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SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART III

THE UNINTENDED CONSEQUENCES OF EXPANDING MIGRANT RIGHTS PROTECTIONS

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One story that can be told about the development of legal protections for certain forced migrants in international law is, in terms of the scope of protection, a progressive one. From expanded definitions of who is entitled to refugee-law protection, to the development of complementary protection in human rights law, the ambit of that which the law purports to cover has moved wider. This might be seen as part of the broader trend in the expanding coverage of international human rights law generally. Yet, a counternarrative can also be told: a diminished commitment on the part of many states, particularly economically advantaged ones, to inward migration, including of forced migrants, as evidenced in the expanded scope of *non-entrée*, "closed borders" measures, from visa restrictions to carrier sanctions, push-back operations, and an unwillingness to engage in numerically significant refugee resettlements to their countries.[1] This backlash trend can also be identified in human rights policy generally.[2] Just as the scope of human rights legal protection in general, and the legal protection accorded to certain migrants in particular, has expanded, so too states have become less willing to provide such protection.

These two chronologically overlapping, normatively divergent developments are an important feature of global migration law. Given this, how can and should the causal relationship, if any, between them be understood? In particular, have progressive legal developments played a causal role in the broader trend of resistance to inward migration? And, moreover, given the actuality of such resistance, what is at stake when legal developments continue to push in a progressive direction?

This essay explores these questions through the case study of progressive legal developments in the application of human rights law protections, including the *non-refoulement* obligation, extraterritorially, in relation to states' migration-policy-related actions outside their borders: the extraterritorial operation of border checks, interception and push-back at sea, detention, transfers to third countries, etc.

The legal developments at issue are at the intersection of two of the main trends in the field of human rights obligations generally, concerning *non-refoulement* and extraterritorial applicability. They come on the heels of obligations in the former category being accepted, and the scope of their coverage expanding, in the territorial context,

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[1] On the idea of a general erosion in the commitment to refugees including the *non-refoulement* obligation, see, e.g., Agnès G. Hurwitz, The Collective Responsibility of States to Protect Refugees 178 (2009) and sources cited therein.

[2] On the trend in human rights law generally, see, e.g., Criticism of the European Court of Human Rights (Patricia Popelier et al. eds., 2016) and sources cited therein.

and obligations in the latter category also developing in a similar fashion somewhat more recently.[3] Now, in a synthesis of both developments, marking a further development in each, there is an acceptance that human rights law, including the *non-refoulement* obligation, applies to extraterritorial migration-related policy activities, as affirmed in the *Hirsi* decision of the European Court of Human Rights about Italian maritime push-back operations.[4]

The progressive developments in the extraterritorial application of human rights law have the effect of grafting onto the migration-policy-related activities similar core protections for migrants as would apply to equivalent activities taking place territorially. This falls short of equivalent protection, given the limited circumstances in which human rights law applies extraterritorially, and important practical impediments in the field of enforcement and third-party scrutiny.[5] Nonetheless, in certain key respects it is a radical shift, introducing substantial constraints on the state. On the issue of *non-refoulement*, this means that, as in *Hirsi*, states can no longer lawfully engage in *refoulement* extraterritorially which would be unlawful territorially, at least as a matter of human rights law.

This development potentially constitutes a direct challenge to the very reason for such extraterritorial action in the first place. The way such action is, essentially, an extraterritorial manifestation of an activity that would normally take place at or within a state's borders—so, for example, "push back" being the extraterritorial equivalent to deporting migrants once they reach the state—requires a consideration of why the extraterritorial locus has been chosen, and what implications such a choice has for the question of protective legal regulation.

