Externalized Migration Governance and the Limits of Sovereignty: The Case of Partnership Agreements between EU and Libya

by

ELIN PALM

Linköping University

Abstract: Can state sovereignty justify privileged receiving countries exercising authority over non-members in a third country to safeguard their own interests? Under the current migration governance of the EU, state sovereignty is manifested in migrant interdiction, interception and detention policies employed to prevent unauthorized migrants from reaching the EU, and even from attempting to embark on cross-Mediterranean journeys. While reinforcement of the Schengen region’s external borders is a key aim of the EU's internal migration politics, collaboration with third countries regarding migration control has, in the last decade, become a key feature of its external migration policy. In close collaboration with third countries, the EU has managed to curb the outflux of migrants from transit and sending countries. In effect, irregular migrants are prevented from exiting as well as from entering. This article explores the justifiability of such practices, by questioning commonly invoked models of justification such as the sovereignty “model”, with a special focus on partnership agreements regarding migration control between the EU and Libya.

Keywords: border control, detention, interdiction, irregular migration, Malta Declaration, migration governance, third country nationals, extra-territorial border control

1. Introduction

Irregular, cross-Mediterranean migration is deadlier than ever before. In fact, the Mediterranean is the deadliest border on earth (McAuliffe and Ruhs, 2018) and the many casualties along this maritime border are intimately connected with the EU’s restrictive migration policies and encompassing measures intended to curb clandestine migration. Over the past decade, initiatives like the carrier agreement1 have effectively prevented legal entry, and joint policing and securitization of the EU’s external frontiers have significantly reduced unauthorized entry into Europe (cf. Bossong and Carrapio, 2016; Frelick et al., 2016; Koenig, 2017). In

1 Strict visa regimes, paired with agreements like the 2001 Carrier Agreement (European Council Directive 2001/51/EC of 28 June 2001) that hold naval and aircraft carriers operating within the EU liable for ensuring that their passengers have valid travel documents and residence permits, have effectively prevented undocumented migrants from reaching the EU via regular means of transport. The carrier agreement implies that only pre-authorized migrants get access to the EU. Documented migrants are often skilled. In this way, the EU can benefit from skilled foreign workers.

© 2020 The Author. Theoria published by John Wiley & Sons Ltd on behalf of Stiftelsen Theoria
This is an open access article under the terms of the Creative Commons Attribution-NonCommercial-NoDerivs License, which permits use and distribution in any medium, provided the original work is properly cited, the use is non-commercial and no modifications or adaptations are made.
addition, EU border governance is, to an increasing extent, taking place outside the jurisdictions of EU Member States, in border zones and within EU neighbour countries. This is done through more or less formalized extra-territorial arrangements between the EU and third countries (cf. Vandvik, 2008; Frelick et al., 2016). Expanding networks of trans-governmental action on asylum and migration (Geddes, 2018, p. 187) hinder undocumented migrants from exiting as well as from entering.

A strong security rationale has underpinned the development of EU immigration and asylum policy (cf. Geddes, 2018, p. 27) and the European boundary build-up is closely linked with to the securitization of migration (cf. Geddes, 2018, p. 29), through which migrants are often framed as a threat (Geddes, 2018, p. 18). External border surveillance is, according to the European Commission, a necessity because of the relaxed internal borders within the Schengen region. Abolition of internal border controls, it has been argued, cannot come at the expense of security, and therefore measures have been taken to facilitate access for those with legitimate interests in entering EU territory at the same time as joint efforts have been made to make external borders more efficient.²

Border control and admission politics have often been justified by reference to the sovereignty principle, according to which legitimate nation states primarily hold obligations towards citizens, and control of immigration is typically seen as a domain of vital importance for securing the needs and interests of citizens (Kerwin, 2016). Thus, nation states have been granted the right to exercise control over non-citizens who seek admission to or stay within their territories, as well as to adopt migration policies that safeguard internal interests. While some have considered the Westphalian sovereignty model outdated (cf. MacCormick, 1993) and others have prompted a serious reconsideration of the sovereignty paradigm (cf. Mostov, 2008), in this article the normative ideal of state sovereignty is accepted. However, the extent to which the principle of sovereignty can give legitimate nation states discretionary power to decide in migration matters is critically discussed. On the basis of a Neo-republican account of sovereignty, it will be disputed that a right to sovereign rule must imply that states are at liberty to control admission as they see fit, as held by, for instance, Walzer (1983), Wellman and Cole (2011) and Miller (2007). Arguably, the scope of sovereign states’ discretionary power in migration matters is less extensive than these scholars have argued. Concomitantly, if there are reasons to restrict legitimate states’ discretionary power over non-citizens within or at their own borders, there are most likely reasons to question the EU’s current execution of authority over aliens outside their own jurisdictions as well. The legitimate reach of sovereign states’ power

