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The Practice of Shared Responsibility in relation to Private Actor Involvement in Migration Management

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The Practice of Shared Responsibility in relation to Private Actor Involvement in Migration Management

Thomas Gammeltoft-Hansen[*]

1. Introduction

There was a time when immigration control or detention were thought to be sole prerogatives of the state. Over the last quarter century, however, migrants and refugees are increasingly met by non-state actors taking on migration management functions. Most countries today impose heavy fines on airline carriers for allowing passengers to board without proper documentation, effectively making these companies carry out rigorous migration control, rejecting thousands of would-be asylum-seekers every year. More recently, governments have turned to private security and military companies to take over control at border crossings; run detention centres; and carry out forced removals. Yet other corporations are invited to handle visa applications; liaise with third countries; or set up and run various migration and border control technology. Last, but not least, vigilante groups have in some instances taken up migration patrols on their own accord, claiming that they are doing what state authorities cannot.[1]

In each of these instances migrants and refugees have found their rights curtailed; from the blunt refusal to board airplanes without appeal; to the documented violations reported in the course of privately-run detention centres; to forced removals. At the same time, private involvement in migration management has given rise to various 'blame games', as both corporations and governments have been keen to distance themselves from taking responsibility in such situations.

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[1] While examples such as vigilante groups and carrier sanctions hardly constitute 'privatisation' in the strict sense of the word, these actors may nonetheless retain close relationships to public authorities, either indirectly supporting these or border officials actively engaging to *de facto* 'deputise' such groups. As such, the present chapter deliberately employs the term loosely, also covering what has been termed 'indirect privatisation', and exploring all instances where non-state actors take on migration management functions. J. Vedsted-Hansen, 'Privatiseret retshåndhævelse og kontrol', in L. Adrian et al. (eds.), *Ret & privatisering* (Copenhagen: GadJura, 1995), 159, 173-175.

The present chapter examines the extent to which states and non-state actors may share responsibility for refugee and human rights violations in the context of migration control, detention, and removal. This challenges us to traverse the public/private divide from both sides, holding states accountable for private conduct and holding non-state actors accountable for violating norms of international law. On the one hand, the role of non-state actors in the violation of the rights of, for example, migrants and refugees is generally overlooked in the liberal, statist paradigm.[2] While this view is increasingly contested in human rights theory more broadly,[3] positive international refugee and human rights law remain addressed almost exclusively to states. On the other hand, while several avenues for holding states responsible for corporate human rights violations exist, difficulties and limitations may arise in situations where private involvement is not clearly contractually regulated or takes place extraterritorially.[4]

Although various avenues for holding states responsible for private human rights violations exist under international law, it must be acknowledged that these areas of law are still developing and that both practical and legal shortcomings remain. Similarly, while certain parts of international law do in fact establish non-state actors as subjects, the material scope of responsibility is narrow or obligations remain non-binding. This picture may gradually change, but at present the possibilities for establishing genuine shared responsibility under international law in regard to private enforcement of migration management is highly limited. At best, international law may be said to establish a transversal notion of shared responsibility, by requiring states to prevent and prosecute human rights violations by non-state actors as a matter of domestic law. Similarly, e.g. tort law may import international human rights norms in order to provide a domestic remedy for human rights violations by corporations or individuals.

The following section provides an overview of the diverse private actor involvement in migration management and their relationship to the controlling state (section 2). Despite many reported refugee and human rights violations in connection with private actors, little case law

[2] M. Goodhart, 'Human Rights and Non-state Actors: Theoretical Puzzles', in G. Andreopoulos, Z.F. Kabasakal Arat, and P. Juviler (eds.), *Non-state actors in the human rights universe* (Bloomfield, CT: Kumarian Press, 2006), 23, 26.

[3] See e.g. P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press, 2005); K. de Feyter and F. Gómez Isa (eds.) *Privatisation and Human Rights in the Age of Globalisation* (Antwerp: Intersentia, 2005); A. Clapham, *Human Rights Obligations of Non-State Actors* (Cambridge University Press, 2006).

[4] See further Chapter 20 in this volume, N. Frenzen 'Extraterritorial Refugee Protection', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), ___.

exists so far, and shared responsibility has been mainly established at the domestic level (section 3). The subsequent section discusses first the attempts to ensure state responsibility in such instances, and secondly the avenues to hold individuals and corporations accountable for similar refugee and human rights violations, as well as the possibilities for shared responsibility between state and non-state actors under international law in this context (section 4).

2. Factual scenarios: private actors in migration management

The last decades have seen the emergence and rapid growth of the 'migration control industry' [5] with private companies taking over a wide range of erstwhile governmental functions to screen, control, detain and deport migrants. In addition to the 'indirect privatisation' of migration control through carrier sanctions, the general outsourcing trend means that governments today equally make use of contractors in migration management, both in direct enforcement capacities and in more supporting roles. Finally, private involvement has emerged from below by groups and individuals taking up migration management functions on their own accord, in some cases labelled as 'vigilantes', in other cases passively tolerated, or even formally endorsed by the state. For the purpose of a legal analysis, a useful starting point may thus be to distinguish these forms of private involvement according to the relationship the actors retain to the state in which, or on whose behalf, they operate.

2.1 Migration enforcement through contractors

The first category encompasses situations where states contract private actors to take on direct law enforcement functions. At the physical border, a number of states today make use of private contractors to assist national border authorities in performing immigration and security checks. Under the Immigration Asylum and Nationality Act 2006, the power to search vehicles, vessels and trains in the United Kingdom may be transferred to private contractors certified by the Secretary of State.[6] In other instances, border checks are entirely

[5] T. Gammeltoft-Hansen and N. Nyberg Sørensen (eds.), *The Migration Industry and the Commercialization of International Migration* (London: Routledge, 2012).
[6] Immigration Asylum and Nationality Act 2006 (UK), sections 40 and 41.

outsourced. Since 2005, Israel has privatised control at the major crossing points between Israel and the West Bank. At several places Israeli officials have been withdrawn from the border check areas, and inspections are handled solely by contractors, such as the private military company 'Modiin Ezrachi'.[7]

Along with the privatisation of prisons, several countries similarly make use of private companies to operate immigration detention facilities. In the United States, 478,000 immigrants were detained in 2012[8] – half of whom were held in privately run facilities.[9] In the United Kingdom, private contractors currently run nine out of thirteen detention centers,[10] and in Australia a single company, 'Serco', operates detention centers at 20 different locations.[11] Private contractors have further been used to carry out forced removals. In the United States, 'G4S' operates a fleet of custom-built fortified buses that serve as deportation transports for illegal migrants caught along the border with Mexico.[12] The United Kingdom has completely outsourced forced removals, with G4S holding the exclusive contract between 2005 and 2010. Shortly after the death of a deportee at Heathrow Airport in 2010,[13] the contract was instead awarded to another private security company, 'Reliance'.

