Extraterritorial Human Rights Obligations Towards Migrants

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This article belongs to the debate » Extraterritorial State Obligations in Migration Contexts
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Beyond Borders

The question of extraterritoriality has found a very particular application in contexts of migration. More than any other global common challenge, migration inherently involves an element of non-territoriality: a migrant is by definition leaving the territory of their country of nationality or origin, and with it the original bearer of legal responsibility for the fulfillment of their human rights. After all, the fundamental principle in international law is territorial jurisdiction: states are responsible for the respect of human rights treaties on their territory. This renders the questions of which state has to fulfil human rights obligations while a migrant is on the move and to what extent very pressing ones.

More important for the proliferation of extraterritoriality than migratory movements themselves has been the rise in border and migration policies of states intended at keeping migrants away from their national territory, and thus the corresponding human rights obligations and responsibility. These are generally referred to as **'**externalisation**'** policies. Both European and international human rights courts and instances, however, have accepted that jurisdiction can be established extraterritorially under certain circumstances.

Awareness among destination states of the potential extraterritorial obligations following from their policies have impacted the specific design of new legal and policy frameworks for migration management and control, with a view to circumventing those obligations. Some of the most recent examples are the EU-Turkey Statement, the UK-Rwanda Asylum Partnership, the Frontex-Libya cooperation on search and rescue operations in the Mediterranean, the memorandum of understanding between the EU and Tunisia or the Italy-Albania Protocol for cooperation in migration and asylum management. The legitimacy of these policies is inextricably intertwined with the issue of states' extraterritorial human rights obligations towards migrants and refugees.

A Gap in International Law

With regards to the protection obligations states have beyond their territory, especially in the context of externalisation, the central question is one of inter-state distribution of responsibilities under human rights and refugee law. Here a distinction can be made between *a priori* 'allocation' of obligations and *a posteriori* restorative 'attribution' of responsibility for violations. Ideally a clear allocation mechanism should exist. In practice, responsibility only seems to be determined and attributed once obligations have been violated – under the assumption that the victim can even find and access a *forum litis* and a legal counsel to assist with their complaint.

One of the flaws in the 1951 Refugee Status Convention is that it did not provide specific distribution criteria for the granting of asylum and other protection obligations. Such criteria could have translated the principles of international cooperation and solidarity (mentioned in the Convention's Preamble and in the UN Charter) into an equitable responsibility- and burden-sharing mechanism among states. By contrast, taking up a fair share of responsibility in the field of refugee protection is, under an effective implementation of externalisation policies, a purely voluntary commitment by individual states – in the form of resettlement, financial support to UNHCR, bilateral inter-state cooperation or other pledges at international fora such as the Global Refugee Forum. Intra- EU distribution instruments, such as the Dublin Regulation and the relocation quota mechanisms between member states, are not treated here, because externalisation policies are predominantly directed at third states.

There is **n**o international court or other supranational body with a specific jurisdiction in the field of migration or refugee law to help elaborate distribution criteria either. The competence of the International Court of Justice (ICJ) to interpret the 1951 Refugee Status Convention in an inter-state dispute has not been invoked so far and it is only a farfetched aspiration that it would adjudicate on the distribution of responsibility.

The Potential of Human Rights Law to Fill the Gap

This gap in international law leaves the identification and distribution of extraterritorial state obligations to be a post-factum exercise which is only engaged once a human rights violation has occurred. In the migration context the geographical scope of human rights, in particular the principle of non-refoulement, is a pressing issue: when do states become responsible for the ill-treatment or other rights violations of migrants that find themselves on the territory of another state?

The case-law of the ECtHR determines that states bear responsibility for acts and omissions of their authorities which cause effects outside their own territory (Loizidou 1997) when that state has effective control over (part of) the territory or the person involved (Öcalan 2005, Issa 2005, Al-Skeini 2011). This is the case in migration control situations at airports (Amuur 1996), sea ports (Sharifi 2014), airports and checkpoints abroad (Commission decision, East

African Asians 1978), and on the high seas when the effect of a state's actions is "to prevent non-nationals from reaching the borders of the state or even to push them back to another state" (Hirsi Jamaa 2012). The Court also holds states responsible for not providing effective protection against violations of this non-refoulement principle by a third state to which it has returned a non-national (chain-refoulement, MSS 2009).

