, *Issa*

Pending cases:

*Hirsi v. Italy*

*Al-Skeini and Al-Jedda v. UK*





# Who's responsible when private actors reject asylum-seekers?

The public-private distinction means that, as a starting point, States are not responsible for the conduct of private actors:

“the fundamental principle governing international law is that a State is responsible only for its own conduct.”

International Court of Justice, *Genocide (BiH)* case

BUT: Under general principles of international law and the ILC's Articles on State Responsibility the conduct of private actors may be attributed to a State if, and only if, the private actors exercises governmental authority (Art. 5) or the State has authorised, directed or controlled the acts in question (Art. 8).

Moreover, States retain certain positive obligations to exercise due diligence in securing that private actors do not violate human rights of asylum-seekers and migrants.







# Are outsourcing states responsible for human rights violations?

Similarly, the concept of sovereignty tends to give primacy to the acting State in assigning responsibility for refugee and human rights violations.

BUT: Under general principles of international law and the ILC's Articles on State Responsibility a State 'aiding or assisting' (Art. 16), 'directing and controlling' (Art. 17) or 'coercing' (Art. 18) another State in the commission of an internationally wrongful act.

Indirect State responsibility for human rights violations does however require both 'knowledge' and 'intent'.

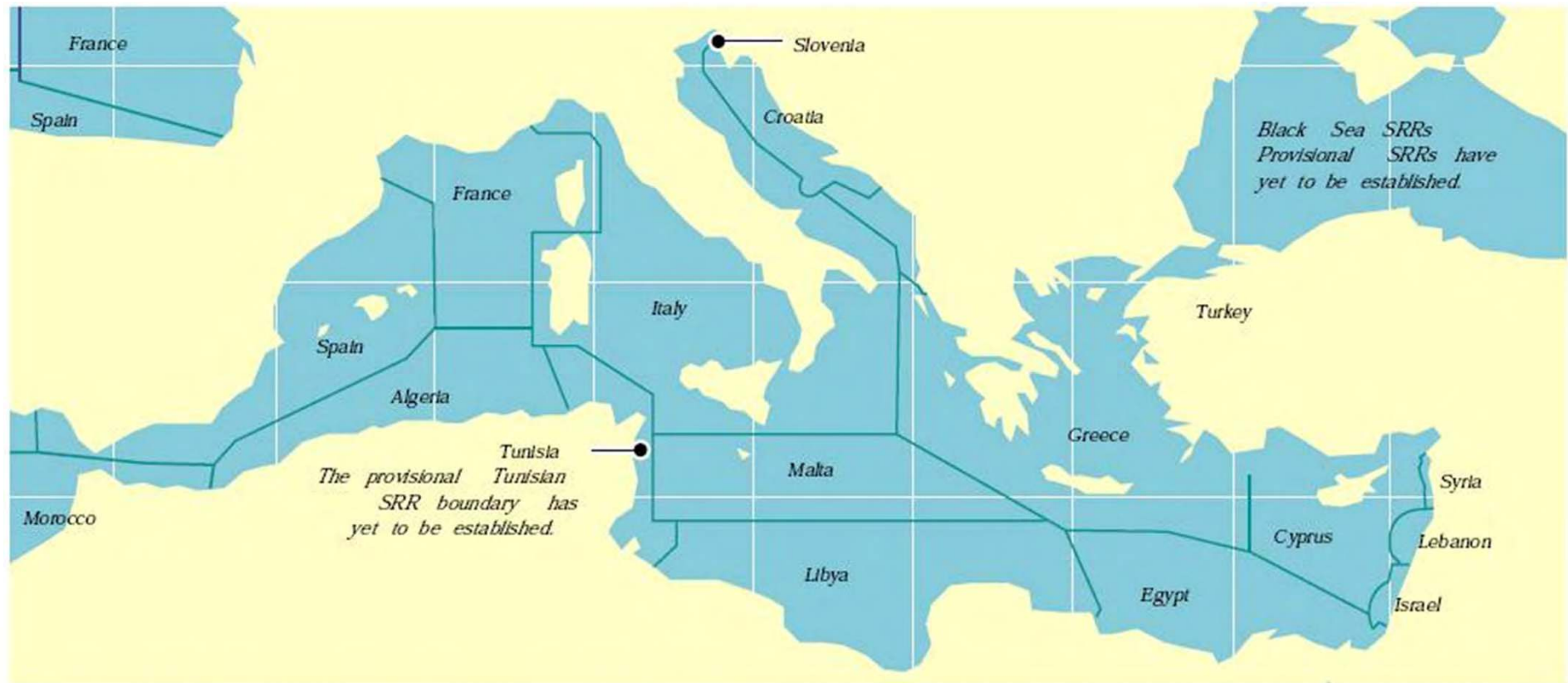




# Interception or Rescue at Sea?

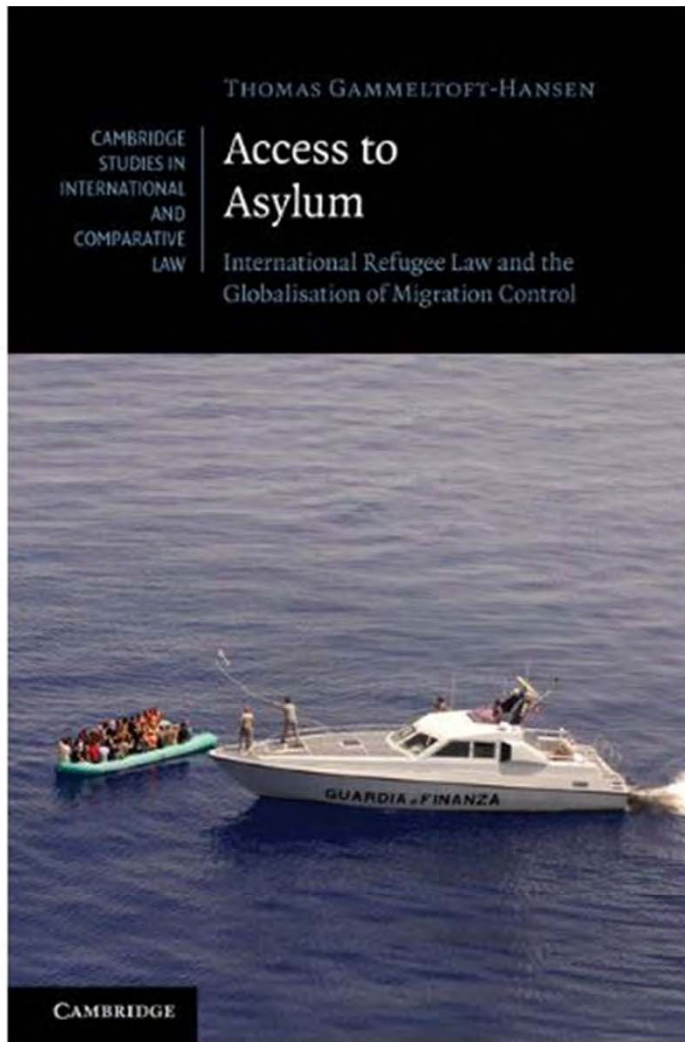


# Interception or Rescue at Sea?









T. Gammeltoft-Hansen,  
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