execution outside their jurisdictions is investigated in light of the EU’s boundary build-up and increasing use of extra-territorial migration governance, using the EU’s collaboration with Libya under the 2017 Malta Declaration as a case in point (EC, 2017). By clarifying limitations of the principle of sovereignty in relation to the increasing externalization of migration control, duties between EU Member States and the broad category of unauthorized migrants are explicated.

In section 2 a central feature of EU external migration politics – extra-territorial migration governance through collaborations with third parties – is described together with its ethically relevant implications. Against this backdrop, section 3 discusses how normative state sovereignty traditionally has been used to justify far-reaching discretion regarding migration governance in general and indicates the limitations of such justifications. Section 4 presents an alternative, Neo-republican perspective on sovereignty that admits limitations of nation states’ migration governance. Some legal limitations on state sovereignty regarding migration control are presented in section 5 together with legal concerns about the extra-territorialization of migration governance. In section 6 the Neo-republican account is employed as the basis for a critical assessment of the EU’s extra-territorial migration governance with Libya as a case in point. In addition, some considerations are raised from the perspective of international law. Section 7 concludes the discussion.

2. The EU’s Externalized Border Governance

EU border controls are, to a growing extent, conducted in non-EU transit or sending countries (Geddes, 2008, pp. 24–25) by means of migrant interdiction, interception and detention policies. Such measures are intended to prevent undocumented migrants from reaching the EU where they could have had their asylum claims processed (Kerwin, 2016; Frelick et al., 2016). They are also aimed at deterring prospective migrants from embarking on journeys towards the EU at all (Kerwin, 2016). Traditional surveillance of external borders is increasingly complemented by pre-border controls in a non-EU country before the frontiers of the receiving nations, along migratory routes on international waters or within the territories of transit and sending countries (cf. Frelick et al.,

---

3 In this article, the EU is understood as a region of connected but sovereign nation states, that effectively dictates the conditions of non-members as well as of members. EU Member States are understood as sovereign nation states and state sovereignty is a central part of the EU as a unique form of supranational governance that possesses the capacity to turn treaties agreed between states into laws that bind those states (Geddes, 2008, p. 31), even if single EU Member States’ capacity to steer admission autonomously is diminished.
These activities are aimed at reinforcing frontiers and stifling irregular entry as well as combating migrant smuggling and trafficking. That is, border control is not exclusively executed along physical boundaries but more broadly in borderlands and extended protection zones, typically upheld by collaboration agreements with third countries (Frelick et al., 2016). Intercepted irregular migrants are routinely readmitted to and detained in third countries (Frelick et al., 2016; Parekh, 2017). This means that measures that are taken under one state’s sovereign powers to enforce its own migration policies are implemented and produce effects in a territory other than its own. It also means that there is no direct connection between the state’s physical territory and the persons whose rights are implicated (Miller, 2009). The EU’s externalization of border management typically entails an outsourcing or subcontracting of responsibilities to neighbour countries. Interventions developed by the EU Member States are executed in sending or transit nations (Frelick et al., 2016). Such actions are carried out at multiple levels by many different actors. They may be unilateral, bilateral or multilateral state undertakings (Gammeltoft-Hansen, 2011). Individual EU Member States may also enter informal agreements to collaborate on migration issues with private actors, groups or organizations (Adepoju et al., 2010, p. 43; Frelick et al., 2016; Palm, 2016). A number of migration partnerships between the EU and third countries were established as a result of the mass influx of migrants in 2015 – which challenged the Common European Asylum System (CEAS) – with the aim of regulating transnational migratory flows. One example is the agreement between the EU and Libya under the Malta Declaration. In January 2017, the European Commission published a Communication outlining a comprehensive package of measures targeting flows on the Central Mediterranean route. Soon after, Italy and the UN-backed Libyan government agreed on a bilateral Memorandum of Understanding (MoU) on cooperation in development and migration. The European Council endorsed the Commission Communication and the Italian

