Extraterritorial human rights obligations in regard to refugees and migrants

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Introduction

Extraterritorial human obligations (ETOs) have always played a particular role in regard to refugees and migrants. As individuals by definition outside their countries of origin, this naturally applies in regard to their home states, with whom jurisdiction based on nationality remains an essential link. But ETOs may also arise in regard to foreign states, whether in the context of prospective access, measures of expulsion or relocation to third states or global responsibilities to assist refugees more generally. Within international refugee law, in particular, discussions about the cornerstone principle of non-refoulement have always been characterised by geographic boundary-drawing. As Atle Grahl-Madsen bluntly notes in his seminal commentary to the 1951 Refugee Convention:

> It must be remembered that the Refugee Convention to a certain extent is a result of the pressure by humanitarian interested persons on Governments, and that public opinion is apt to concern itself much more with the individual who has set foot on the nation’s territory and thus is within the power of the national authorities, than with the people only seen as shadows or moving figures “at the other side of the fence.” The latter have not materialized as human beings, and it is much easier to shed responsibility for a mass of unknown people than for the individual whose fate one has to decide.

(Grahl-Madsen 1963)

Writing in 1963, Grahl-Madsen’s concern was whether the non-refoulement principle applied to situations where refugees presented themselves at, but had not yet crossed, the physical border of a state (a question he, alongside other contemporary commentators, answered in the negative). He could not possibly have known how prescient his description would seem today. Since the mid-1980s, developed states have routinely attempted to stop unauthorised migrants and refugees in their tracks, applying ever more sophisticated forms of extraterritorial, or transnational, migration control and deterrence (Gammeltoft-Hansen 2011). These policies are designed exactly to keep migrants and refugees in the ‘shadows’ and avoid triggering the human rights obligations of extraterritorially acting or sponsoring states.
For years, these practices went largely unchallenged. As international legal regimes without dedicated courts or supervisory bodies, interpretation of international migration and refugee law is principally left to domestic courts and governments themselves, many of which have shown a reluctance to apply foreigners’ rights extraterritorially. During past decades, however, international human rights courts and bodies – and their growing jurisprudence in regard to extraterritorial obligations – have come to play an increasingly important role in this issue area. So much, in fact, that individual cases regarding non-refoulement are the single most prominent issue confronting UN human rights committees (Cali, Costello and Cunningham 2020). International human rights law, to paraphrase Dembour, has helped pull migrants and refugees out of the shadows and re-materialise as humans in the legal sense (Dembour 2015).

This chapter sets out by reviewing the ‘human rights turn’ in regard to transnational migration control (Section 2). It charts the early responses to transnational migration control based on international refugee law and the wider impact of growing human rights litigation on state practice and policy development. It secondly argues that, the historical importance of ETOs in this area notwithstanding, we may be seeing the beginning of a counter-progressive development, in which at least some international human rights institutions are facing increasing political pressure to take a more restrictive line in refugee and migrant cases (Section 3). This not only has implications for a number of currently pending and important cases concerning human rights responsibility related to transnational migration control, but it should also prompt practitioners and scholars looking to promote ETO protection of migrants and refugees to critically rethink existing approaches. To this end, the final part of the article outlines two different, largely complementary approaches to respectively reframe and redirect extraterritorial human claims in the context of transnational migration control (Section 4).

Human rights responses to transnational migration control

Migration control features among some of the earliest forms of transnational law enforcement. High seas interdiction policies were pioneered by the United States in the 1990s and quickly spread to other parts of the world (Ghezelbash 2018). The use of offshore detention facilities stretches back even further. Decades before the ‘war on terror’, the United States began detaining Haitian and other boat refugees at the Guantanamo base in Cuba (Dastyari 2015). The deployment of immigration officers at foreign airports began in the 1980s and quickly spread across European and other developed countries (Bigo 2002).

Enlisting private actors as part of transnational migration control similarly has a long history. In its modern incarnation, the concept of carrier sanctions emerged in the 1980s (Cruz 1995), but the imposition of fines on shipmasters for bringing in unlawful migrants or failing to perform pre-boarding screenings can be traced back as far as to the 18th century. Today, private actors perform a broad range of functions related to transnational migration management – from handling visa claims, to operating offshore detention centres (Gammeltoft-Hansen 2015).