2.2 Contractors in an advisory, technical or supporting capacity

A second group of private actors is composed of contractors involved in migration management in various non-enforcement capacities. The United Kingdom employs 'Serco' to run the National Border Targeting Centre and the Carrier Gateway – two central components in the 'e-Borders Initiative', a GBP 1.2 billion immigration project to be completed by 2015. In the United States, 'Boeing' won the bid for setting up 'SBInet': a multibillion high-tech border surveillance system along the United States-Mexico border that includes sensor towers and radar scanners. The contract, which was cancelled in 2011, involved Boeing designing

[7] M. Rapaport, 'Outsourcing the Checkpoints', *Haaretz*, 2 October 2007.
[8] 'End the Immigration Detention Bed Quota', Detention Watch Network, February 2014, available at www.detentionwatchnetwork.org/EndTheQuotaNarrative.
[9] C. Kirkham, 'Private Prisons Profit From Immigration Crackdown, Federal and Local Law Enforcement Partnerships', *The Huffington Post*, 7 June 2012.
[10] 'Immigration removal/detention centres', Politics.co.uk, available at www.politics.co.uk/reference/immigration-removal-detention-centres. 'Overview: Find a Immigration Removal Centre', Gov.uk, available at www.gov.uk/immigration-removal-centre.
[11] Information retrieved from Serco's website, see www.serco-ap.com.au/our-services/our-work/immigration-services.
[12] These only operate within United States territory.
[13] See below, section 3.

and setting up the system, as well as Boeing operators directing United States border guards to intercept irregular border crossers.[14]

Visa processing constitutes another important field of outsourcing migration control. Many governments today require visa applicants to go through specialised and pre-approved visa agencies. The lead in this industry is 'VFS Global', which operates visa application centres on behalf of 42 countries and 26 diplomatic missions, processing more than seven million visas annually.[15] In the United Kingdom, 80 per cent of all visa applications are handled by 'VFS Global' and its American counterpart 'CSC WorldBridge'. Companies typically handle the preparation, initial screening and administrative processing before forwarding applications, including biometric data and other personal information, to national immigration authorities, who retain final decision-making power.[16]

2.3 Indirect privatisation

The third category concerns instances where there is no direct contractual relationship between the state and private company, but other mechanisms, for example criminal or civil liability, are used to co-opt private actors for the purpose of migration management. As a form of 'indirect' privatisation, financial sanctions on international carriers far precedes the current privatisation era.[17] In addition to the cost of bringing back passengers without the

[14] J. Richey, 'Fencing the border: Boeing's high-tech plan falters', CorpWatch, 9 July 2007, available at www.corpwatch.org/article.php?id=14552.
[15] Information available at www.vfsglobal.com.
[16] Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts, (2005) OJ C 326/1, Section VIII(5).
[17] As early as 1902, the United States Passenger Act demanded shipmasters to sign an affidavit to verify that all passengers were in good physical and mental health. Those found inadmissible by United States immigration officers were to be transported back at the cost of the steamship company (A. Zolberg, 'Matters of State', in C. Hirschman, P. Kasinitz, and J. DeWind (eds.), *The Handbook on International Immigration* (New York: Russell Sage Foundation, 1999), 71, at 75). In its modern variant, carrier liability for bringing in aliens without valid passports and visas has been part of the United States Immigration and Nationality Act since 1952 (the MacCarran-Walter Act, Section 273). Similarly, in Canada, rules were introduced as part of the 1976 Immigration Act. In the European context, legislation to impose obligations and concurrent fines upon carriers was implemented by Belgium, Germany and the United Kingdom in 1987. A. Cruz, *Shifting Responsibility: Carriers' Liability in the Member States of the European Union and North America* (London: Trentham Books, 1995). Since 1990, Article 26 of the Schengen Convention further imposes an obligation on signatory states to impose sanctions on all carriers who transport aliens without the necessary travel documents. The Schengen acquis – 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, Schengen, 19 June 1990, in force 1 September 1993, (2000) OJ L 239/19.

required documents or visas, an additional fine was imposed on the carrier by states.[18] The threat of such fines has made private airline companies gradually take on a number of control functions related to document checks, forgery control and passenger profiling.

While the imposition of carrier sanctions in principle leaves the organisation and modes of control up to the airlines and transportation companies, in practice states often exercise a great deal of influence over the control functions carried out, and government immigration officers often work in close consultation with, or directly oversee, carrier staff.[19] Countries like the United Kingdom and the United States have further introduced procedures requiring carriers to forward passenger biometrics to the destination country at check-in, thereby allowing national immigration authorities time to check relevant databases, and on that basis notify carriers about whether to allow passengers to board or not.[20]

Given the high cost of fines, any lack of proper documentation or suspicions of forgery are likely to lead to carriers rejecting passengers at the point of departure. As a result, carrier sanctions constitute a primary tool for ensuring pre-arrival migration control, and are a major obstacle for many migrants and refugees to reach the territory of their prospective destination state by regular travel.[21]

The delegation of migration control to private airlines may further entail a responsibility by carriers to take custody of rejected passengers in transit or at the point of destination until they can be returned. A number of cases have thus emerged where passengers have been held either at hotels under guard by private security companies, or in privately managed detention zones at the airport.[22] While agreements or contracts with the host state have in some

[18] T. Rödenhauser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control' (2014) 26 IJRL 223.

[19] The United Kingdom has thus offered to waive fines if airlines agree to comply with its 'approved gate check' regulations. This involves British immigration officers training airline staff in profiling techniques and detecting forged documents, the institution of an additional control procedure immediately prior to boarding and regular audits of airline performance by government officials. F. Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: privatising immigration functions at the expense of international obligations' (1997) 46 ICLQ 586, 592-593. See generally S. Scholten and P. Minderhoud, 'Regulating immigration control' (2008) 10 EJML 123, 136; and Vedsted-Hansen, 'Privatiseret retshåndhævelse', n. 1, 173-175

[20] In the United Kingdom this is known as the 'e-Borders programme' and provided for by the 2006 Immigration, Asylum and Nationality Act, n. 6. Developing the technology and setting up the programme have similarly been outsourced.

[21] V. Guiraudon, 'The constitution of a European immigration policy domain: a political sociology approach' (2003) 10 JEPP 263, 272; I. Kruse, *Creating Europe Outside Europe: Externalities of the EU Migration Regime*, paper presented at European Consortium for Political Research Conference, Theories of Europeanisation, Marburg, 18-21 September 2003, 15.

[22] A notorious example is the transit zone at the 'Sheremetyevo 2' airport in Moscow that according to Nicholson 'has held up to 20 passengers at any one time, including refugees who have been denied flights to

instances been formalised for the purpose of carrying out these tasks, detention zones are generally operated by airline companies with *de facto* no way to address human rights claims or launch asylum claims.[23]

2.4 Private involvement in migration management not initiated by the state

Fourth and finally, private involvement in migration management is not necessarily initiated or even endorsed by the government. Private actors may on their own initiative take on migration management related functions for ideological or economic purposes. Following the rise of xenophobic sentiments in Greece, a number of violent attacks on immigrants by uniformed vigilantes, claiming to take immigration enforcement into their own hands, have been reported.[24] In Italy private citizen squads, *ronde padane*, have reported irregular migrants and patrolled immigration settlements since the mid-1990s. In 2009, the Berlusconi government conferred legal status on these groups 'to cooperate in the undertaking of territorial defense activities'; a move subsequently overturned by the Italian Constitutional Court.[25]

Both private associations and individuals have similarly taken up border control functions in the United States. Members of the self-proclaimed 'Minuteman Project' and other anti-immigration groups carry out armed patrols on the United States-Mexico border, claiming to provide extra eyes and ears for national border security.[26] Their relationship to United States authorities is unclear. While the Department of Homeland Security has described the Minutemen as 'vigilantes' and asked them to step down activities, local border patrol officers have in some instances endorsed them as providing support and a positive supplement to

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Western European States'. Nicholson, 'Immigration (Carriers' Liability) Act', n. 19, 598 f. See generally R. Abeyratne, 'Air carrier liability and state responsibility for the carriage of inadmissible persons and refugees' (1998) 10 IJRL 675, 681; and J. Hughes and F. Liebaut (eds.), *Detention of Asylum-Seekers in Europe: Analysis and Perspectives* (The Hague: Martinus Nijhoff, 1998), 108-109.

[23] E. Guild, 'The borders of the European Union: visas and carrier sanctions' (2004) 7 TP 34; V. Guiraudon, 'Before the EU border: remote control of the "huddled masses"', in K. Groenendijk, E. Guild, and P. Minderhoud (eds.), *In Search of Europe's Borders* (The Hague: Kluwer Law International, 2002), 191, 203; and Nicholson, ibid., at 598.