---

4 Importantly, the externalization of borders and outsourcing of control mechanisms should not be seen as a novel migration management strategy (Palm, 2016) but rather as an increasingly common feature of EU migration governance whereby the EU expands its membership and includes in collaboration countries that are closer to major migrant-sending regions (Geddes, 2008, p. 183). The EU’s external migration policy has for a long time been based on the principles of extra-territorial migration control and conditionality in the relationship with sending and transit countries (cf. Geddes, 2008; Palm, 2016), as expressed in the European Commission’s Global Approach to Migration and Mobility (GAMM), i.e., the overarching framework of the EU’s external migration and asylum policy, that addresses partnerships regarding migration with third countries (Palm, 2016).

5 Preventive approaches seek to avert emigration via development assistance, trade and foreign direct investment, or to provide “refugees with access to protection nearer their countries of origin” (Boswell, 2003, pp. 619–620). Extra-territorial arrangements are motivated by the need for both state security and life-saving humanitarian interventions (Palm, 2016).
memorandum via its Malta Declaration on 3 February 2017. Taken together, these documents cover a broad range of measures aimed at reducing irregular migration while promoting both reception conditions in Libya and the voluntary return of migrants in transit (Palm, 2016). More specifically, the 2017 Malta Declaration is an agreement between the EU and Libya, by joint forces, to fight clandestine migration and human trafficking along the Central Mediterranean route (Palm, 2016). According to this declaration, Libya receives training as well as funding from the EU. For example, FRONTEX has assisted the Libyan Coast Guard in the reinforcement of Libya’s naval borders and equipped maritime forces to obstruct migrant-smuggling boats. Under the MoU the Libyan coast-guard is entitled to intercept boats bound for Italy and return all passengers to disembarkation zones in Libya, where the apprehended migrants are detained in EU-supported encampments. Long-term detention is a routine solution in Libya, and massive financial support has been channelled to Libya’s detention infrastructure. This has included training on human rights standards for staff overseeing the country’s detention system and the accommodation of intercepted and retrieved irregular migrants (Koenig, 2017). Even before the Malta Declaration, EU Member States had several bilateral agreements with Libya regarding naval border control with the intention to stifle irregular migration into Europe (Palm, 2016), the Tripoli–Rome accord (Palm, 2017) being one example. Such arrangements collapsed under the Arab Spring uprisings, and in particular with the fall of the Gaddafi regime when the migration flow across the Central Mediterranean route peaked (Palm, 2017). Importantly, the current EU-supported detention system draws on an infrastructure that was already in place before the overthrow of Gaddafi (Global Detention Project, 2018). Previous arrangements entailed mass detention and endemic human rights violations of undocumented migrants. Despite this past experience, Europe has renewed collaboration with Libya to avert the flow of migrants embarking from North Africa. At the time of the implementation of the Malta Declaration, the European Council was heavily criticized for underestimating the problems in Libya (Palm, 2017). The Malta Declaration stated that a pan-national collaboration would only come into effect once a Libyan government that respects human rights was in place and would “be carried out in full respect for human rights and international law, and in conjunction with UN General Assembly and IOM” (Ktistakis, 2013). But this was not the case at the time when the collaboration started, nor is it true at present. Médecins Sans Frontières (MSF) foresaw and warned in 2017 that the Libyan government would (i) lack the necessary control over parts of its territory and capacity to tackle organized human trafficking, (ii) fail to process asylum claims fairly and efficiently and (iii) be unable to administer detention in accordance with international and regional refugee law (Palm, 2017). Despite these warnings, collaboration was
initiated and post implementation the UN High Commissioner for Human Rights has characterized the plight of refugees and migrants in Libya as a “human rights crisis” (Global Detention Project, 2018). Today, there is ample evidence that the Libyan authorities violate human rights, in particular of detainees but also of migrants, as when the Libyan coastguard has been shooting at migrants at sea (UNSMIL and OHCHR, 2018). Detainees typically lack access to basic resources, rights and protection (UNSMIL and OHCHR, 2016). Their freedom of movement is circumvented and their chances of political representation are nonexistent. From a legal perspective, reporting or detaining migrants in countries where they may be in danger violates international law, e.g., the principle of non-refoulement. Most importantly, this applies to “all refugees, including those who have not been formally recognized as such, and to asylum-seekers whose status has not yet been determined” (UN General Assembly, 2016).6 Despite limited transparency, organizations that have managed to gain access to Libyan detention camps have all testified to serious abuse (Global Detention Project, 2018). Human rights organizations have criticized the EU Member States for not taking serious measures to “reduce the level of abuses suffered by migrants” (Global Detention Project, 2018). Clearly the treatment of individual migrants under the Malta Declaration involves a wide range of atrocities and circumvents several fundamental human rights. The extended periods of detainment are clearly questionable from a moral point of view (cf. Parekh, 2017) even though they may not be legal violations.