The present enquiry forms part of a broader question relating to certain other forms of extraterritorial state activity, where states have chosen to engage in an activity extraterritorially which they could have performed, and usually do perform, territorially. Most prominent in the post-9/11 human rights era is the decision by the United States to detain suspected members of *Al Qaeda* and other militant Islamist groups not in the territorial United States but extraterritorially, in its military facility in Guantánamo Bay, Cuba, and the initially secret so-called "black sites."[6] It was speculated in the case of these arrangements that part of the reason for the choice of the extraterritorial over the territorial locus was that the former offered an arena of relatively less, if any, substantive normative restrictions, and associated accountability, including of a legal kind.[7] So, too, a speculation arises as to whether an important reason for moving migration-policy-related activities "offshore" is to evade normative constraints and scrutiny.[8]

The significance of such speculation is heightened when attention is given to the broader context of an increased resistance on the part of many economically advantaged states towards inward migration in general, and the migration of individuals protected from *refoulement* by refugee law and human rights law in particular—the *non-entrée* policy identified above. Extraterritorial migration-related activities have to be considered, then, not only in a neutral way, aimed at implementing policy that could be, potentially, relatively receptive or restrictive of migration. Rather, the broader context requires a consideration of how these activities might be viewed as a means of furthering *non-entrée* policy.

[3] On the development of the *non-refoulement* obligation in human rights law territorially, see, e.g., Jane McAdam, The Evolution of Complementary Protection (2007) and sources cited therein. On the extraterritorial application of human rights law in the area of civil and political rights, see, e.g., Ralph Wilde, *The Extraterritorial Application of International Human Rights Law on Civil and Political Rights*, *in* Routledge Handbook on Human Rights 635 (Nigel Rodley & Scott Sheeran eds., 2013) and sources cited therein.

[4] Hirsi Jamaa v. It., App No. 27765/09, 55 EHRR 21 (GC) (2012).

[5] On the scope of applicability of human rights treaties in the field of civil and political rights, see, e.g., Ralph Wilde, *Legal "Black Hole"?: Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 Mich. J. Int'l L. 739 (2005) and sources cited therein.

[6] *See, e.g.*, *id.*, sec. II and sources cited therein.

[7] *See id.*, sec. IV.C. and sources cited therein.

[8] *See, e.g.*, Thomas Gammeltoft-Hansen, Access to Asylum: International Refugee Law and the Globalisation of Migration Control 3 (2011).

In consequence, it is necessary to ask whether the objective of circumventing legal restrictions that would operate were these activities to take place territorially might lie behind the move offshore. If this is the case, the question arises: will the legal move of following state activity to the extraterritorial arena precipitate a counterresponse by states? And what might that response look like? And should this matter when considering the merits of the legal move for the field of migration law? What negative blowback consequences for the protection of migrants might be precipitated by the progressive legal developments that have taken place and might take place in the future?

The potential risks in the migration context in particular can perhaps be illustrated with an example from the subject of extraterritoriality more generally. It is instructive to consider the shift from the President George W. Bush "War on Terror" policy of the extraterritorial detention of individuals deemed security threats, to the President Obama policy of the killing of such individuals via strikes by so-called "drones." To be sure, this shift has multiple explanations, including advances in so-called "drone" technology and the lack of a full-spectrum boots-on-the-ground presence in many of the Obama-era theatres of operation like Yemen and the Afghan-Pakistan borderland, compared to Iraq and Afghanistan in the George W. Bush-era. But it is surely important to consider how the general progressivist, human-rights-based critique of Guantánamo and the black sites, shared, of course, by President Obama, might have played a part in the search for and recourse to an alternative, and, crucially for the purposes of the present discussion, more extreme means of achieving the same objective of neutralizing security threats.

Indeed, there might be something about extraterritoriality that is particularly salient in the backlash debates, precipitating an exceptionally regressive response. It is possible to identify the linked issues of the rights of foreigners, and the rights of people extraterritorially, as a dominant theme in the general backlash debate, with serious consequences for the position of migrants.

In the United Kingdom, for example, the long-standing process of periodic assaults on the European Commission and Court of Human Rights, and the Convention, has in recent years tipped over into a position, first, where the Conservative party committed to replacing the domestic U.K. Human Rights Act with a "Bill of Rights" that would somehow enable a greater diminution in substantive protections from the position of the European Convention, and then, second, where the current Prime Minister Theresa May, before taking up this position, expressed a preference not just to alter the domestic law position but to withdraw from the European Convention on Human Rights.