The early onset of these practices similarly shaped the outlook of advocacy organisations and scholars in terms of how to respond to transnational migration control. Initially, legal arguments centred on the 1951 Refugee Convention itself (e.g. Vedsted-Hansen 1988; Goodwin-Gill 1994). Central debates revolved around the geographical scope of the non-refoulement principle and the implications of the non-penalisation principle. In some instances, this has led to evidently expansive interpretations. For example, Article 31 of the Refugee Convention prohibiting states from penalising refugees for irregularly entering their territory has been argued to

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equally encompass financial penalties imposed on airline companies in the context of carrier sanctions (Feller 1989).

The absence of a dedicated international court or other supranational supervisory mechanism in the field of migration and refugee law further meant that concrete legal challenges to transnational migration control were largely dependent on national avenues for adjudication. Domestic courts have, in several instances, played an important role in upholding refugee and migrant rights as part of transnational migration control. Yet, national courts from key states implementing transnational migration control have so far been reluctant to extend protection under the Refugee Convention to situations involving extraterritorial action. Thus, despite broad scholarly consensus and UNHCR’s support for the position that the non-refoulement principle enshrined in Article 33 of the Refugee Convention applies extraterritorially wherever a state exercises jurisdiction, higher courts in the United States, the United Kingdom and Australia have all adopted more restrictive interpretations. Challenging the long-standing involvement of private actors in transnational migration control through domestic courts has proven equally difficult (Gammeltoft-Hansen 2017), leaving long-standing and pervasive measures such as carrier sanctions virtually unchallenged from a rights-based perspective (Scholten and Minderhoud 2008).

Since the 1990s, however, the so-called ‘human rights turn’ in migration and refugee law scholarship has gradually changed this situation. Framing arguments against migration control through international human rights law provided refugee advocates access to an array of regional and international litigative avenues never entrusted to the international refugee and migration law regimes themselves. Consequently, several important cases relating to migrants and refugees have been heard before regional human rights courts and different UN human rights committees.

Specific human rights litigation has in several instances forced states to either abandon or substantially adjust both domestic and transnational migration control policies. This applies to, for instance, policies of excising coastal territory or designating so-called ‘international zones’. Similarly, the European Court of Human Rights has repeatedly challenged governments’ use of ‘safe third country’ notions and time limits in asylum procedures. International and regional human rights institutions have further played an important role in addressing interdiction policies involving maritime patrols in international or third country waters. Last, but not least, governments’ own interpretation of extraterritorial human rights obligations has been argued to pre-emptively block earlier proposals to outsource asylum processing (Garlick 2006).

During this period, the growing body of general ETO jurisprudence may further be seen to support similar shifts in interpretation within, for example, international refugee law. One of the most remarkable developments of international refugee law concerns the interpretation of the geographical scope of the non-refoulement principle. Unlike most other Articles in the Convention, no specific delimitation ratione loci is set for Article 33 of the 1951 Refugee Convention. Early commentaries on the convention have thus maintained a strictly territorial interpretation (as in the case of Grahl-Madsen cited above), while some later scholars have vice versa argued the principle to be geographically unlimited in its application (Lauterpacht and Bethlehem 2003). Today, however, the dominant interpretation reflects a jurisdictional ratione loci in line with general human rights law (Gammeltoft-Hansen 2011). Taking on a somewhat surrogate role across regimes, the European Court of Human Rights has similarly suggested that international refugee law, notably the principle of non-refoulement, must be observed when states exercise extraterritorial jurisdiction through migration control.
A human rights retreat in regard to migrant and refugee rights?

As new and important cases are being brought forward to regional human rights courts and UN bodies, one could of course expect this dynamic to continue. Several factors, however, suggest that the position of migrant and refugee rights issues within the larger ambit of extraterritorial human rights obligations may be changing once again.

First, early claims concerning transnational migration control followed in the footsteps of broader ETO developments. In the *Hirsi* case, for example, litigators were able to rely on recent jurisprudence concerning other types of transnational law enforcement in order to establish Italy’s jurisdiction over migrants and refugees brought onboard government vessels on the high seas. In contrast, recent examples of transnational migration control are increasingly premised on shifting enforcement responsibilities to third state authorities and/or private actors – sometimes dubbed ‘contactless control’ (Moreno-Lax and Giuffré 2019) – specifically intended to eclipse any jurisdictional links to the sponsoring state. The current generation of transnational migration control schemes will thus require human rights judiciaries to break new ground in substantive terms as opposed to simply applying an evolutive approach to existing precedent related to ETOs and extraterritorial human rights jurisdiction. As argued elsewhere, principled arguments exist for holding sponsoring states responsible for, for example, their complicity in human rights violations committed by partner states (Gammeltoft-Hansen and Hathaway 2015). Yet, this form of responsibility has still to be applied as a matter of human rights case law. Doing so would set a much wider precedent across a variety of other issue areas.