3. State Sovereignty and Migration Control

Migration control is typically seen as a natural part of legitimate nation states’ exercise of sovereign power. This section presents key assumptions on which normative state sovereignty rests and some of the ways in which influential political philosophers have defended a rather far-reaching discretionary power in matters of migration on the basis of the sovereignty principle.

Sovereignty has to do with jurisdiction over territory and boundaries of the nation state and the right to make laws, including the right to decide who is a citizen and who enters the country (Mostov, 2008, p. 19). The principle of national sovereignty is frequently invoked to explain why nation states are within their rights to adopt migration policies and to control admission. In political theory,  

6 The intergovernmental International Organization of Migration (IOM) has been a key implementing partner within this project, but it has been criticized for its role in Libya, in particular for providing “human rights training” for detention centre staff and for its oversight of the EU-financed “assisted voluntary return program” which is one of the few ways migrants can exit detention centres (Global Detention Project, 2018). With this form of involvement, IOM has been said to give legitimacy to a system that is inherently disrespectful of human rights.
the legitimate state has two essential features: (1) the exercise of power by means of certain political institutions and (2) a geographical domain or territory within which power is exercised (Agnew, 1994, p. 53). The Westphalian constitutional concept of state sovereignty is typically taken to mean the authority of a polity to govern itself without the intervention of other states. Without the mandate to govern within a specific territory, a state would be a mere organization (albeit large in scale). Sovereignty is what distinguishes the state, and international relations are relations between such territorial states (Agnew, 1994, p. 53). Moreover, state sovereignty is premised on the ideas of (a) fixed territorial entities (even if boundaries can change) (Agnew, 1994, p. 54) and (b) all states being ontologically equal and independent (cf. Chigudu, 2015; Kingsbury, 1998).7 “Territorial sovereignty” grants states permission to exercise their power legitimately when the events, persons or property in question are physically placed within their territory. This is the principle of jurisdiction upon which sovereign statehood is fundamentally based (Hudson, 1998) and it is a cornerstone of today’s international system of migration control. Full discretion over admission, detention and expulsion of non-members is typically seen as an essential mode of exercising sovereignty (Kerwin, 2016). Without this capacity, the survival and maintenance of the independent governance of the state over its geographical territory is often said to be at risk (Agnew, 1994, p. 61). A right to defend a particular spatial sovereignty and the politics within it is often seen as necessary from the perspective of national security (Agnew, 1994, p. 63). Importantly, though, what constitutes a threat and why can be disputed.

Political philosophers like Walzer (1983), Miller (2007) and Altman and Wellman (2011) draw on state sovereignty when explaining why legitimate states are within their rights to control immigration. On this basis, they ascribe to such states rather far-reaching control and decision-making authority. If not exclusively, sovereign states have, according to them, at least foremost obligations towards themselves and their citizens. Wellman sees immigration control as a matter of self-determination (Altman and Wellman, 2011, p. 162) and as a central element of state sovereignty (Altman and Wellman, 2011, p. 158). Nation states must be at liberty to choose those with whom to associate. According to Walzer, this type of self-determination is essential for nation states to preserve themselves as they wish to be (character, make-up), and a right to restrict access is crucial