At the international level, the Human Rights Committee has also adopted the criterion of effective control. According to the Committee, state jurisdiction is established when a relationship exists between the acting state and the individual, related to the violation of their rights, but irrespective of the place where this takes place (Lopez Burgos 1981), for example a 'special relation of dependency' (A.S. e.a. 2020). The Committee against Torture adopted the same effective control criterion, regardless of whether such control is exercised directly or indirectly (Marine I 2008). The International Court of Justice also endorsed the effective control criterion as a constant practice and in line with the original inspiration of the ICCPR drafters (Construction of a Wall advisory opinion 2004)

However, externalisation policies that require implementation by third countries might not take place under the effective control of the externalising (non-territorial) state, and thus not establish the latter's extraterritorial responsibility for violations, while still clearly being affected by its policies. For such situations, the emerging impact criterion might be useful in imposing extraterritorial obligations on states in right to life cases. The Human Rights Committee suggested that states have jurisdiction and are responsible for all 'direct and reasonably foreseeable impact' on the right to life of persons outside the territory, including for aid and assistance to actors violating the right to life (General Comment n° 36, §22 and 63; A.S. e.a. 2020). This criterion expands responsibility for states for refoulement practices, discretionary border controls, detention practices or any other policy executed (or omitted) *by a third state* that endangers lives of migrants, is not controlled by these states, but still the direct and foreseeable impact of their externalisation policies.

Remaining Challenges

The current law does not provide for a distribution of responsibility that allows for the effective realisation of migrants' human rights. The exception is individual cases where responsibility for violations has been attributed to states under the strict scope and application of case-law criteria (which are only to a limited extent implemented into general migration governance). Outsourcing, contactless control (Moreno-Lax & Giuffré, 2019), pull-backs, over-burdening and protracted situations in first countries of asylum, the absence of solidarity measures or access to asylum are all practices that are at odds with human rights and refugee law standards. They often are the consequence of border and migration control policies, but lack allocation criteria to effectuate responsibility for human rights violations.

There even is a worrying trend of **judicial passivism** towards the issue of extraterritorial responsibility, with courts seemingly shying away from what is considered a politically sensitive issue. Even the Strasbourg Court has substituted states' responsibilities with attributing responsibilities to protection-seeking migrants themselves, for not having chosen the right visa application (MN 2020) or for having tried to cross a border irregularly in a group (ND & NT 2020).

Drawing Inspiration from Other Fields of Law

This symposium examines what the existing criteria for attribution exactly mean for states' extraterritorial obligations and responsibility in a migration context and whether arguments from other fields of law could either inspire or be implemented *beyond their respective borders*.

Following this introduction, the first blogpost by Salvatore Nicolosi (Utrecht University) illustrates the advantage of legal regime interaction in comparison to self-contained specialised regimes, by means of the Human Rights Committee AS case. In the second post, Nicolas Angelet (Ghent University, ULB) engages with extraterritorial due diligence under general international law and the potential of a causation-based responsibility attribution, rather than a jurisdiction-based one. The third blogpost by Ruben Wissing (Ghent University) examines the potential of mechanisms of 'common but differentiated responsibility and respective capability' (CBDRRC), which have found legal ground in climate and genocide cases, for equitable responsibility distribution in situations of forced migration. In the fourth post, we abandon the state perspective when Joyce De Coninck (Ghent University, NYU School of Law) identifies gaps in EU 'relational' human rights responsibility that are linked to supra-national and non-state involvement in externalisation of migration policies. In the fifth blogpost, Eugénie Delval (ULB) focusses on how the state's obligation to protect against refoulement relates to its jurisdiction in issuing humanitarian visa, in a critical assessment of the Strasbourg's MN case. Finally, in the concluding blogpost, Wouter Vandenhole (University of Antwerp) sums up how accountability gaps could be addressed under a 'post-territorial' human rights paradigm.

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