Second, the call for human rights judiciaries to intervene comes at a time when many of these institutions face substantial political backlash, often specifically related to their progressive role in regard to migrant and refugee rights. As early as 2011, the Council of Europe member states noted in the Izmir Declaration, ‘[t]he Court is not an immigration Appeals Tribunal or a Court of fourth instance’. The statement was repeated in 2018 in the draft Copenhagen Declaration, along with proposals that the Court generally defer to domestic asylum and immigration procedures and ‘where these are seen to operate fairly and with respect for human rights, avoid intervening except in the most exceptional circumstances’. In 2017, the United States for the first time refused to attend a hearing before the Inter-American Commission on Human Rights concerning the US immigration ban policy. UN treaty bodies have faced similar criticism from governments, and even national human rights institutions, for their role in regard to non-refoulement cases.

If and how this will impact the direction of human rights institutions when responding to transnational migration control remains to be seen. On the one hand, the politicised nature of this issue area may be exactly what drives judiciaries to dynamically develop interpretation in order to ensure the continued effectiveness of human rights in the face of new restrictive measures towards migrants and refugees (Wilde 2017; Gammeltoft-Hansen 2014). On the other hand, the general pushback against supranational human rights institutions may equally push judiciaries to become politically risk-averse, avoiding borderline cases at the admissibility stage and shying away from legal reasoning likely to establish wider precedents (Tan and Gammeltoft-Hansen 2020).

The most recent European case law concerning transnational migration control may indeed suggest a more restrictive trend among international courts. In the case of *MN and Others*, the Grand Chamber of the European Court of Human Rights refused the applicant’s argument that a Syrian family’s humanitarian visa application at the Belgian embassy in Beirut triggered the state’s human rights law obligations, declaring the case inadmissible. A similar case concerning
the extension of humanitarian visas to Syrian refugees was rejected by the Court of Justice of the European Union in 2017 – notably ruling against the opinion of the Advocate-General.15 The European Court of Human Rights further dismissed the applicants in ND and NT v. Spain, arguing that the prohibition against collective expulsions did not apply as the claimants had placed themselves in danger and entered illegally by climbing the fence between Morocco and the Spanish enclave of Melilla, as opposed to making use of supposed ‘legal pathways’ available to them.16

Just as migrant rights claims have been able to benefit from the wider ETO case law developments, a more restrictive turn in this issue area may ultimately come to impact ETO jurisprudence more generally. MN and Others is a case in point. While the Court acknowledged Belgium’s exercise of public powers in taking a decision on the applicant’s visa application, it deemed this to be insufficient to trigger extraterritorial jurisdiction (para. 122), thereby limiting the scope of the ‘public powers’ doctrine developed in Al-Skeini and Other v. United Kingdom. Secondly, the emphasis on the exceptional nature of extraterritorial jurisdiction appears to be particularly pointed in this judgment. The Grand Chamber does not simply insert the usual disclaimer that a state’s jurisdictional competence for the purpose of Article 1 is ‘primarily territorial’ (para. 98). It also revives the old all-or-nothing approach set out in Bankovic, arguing that any extraterritorial exercise of jurisdiction is ‘as a general rule, defined and limited by the sovereign territorial rights of the other relevant states’ (para. 99). This appears to be the first time that the Court cites this particular passage from Bankovic, and it is bound to raise questions in relation to the Court’s subsequent jurisprudence, which generally applies a less rigid understanding of the concept.