[24] Human Rights Watch, *Hate on the Streets: Xenophobic Violence in Greece* (New York: HRW, 10 July 2012); L. Alderman, 'Greek Far Right Hangs a Target on Immigrants', *New York Times*, 10 July 2012.

[25] Law 94/15, July 2009. See e.g. V. Scalia, 'The context of decentralised policing or local squads: The case of the Italian "Ronde"' (2012) 4 IJSA 38; A. Triandafyllidou and M. Ambrosini, 'Irregular Immigration Control in Italy and Greece: Strong Fencing and Weak Gate-keeping Serving the Labour Market' (2011) 13 EJML 251, 263 f.

[26] L.R. Chavez, 'Spectacle in the Desert: The Minuteman Project on the US-Mexico Border', in D. Pratten and A. Sen (eds.), *Global Vigilantes* (London: Hurst and Company, 2007), 25.

official controls.[27] The actual activities and effects of these groups are difficult to gauge, yet reports suggest that border-crossers and irregularly staying migrants have been subjected to both violence and physical restraint by vigilante groups, and that groups or individuals have apprehended migrants before handing them over to local authorities.[28]

The adverse effects of carrier sanctions and other forms of private involvement in migration management are well documented.[29] Carrier sanctions are generally implemented indiscriminately, without regard to human rights concerns. Asylum seekers are particularly likely to be rejected as they are naturally prone to lack full documentation and unlikely to have been granted a visa. In the words of the United Nations High Commissioner for Refugees (UNHCR):

> Forcing carriers to verify visas and other travel documentation helps to shift the burden of determining the need for protection to those whose motivation is to avoid monetary penalties to their corporate employer, rather than to provide protection to individuals. In so doing, it contributes to placing this very important responsibility in the hands of those (a) unauthorized to make asylum determinations on behalf of States (b) thoroughly untrained in the nuances and procedures of refugee and asylum principles, and (c) motivated by economic rather than humanitarian considerations.[30]

In some instances fines have been waived for passengers who subsequently claim or are granted asylum. In practice, however, these exceptions appear to have little effect. As long as airline companies are faced with a prospect of substantial economic penalisation for erroneous decisions regarding undocumented asylum seekers, they are likely to adopt a preventive logic of 'if in doubt, leave them out'.

Similar criticisms have been raised in connection with privately run immigration detention centres. As a starting point, the very detention of asylum seekers may constitute a violation of

[27] 'Armed Americans patrol B.C.–Washington border', *CTV Global Media*, 2 October 2005, available at www.ctv.ca.

[28] C.J. Walker, 'Border Vigilantism and Comprehensive Immigration Reform' (2007) 10 HLLR 135. American Civil Liberties Union, 'Unlawful imprisonment of immigrant by Minuteman volunteer', 7 April 2005, available at www.aclu.org. In 2011 two persons affiliated with the Minutemen American Defense group were sentenced to death in Tucson, Arizona, for having shot and killed Raul Flores and his nine-year old daughter, both American citizens, in their home. According to the perpetrators, valuables from the home were to finance the group's patrol activities. 'Arizona: Border Activist Sentenced to Death', *New York Times*, 23 February 2011.

[29] Vedsted-Hansen, 'Privatiseret retshåndhævelse', n. 1; M. Kjærum (ed.), *The Role of Airline Companies in the Asylum Procedure* (Danish Refugee Council, 1988), 16-23; United Kingdom Refugee Council, 'Remote Controls: How UK Border Controls are Endangering the Lives of Refugees', December 2008, 44-51; European Council for Refugees and Exiles, 'Defending Refugees' Access to Protection in Europe', December 2007, 29-31; and Amnesty International, 'No flights to safety: airline employees and the rights of refugees', ACT 34/21/97, November 1997.

[30] United Nations High Commissioner for Refugees, 'Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions)', 16 August 1991, 3 ES 2, at 385, at 'Re: Visas-and Carrier Sanctions'.

international refugee law.[31] The coincidence of private companies running prisons and immigration detention centres has led to situations where guards fail to recognise the difference between punitive and administrative detention.[32] Several reports further document instances of racism; overcrowding; poorly trained staff; lack of access to outside contacts; and lack of appeal possibilities.[33] In Australia, 'GEO Group' lost its contract following a national human rights commission report that found numerous and repeated violations of children's rights during immigration detention.[34] In 2007, the Western Australian Human Rights Commission similarly fined G4S for inhumane treatment, after its drivers had ignored detainees begging for water during a transport journey, leaving one to drink his own urine.[35] In May 2013, an Australian Ombudsman report on suicide and self-harm in immigration detention, which is contracted out to Serco, found that between 1 July 2010 and 24 April 2013, there were 11 deaths in immigration detention.[36] In an analogous context, former United Nations (UN) Rapporteur on Torture Nigel Rodley has stated, 'the profit motive of privately run prisons in the United States and elsewhere has fostered a situation in which the rights and needs of prisoners and the direct responsibility of states for the treatment of those they deprive of freedom are diminished'.[37]

3. Case law

Despite the growing scale of private involvement in migration management, case law on this issue remains notably scarce. Several factors may contribute to this fact, including legal barriers, the lack of access to privately run facilities, and the existence of a 'corporate veil' in terms of monitoring and complaint mechanisms. An employee in charge of reviewing

[31] Article 31 of the Refugee Convention, n. 54, obliges states not to penalise refugees for irregular access to their territory and was specifically inserted to recognise that refugees may occasionally have an overriding need to seek entry, even under false pretences or not in possession of proper documentation.
[32] I.P. Robbins, 'Privatisation of corrections: violation of United States domestic law, international human rights, and good sense', in K. de Feyter and F. Gómez Isa (eds.), *Privatisation and Human Rights in the Age of Globalisation* (Antwerp: Intersentia, 2005), 57, 86.
[33] Australian Lawyers for Human Rights, 'Submission to the National Inquiry into Children in Immigration Detention', Submission No. 168 to the Australian Human Rights Commission, 10 October 2002; and 'Inquiry into allegations of racism and mistreatment of detainees at Oakington immigration reception centre and while under escort', Report by the Prisons and Probation Ombudsman for England and Wales, July 2005.
[34] Australian Human Rights Commission, 'A last resort? - The Report of the National Inquiry into Children in Immigration Detention', 13 May 2004.
[35] N. Bernstein, 'Companies use immigration crackdown to turn a profit', *New York Times*, 28 September 2011.
[36] Commonwealth Ombudsman, 'Suicide and Self-harm in the Immigration Detention Network', May 2013.
[37] N. Rodley, 'Foreword', in A. Coyle, A. Campbell, and R. Neufield (eds.), *Capitalist Punishment: Prison Privatization and Human Rights* (London: Clarity Press, 2003), 7.

disciplinary cases at a Corrections Corporation of America facility in Houston squarely told the *New York Times*: 'I am the Supreme Court'.[38] Similarly, carrier sanctions legislation is, by design, weak in terms of accountability and judicial avenues for those rejected.[39]

Only a handful of cases concerning carrier controls have been brought before national courts, mainly concerning civil suits by passengers against an airline, or airlines challenging the legality of carrier sanction legislation.[40] In 1999, the German Federal Administrative Court upheld the carrier legislation, despite arguments by Air France and Air India that the requirements imposed on their staff violated the constitutional right to seek asylum.[41] In the *Prague Airport* case, the United Kingdom House of Lords held *obiter dictum* that the long-standing and widespread state practice regarding visa regimes and carrier sanctions could not be interpreted as being contrary to international law.[42]