7 An important aspect of the sovereignty ideal is the assumption that legitimate sovereign states are equal (Chigudu, 2015; Kingsbury, 1998) and that they should enjoy the same rights and respect. In the international legal system, this status means that, among other things, small states are procedurally on an equal footing with the largest or most powerful states, e.g., in the International Court of Justice (Kingsbury, 1998). However, when considering sovereign states’ capacity to govern their border and control migration flow, de facto inequalities in power and resources have a considerable impact.
for nation states’ independence. They depend on closure in order to preserve their distinctive cultures, etc. Like clubs, nation states should be allowed to set the criteria for membership to protect a certain community. They are normatively justified in restricting non-members’ admission, and even in denying admission completely. Following Wellman, legitimate states are entitled to political self-determination, and freedom of association is an integral component of self-determination. The right to free association includes the right to refuse to associate with others. In analogy with marriage, Wellman identifies a freedom not to associate against one’s wish (Altman and Wellman, 2011). The freedom to marry must include the freedom not to be forced to marry, or to marry a particular person. A person is in her or his right to reject suitors for marriage and a married couple is not required to open their marriage to undesirable prospects. By analogy with this personal right, there must be a right to exclude from freely-formed clubs or organizations. Wellman’s argument is similar to that of Walzer’s in that he believes that national communities must have the right to create admissions policy, to control and sometimes restrain the flow of immigrants, but it is not the same as Walzer’s, which presupposes a particular culture with distinctive qualities worth preserving. Wellman does not suppose something special about the excluding community, other than the right of actual members of the association to choose those with whom they will associate. Wellman sees the right to exclude prospective immigrants as an execution of the more general right that a state has to exercise control over entry into its territory and to grant or deny admission into its political membership. According to these scholars, legitimate nation states are within their rights to decide whether or not to exclude or admit prospective immigrants (Walzer, 1983; Altman and Wellman, 2011).

In none of the accounts sketched above do non-members have a right to be admitted to a state. Nevertheless, refugees are typically considered to be a category entitled to special recognition and treatment. According to Walzer (1983, pp. 43–51), nation states must be sensitive to the plight of refugees, meaning that the sovereign states also have duties towards a particular category of non-members. Those who are persecuted in their own countries have the right to seek asylum abroad. Likewise, Miller (2007, p. 227), who otherwise argues that states have a right to enforce immigration restrictions, stresses that refugees have “a very strong but not absolute, right to be admitted to safety”. Following Altman and Wellman (2011, p. 181), nation states have a general duty to assist those in need but they are not required to assist those arriving on their doorstep and seeking asylum by means of granting admission or membership. This seems to be in line with the popular idea that help should mainly be offered in proximity to those in need, as manifested in the EU’s reception and registration centres for refugees – so-called hot spots – where migrants must remain until resettlement
within the EU is arranged (ECRE, 2016); for instance, on the island of Lesbos, Greece.

All of the scholars mentioned above are concerned with territorial sovereignty and migration governance. But even when rule is territorial and fixed, territory does not necessarily entail the practices of total mutual exclusion which the dominant understanding of the territorial state attributes to it (Agnew, 1994, p. 54). The case can be made that state sovereignty is composed of several different elements, some more central than others – such as the relations between the state and its citizens and with other states. Migration control was not always considered a central part of state sovereignty as it is today, and even if we accept that a legitimate nation state is sovereign in certain respects, we must not grant it an unrestricted freedom to devise its migration politics as it sees fit (Honohan, 2014). Mass immigration is often labelled a threat to national stability and security (cf. Huemer, 2010) but even if large-scale immigration will be demanding for affluent and stable receiving nations in terms of organization and economy, there are not necessarily compelling reasons to believe that large-scale immigration will, fundamentally, alter their capacity to govern or cater for the rights and needs of their populations. While the case can be made that the burdens of states must be weighed against the values at stake for individual migrants such as personal security and the right to life (cf. Huemer, 2010), many scholars who invoke the right to sovereign governance in migration matters tend to focus on the burdens of states without questioning the implications for non-citizens and whether immigration constitutes a substantial threat to a receiving nation’s capacity as a sovereign state. While irregular migration is often framed as a security matter and border and pre-border governance a necessary tool to manage this threat, the validity of this threat can be questioned. Arguments for restrictions of sovereign states’ migration governance are explored in the following section.

