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Controlling Migration through International Cooperation

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Efforts by States to prevent migrants and refugees from reaching their territory has been a defining feature of the developed world's migration policies since the mid-1980s. Throughout this period the nature of migration control policies has continuously changed and developed—often adding new instruments or refining the existing arsenal of mechanisms. The idea to control migration 'upstream', referred to by some as 'externalisation', has been a red thread in many policy proposals and implemented measures, from visa requirements and carrier sanctions to high seas interdictions. Within this logic, the current generation of migration control measures is further characterised by the concurrent involvement of partner States in regions of transit and origin. International cooperation concerning migration control can take various forms, including granting access to foreign migration authorities to operate within the territory of partner States and joint patrols between two or more countries, as well as different forms of delegation, typically involving wealthier States in the Global

North funding, training and equipping partner state authorities to carry out migration control.[1]

In the European context, the so-called 'refugee crisis' in 2015–2016 triggered a raft of *ad hoc* measures aimed at addressing the higher numbers of arrivals, and, crucially, stopping the flows. Many of these included cooperation between EU Member States and third States. The EU-Turkey Statement of 18 March 2016 is a paradigmatic example of such measures, providing not only for Turkish exit border controls, but also indirect deterrence measures in the form of a return programme in exchange for resettlements from Turkey to EU Member States. In February 2017, a new memorandum of understanding was concluded between Italy and Libya, subsequently endorsed by the EU, expanding on previous collaboration between the two countries concerning migration control. The EU has also developed various instruments to cooperate with States further from its borders, for instance through the EU Migration Partnership Framework launched in 2016.[2] Most recently, European States have showed an interest in exploring the concept of 'regional disembarkation platforms' in a new attempt to stem migration across the Mediterranean.[3]

Europe in turn is often argued to follow the Australian example in its drive to stop migrant arrivals. Australia cooperates bilaterally with a number of States in the region, including Sri Lanka, Indonesia, Malaysia, Cambodia, Nauru and Papua New Guinea, and co-chairs the regional Bali Process together with Indonesia. Substantively, these agreements span a host of different measures, from pre-inspection schemes and engagement of cooperating States' border authorities, to extraterritorial processing of asylum seekers and exchanges of recognised refugees.[4]

Likewise, the USA provides assistance to Mexico as part of security cooperation within the framework of the Mérida Initiative, which includes creating a '21st-century border'. It not only focuses on Mexico's northern border with the

1 For an attempt towards a typology see T. Gammeltoft-Hansen & J.C. Hathaway, *Non-Refoulement* in a World of Cooperative Deterrence, 53(2) *Columbia Journal of Transnational Law* 2015, p. 235–283.

2 European Commission, *Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, 7 June 2016, COM(2016) 385 fin.

3 European Council, *European Council Meeting (28 June 2018)—Conclusions*, EUCO 9/18 (Brussels: European Council, 2018).

4 N.F. Tan, State Responsibility and Migration Control: Australia's International Deterrence Model, in: T. Gammeltoft-Hansen & J. Vedsted-Hansen (Eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Oxford: Routledge, 2017), p. 215–37.

USA but also on its southern border with Guatemala and Belize.[5] Since 2014, Mexico has thus implemented the 'Southern Borders Programme' with US support in the form of training, equipment and funding. The result of this cooperation is more interceptions and returns of Central American migrants by Mexican authorities. The USA has also provided funding and training to authorities in Honduras and Guatemala to prevent people from leaving these countries.[6]

This is not to say that international cooperation regarding migration control is a new phenomenon as such. Many of the earlier measures to externalise migration control policies indirectly presume some kind of international arrangement.[7] Yet, current migration control schemes seem to herald a more qualitative change in this form of cooperation. Previously, cooperation was often limited to ensuring access for the authorities of prospective asylum countries in the Global North to carry out migration control within the territory or territorial waters of partner States, with the involvement of said States' own authorities absent or more nominal, as in the case of 'shipriders' for instance. Today, in contrast, partner states in regions of transit and origin can be seen to take on a more hands-on role. Actual control is increasingly carried out by the authorities of these States, with traditional asylum countries in the Global North taking a back seat and limiting their role to the provision of training, equipment, funding and advice.