A number of cases regarding detention centres and forced removals have emerged considering combinations of individual, corporate and government responsibility as a matter of domestic law. Responsibility in these cases is typically related to negligence and violations of the actors' duty of care, and seldom involves any explicit discussion of international human rights or refugee law. In *Medina* v. *O'Neill and Danner's Inc*., the responsibility of both the United States government and a private contractor was considered. The case concerned 16 stowaway migrants who were discovered by Immigration and Naturalization Service (INS) agents and subsequently detained by private security company 'Danner's Inc.' in a windowless 12 by 20-foot cell owned by the company. Following unrest among those detained, a Danner's Inc. employee, untrained in the use of firearms, used a shotgun as a cattle prod and the gun went off killing one migrant and wounding another. Criminal charges were never raised, and the INS rejected any responsibility for the actions of Danner's Inc., which was contracted directly by the transportation company. In the ensuing civil suit, however, the District Court found

[38] *New York Times*, 19 February 1985, cited in Robbins, 'Privatisation of corrections', n. 32, at 61.
[39] Scholten and Minderhoud, 'Regulating immigration control', n. 19, 131.
[40] See e.g. *Case Regarding Carrier Responsibilities*, Austrian Federal Constitutional Court (Verfassungsgerichthof), G224/01, 1 October 2001; *Scandinavian Airlines Flight SK 911 in Fine Proceedings.* Board of Immigration Appeals, NYC 10/52.6793, Interim Decision 3149, 26 February 1991; and *R* v. *Secretary of State for the Home Department, Ex parte Hoverspeed*, 1999, INLR 591.
[41] United States Committee for Refugees and Immigrants, 'U.S. Committee for Refugees World Refugee Survey 2000 – Germany', 1 June 2000.
[42] *European Roma Rights Centre and others* v. *Immigration Officer at Prague Airport and another* [2004] UKHL 55, para. 28. See further G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn (Oxford University Press, 2007), 371. The principal matter of the case however, did not concern the use of carrier sanctions, but rather the responsibility of the United Kingdom's own authorities under the Refugee Convention, n. 54, and other human rights instruments when acting abroad.

that despite the absence of a direct contractual relationship, the 'public powers' test was satisfied and it held both the INS and Danner's Inc. jointly and severally liable for damages.[43]

Following the death of Jimmy Mubenga, an Angolan refugee, during his deportation from the United Kingdom, manslaughter charges were brought against three G4S officers for holding down Mr Mubenga thereby causing asphyxia. An inquest jury initially found the death to be unlawful, but the Central Criminal Court subsequently acquitted all three guards. Following testimony from a number of former and current G4S staff, that senior management had disregarded internal warnings about poor training and unsafe restraint techniques, a corporate manslaughter charge was further considered, but never launched.[44]

4. Shared human rights responsibility between state and non-state actors

At the very outset, talking about shared responsibility between state and non-state actors under international law demands that two premises are fulfilled: first, that state responsibility for private actors violating refugee or human rights law can be established; and second, that corporations or individuals have direct or indirect obligations in relation to international refugee and human rights law. While the issue of state responsibility may be straightforward in situations where the institutional link between the state and non-state actor is pre-established or the state readily acknowledges the conduct of the non-state actor as its own, situations of 'indirect privatisation' require a more careful examination of primary and secondary rules. Conversely, the possible responsibility of non-state actors should be assessed according to both the kind of relationship private actors hold with the state(s) and the kind of violations involved. It further depends on the acceptance of different modes of responsibility for non-state actors under international law. This is not only a challenge at the level of existing legal frameworks, the 'corporate veil' prevailing in this area is also likely to entail substantial procedural and practical difficulties taking such cases forward.[45]

[43] *Medina* v. *O'Neill, Garcia and Danner's Inc.*, 589 F. Supp. 1031 (United States District Court, 7 May 1984). The Court of Appeal subsequently found only negligence on behalf of the authorities given the lack of knowledge of the detention conditions by the INS. United States Court of Appeal, 838 F. 2d 800 (5th Cir. 1988). See further J.D. Donahue, *Prisons for Profit: Public Justice, Private Interests* (Washington DC: Economic Policy Institute, 1988), 18 f.; Robbins, 'Privatisation of corrections', n. 32, 64.

[44] P. Lewis and M. Taylor, 'G4S security firm was warned of lethal risk to refused asylum seekers', *The Guardian*, 8 February 2011.

[45] T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011), 217 ff.

A second issue to consider is the relevance of international law in this context. Domestic law generally provides for individual criminal responsibility, and in some cases also corporate criminal responsibility,[46] in cases of grave human rights violations or a breach of a duty of care against migrants and refugees. In addition, international human rights law imposes certain due diligence obligations upon states to prevent, investigate and prosecute human rights violations by non-state actors.[47] As argued elsewhere, however, the involvement of non-state actors in this area forms part of a larger nexus of policies to prevent or deter unwanted migrants and refugees from arriving and/or applying for asylum.[48] As such, the very appeal of privatising migration management may partly lie in the distancing of otherwise governmental functions from the state to avoid responsibility. As discussed above, relatively few cases have been brought against non-state actors taking on migration management functions in domestic courts. Further, in practice responsibility is often placed with individual perpetrators only, as opposed to the contracting corporations.

A third and more conceptual issue relates to the very distinction between public and private in this context. The definition of the private sphere is based on it consisting of *non*-state actors, inter alia, autonomous and independent of government funding, control, authority or direction.[49] By defining private actors simply by what they are not, it first of all becomes difficult to distinguish between the different actors in this field and their rather different relationships to the state; from bands of private vigilantes to international security or military contractors.[50] More fundamentally, this dichotomous definition serves to reinforce the notion that private actors are *prima facie* removed from the sphere of public international law. It is in this sense that establishing various modes of responsibility in cases of privatisation becomes problematic, as it sets out by assuming a distinction that may simply not be there in the first place.[51]

The present contribution cannot do justice to the legal complexity and multitude of constellations in which shared responsibility may arise in this context. Rather, this section

[46] The United Kingdom Corporate Manslaughter and Corporate Homicide Act 2007 constitutes one such example.
[47] *Velásquez Rodríguez* v. *Honduras*, IACtHR, (Ser. C) No. 4 (1988). See further *Z.* v. *the United Kingdom*, App. No. 29392/95 (ECtHR, 10 May 2001).
[48] Gammeltoft-Hansen, *Access to Asylum*, n. 45, 35 ff.
[49] See, inter alia, Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA), Articles 5-8.
[50] Goodhart, 'Human Rights and Non-state Actors', n. 2, 28.
[51] P. Alston, 'The "Not-a-cat" syndrome: can the international human rights regime accommodate non-state actors?', in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press, 2005), 3, 24.

proceeds in two steps, first examining the different avenues for establishing state responsibility for human rights violations carried out by non-state actors as a matter of both primary and secondary international law. Secondly, the extent to which non-state actors may incur direct responsibility for refugee and human rights violations in this area is examined, as well as the scope for shared responsibility between state and non-state actors.