It is still too early to pass judgment on the general direction of international human rights courts and bodies based on these few European cases. Yet, these cases underscore that the trajectory of international human rights jurisprudence in this area is hardly unidirectional. In this context, it is worth reminding ourselves that the embrace of migrant rights by international human rights institutions was never a foregone conclusion. As Dembour argues in respect to the European human rights system, ‘[…]migrants were hardly a consideration in the newly created human rights scheme. The Convention was not meant to sustain their rights’ (2015, p. 2). The jurisprudence establishing extraterritorial effect of Article 3 was initially developed not via migrant cases but in the context of extradition of a German citizen to the United States, where the Court found that the risk of the ‘death-row phenomenon’ would constitute inhuman and degrading treatment.17 As Gammeltoft-Hansen and Madsen conclude, ‘the discreet turn towards migration law in Strasbourg occurs rather late, and generally after the member states had started developing their own legislation in this area’ (Gammeltoft-Hansen and Madsen 2021). As immigration legislations and practices are now developing in a more restrictive direction, the political pressure is equally mounting on human rights institutions to follow suit.

**Forward-looking strategies for ETOs in the context of transnational migration control**

If the current normative trajectory for ETO protection of migrants and refugees is less certain, transnational migration control policies are meanwhile developing in a manner that risks eclipsing accountability under international refugee and human rights law altogether. Drawing on different strands of recent scholarship and legal development, this final section thus outlines two different sets of approaches for future research and legal actions in this area.
Reframing ETOs in the context of migration control

Perhaps the most immediate response to the situation sketched out above is to critically engage with and seek to reframe dominant understandings of current ETO jurisprudence. In the context of migration control, extraterritorial jurisdiction for the purpose of human rights responsibility is generally assumed to arise whenever a state exercises effective control over either individuals or territory. Within the ETO literature, however, the exact contours of what constitutes ‘effective control’ varies according to interpretive outlook, and different variants, such as ‘functional jurisdiction’ (Moreno-Lax 2020; De Boer 2014; Gammeltoft-Hansen 2011), ‘public powers jurisdiction’ (Gammeltoft-Hansen and Hathaway 2015) and ‘effective control over situations’ (Altwicker 2018), have been advanced by individual scholars.

Even within these more expanded notions of jurisdiction, however, several recent instances of cooperative deterrence are likely to fall outside its scope. By design these schemes place the emphasis on control being carried out not just within the territory but also at the hands of the authorities of partner states, thereby hoping to insulate sponsoring states from any direct human rights responsibility. Other scholars have thus examined the possibility of applying the general law on state responsibility, including notions such as ‘complicity’, ‘direction and control’ and ‘shared responsibility’ to such instances of cooperative deterrence (Pijnenburg 2018; Tan 2017; Gammeltoft-Hansen and Hathaway 2015; den Heijer 2013). Yet, the thresholds for applying these forms of attribution and derived responsibility are often high and as a matter of practice much less established within human rights jurisprudence.

In a recent article, Moreno-Lax (2020) thus argues for a model of ‘functional jurisdiction’ in human rights law intended to overcome these obstacles. Like previous conceptions of ‘functional jurisdiction’ (e.g. Gammeltoft-Hansen 2011), it takes as a starting point the relationship between state authority and responsibility as fundamental and inseparable. The concept of jurisdiction, in this sense, ‘has an essential role to play in arbitrating between duty, capability, and desirability of compliance by any specific state vis-à-vis any specific human rights holder’ (Moreno-Lax 2020, p. 396). Although jurisdiction cannot simply be presumed beyond the state’s territory, it nonetheless follows directly from a state’s exercise of ‘public powers’, whether or not acting *ultra vires* (p. 413).