4. The Limits of Sovereign States’ Discretionary Power in Migration Matters

Without questioning sovereignty per se, the widespread idea of legitimate nation states’ discretion in migration matters can be challenged. On the basis of Neo-republican theory that, in the main, accepts state sovereignty but sets forth criteria for the non-arbitrary execution of power, the acceptability of the EU’s exercise of control along and across borders and the concomitant impact on non-members will be questioned. The discussion entails both traditional admission control along state or regional borders and the increasingly common migration governance outside a bounded territory when the events, persons or property concerning which decisions are made are located outside the territory of the sovereign state in question.
A key question of sovereignty is that of legitimate power: who is entitled to rule, over whom, and on what conditions. Legitimate authority and fair conditions of the exercise of power are also key concerns for Neo-republican scholars (cf. Pettit, 1997, 2012; Skinner, 1998, 2008). They articulate conditions under which political power is morally acceptable, stressing the ideal of freedom as non-domination, i.e., a political system within which those in power cannot interfere arbitrarily with individuals’ choices (Culp et al., 2016). Criteria that must be satisfied in order for the exertion of power to be justifiable are that power is executed via accountable institutions and that those who are subjected to it can influence and, if need be, contest the authority (Pettit, 1997). While, in the case of EU migration governance, the institutions may be accountable in a formal sense, those subjected are typically not in a situation where they, in practice, can influence or contest actions that harm them. Classical Neo-republican theory is mainly concerned with the non-domination of citizens rather than with aliens, but also lends itself to assessments of migration control as part of a nation’s migration policy (Hoye, 2016) and what counts as domination of foreigners beyond national borders (Honohan, 2014; Culp et al., 2016).

Even under standard migration management and admission control, foreigners who seek admission “at the border” are subjected to the power of an authority that they cannot influence and that, hence, imposes on them a form of coercion (Abizadeh, 2008; Honohan, 2014). According to Abizadeh (2008), this coercion requires some kind of democratic justification and fora within which foreigners whose freedoms are coercively restricted can participate. But domination can exist even in the absence of actual interference. Focusing on domination rather than on freedom as non-interference, Honohan (2014) is concerned with a systematic subjection to the threat of interference even if no de facto interference occurs at a given point in time. To be dominated, she argues, is to be systematically vulnerable to the exercise of arbitrary power due to a particular status. It is important to recognize that in Neo-republican theories, much hinges on how arbitrariness is understood and what is considered non-arbitrary, and many different proposals can be found (Alexander, 2015). On Honohan’s (2014) account, arbitrariness of power is an unchecked exercise of power, not “random” or “undeserved”. While nation states have a general right to control migration, the wide range of discretionary procedures currently employed in migration controls render non-members vulnerable to arbitrary power. Certainly, not all forms of interference are dominating, and migration controls as such must not be dismantled. Instead, proper checks on interferences and a reduction thereof are needed.

Reducing domination requires, rather than removing all immigration restrictions or democratically justifying them to all, that there be certain constraints on states’ freedom to control migration:
giving migrants a publicly secured status somewhat analogous to that enjoyed by citizens, subjecting migration controls to higher legal regulation, and making immigration policies and decision contestable by those who are subject to them. (Honohan, 2014, p. 31)

Whether migration controls warrant restraints or not will depend on the intensity and extent of the domination that they exercise over outsiders (Honohan, 2014). In relation to the acceptability of the EU’s migration governance and drawing on Honohan’s reasoning, the case can be made that restraints become relevant for reasons of intensity as well as for reasons of extent, or scope, and that reduction should be considered.