From the perspective of international law, this represents a significant development, creating both new challenges for ensuring the continued applicability of refugee and human rights law as well as raising more fundamental questions about the role of international law in this area.

At the most immediate level, this includes questions around the legality of such agreements and measures as a matter of international human rights law, EU law or constitutional law for instance. Here, not only questions of *non-refoulement* and access to protection for refugees are relevant to consider but also whether such schemes are discriminatory in their design and/or effects.

5 C.R. Seelke & K. Finklea, US-Mexican Security Cooperation: the Mérida Initiative and Beyond. Congressional Research Service Report R41349 (North Charleston: Createspace Independent Publishing Platform, 2017).

6 J. Podkul & I. Kysel, *Interdiction, Border Externalization, and the Protection of the Human Rights of Migrants*, Working Paper submitted as written testimony to: The Inter-American Commission on Human Rights. For the thematic hearing on: Human Rights and the Interdiction of Persons Eligible for International Protection, 22 October 2015 (New York/Storrs: Women's Refugee Commission/Human Rights Institute, 2015), p. 9.

7 See Gammeltoft-Hansen's contribution to this special issue.

Second and related, international cooperation on migration control raises questions concerning the responsibility and accountability of the different States involved for any ensuing human rights violations. This includes complex legal issues such as the establishment of shared or differentiated responsibility amongst multiple actors, but also strategic and jurisdictional questions for refugee and human rights advocates seeking to challenge these practices.

Closely related, the move to international cooperation has important practical implications for the ability of scholars and advocates to access information about how migration control is carried out and its consequences for migrants and refugees. While the 'out of sight, out of mind' effect has always been a key component of efforts to shift migration control 'elsewhere', shielding control practices behind the sovereignty of third States adds a further layer to this dynamic.

Last, but not least, current deterrence schemes prompt more fundamental questions about the role and development of international law. As others have pointed out, international cooperation in this area is itself couched in and facilitated by international law.[8] International law, in other words, not only *constrains* but may also *enable* practices to deter and constrain mobility for migrants and refugees.

As the various contributions to this special issue highlight, several avenues nonetheless exist for addressing the array of human rights violations occurring in the context of cooperative deterrence. One approach is to delve deeper into key international law concepts such as jurisdiction and different forms of State responsibility, including questions of shared responsibility amongst multiple actors. The concept of extraterritorial jurisdiction has thus spawned a rich and extensive body of literature,[9] while scholars have also looked towards the growing literature in other fields such as the law on State responsibility and law and development to resolve questions about shared responsibility, attribution

8 I. Mann, Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013, 54(2) *Harvard International Law Journal* 2013, p. 315–91. See further the contribution by Spijkerboer to this issue.

9 See for instance M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011); K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden: Martinus Nijhoff, 2012); M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2009); M. den Heijer & R. Lawson, Extraterritorial Human Rights and the Concept of 'Jurisdiction', in: M. Langford, W. Vandenhole, M. Scheinin & W. van Genugten (Eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), p. 153–91.

and complicity.[10] In this vein, in this special issue Thomas Gammeltoft-Hansen suggests to critically re-examine the extraterritorial effects doctrine from a human rights perspective, while Annick Pijnenburg explores different ways in which the European Court of Human Rights may address issues of jurisdiction and State responsibility in the context of so-called 'pullbacks' by the Libyan Coast Guard.

The legal challenges raised by cooperative migration control policies may also be approached from other angles within international human rights law. These include, but are not limited to, the principle of non-discrimination and economic, social and cultural rights. In this special issue, Maarten den Heijer thus examines to what extent European visa policies are discriminatory. Taking a more structural approach, Thomas Spijkerboer argues that the Global North today controls access to the Global mobility infrastructure, effectively excluding citizens from accessing mobility on the basis of nationality, race, class and gender.

Yet other approaches move beyond international refugee and human rights law, exploring cooperation migration control from the perspective of e.g. international criminal law, private law and constitutional law. Nikolas Feith Tan's contribution to this special issue for example outlines multiple legal advocacy and litigation avenues pursued in relation to the Manus Island Regional Processing Centre, including human rights law, international criminal law, constitutional law, tort, and business and human rights.