Her argument is closely linked to a concrete pending case, *S.S. and Others v. Italy*, lodged by the Global Legal Action Network (GLAN) and concerning Libyan-Italian interdiction cooperation in the Mediterranean. This interdiction scheme was specifically designed to eclipse the precedent set in *Hier v. Italy*, placing the Libyan Coast Guard as opposed to Italian authorities in charge of effectuating interceptions. It is thus a key example of the kind of cooperative migration control detailed above, in which enforcement responsibilities are increasingly delegated to third state authorities. However, according to Moreno-Lax, a basis for extraterritorial jurisdiction can nonetheless be established based on a combination of three factors. Firstly, despite its more hands-off approach, Italy nonetheless had a decisive impact in regard to applicants by coordinating operations from its national Maritime Rescue Coordination Centre in Rome and directing intercepted migrants and refugees to be returned to Libya. Secondly, Italy maintained significant influence over the Libyan Coast Guard, having actively worked to revive its authority and (together with the EU) providing substantial material support, financing and capacity-building. Last, but not least, the plaintiffs in *S.S. v. Italy* argue that Italian authorities continued to exercise ‘overall control’ of the Libyan Coast Guard’s operations, making the Libyan a ‘subrogate Italian proxy for interdiction and pull-back at sea’ (Moreno-Lax 2020, p. 412). She argues that these three elements, taken together, may suffice to establish Italy’s jurisdiction in the functional sense.
A second response in this category involves taking a step back and re-examine other bases for extraterritorial human rights jurisdiction useful in the context of transnational migration. One track, long recognised within both human rights and other areas of international law, concerns extraterritorial effects jurisdiction (Gammeltoft-Hansen 2018; Kessing 2017). As a matter of human rights law, extraterritorial effects jurisdiction may come about as a result of actions taking place within a state’s own territory, leading to human rights violations on the territory of another state. In contrast to other bases for extraterritorial jurisdiction, there is thus no requirement that the responsible state itself acts extraterritorially or exercises effective control over the individuals or territory in question.

Within international human rights law, extraterritorial effects jurisdiction has been applied in instances where either executive or legislative measures were argued to have ‘direct and immediate’ effects beyond their territory. In Andreou, for example, the European Court of Human Rights held that shooting down a demonstrator across the border inside the UN-controlled demilitarised zone in Cyprus amounted to jurisdiction, noting that ‘even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as within the jurisdiction of Turkey’. The UN Human Rights Committee has similarly expressed its concern that, for example, domestically implemented surveillance programs or government measures, such as the issuing of a Fatwa, may violate the human rights of individuals in other territories. The extraterritorial effects doctrine is moreover a well-established principle of public international law and a central concept in, for example, international environmental law.

As Kessing (2017) points out, the extraterritorial effects doctrine remains comparatively less developed in international human rights law. Whether a ‘direct and immediate’ link can be established between European or other Global North states and human rights violations suffered by refugees and migrants as part of transnational migration control depends on the individual case. Yet, it is not inconceivable that human rights judiciaries or treaty bodies would find that a combination of funding, training and directing migration control performed by third state authorities would fall within the ambit of the extraterritorial effects jurisdiction; and the extraterritorial effects doctrine is thus something that merits further research and testing also within an ETO approach more generally.

Third and finally, some scholars have attempted to more fundamentally reframe existing ETO approaches to transnational migration control by appealing to the normative foundations or telos of human rights law. As Dupuy (1998) has argued, human rights can never be entirely reduced to positive international law but also, always remain a ‘normative ideal’ which invariably impacts interpretation. In a similar vein, Mann (2016) takes the entire phenomenon of transnational migration control to construct a theory of human rights based on the encounter between the ‘universal boatperson’ and state officials. According to Mann, ‘[h]uman rights aren’t naturally given’ but rather ‘the result of active assertions of rights by persons who have no rights within existing states’ (pp. 58–59). The principle of non-refoulement is thus essential not only to refugee law, but to help ‘shed light on the moral and legal structure of the entire normative universe of human rights’ (p. 10).

Transnational migration control in this sense serves as a kind of developer fluid for ETOs more generally. While Mann’s universal boatperson formally remains outside of state authority and beyond the ordinary social-contractual obligations maintained by states, the very encounter nonetheless triggers a human rights dilemma for state authorities. The legal geography of this particular type of encounter allows us to see this more clearly as the sea ‘opens a crack between the territorial jurisdictions established by sovereignty’ (p. 25). Through an exegesis of major
political crises surrounding boat migration since the Second World War, Mann shows that even the most disenfranchised are never without political agency, and that the very act of putting one’s life at risk crossing the sea imposes an undeniable human rights claim upon the sovereign.

Contrary to the strategies reflected above, Mann’s approach suggests that challenging transnational migration control from a strictly positive human rights law perspective is ultimately a rear-guard battle. Despite multiple cases of successful strategic litigation and pushing forward the law on extraterritorial jurisdiction, transnational migration control has continued unabated. For every new judgment, migration management is adapting and itself developing (Gammeltoft-Hansen 2014; Mann 2013). As Mann argues, Strasbourg has at best made border control in the Mediterranean more costly for European states. If there is any hope for overcoming this problematic dynamic, the human rights claims forwarded in regard to transnational migration control must dig deeper both inside and outside the court room.