4.1 State responsibility for non-state actor violations of international refugee and human rights law

Various human rights institutions have emphasised that in the process of privatisation, continued respect for human rights must be ensured. As noted by the European Court of Human Rights in *Costello-Roberts* v. *the United Kingdom*, 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals'.[52] With regard to privately operated detention centers, the Human Rights Committee has expressed concern that 'the practice of the State party in contracting out to the private commercial sector core State activities … weakens the protection of rights under the Covenant. The Committee stresses that the State remains responsible in all circumstances for adherence to all articles of the Covenant'.[53]

The 1951 Convention relating to the Status of Refugees (Refugee Convention)[54] does not explicitly foresee that private actors, such as airlines, may take part in migration management functions. Yet, various attempts have been made by scholars to bring such situations within the scope of *primary obligations* under international refugee and human rights law. Some scholars have argued that the imposition of carrier fines is inconsistent with Article 31 of the Refugee Convention, which obliges states not to penalise refugees irregular accessing their

[52] *Costello-Roberts* v. *the United Kingdom*, App. No. 13134/87 (ECtHR, 25 March 1993), para. 27. Certain human rights obligations furthermore make the issue of private or public implementation irrelevant. Article 10 of the International Covenant on Civil and Political Rights thus demands that, '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' In other words, although the means and actors through which human rights obligations are realised may change in the course of privatisation, states maintain ultimate responsibility under international law. International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR).
[53] Human Rights Committee, 'Comments on the 4th UK Periodic Report', UN Doc. CCPR/C/79/Add.55 (27 July 1995), para.16.
[54] Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 189 UNTS 137 (Refugee Convention).

territory.[55] The argument faces several challenges however. First, the application of this Article is limited to refugees who 'enter or are already present in the country of refuge' and thus cannot apply to pre-departure rejection by carriers. Second, and more fundamentally, Article 31 prohibits the imposition of penalties 'on refugees'; the wording does not lend itself to an interpretation covering penalties imposed on other actors.[56]

Rejection by airlines or other private enforcers of migration control has further been argued to undermine the effectiveness of the *non-refoulement* principle, and it has been argued that these practices are therefore incompatible with an interpretation and implementation of Article 33 of the Refugee Convention in good faith.[57] Concern over the effect of carrier sanctions has further been expressed by the Human Rights Committee with regard to the right to leave any country, expressed in Article 12(2) of the International Covenant on Civil and Political Rights.[58]

In determining the relationship between state and non-state actor, recourse may further be had to secondary rules of international law. As discussed above, this has been the case in regard to both carrier controls and certain cases involving private contractors. Under the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[59] the conduct of a private actor can be attributed as an 'act of state' in three situations: where the private actor exercises 'governmental authority';[60] where it can be

[55] Cruz, *Shifting Responsibility*, n. 17, 74; E. Feller, 'Carrier Sanctions and International Law' (1989) 1 IJRL 48, 58. In addition, Cruz argues that the effect of carrier sanctions in preventing refugees to board airplanes in order to seek asylum may amount to a violation of Article 31(2) of the Refugee Convention, ibid., prohibiting restrictions to the movement of refugees other than those necessary. Cruz, ibid., 75.

[56] G. Noll, 'Article 31, Refugee Unlawfully in the Country of Refuge', in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), 1243, 1253. Some carriers have been seen to introduce clauses into their general conditions of carriage that make passengers liable for any fines or other expenditure incurred as a result of improper documentation. In such cases, it is arguable that carrier legislation indirectly leads to a penalisation of asylum seekers in potential violation of Article 31 Refugee Convention, ibid. See A. la Cour Bødtcher and J. Hughes, 'The effects of legislation imposing fines on airlines for transporting undocumented passengers', in M. Kjærum (ed.), *The Effects of Carrier Sanctions on the Asylum System* (Danish Refugee Council and the Danish Center of Human Rights, 1991), 6, 10. The International Civil Aviation Organization (ICAO) Standards under the 1944 Chicago Convention (Convention on International Civil Aviation, Chicago, 7 December 1944, in force 4 April 1947, 15 UNTS 295) equally provide that airlines may attempt to recover costs related to removal and return flights from inadmissible passengers. Annex 9, Standard 5(10).

[57] Goodwin-Gill and McAdam, *The Refugee in International Law*, n. 42, 377-380, 387-390; Nicholson, 'Immigration (Carriers' Liability) Act', n. 19, at 618; Feller, 'Carrier Sanctions', n. 55, at 59; Refugee Convention, ibid.

[58] Human Rights Committee, 'Concluding observations of the Human Rights Committee: Austria', UN Doc. CCPR/C/79/Add.103 (19 November 1998), para. 11. ICCPR, n. 52.

[59] ARSIWA, n. 49.

[60] Article 5 ARSIWA, ibid.

shown that the state is 'directing or controlling' the particular conduct;[61] and where such conduct is 'acknowledged and adopted' by the state as its own.[62]

As traditional functions of sovereignty, immigration control, detention and forced removal arguably all constitute 'governmental authority', and private actors directly engaged in these activities, these scenarios may thus give rise to state responsibility based on Article 5 of the ARSIWA. To clear any doubts that the application of Article 5 is relevant in some cases relating to the privatisation of migration control, the ARSIWA Commentary explicitly mentions the delegation of 'certain powers in relation to immigration control or quarantine' to '[p]rivate or state-owned airlines' as an example of private actors exercising governmental authority.[63]

A requirement under Article 5 ARSIWA is that private actors are empowered to exercise governmental authority through national law.[64] In the case of carrier sanctions, the legislative link is formally established, yet it could be argued that carrier legislation does not amount to an obligation to actually enforce controls.[65] Sanctions constitute a third party liability mechanism that may compel carriers to take on migration control functions,[66] yet to establish attribution it must be shown that legislation itself confers governmental authority in this respect. As carrier liability has developed, however, this requirement is more likely to be fulfilled. Today, most legislation not only provides for a fines system, but also establishes a number of direct duties upon carriers to perform document and identity checks, as well as an obligation to remove passengers without proper documentation from the host country.[67]

Short of a *de jure* link through national legislation, attribution may equally be based on the *de facto* instruction, direction or control exercised by a state over the private actor in question. This concerns first situations where conduct of private actors is *authorised* by a state. This not only covers the use of contractors for migration management more generally, but also

[61] Article 8 ARSIWA, ibid.
[62] Article 11 ARSIWA, ibid.
[63] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), 100.
[64] An example is the use of private contractors by the United Kingdom both at its territorial borders and under the juxtaposed controls scheme. In both cases, the role of contractors is explicitly provided for in the Immigration, Asylum and Nationality Act 2006, n. 6, sections 40 and 41. The authority of contractors is further narrowly circumscribed (searching vehicles, detaining irregular entrants and escorting them to national authorities), and private agents undergo both an authorisation process and on-going monitoring.
[65] Feller, 'Carrier Sanctions', n. 55.
[66] Scholten and Minderhoud, 'Regulating immigration control', n. 19, at 134.
[67] Nicholson, 'Immigration (Carriers' Liability) Act', n. 19, at 601; Cruz, *Shifting Responsibility*, n. 17; Feller, 'Carrier Sanctions', n. 55, at 51.

situations, such as the *Medina* v. *O'Neill and Danner's Inc*. case mentioned above, where individuals or groups have been engaged or recruited to supplement, or act as auxiliaries to state organs, while still remaining outside the official state structures.[68] It must be established that the contract or instructions clearly relate to the human rights violation in question.[69] Situations where private contractors are not authorised to carry out direct enforcement tasks or explicitly limited to avoid the exercising of power by non-officials that may breach national or international law are thus excluded, even if employees act *ultra vires.*

Second, attribution may be based on a finding of 'direction or control' by the state. In principle this covers a wider set of instances: no formal pre-authorisation or legal basis for private action is necessary, nor is it decisive whether delegation only involves limited or inherently lawful functions. Yet, in practice, the bar for what constitutes 'direction and control' has been set high. Following the International Court of Justice (ICJ), the fact that a government finances, trains and in other ways supports a private entity is not enough; it has to be shown that the particular actions leading to a rights violation are imputable to the state.[70] Carrier legislation and general requirements to check documents etc. in and of themselves are thus unlikely to fulfill the specificity requirement. Yet, the increasing involvement of state officials in how controls are carried out may amount to 'direction or control', even within the restrictive interpretation set by the ICJ in the *Nicaragua* case. In an analogous example, as Scholten and Minderhoud evidence, the Dutch government not only ensures general training of KLM Royal Dutch Airlines employees, deployed immigration liaison officers also support and advise carriers in individual cases.[71] Similarly, one could imagine situations where active state support to otherwise vigilante groups carrying out border control or rounding up migrant settlements would constitute 'direction or control'. Conversely, establishing this 'real link' may be problematic where privatisation involves the use of subcontractors. Moreover, the state may be insulated from responsibility where private contractors act outside, or in excess of, their instructions.