As noted above, many contemporary cooperative migration control policies are characterised by wealthier States in the Global North providing countries of origin or transit with funding, training and/or equipment in order to stem migration flows. This shift in the 'centre of gravity' of migration control away from the Global North and towards the Global South may require scholars to likewise shift, or at least enlarge, their focus. Gammeltoft-Hansen, in this special issue, thus argues that scholarship should adopt a more holistic approach, equally taking into account the role and responsibility of partner States in the Global South, including possible remedies available within these jurisdictions.

10 See for instance A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009); H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011); J. Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013); A. Nollkaemper & I. Plakokefalos, *Principles of Shares Responsibility: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014); D. Davitti & A. La Chimia, The European Agenda on Migration and the Use of Aid Funding for Migration Control, 10 *Irish Yearbook of International law* 2017, p. 133–162.

Of course, the directions explored in this special issue are by no means the only possible answers to cooperative migration control. Rather, they are a few among many possible routes to address the challenges these practices raise explored in current scholarship.[11] As such, the ambition of this special issue is merely to draw some further contours for the next phase in legal scholarship regarding cooperative migration control. The authors in this special issue do so by exploring different research agendas, possibilities for strategic litigation, and more broadly contextualising and problematising mobility policies.

In the first contribution to this special issue, Thomas Gammeltoft-Hansen explores three different avenues for future legal research on deterrence policies. He first suggests to critically re-examine other bases for extraterritorial human rights jurisdiction, in particular the extraterritorial effects doctrine, in regard to deterrence. Second, he argues that scholarship in this area exhibits a Global North bias, overlooking or downplaying the role and responsibility of partner states in the Global South, as well as possible remedies within these jurisdictions. Third, his contribution makes a call for more reflexive and interdisciplinary approaches in order to understand the wider effects of litigation and other advocacy measures.

In the second contribution, Annick Pijnenburg addresses the first avenue identified by Gammeltoft-Hansen, as she discusses the application that was recently lodged with the European Court of Human Rights alleging that Italy is responsible for its involvement in so-called 'pullbacks' by the Libyan coast guard. Her contribution discusses different ways in which the Court can address the issues raised by this case, focusing particularly on the question whether it is likely to find that Italy exercises jurisdiction and whether Italy could incur derived responsibility for its involvement in the pullbacks.

Nikolas Feith Tan's contribution, in turn, fits into the second avenue identified by Gammeltoft-Hansen. It considers the controversial cooperative migration control approach of extraterritorial asylum through a case study of the Manus Island Regional Processing Centre (RPC), in operation between 2012 and 2017. Tan argues that the RPC was the site of legal contestation, as refugees and their lawyers turned to various legal fora in an attempt to hold Australia, Papua New Guinea and private contractors responsible for violations of human rights law. He concludes that the Manus Island RPC experience holds lessons

11 See for instance V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017); C. Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: Oxford University Press, 2015); I. Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge: Cambridge University Press, 2016).

for future litigation on policies of extraterritorial asylum, presenting both opportunities and risks for policymakers and refugee lawyers alike.

Thomas Spijkerboer conversely paints a broader picture of how migration control fits into what he calls the 'global mobility infrastructure'. This consists not only of the physical structures and manifestations of migration control, but also the services and laws that enable some people to move across the globe with high speed, low risk, and at low cost, while others, who have no access to this infrastructure, travel slowly, with high risk and at high cost. Spijkerboer argues that exclusion from the global mobility infrastructure is based on nationality, race, class and gender. The notion of the global mobility infrastructure thus enables Spijkerboer to interrogate the way in which international law reproduces these forms of stratification, instead of correcting them.

Last, but not least, Maarten den Heijer takes up Spijkerboer's argument that the externalisation of migration control has resulted in the discriminatory denial of access to the global mobility infrastructure. His contribution thus examines whether processes of migrant selection in the context of European visa policies are discriminatory. He argues that the EU's current rules and decision-making on issuing or lifting a visa obligation for a particular group of nationals displays neither direct nor indirect signs of discrimination, although the EU continues to lie open to the charge that its visa regime may be discriminatory on the grounds of race as well as religion.

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