**Redirecting ETOs in the context of migration control**

Following on from the above, a second set of strategies instead seek to promote accountability related to transnational migration control by redirecting human rights claims institutionally, across regimes as well as geographically.

Although recent case law suggests that key regional human rights courts have begun to approach migration cases more cautiously, the international landscape of human rights institutions is hardly uniform. As detailed above, not least the UN human rights committees have taken a more active role and generally remain more open to migration cases. *Non-refoulement* today constitutes the single most petitioned issue across all UN human rights committees, with the vast majority specifically concerning asylum claims rejected at the national level (Cali et al. 2020, p. 360). But the committees have also heard several cases specifically related to transnational migration control. In *JHA v. Spain*, for example, the Committee Against Torture found Spain to have exercised jurisdiction both during interception of migrants off the West African coast and ‘throughout the identification and repatriation process’ during which the applicants were detained at a fishing plant in Mauritania.22 Although the individual decisions issued by these human rights bodies are not binding as a matter of international law, their quasi-judicial function has nonetheless been described as ‘soft courts’ (Cali et al. 2020) and in many cases leads national authorities to overturn or at least re-examine their decisions.

In their comparative analysis of the committee’s migration jurisprudence, Cali, Costello and Cunningham further argue that several of the committees apply a decidedly more expansive interpretation of extraterritorial jurisdiction as compared to other international human rights institutions (2020, p. 363 ff.). This applies not only to the threshold criteria for establishing jurisdiction as a result of a state’s own authorities acting abroad, but also in respect to, for example, effects-based jurisdiction mentioned above. The Committee on the Elimination of Discrimination against Women, for example, maintains that states remain ‘responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territories’.23 In their joint general comment, the Committee on the Rights of the Child and the Committee on the Rights of Migrant Workers have similarly underscored that the *non-refoulement* principle applies everywhere a state exercises full or even partial jurisdiction, ‘including in international waters or other transit zones where states put in place migration control mechanisms’.24

But human rights accountability in the context of transnational migration may also be pursued through other avenues, not directly linked to international human rights law. In recent years, a number of scholars have called attention to the possibility of establishing responsibility for migration control in relation to legal regimes and adjudicatory fora pertaining to a range
of national, regional and international regimes. At the international and regional levels, this includes, for example, international criminal law (Kalpouzos 2020), EU public procurement law (Spijkerboer and Steyger 2019) and the law of the sea (Papastavridis 2020). At the domestic level, tort law, constitutional law and non-discrimination law have each been important regimes for establishing responsibility in cases involving, for example, privatisation or outsourcing of migration control (Tan and Gammeltoft-Hansen 2020).

While neither of these regimes is specifically geared towards migrants and refugees, they nonetheless provide a range of alternative inroads for thinking about and practically pursuing accountability in the context of transnational migration control. Pushing beyond the ‘human rights turn’ in this way may further side-step some of the current legal and political constraints facing current litigation in regard to transnational migration control before general human rights courts. Tort cases, for example, typically involve a lower standard of proof and may thus constitute a ‘powerful means of providing redress for (human rights) wrongs’ particular in cases concerning delegation of migration control responsibilities (Holly 2020).

One example of such an approach has been championed by Mann (2020). Drawing on broader work linking human rights and international criminal law (Engle et al. 2016), Mann explores to what extent border violence may be legally framed as crimes against humanity. According to Mann, the ‘structural accountability deficit when it comes to irregular migrants’ is ‘hard-wired in international law’ (ibid, p. 9). Recasting border violence as an issue of international criminal liability, however, represents an opportunity to partly overcome this deficit by shifting from an individual victims’ approach to documenting the systematic and structural effects of transnational migration control. Concretely testing this argument, Mann was also one of the main authors of an Article 15 communication to the International Criminal Court related to Australia’s forced relocation and detention of migrants and refugees in neighbouring states – Nauru and Papua New Guinea.25 In 2019, a similar communication was filed addressing Italy and the European Union’s cooperation with Libya since 2014.26

The turn to international crimes in human rights and refugee law is not without its critics, however. The focus on anti-impunity, Samuel Moyn argues, is self-validating in a way that invites ‘political trials’ for which legal argumentation ultimately tend to take a backseat (Moyn 2014). As Mann further concedes, ‘trials for mass human rights violations, particularly at the ICC, have largely been ineffective’ (Mann 2020, p. 719) – and indeed the Office of the Prosecutor has so far declined to open preliminary investigations into the above-mentioned complaints. Whether this threshold will be crossed in the future remains to be seen – current developments suggest a continued harshening of border control practices across Europe, Australia and the United States. Moreover, not only international but also domestic courts are currently being confronted with migration-related cases couched in the language of international crimes.27 Similarly, although the Australian submission was rejected by the ICC, it helped bolster a subsequent class action suit linking international migration law and torts (ibid, p. 49).

