Mr Gehad Madi
UN Special Rapporteur on the human rights of migrants

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Dear Mr Madi, Special Rapporteur,

## Externalization of Migration and the Impact on the Human Rights of Migrants

Thank you for the opportunity to provide input into your forthcoming report to the 80th session of the UN General Assembly on the externalization of migration and the impact on the human rights of migrants. I am a Senior Research Fellow at the Kaldor Centre for International Refugee Law at UNSW Sydney, where I direct the Offshore Processing project. This submission draws on more than a decade of research into the international law aspects of Australia's 'offshore processing' policies since they were reintroduced in 2012. These policies are analysed in separate submissions by me and Natasha Yacoub, and by Anna Talbot.

This submission takes a broader view, and addresses question 7 of the call for input. In summary, it recommends that the Special Rapporteur consider:

- defining and distinguishing responsibility, jurisdiction and attribution (Part 1);
- clarifying the grounds for extraterritorial jurisdiction relevant to externalization (Part 2); and
- in light of limitations in the existing framework for establishing the responsibility of a plurality of wrongdoing States in the human rights context (Part 3), engaging with the concept of 'shared responsibility' set out in the Guiding Principles on Shared Responsibility in International Law ('Guiding Principles').[1]

### 1 Defining and distinguishing responsibility, jurisdiction and attribution

The Special Rapporteur may wish to reiterate the importance of clear definitions and conceptual clarity when invoking the concepts of 'responsibility', 'jurisdiction' and 'attribution'.

'**Responsibility**' has various meanings and usages under international law, especially in the migration context. It is sometimes used as a synonym for a legal 'obligation' or 'duty'. Alternatively, the term 'responsibility-sharing' may be used to refer to the practical distribution between States of the physical and financial efforts involved in protecting refugees. By contrast, 'responsibility' as a legal term of art refers to the legal consequences that States incur for committing or being implicated in internationally wrongful acts. This definition derives from Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which provides that '[e]very internationally wrongful act of a State entails the international responsibility of that State'. A State commits an internationally wrongful act whenever conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State. Where these two conditions are met (and there are no circumstances precluding wrongfulness), the State's international 'responsibility' will be engaged, and certain consequences will flow therefrom.

Like 'responsibility', '**jurisdiction**' is a homonym under international law. Under general public international law, 'jurisdiction' refers to a State's legal competence to act and determines the scope of lawful State action. By contrast, under international human rights law, it is 'used more generally as a synonym for words such as power, authority, or control, either over people or over territory, or as a

[1] André Nollkaemper et al, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31(1) *European Journal of International Law* 15 ('Guiding Principles').

synonym for the territory within which such power is exercised'.[2] In this latter context, 'jurisdiction' is a threshold criterion which must be satisfied to engage a State's human rights obligations. It refers to the factual and/or legal link between a State and certain individuals. It is generally assumed that States exercise jurisdiction within their territories, but it is not territorially bound. States can and do exercise jurisdiction extraterritorially, although the circumstances in which they do so is subject to evolving and contested debate between States, scholars, courts and other bodies (see discussion in Part 2 below).

Jurisdiction (in its international human rights law sense) is distinct from '**attribution**' – 'while jurisdiction concerns the relation between a person and a State, attribution concerns the relation between a given conduct and a State'.[3] Attribution is a legal concept which recognises that States act through people and entities and clarifies when conduct can be tied back to the State such as to engage its responsibility. It is determined by reference to international law. Specifically, it is governed by a series of factual and legal conditions set out in Articles 4 to 11 of the ARSIWA, which are 'deemed to be reflective of customary international law'.[4] These conditions give rise to three general categories of attribution rules: (i) attribution based on 'institutional links' (*de jure* and *de facto* State organs, and other individuals or entities exercising governmental authority); (ii) attribution based on 'factual links' (a person acting on the instructions, directions or control of a State); and (iii) attribution based on a State adopting conduct as its own *ex post facto*.[5] If the relevant conditions are met, an act or omission will be attributable to the State, *regardless of where it occurs*. This fact is important in the context of externalization.

The same facts may be relevant to both jurisdiction and attribution, but they speak to different elements of the definition of an internationally wrongful act. Attribution forms the basis of the first part of the definition: there is an internationally wrongful act when conduct is *attributable* to the State under international law.[6] By contrast, 'jurisdiction' is relevant to the second part of the definition.[7] It establishes whether an obligation exists, and therefore whether impugned conduct amounts to a breach of an international obligation of the State to which it is attributed. This distinction is not always clearly drawn in scholarship and jurisprudence.[8] Nevertheless, it is an important distinction to maintain in the analysis of State responsibility for externalization of migration control and asylum.