Significantly, Theresa May's criticism of human rights has focused mainly on the impact of the *non-refoulement* obligation territorially, something which operated as a constraint on her decisions as Home Secretary when seeking to deport, expel, or extradite foreigners from the United Kingdom. Moreover, the topic in the United Kingdom that has led to the most opposition to the European Convention in recent years, other than the issue of prisoners' voting rights, has been the extraterritorial application of the Convention to the actions of U.K. soldiers, notably in relation to abuses in Iraq.

Prisoner voting aside, then, extraterritoriality and *non-refoulement* (in the territorial context) are at the heart of an exceptional rejectionist position when it comes to, in the case of the United Kingdom, the most significant regime of operative international human rights law. It is exceptional because it involves not simply objecting to and complaining about positions in certain areas, but, rather, proposing withdrawal from the regime in its entirety. It is also notable that one common speculated explanation for the Brexit outcome in the U.K. referendum on leaving the European Union is antimigrant views, in relation to both inward migration from the European Union and the reception of refugees.

Returning to human rights law, there is other evidence that resistance to extraterritorial applicability is of an exceptional nature when compared to resistance to other human rights topics. In surveying the Turkish government's responses to decisions by the European Court of Human Rights, which have ranged across many important

and controversial topics, Olgun Akbulut places the responses to the cases about the Turkish occupation in Northern Cyprus in an exceptionally negative category, as the "one group of cases where the government has completely rejected the findings and the judgment of the ECtHR."[9]

When considering the special nature of objections to extraterritorial human rights protections, including for migrants, it is important to bear in mind the identity of the right-holders. Most individuals given the particular right of *non-refoulement* (whether territorial or extraterritorial), and rights generally in the extraterritorial context, are foreigners. Objections to *non-refoulement* and extraterritorial applicability have to be understood, in part, as objections to the legal protection of rights for foreigners, especially given the xenophobic turn commentators have identified and are identifying for the period corresponding to that under present analysis, where *non-entrée* policies, extraterritorial migration-policy-activities, and the backlash against human rights protection, have taken place.[10]

So progressive moves towards the human rights regulation of extraterritorial state activity in general, and such activity that impacts on migrants, could precipitate a backlash from states of an exceptionally significant character.

What might happen? In the first place are responses by states that might be understood as still, ultimately, accepting the assumptions of the normative regime, but avoiding the implementation of it by avoiding allowing migrants to enter and reside in their territories. For example, migrants have been forcibly transferred on their way to, or having arrived at, the state's borders, to a third location, allied to the claim that those entitled to protection will not suffer as far as the *non-refoulement* obligation is concerned, because the third location is deemed safe. This approach, the spirit of which is captured in the EU-law Dublin "first country of asylum" regime, can be seen in the Australian policy of intercepting migrants at sea and transporting them to extraterritorial centers such as on Nauru and Papua New Guinea. It has been discussed in Europe for some time, and has resurfaced there during the recent "crisis," with the possibility of creating such centers somewhere in north Africa. In all these cases, what is being proposed and implemented is the transfer of responsibilities for hosting migrants from relatively economically advantaged countries to relatively economically disadvantaged ones.

Approaches such as these can be seen as responses by states which, on the one hand, gesture to an acceptance of the position that, if migrants fall within their control, whether territorially or extraterritorially, then they do bear an obligation of *non-refoulement*, but, on the other hand, seek to avoid the usual consequence of this, which is that they then discharge the obligation through hosting those individuals entitled to protection within their own territories. The consequent reduction in the numbers hosted is seen as a benefit not only in and of itself, as far as the individuals directly affected by it are concerned, but also as a deterrent to others who might try to travel to the states concerned not just to obtain protection in general, but to obtain protection that would be delivered in those states' territories, and also to all other migrants without a protection entitlement.

For the individuals directly affected, the arrangement is not on its own terms supposed to diminish providing the protection required by the *non-refoulement* obligation if they are entitled to this. But in shifting the provision of protection to an extraterritorial location in a less economically advantaged state, the solution exacerbates the unequal distribution of hosting refugees globally.