[68] Crawford, *State Responsibility*, n. 63, 110. In *Stocke* v. *Germany*, the European Court of Human Rights similarly pronounced that: 'In the case of collusion between State authorities, i.e. any State official irrespective of his hierarchical position, and a private individual for the purpose of returning against his will a person living abroad, without the consent of his State of residence, to its territory where he is prosecuted, the High Contracting Party concerned is responsible for the acts of the private individual who *de facto* acts on its behalf.' *Stocke* v. *Germany*, App. No. 11755/85 (EComHR, 19 March 1991), para. 168.
[69] Crawford, ibid., 113.
[70] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, ICJ Reports 1986, 14, para. 17 (*Nicaragua*).
[71] Scholten and Minderhoud, 'Regulating immigration control', n. 19, at 137-140.

Last, but not least, under human rights law states retain certain positive or due diligence obligations to ensure the fulfilment of human rights protection, not just in regard to its own actions, but also where human rights violations are carried out by private individuals or other non-state actors.[72] These obligations do not stem from the conduct of private actors being attributed to the state, or the actor being subsumed as a *de facto* public body, but from the requirement of states to exercise due diligence in preventing, investigating and providing remedies for human rights violations regardless of who commits them.[73] The Inter-American Court of Human Rights in *Velásquez Rodríguez* v. *Honduras* thus held that the widespread occurrence of disappearances in Honduras, even though it could not be proved that these were directly imputable to the Honduran government, nonetheless engaged the responsibility of Honduras; not 'because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the convention'.[74] Similarly, the European Court of Human Rights in *Osman* v. *the United Kingdom* recognised that core obligations such as the right to life protected under Article 2 of the European Convention on Human Rights may imply a 'positive obligation for states to take preventive operational measures to protect an individual whose life is at risk from criminal acts of another individual'.[75]

In the present context, this kind of responsibility is most directly relevant in regard to vigilante groups not otherwise associated with, or endorsed by, the state. It may, however, also find application in situations of direct or indirect privatisation. As noted above, states are thus obliged to institute criminal proceedings against both individual employees and

[72] A. Reinisch, 'The Changing International Framework for Dealing with Non-State Actors', in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press, 2005), 37, 79-80. The due diligence principle has also been recognised as a secondary norm of general international law, see e.g. *Corfu Channel* case. *Corfu Channel (United Kingdom of Great Britain and Northern Ireland* v. *Albania)*, Merits, ICJ Reports 1949, 4. As a matter of soft law it is further reflected in the state duty to protect doctrine in the UN Guiding Principles on Business and Human Rights. United Nations Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc. A/HRC/17/31 (21 March 2011) (Guiding Principles).

[73] D.M. Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 MJIL 1, at 9-11; M. Scheinin, 'State Responsibility, Good Governance and Indivisible Human Rights', in H.-O. Sano and G. Alfredssson (eds.), *Human Rights and Good Governance: Building bridges* (The Hague: Martinus Nijhoff, 2002), 29, 35; R. McCorquodale and P. Simons, 'Responsibility Beyond Borders' (2007) 70(4) MLR 598, at 617-618; R.P. Barnidge Jr, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (The Hague: Asser Press, 2008), 55-112; A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993), 239; M.D. Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm', in M. Fitzmaurice and D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart Publishing, 2004), 139, at 151, 157.

[74] *Velásquez Rodríguez*, n. 47, para. 88.

[75] *Osman* v. *the United Kingdom*, App. No. 23452/94 (ECtHR, 28 October 1998), para. 1. See further *Z.* v. *the United Kingdom*, n. 47; and *Siliadin* v. *France*, App. No. 73316/01 (ECtHR, 26 July 2005). Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights).

corporations in situations of negligence or breach of duty of care, and more generally states are obliged to ensure proper regulatory frameworks for all contractors, relevant training and regular monitoring.[76] In each instance, however, the exact content of obligations will depend on both the actual power of the state to intervene, and on the foreseeability of any human rights violation.[77] The geographical scope of due diligence obligations in cases of extraterritorial actions further remains debatable, possibly excluding – or at least contextually limiting – responsibility in cases of airline control, private visa contractors and other situations where the outsourcing state does not simultaneously exercise some kind of jurisdiction for human rights purposes.[78] In such cases, however, due diligence obligations may of course still fall upon the territorial state in which the private actor operates.[79]

The law on state responsibility and due diligence obligations could be thought of as approaching the issue of state responsibility from opposite directions. Under the ARSIWA, a formal or effective link must be established between the state and the (nominally) private actor, thereby attributing the conduct in question as an act of state for the purpose of international law. Under international human rights law, the presumption is conversely that even in the absence of links of authority or control between the state and non-state actor, the state retains certain obligations to prevent, investigate and prosecute refugee and human rights violations within its sphere of influence.

As is well known, the law on state responsibility has explicitly constructed private actors exercising governmental authority as a 'narrow category' and the ICJ maintained an equally high bar for what constitutes 'direction and control'. The question thus remains whether due diligence obligations are a sufficient and appropriate mechanism to catch the remaining cases where states actively rely on private actors to implement migration control functions. Even though due diligence obligations may create indirect obligations for corporations, a public-private distinction is nonetheless retained as the premise for which to establish responsibility.

[76] C. Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 EJIL 989, 993.
[77] *Velásquez Rodríguez*, n. 47, para. 174; *Osman*, n. 75, para. 116.
[78] That states retain due diligence obligations in cases where they exercise extraterritorial jurisdiction over territory was recognised by the European Court of Human Rights in the *Cyprus* case. *Cyprus* v. *Turkey*, App. No. 25781/94 (ECtHR, 10 May 2001), para. 81. The UN Guiding Principles take the position that states are not generally required to regulate the extraterritorial activities of businesses domiciled within their territory and/or jurisdiction, yet nor are they prohibited from doing so. UN Guiding Principles on Business and Human Rights, n. 72, Principles 1 and 2. See more generally J. Cerone, 'Out of Bounds? Considering the reach of international human rights law', Working Paper No. 5, Center for Human Rights and Global Justice, New York, 2006, at 27; J. Zerk, 'Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas', Corporate Social Responsibility Initiative Working Paper No. 59, John F. Kennedy School of Government, Harvard University, Cambridge, MA, 2010; Gammeltoft-Hansen, *Access to Asylum*, n. 45, 200-204.
[79] See inter alia *Ilaşcu and others* v. *Moldova and Russia*, App. No. 48787/99 (ECtHR, 8 July 2004).

The risk in this context is that a gap remains in between, where the more complex, hybrid or indirect forms of privatisation may be difficult to capture within our existing legal toolbox. As the intersections between public and private are becoming increasingly blurred and interconnected, determining where private involvement begins and where public authority ends becomes likewise difficult. The criteria for attribution in respect of actions by private agents thus remain evidently higher than in the case of cooperation between two or more states, where merely 'aiding or assisting' another state in committing an internationally wrongful act is sufficient to establish collaborative or derivative state responsibility.[80]

4.2 Non-state actor responsibility under refugee and human rights law

Turning to the other side of the equation, it should be examined under what conditions individuals and corporations may incur direct responsibility under international law for refugee and human rights violations, and whether such responsibility can be shared with state actors. As discussed above, international law mainly regulates the responsibility of non-state actors indirectly, by placing obligations upon states to regulate their conduct.[81] This is largely the case for international human rights law as well. The Refugee Convention is addressed exclusively to states and the international community at large. Other instruments, such as the Convention Against Torture, do recognise that non-state actors may be rights violators and indeed duty-bearers, yet it does not purport to bind non-state actors directly, but as is the case above, places obligation upon states to regulate such conduct as a matter of domestic law.