A third and related strategy involves geographically redirecting claims. So far, litigation efforts concerning transnational migration control has been almost exclusively focused on sponsoring states in the Global North. There may be both political and legal reasons to maintain such a focus (Gammeltoft-Hansen 2018). Yet, at a time where international cooperation on migration control is generally tipping towards stronger involvement of authorities in transit and origin states, it becomes all the more important to consider the role and responsibility of these states, as well as the legal remedies available within these jurisdictions. From an international law perspective, a holistic approach is the natural starting point in any case concerning cooperative deterrence whether concerning independent or shared responsibility. This does not imply that political power asymmetries and questions of relative authority should be ignored. Each state
should be held accountable only to the extent of its legal responsibility for breach of refugee and human rights. In that sense, holding partner states responsible complements rather than excludes destination state responsibility (ibid).

Recent examples illustrate that domestic courts in partner states may sometimes be able to indirectly enforce refugee and migrant rights even in states with limited to no adherence to international refugee and human rights law. As Tan (2018) documents in a recent article, it was neither UN treaty bodies nor domestic courts in Australia that finally undid Australia’s offshore processing centre on Manus Island. Rather, the Supreme Court of Papua New Guinea ruled that the detention of asylum seekers within the centre violated the right to personal liberty enshrined in the country’s constitution.28 Similarly, in March 2017 a Libyan appeals court formally suspended the Memorandum of Understanding signed between Libya and Italy and ordered a halt to all current cooperation on migration control between the two countries on the basis that Faiez Serraj, acting on behalf of the Government of National Accord, did not have authority to enter into an international agreement not approved by the House of Representatives.

Although the Libyan case was subsequently overturned by the Libyan Supreme Court, the role of domestic courts in major refugee hosting countries should not be underestimated (Abass and Ippolito 2014). For example, in a landmark judgment from 2017, the Kenyan High Court declared that the closure of the Dadaab camp and consequent expulsion of refugees was a violation of both the Kenyan Constitution and Kenya’s international obligations, including the 1951 Refugee Convention and the 1969 Refugee Convention adopted by the Organisation of African Unity (OAU).29 A holistic approach to establishing responsibility for refugee and human rights violations in the context of cooperative deterrence further opens up a range of regional avenues in transit and origin countries. At the normative level, this includes regional refugee instruments such as the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration, both of which in their content and/or surrounding political tradition entail more refined approaches to international cooperation and responsibility-sharing. At the institutional level, refugee and migration issues may not only be pursued via regional human rights courts, such as the Inter-American System of Human Rights and the African Court on Human and Peoples’ Rights, but also, and importantly, in the context of broader regional institutions and legal frameworks linked to, for example, economic cooperation, trade and free movement (Gammeltoft-Hansen 2018).

**Conclusions**

Although migration control remains one of the oldest forms of transnational law enforcement, the inclusion of migrant and refugee issues in extraterritorial human rights case law remains a somewhat latecomer within the wider ETO jurisprudence. As argued in this article, this timing sequence could be seen as an important factor for the progressive developments in regard to transnational migrant and refugee rights during the last two decades. It allowed migrant and refugee cases to benefit from precedents established in regard to other issues and the wider attention to extraterritorial rights, thereby helping to counter previous reluctance to apply national or international migration law extraterritorially among domestic courts. The importance of the ‘human rights turn’ in this regard can hardly be overstated – not only in terms of providing access to international litigation in an area of international law without a dedicated international court or supervisory committee, but also in shifting dominant interpretations within international refugee law itself.