## 2 Clarifying the grounds for extraterritorial jurisdiction

As noted above, the circumstances in which States exercise extraterritorial jurisdiction such as to engage their international human rights obligations are subject to evolving and contested debate. While this debate cannot be definitively resolved in the Special Rapporteur's report, it would be helpful to clarify, at a general level, the grounds for extraterritorial jurisdiction relevant to externalization practices.

In this regard, I commend the 'functional' approach to jurisdiction proposed by Professor Violeta Moreno-Lax.[9] While the state of international jurisprudence does not yet permit us to expound a single coherent theory of extraterritorial jurisdiction, the functional approach does draw together and explain many of the grounds on which extraterritorial jurisdiction has previously been based. Moreno-Lax 'use[s] "functional" to literally denote the governmental "functions" through which the power of the state finds concrete expression in a given case'.[10] She argues that jurisdiction exists whenever there is an

[2] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011) 39. See also, Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 107.
[3] Annick Pijnenburg, *At the Frontiers of State Responsibility: Socio-Economic Rights and Cooperation on Migration* (Intersentia, 2021) 188.
[4] Francesco Messineo, 'Attribution of conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014) 60, 64, citing compilations of decisions of international courts, tribunals and other bodies prepared by the UN Secretary-General on the request of the General Assembly.
[5] Ibid, 65-67.
[6] ARSIWA, art 2(a).
[7] Ibid, art 2(b).
[8] In particular, scholars have critiqued the European Court of Human Rights' apparent conflation of attribution and jurisdiction in cases such as *Jaloud v Netherlands* (App 47708/08, 20 November 2014). See e.g., Aurel Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions' (2014) 53(2) *Military Law and Law of War Review* 287, 291-295; Jane M. Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v. Netherlands*' (2015) 62(3) *Netherlands International Law Review* 407.
[9] Moreno-Lax uses this term differently from certain other scholars. See, Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model"' (2020) 21(3) *German Law Journal* 385, 402-403.
[10] Ibid, 402.

'underlying sovereign-authority nexus that connects the state to those within its might and the control it thereby purports to exercise',[11] whether lawfully or otherwise. On this view, '[o]nce the sovereign authority-nexus has been ascertained, there seems to be no principled reason justifying a distinction on the basis of the *locus* of such activity in deeming it a manifestation of jurisdiction, whether territorially or extraterritorially exercised'.[12] The basic premise of this approach 'is that human rights obligations … track sovereign jurisdiction and require that any exercises thereof be performed in conformity therewith, regardless of the location'.[13] Effective control over persons or territory *and* '[c]ontrol over (general) policy areas or (individual) tactical operations, performed or producing effects abroad' are all 'vehicles of the exercise of "public powers" that amount[] to jurisdiction'.[14]

The functional approach is consistent with general principles of international law, and the international law of State responsibility in particular. Professor Guy Goodwin-Gill, a pre-eminent authority on international refugee law, has long maintained that responsibility attaches to the State 'wherever it seeks to project power beyond territory',[15] and that 'no state can avoid responsibility by outsourcing or contracting out its obligations, either to another state, or to an international organisation'.[16] This position stems from the basic rule that '[t]he exercise of sovereign powers … is always accompanied by the responsibility of the state for such internationally wrongful acts as may be attributed to its organs'.[17] Similarly, in his concurring opinion in *Hirsi Jamaa,* Justice Pinto de Albuquerque affirmed:

> Immigration and border control is a primary State function and all forms of this control result in the exercise of the State's jurisdiction. … A State cannot evade its treaty obligations in respect of refugees by using the device of changing the place of determination of their status. … Thus the full range of conceivable immigration and border policies, including denial of entry to territorial waters, denial of visa, denial of pre-clearance embarkation or provision of funds, equipment or staff to immigration-control operations performed by other States or international organisations on behalf of the Contracting Party … all constitute forms of exercise of the State function of border control and a manifestation of State jurisdiction, wherever they take place and whoever carries them out.[18]

An outstanding question is whether jurisdiction is engaged only by *actual* exercises of State power, or also by *potential* exercises of State power. Using a different and more 'capacious'[19] understanding of 'flexible' or 'functional' jurisdiction, Shany argues that '[a] State should be obligated to respect and protect the human rights of those it is in a position to respect and protect, to the extent that [it] is in a position to do so'.[20] Similiarly, Papachristodoulou argues that 'having the potential to exercise effective control in a situation arguably carries the same degree of power as actual placement within a State's control'.[21] Her reasoning, that 'the power to do something is potential, and if and when it is exercised, results in control',[22] is persuasive – particularly in the context of externalization where some States might strategically structure their arrangements with partner States and non-State actors to create distance between themselves and the effects of their policies. It is also consistent with the principles of State responsibility which attach legal consequences to wrongful State acts *and omissions*.