Despite this traditional emphasis on states within positive international law, several developments since 1945 point to an increasing openness towards other subjects under international law. Since Nuremberg, a substantial case law has developed holding individuals accountable for genocide, war crimes, crimes against humanity and certain human rights violations.[82] Armed groups have further been held responsible for human rights violations by

[80] Article 16 ARSIWA, n. 49. See further Crawford, *State Responsibility*, n. 63, at 148-151. Nonetheless, some scholars have argued that while Article 16 only covers inter-state relations, the increased direct liability of corporations and private actors under international law may extend it to apply in relations between outsourcing states and private corporations as well. McCorquodale and Simons, 'Responsibility Beyond Borders', n. 73, at 613-614.

[81] C.M. Vazquez, 'Direct vs. Indirect Obligations of Corporations under International Law' (2005) 43 CJTL 927, 930.

[82] This includes both domestic case law and cases brought in the context of the International Criminal Court (ICC) and the ad hoc tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). P.A. Nollkaemper,

international human rights institutions where they exercise effective control over territory or state-like prerogatives in the absence of effective government authorities.[83] While these developments have raised concerns about legal coherence, modern international law would seem to afford states a great deal of discretion in terms of addressing particular instruments of international law to non-state actors.[84] Yet, leaving aside soft law instruments and domestic enforcement, binding legal obligations today remain limited.

As noted above, individuals may incur responsibility for human rights violations as a matter of international criminal law. Although the majority of cases have been brought against state officials, examples do exist where for instance managers of corporations have been held responsible for aiding and abetting international crimes.[85] The material scope is further limited to the category of international crimes and contextually linked to armed conflict, which would rule out the majority of instances in which private actors partake in migration management. Nonetheless, situations may arise where individuals' role in either preventing access to, or departure from, the territory of a state may constitute, or contribute to, an international crime in the context of e.g. ethnic cleansing, genocide or armed conflict in general.

In *Streletz, Kessler and Krenz* v. *Germany*, the European Court of Human Rights indirectly considered the responsibility of three former senior officials of the German Democratic Republic (GDR), who had been convicted for intentional homicide as principals of the GDR border regime, responsible for the death of numerous people shot and killed trying to cross the

'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615.

[83] See e.g. Human Rights Council, 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya', UN Doc. A/HRC/17/44 (1 June 2011), and the reasoning in *Sadiq Shek Elmi* v. *Australia*, Communication No. 120/1998, UNCAT, UN Doc. CAT/C/22/D/120/1998 (1999), which is equally reflected in Article 9 of the ARSIWA, n. 49. Most recently, the Independent International Commission on the Syrian Arab Republic argued that even armed groups not exercising territorial control as a minimum must respect *jus cogens* human rights obligations. Human Rights Council, 'Report of the Independent International Commission on the Syrian Arab Republic', UN Doc. A/HRC/19/69 (22 February 2012), para. 106.

[84] J. Cerone, 'Much Ado About Non-state Actors: The Vanishing Relevance of State Affiliation in International Criminal Law' (2009) 10 SDILJ 335, 346.

[85] See *U.S.* v. *Krauch*, VIII Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952); *U.S.* v. *Flick*, VI Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952); and *U.S.* v. *Krupp*, IX Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950). Discussed in Vazquez, 'Direct vs. Indirect Obligations', n. 81, at 939.

intra-German border between 1971 and 1989.[86] Although the Court cannot rule on individual criminal responsibility, it noted that:

> If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside State responsibility the applicants individually bore criminal responsibility at the material time. Even supposing that such responsibility cannot be inferred from the above-mentioned international instruments on the protection of human rights, it may be deduced from those instruments when they are read together with Article 95 of the GDR's Criminal Code, which explicitly provided, and moreover from as long ago as 1968, that individual criminal responsibility was to be borne by those who violated the GDR's international obligations or human rights and fundamental freedoms.
>
> In the light of all of the above considerations, the Court considers that at the time when they were committed the applicants' acts also constituted offences defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights.[87]

In the highly limited instances where a human rights violation by a private actor involved in migration management may both be attributed to a state and constitute a violation of individual criminal law, there is thus a basis for establishing shared responsibility under international law.

Beyond international criminal law, a number of scholars have argued that corporations can, or should, be held directly responsible for violations of international human rights law.[88] There is little doubt that the power and influence some corporations wield in today's world in many ways match, or even supersede, that of states. This also includes corporations engaged in migration management. G4S is one of the largest private employers globally with more than

[86] *Streletz, Kessler and Krenz* v. *Germany*, App. Nos. 34044/96, 35532/97 and 44801/98 (ECtHR, 22 March 2001).
[87] Ibid., paras. 104-5. While the applicants in this case were all leading officers, individual responsibility in such circumstances may equally be established for lower-ranking personnel engaged in migration control. In the parallel case of *K.-H. W.* v. *Germany* the ECtHR thus found that even a junior border guard 'could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human rights'. *K.-H.W.* v. *Germany*, App. No. 37201/97 (ECtHR, 22 March 2001), para. 75.
[88] See notably A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 YLJ 443; M.T. Kamminga and S. Zia-Zarifi (eds.), *Liaibility of Multinational Corporations under International Law* (The Hague: Kluwer, 2000); J.G. Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 AJIL 819. It should be noted, however, that this view has still to find general acceptance in international law. For a contrary view, see e.g. R. McCorquodale and P. Simons, 'Responsibility Beyond Borders' (2007) 70 (4) MLR 598, 599. See more generally P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press, 2005).

650,000 staff and a substantial lobbying capacity, and it has been able to retain its market dominance despite a number of serious human rights incidents.[89]

As a matter of international law, several attempts have been made to establish both direct obligations on corporations to respect human rights and complicity of corporations for human rights violations in their dealings with states. [90] In 2011, the Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights (Guiding Principles). [91] The Guiding Principles fall in three parts: the first concerns state duties to protect against human rights abuses of corporations and other non-state actors; the second corporate responsibility to respect human rights; and the third access to remedies. The first part reiterates direct and indirect state obligations under international human rights law, and argues for a broader interpretation of e.g. due diligence obligations. This part of the Guiding Principles could thus be said to reflect either pre-existing binding obligations under international law as outlined above or be an interpretation *de lege ferenda*.

The second part of the Guiding Principles set out a corporate duty to respect human rights both in their own activities, and to exercise due diligence in terms of their wider human rights impact. The material nexus is set to be international human rights obligations in general, but also extends to International Labour Organisaion rights and international humanitarian law when relevant.[92] As is clear from the text itself, however, the corporate duty to respect human rights is an expected conduct, not a binding legal duty in itself, nor something that can be extrapolated from existing human rights instruments. The general assertions of the Guiding Principles that corporations must respect existing human rights obligations are further likely to create difficulties translating obligations originally addressed to states. Even if this part of the Guiding Principles contains legal standards, they arguably lack the precision and self-executing form to make them directly applicable.[93] While some scholars have argued that

[89] G. Menz, 'The neoliberalized state and the growth of the migration industry', in T. Gammeltoft-Hansen and N. Nyberg Sørensen (eds.), *The Migration Industry and the Commercialization of International Migration* (London: Routledge, 2012), 108, at 118-120; M. Lemberg-Pedersen, 'Private Security Companies and the European Borderscapes', in T. Gammeltoft-Hansen and N. Sørensen (eds.), *The Migration Industry and the Commercialization of International Migration* (London: Routledge, 2012), 152, 162.

[90] See for example the 1976 OECD Guidelines for Multinational Enterprises (see www.oecd.org); the 2000 UN Global Compact (see www.unglobalcompact.org); the 2003 Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)); and the 2011 OECD Guidelines for Multinational Enterprises (see www.oecd.org).

[91] UN Guiding Principles on Business and Human Rights, n. 72.