However, a number of factors suggest that this relationship between the specific legal regimes related to migrants and refugees, on the one hand, and general human rights law, on the other
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hand, is currently changing. Practices of transnational migration control have been significantly developing in recent years, meaning that migration and refugee issues are moving from a trailing to a pole position when it comes to ETO litigation. Several of the cases currently pending raise new and difficult legal questions regarding the boundaries of extraterritorial jurisdiction and shared forms of responsibility, the adjudication of which will likely reverberate across other issue domains as well. Meanwhile, international human rights institutions have come under increasing political pressure, not least for their role in regard to migrant and refugee cases. Consequently, at least in the European context, we may be seeing the contours of a more cautious, or even regressive, approach to migrant and refugee rights.

While it is too early to draw more general conclusions in terms of the broader human rights response on this basis, this chapter nonetheless takes the opportunity to explore alternative pathways forward for progressively realising ETOs in regard to transnational migration control. These may be seen as a set of compensatory strategies, represented by different nascent or currently applied approaches championed by either academics or practicing lawyers (in some cases with a significant overlap between the two).

For the purpose of this chapter, these approaches have been divided into two overall groups. The first concerns efforts to reframe existing approaches to ETOs, essentially seeking to move or challenge the status quo of existing human rights jurisprudence. Examples within this category involve efforts to expand dominant understandings of extraterritorial jurisdiction and responsibility, for example, by drawing on seemingly outlier cases, or by exploring different bases for jurisdiction, such as the extraterritorial effects doctrine. But it also includes attempts to more fundamentally reconstruct human rights approaches to migrants and refugees that look to wider legal principles and historical cases.

A second group of approaches involves strategies to redirect accountability claims towards other legal regimes and institutional settings. As is already happening, this may include a greater emphasis on ‘soft courts’ (Cali et al. 2020) in the form of individual petitions to the different UN human rights committees. But it also entails exploring possibilities for pursuing human rights claims via other international legal regimes, such as international criminal law. Last, but not least, it may involve a geographic reorientation to examine litigation possibilities in and related to partner states in the Global South as exemplified by the Supreme Court of Papua New Guinea’s ruling in regard to the Australian offshore processing facility on Manus Island.

While individual scholars may disagree regarding the relative potential of these different strategies from both a practical and doctrinal perspective, they are presented here as largely complementary. For the purpose of the present chapter, they represent an incomplete catalogue that highlights the growing diversity of approaches pursued by advocates and academics navigating and responding to the different impulses set out above. Just as international migration and refugee law has historically benefited from similar creativity and diversity of approaches within the broader field of human rights scholarship and practice, present developments in regard to migrants and refugees may perhaps equally inspire the wider field of ETOs.

Notes

2. The preamble to the 1951 Convention Relating the Status of Refugees famously notes, ‘the grant of asylum may place unduly heavy burdens on certain countries….a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation’ (para. 4).

3. The term ‘transnational migration control’ is used from here on as a broad signifier encompassing both situations where states carry out controls outside their territory through their own officials as well as practices involving private parties and/or third state authorities implementing controls.


6. For a recent counterexample, however, see Papua New Guinea Supreme Court (2016) Namah v. Pato (Minister for Foreign Affairs and Immigration) and Ors, PJSC 13.


12. Paragraph 26. This paragraph was ultimately dropped from the final text but arguably still sends a clear signal as to where Member States would like to see the Court apply a wider margin of appreciation.


15. Court of Justice of the EU (CJEU) (2017) X and X v. Belgium, Case C-638/16.


18. For a similar argument see Gammeltoft-Hansen and Hathaway 2015.


22. CAT (2008) JHA v. Spain, UN doc CAT/C/41/D/323/2007. The case was, however, declared inadmissible as the complainant was not expressly authorized to act on behalf of the victims.

ETOs in regard to refugees and migrants


References


Court of Justice of the EU (CJEU) (2017) X and X v. Belgium, Case C 638/16.


Thomas Gammeltoft-Hansen


Holly, Gabrielle (2020) Challenges to Australia’s Offshore Detention Regime and the Limits of Strategic Tort Litigation’, *German Law Journal* 21(3), 549–570.


Papua New Guinea Supreme Court (2016) Namah v. Pato (Minister for Foreign Affairs and Immigration) and Ors, PJSC 13.


Trail Smelter Arbitral Tribunal (1942) Trail Smelter Arbitral Decision (United States v. Canada), Reports of International Arbitral Awards vol. 3.


UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) (2017) Joint General Comment no. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and no. 22 (2017) of the Committee on the Rights