That this can be done within the boundaries of the *non-refoulement* obligation indicates the limited nature of international law in this area, which does not provide for a binding regime of equitable refugee hosting among states. In

[9] Olgun Akbulut, *Turkey: The European Convention on Human Rights as a Tool for Modernisation*, *in* Criticism of the European Court of Human Rights 424 (Patricia Popelier et al. eds., 2016).

[10] Indeed, it is notable that the other main issue precipitating an exceptional backlash in the United Kingdom, prisoners' voting rights, is also concerned with the rights of individuals who, like foreigners, are placed in a separate, lesser category from citizens, and where the legal issue challenges this treatment (voting being a right that is quintessentially tied to citizenship, the denial of which being tied up, alongside the deprivation of liberty, with the breaking of the civic bond that forms the basis for a serious criminal conviction).

this respect, then, the backlash precipitated by the progressive development in the law may not necessarily lead to a diminution in the additional protection provided by the law but has come at the cost of the worsening of a separate problem, not covered by the law, in the area of the equitable hosting of refugees between states. More migrants are potentially protected than would be the case without extraterritorial applicability, but responsibility for realizing this through the hosting of such migrants has been added to the already disproportionately involved developing world.

For those individuals affected in a broader way, whereby the exemplary nature of this arrangement deters them from attempting to travel to the states involved in the first place, the arrangement might have a similar effect if they are able to obtain protection elsewhere. But if they are not so able—if travel to the states implementing these measures is the only route to protection—then the danger is that protection itself will not be realized. Thus, the backlash response reverses the practical significance of the progressive development: the *non-refoulement* obligation might apply extraterritorially, but people have been deterred from travelling into the zone where they would benefit from this. Since the deterrent effect is based on shifting the place where protection will be afforded to a less desirable location, the effect of the backlash response illustrates how the international legal regime only offers core protection, failing to address the broader issues of equitable hosting or, to a large extent, the material conditions in the site of protection. States can respond to the progressive developments by exploiting the lack of effective regimes dealing with these broader issues, to generate disincentives that diminish protection and thereby undermine the practical effect of the progressive developments. It is as if the *non-refoulement* obligation did not apply extraterritorially.

Progressive developments leading to expanded protection may also precipitate backlash measures in other areas which, although not undermining the developments as such, aim to reduce overall inward-migration numbers, including of individuals who would be entitled to protection. Carrier sanctions and visa restrictions could be tightened up. Economically advantaged states could more aggressively seek to contain forced migrants in refugee camps in developing countries, through leverage exercised in relation to the Office of the UN High Commissioner for Refugees and host states. In consequence, fewer people would be able to enter zones of protection, or, at least, such zones where the material conditions are better than initial locations of safety. These measures might have the effect of reducing, and possibly cancelling out, the effect of the progressive developments in expanding the numbers of people protected. Indeed, it might even lead to an even lower number of such people than was the case before the progressive developments occurred.

This possibility—that the backlash responses to the progressive developments are of such an extreme nature that they lead to a position even worse than a situation without such developments—is illustrated by the example of the move from Guantánamo to drones. It would be, obviously, the consequence of a withdrawal from human rights instruments, as is being discussed in the United Kingdom, which would drastically diminish legal protections territorially as well as extraterritorially, and in relation to all rights, not just the rights of migrants.

This piece is neither asserting a clear causal link between progressive developments in migration law protections and backlash responses by states, nor predicting what will happen in the future. Rather, it is speculating about what might be happening and might happen in the future, based on the coincidence between the two phenomena. Ultimately, the clear evidence that many economically advantaged states wish to adopt *non-entrée* measures, in the context of widespread popular xenophobia, indicates that the stakes are particularly high when migration law developments cut against this. It is not being suggested, necessarily, that the progressive developments are mistaken, nor that efforts to further and deepen them misguided. Rather, it is important to acknowledge that improvements in particular areas need to be assessed in a broader context. At the very least, the notion of progress itself needs to be approached holistically, and consideration needs to be given to how the combination of improvements in particular areas of migration law, with serious regressions elsewhere, might leave things, overall, no better or, even, worse.