In light of the above, the Special Rapporteur may wish to reiterate that States cannot avoid jurisdiction (and thereby evade their human rights obligations) by acting outside their territories and/or through

[11] Ibid, 397.
[12] Ibid.
[13] Violeta Moreno-Lax, 'Meta-Borders and the Rule of Law: From Externalisation to "Responsibilisation" in Systems of Contactless Control (2024) 71(1) *Netherlands International Law Review* 21, 41.
[14] Moreno-Lax, 'The Architecture of Functional Jurisdiction' (n 9) 403.
[15] Guy S. Goodwin-Gill, 'The Continuing Relevance of International Refugee Law in a Globalized World' (2015) 10 *Intercultural Human Rights Law Review* 25, 34.
[16] Guy S. Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' (2007) 9 *UTS Law Review* 26, 34. See also *Hirsi Jamaa v Italy* (European Court of Human Rights, Grand Chamber, App. No. 27765/09, 23 February 2012) [129].
[17] Guy S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23(3) *International Journal of Refugee Law* 443, 447.
[18] *Hirsi Jamaa* (n 16), Concurring Opinion of Judge Pinto de Albuquerque.
[19] Moreno-Lax, 'The Architecture of Functional Jurisdiction' (n 9) 402.
[20] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7(1) *Law & Ethics of Human Rights* 47, 65.
[21] Aphrodite Papachristodoulou, 'The Exercise of State Power over Migrants at Sea through Technologies of Remote Control: Reconceptualizing Human Rights Jurisdiction' (2024) 73(4) *International and Comparative Law Quarterly* 931, 952.
[22] Ibid, 953.

partner States or organisations, nor can States 'contract out' of their obligations. A functional understanding of State power affirms that wherever the State acts, it is bound by its obligations.

Finally, it is worth noting that the provisions of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol are not limited by any jurisdictional clause.[23] The Special Rapporteur may wish to clarify how extraterritorial conduct in the context of externalization engages State obligations under these instruments.

## 3 Acknowledging the limitations of the ARSIWA in establishing the responsibility of a plurality of wrongdoing States in the human rights context

As noted in Part 1 above, the international law of State responsibility sets out the legal principles relevant to determining the responsibility of States for internationally wrongful acts. It is intended to be 'a general law of wrongs',[24] applicable to all areas of law regardless of the primary norms at issue. However, the drafting history of the ARSIWA demonstrates that the International Law Commission (ILC) was primarily concerned with bilateral or reciprocal rights and obligations arising between States. The application of the ARSIWA to primary norms establishing non-reciprocal obligations for States with respect to individuals (and refugees in particular) was not considered at great length. Additionally, while the ILC did debate how principles of State responsibility should apply to situations involving a plurality of potentially wrongdoing States (and adopted Article 47 on this topic), it remained ambiguous on or declined to resolve many of the complex issues which arise in such cases. These two limitations – the ILC's superficial engagement with non-reciprocal rights and its reluctance to establish definitive provisions on multiple-State responsibility – directly contribute to the current challenges of applying State responsibility norms to externalization practices.

## 4 Engaging with the concept of 'shared responsibility' under international law

Despite these limitations in the historical development of the law of State responsibility, important scholarly developments over the past 15 years may assist the Special Rapporteur with his current inquiries. From 2010, the SHARES research project examined international law questions arising from the allocation of international responsibility among multiple states and other actors.[25] This project led to an extensive catalogue of publications, including a trilogy of edited volumes which canvas many aspects of multiple-State responsibility.[26] It also led to the publication of the Guiding Principles in 2020.

The Guiding Principles are intended to 'provide guidance to judges, practitioners and researchers when confronted with legal questions of shared responsibility of states and international organizations'.[27] They are described by the authors as being of 'an interpretive nature' and substantiating or building and expanding on the existing rules of the law of international responsibility set out in the ARSIWA and the Articles on the Responsibility of International Organizations.[28] Having thoroughly reviewed the drafting history of the ARSIWA and the evolution of State practice and scholarship since their adoption in 2001, it is my assessment that the Guiding Principles provide an appropriate framework for determining the existence and consequences of State responsibility for international wrongs in the context of externalisation.