[92] Ibid., principle 12.

[93] C. Methven O'Brien, *Human Rights and Transnational Corporations: For a Multi-Level Governance Approach* (PhD Thesis, European University Institute, 2009), 22; O. De Schutter, 'The Challenge of Imposing

international human rights bodies should exercise ingenuity in enforcing direct responsibility for corporations and other non-state actors on this basis,[94] it is difficult to see how jurisdiction over corporations can be asserted within existing international human rights institutions. At best, the Guiding Principles may thus serve as a starting point for establishing 'shared accountability' as opposed to international responsibility of non-state actors for violations of human rights.[95]

At this stage, it must be conceded that international law does not provide a general basis for shared responsibility between state and non-state actors in the meaning employed by this volume. Corporate responsibility for human rights violations may however still be considered as a matter of national law and judiciary practice. States are free to give domestic legal force to international human rights norms and, as noted above, may be required to criminalise and prosecute private human rights abuses as a matter of their own human rights commitments. While conceptually different from direct international legal obligations, international law thus does provide a 'transversal' basis for shared responsibility or accountability based on a combination of international and domestic law.

Besides domestic criminal law, tort law provides another important avenue for establishing individual and corporate liability for human rights violations, especially in common law jurisdictions.[96] The lower standard of proof typically applied in civil actions may further establish responsibility where the evidentiary threshold for a criminal conviction cannot be met. In particular, the United States Aliens Tort Claims Act (ATCA) allows foreigners, such as migrants and refugees, to bring claims against non-state actors for human rights violations.[97] Claims have equally been accepted in instances where individuals or corporations have acted on behalf of a government, and suits against both private parties and the United States government have similarly been accepted.[98] Both material and jurisdictional restrictions apply, however. The United States Supreme Court has held that only a 'modest number of international law violations' are recognised under the Alien Tort Claims Act,

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Human Rights Norms on Corporate Actors', in O. De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart Publishing, 2006), 1.

[94] R. McCorquodale and R. La Forgia, 'Taking Off the Blindfolds: Torture by Non-State Actors' (2001) 1 HRLR 189, 217.

[95] P.A Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, 369.

[96] J. Wright, *Tort Law and Human Rights* (Oxford: Hart Publishing, 2001).

[97] See e.g. *Filártiga* v. *Peña-Irala*, 630 F. 2d 876 (2d Cir. 1980). Alien Tort Claims Act (or Alien Tort Statute), 28 USC § 1350.

[98] *Sosa* v. *Alvarez-Machain et al*., 542 US 692 (S. Ct., 2004).

namely those with 'definite content and acceptance among civilized nations'.[99] While this would encompass for example torture, few norms under international refugee law are likely to meet this threshold.[100] Equally important is that in the 2013 Supreme Court ruling in *Kiobel*, a general presumption against extraterritorial application has been laid down in regard to all claims under the Statute.[101] This has brought an end to several pending claims, and rules out ATCA as a general avenue for bringing claims against non-state actors engaged in migration management. However, the Supreme Court noted that this presumption may be rebutted where claims can be shown 'with sufficient force' to 'touch and concern the territory of the United States'.[102] This leaves a potential window for claims against corporations that are actively engaged by United States authorities to prevent access to its territory, e.g. where carriers or security companies operate controls on behalf of the United States; are required to send advanced passenger information to Customs and Border Protection for pre-approval; or take advise regarding the admissibility of individual passengers from United States immigration liaison officers.

More generally, the use of domestic tort law as a remedy for non-state violations of human rights norms raises certain conceptual issues. First, from a positivist perspective, it is not at all clear that a domestic remedy could or should be able to create tort liability for non-state violations of international law where these actors are not already subject to such obligations at the international level.[103] This would amount to a creation of obligations *ex nihilo*. Second, although tort law may, in a limited set of situations, create shared responsibility for human rights abuses by importing a more or less well-defined set of human rights obligations from international law as prohibited conduct, for which a remedy is provided. The establishment of individual or corporate liability is thus strictly speaking a matter of domestic and not international law.[104]. This does not mean that tort law will not continue to develop as an important avenue for ensuring shared accountability for individual or corporate human rights

[99] Ibid.
[100] In 2001 all parties to the Refugee Convention formally acknowledged 'the principle of *non-refoulement*, whose applicability is imbedded in customary international law'. UNHCR HCR/MMSP/2001/09, Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees [New York, 31 January 1967, in force 4 October 1967, 606 UNTS 267] (16 January 2002), para. 4. Other scholars, however, have argued that regardless of such declarations, state practice is still too inconsistent. See notably J. Hathaway, 'Leveraging Asylum' (2010) 45(3) TILJ 503; and K. Hailbronner, 'Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking', in D. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht: Martinus Nijhoff Publishers, 1988), 128.
[101] *Esther Kiobel et al.* v. *Royal Dutch Petroleum Co. et al*., 621 F. 3d 111 (S. Ct., 17 April 2013) (*Kiobel*), at 13.
[102] Ibid., at 14.
[103] J. Cerone, 'The ATCA at the Intersection of International Law and U.S. Law' (2008) 42 NELR 101.
[104] Ibid., 112.

abuses, and even shared responsibility in the case of direct or indirect privatisation, however. And although the scope for post *Kiobel* case law is more limited, other jurisdictions – not least the countries where violations have taken place – may well take on a more active role in transnational human rights litigation.[105]

5. Conclusion: The (im)possibility of shared responsibility

Given the general trend towards privatisation, the almost exponential growth of private actor involvement in migration management over the last decades should not come as any surprise. It is a far cry from the classical conception of migration control, detention and removal as core functions of the sovereign state. As this chapter has tried to show, the privatisation of migration management presents a particularly harmful case in this context, because foreigners, migrants and refugees often have a harder time accessing relevant complaint mechanisms and advocacy institutions. Exacerbating this issue, a large part of private involvement in migration management further takes place 'out of sight', at points along the migratory route or in difficult-to-access locations, such as transit airports or closed detention centres, which further hampers democratic control.

These factors may be part of the explanation why relatively few cases have been brought forward establishing state responsibility in cases concerning private involvement in migration management. Traditionally, the main challenge has been to bring international refugee law to bear on the indirect privatisation through carrier sanctions. As the preceding section has tried to show, various avenues for holding states responsible for private human rights violations exist under international law, each capturing different situations of privatisation or non-state involvement. Much is thus to be gained from applying a more holistic approach that takes into account the broader developments in human rights law and general principles of international law. Even if recourse to other areas of international law may help ensure state responsibility for private actor involvement in migration management, it should equally be acknowledged that these areas of law are still developing and legal shortcomings in some areas continue to endure.

[105] D. Childress, 'Kiobel commentary: An ATS answer with many questions (and the possibility of a brave new world of transnational litigation)', *SCOTUSblog*, 18 April 2013.

Turning to the other side of the equation, different approaches to establishing responsibility of non-state actors under international law may equally be identified. While in principle shared responsibility between state and individual actors may arise for violations of international criminal law, the material scope remains highly limited. Second, while several attempts have been made to establish direct responsibility for non-state actors for human rights violations under international law, so far none of these can be considered to be binding obligations. Even if one was to accept the proposition that corporations incur direct human rights obligations, it still remains to be seen that this would serve as the basis for shared responsibility alongside states'. Finally, the role of domestic law and remedies may be considered. International human rights law and associated due diligence obligations require states to regulate the conduct and criminal responsibility for non-state actors at the domestic level. Similarly, domestic law, such as the ATCA, may operate to import a limited set of human rights norms for the purpose of assessing e.g. civil liability in a domestic context. Thus, even though international law does not provide a basis for direct shared responsibility, it could be argued to establish a transversal principle of shared responsibility that straddles international and national law by simultaneously holding states to account and obliging states to hold non-state actors to account.