Shared responsibility arises when multiple States commit one or more internationally wrongful acts which contribute to a 'single harmful outcome' or 'indivisible injury', and legal responsibility for this outcome is distributed or allocated among more than one of the contributing States. There are a few points to note here:

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[23] Nicolosi observes that 'State parties are thus bound even when engaging in activities outside their territory, although the set of duties they have vis-à-vis refugees depends "on the intensity of the territorial bond between a refugee and the state of asylum"': Salvatore Fabio Nicolosi, 'Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law' (2024) 71 *Netherlands International Law Review* 1, 11 citing Vincent Chetail, *International Migration Law* (Oxford University Press, 2019) 182 and James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2021).

[24] Silvia Borelli, 'State Responsibility in International Law' in *Oxford Bibliographies* (Oxford University Press, 2017).

[25] 'SHARES Research Project on Shared Responsibility in International Law' (undated).

[26] A list of publications is available at <http://www.sharesproject.nl/publication>.

[27] Guiding Principles (n 1) 20.

[28] Ibid, 20-21.

i. shared responsibility arises when multiple States commit one *or more* internationally wrongful acts. Thus, it includes but is broader than the concept of joint responsibility set out in Article 47 of the ARSIWA (which requires the commission of a single wrongful act). In this way, shared responsibility is particularly well suited to complex cooperative externalization arrangements between two or more States which involve a series of wrongful acts and/or omissions;

ii. if an injury is 'divisible', and each State's individual causal contribution to it can be determined, the allocation of responsibility can be resolved by the general principle of independent responsibility. By contrast, 'shared responsibility is an antidote for situations where causation does not provide an adequate basis for responsibility'.[29] An injury will be 'indivisible' when 'the proportion of harm attributable to each contributing actor cannot be determined'.[30] This approach, which shifts the focus from whether there is a single internationally wrongful act to whether there is a single harmful *outcome*, is better suited to the reality of complex cooperative externalization arrangements. It also lends itself well to a human rights analysis. It focuses on the human impact rather than the State wrong, and is apt in the context of human rights violations where each State's 'share' of a violation may not be identifiable or quantifiable; and

iii. shared responsibility is a flexible concept which may arise when each State's contribution to the indivisible injury is individual, concurrent or cumulative:[31]

   a. States make *individual* contributions when there is one effective cause of the injury, and it is attributable to multiple States.[32] This situation arises when a single act or omission is attributable to two or more States, both of which are responsible for it under Article 47 of the ARSIWA. An example could be the conduct of a joint committee or other entity acting on behalf of two States engaged in externalization practices;
   b. States make *concurrent* contributions when there are multiple, different wrongful acts, and the wrongful act of each State would have been sufficient on its own to cause the injury.[33] From the extraterritorial processing context, one could imagine a critically ill asylum seeker who requires urgent medical evacuation from a host State, but the host State blocks removal, and the evacuating/receiving State also delays it, resulting in the death of the asylum seeker.[34] In this situation, the contribution of each State, on its own, would have been sufficient to cause the fatal delay in access to healthcare; and
   c. States make *cumulative* contributions when each State's wrongful conduct is insufficient on its own to cause the injury, but they accumulate to produce the injury collectively.[35] This basis for shared responsibility is especially relevant to complex cooperative externalization arrangements where each State claims that their conduct alone did not create the relevant harm, but the cumulative effect of all States' conduct is a violation of human rights.

It is my view that 'shared responsibility' provides a principled and effective framework for determining multiple-State responsibility for externalization practices which involve a plurality of States and result in human rights violations for asylum seekers, refugees and migrants.[36] It also sets out appropriate legal consequences (cessation, non-repetition and reparation) for each State which shares responsibility. I welcome the opportunity to discuss this framework further at the forthcoming consultation.

Yours sincerely,

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[29] André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359, 367-368.
[30] André Nollkaemper, 'Introduction' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014) 1, 7.
[31] Guiding Principles (n 1) Principle 2(2).
[32] Ibid, Commentary to Principle 2, para 6.
[33] Ibid, Commentary to Principle 2, para 7. See also, Nollkaemper, 'Introduction' (n 30) 9.
[34] *Inquest into the Death of Hamid Khazaei* (Coroners Court of Queensland (Australia), File No. 2014/3292, 30 July 2018).
[35] Guiding Principles (n 1) Commentary to Principle 2, para 8; Nollkaemper, 'Introduction' (n 30) 10.
[36] But consider Chimni's critique of both the ARSIWA and the Guiding Principles: B S Chimni, 'The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective' (2020) 31(4) *European Journal of International Law* 1211.