Today privileged nations are, due to their affluence, capable of almost hermetically sealing their external borders by means of massive investments in sophisticated surveillance systems and financial means to reach agreements with transit countries that secure their interests in keeping aliens out. This capacity has a significant impact on non-citizens. Migration dominates EU priorities, and border surveillance is effectively overseen via powerful agencies like the European Agency for the Management of External Borders (FRONTEX) and coordinated under the European Border Surveillance System (EUROSUR), i.e., an agency responsible for coordinating EU Member States’ surveillance activities. Pre-borders and Schengen borders are both controlled by means of automated systems utilizing infrared systems and satellite technology which enable continuous monitoring, as well as alerts, when paired with risk calculation programmes. A massive deployment of information technologies in EU border governance implies that large areas can be scanned for potential unauthorized border transgressions day and night. More to the point, EUROSUR provides a network that is capable of storing and exchanging data extracted from migrants (Palm, 2017). Most importantly, under the Schengen agreement, the EU has created an encompassing border surveillance system that is unparalleled in intensity. But the efficiency of EU migration governance is not only dependent on collaboration between EU Member States and the pooling of resources among members, but also on external collaboration and support from non-EU countries, so-called third countries. The outsourcing of border control to third countries has significantly extended the reach of EU migration control. In combination with the EU’s longstanding securitization of its external frontiers, its recent focus on pre-border controls has created a situation where asylum seekers are blocked from exiting as well as from entering. When groups of affluent nations like the EU Member States unite to stifle unauthorized immigration into their jurisdictions, and manage to do so effectively, underprivileged neighbour countries are typically forced to host large numbers of clandestinos who are blocked from entering the EU and have “nowhere else to go”. That is, measures that are taken by the EU to enforce
its own migration policies are implemented and produce effects in a territory other than its own, and there is no direct connection between the EU’s physical territory and the persons whose rights are implicated (Miller, 2009). In cases of extra-territorial migration governance, migrants’ chances of influencing the authority that exercises power over them are even weaker than under ordinary border and admission control. Irregular migrants typically encounter local coast guards that control borders between receiving nations and transit nations on behalf of a receiving nation, not representatives of the power-executing nation state.

Not only are aliens dominated under extra-territorial border governance, but so are the countries where this extended border control is conducted. Externalized migration also exploits other sovereign states. The countries that have joined collaborative agreements with the EU have certainly done so voluntarily and they gain substantially from remuneration. However, the conditions under which the voluntary choices were made can be discussed. The EU’s collaborative partners in migration matters are typically developing nations with relatively weak capacities to protect their own territories against immigration even if they would wish to do so. Given their generally disadvantaged situation, limited capacity to tackle migration and vulnerability to a massive influx of migrants aiming to reach the EU or return from a failed attempt, it can be argued that the most rational thing they can do is to obtain compensation for accommodating migrants in transit. Accepting collaborative agreements and financial support can be a way of not losing, rather than gaining, from a situation that they cannot influence. The terms of collaboration are not necessarily in their best interest and their consent should not necessarily be seen as an expression of sovereign decision making. Differences in bargaining power will be decisive for the extent to which sovereign states can act with full discretion in state affairs like immigration and migration control – at least in any meaningful sense. And arguably, a state’s responsibility for the needs and rights of migrants does not disappear if it arranges with another country to act on its behalf.

5. Legal Concerns about the Externalization of EU Migration Governance

In addition to the ethical questions raised above concerning current EU migration governance, extra-territorial migration governance has been questioned from a legal perspective (cf. Vandvik, 2008). On the basis of a thoroughgoing examination of international and European refugee and human rights, it has been demonstrated that there is a strong link between the exercise of extra-territorial immigration control, and the obligation to assume responsibility for the impact and consequences of this control. EU Member States cannot abstain from their
principles, values and commitments by adopting double standards: doing outside their borders what would not be ethically and legally permissible within their territories. Control implies responsibility, and obligations do not stop at national borders (Vandvik, 2008). Moreover, not only is the current exercise of pre-border control surrounded by legal uncertainties in that it takes place in borderlands, EU Member States exploit such legal uncertainties, and the ongoing externalization of migration governance has been labelled a form of “jurisdiction shopping” (Gammeltoft-Hansen, 2011). Seemingly it is believed that shifting the territorial aspects of migration control from one nation to another will transfer the legal framework and responsibilities as well. With externalized migration policies, the legal responsibility of the acting state is seemingly reduced, since the “primary responsibility for assessing protection needs and asylum claims” is essentially delegated to another country (Gammeltoft-Hansen 2011, p. 5). However, from a legal perspective, it is not obvious that responsibility can be relaxed by an outsourcing of migration control. It has been argued that EU Member States have a certain duty to protect migrants in distress that may extend extra-territorially; for instance, to the high seas (Vandvik, 2008; Tzevelekos and Katselli Proukaki, 2017). All states have the responsibility to offer (some) protection even when migrants are not within their territory, based on the positive effect of human rights and the principle of due diligence (Tzevelekos and Katselli Proukaki, 2017; Kim, 2017) that requires states to be proactive, inter alia, for preventive and, more generally, protective purposes, irrespective of the nationality or statelessness of the individual concerned (Tzevelekos and Katselli Proukaki, 2017).

Paradoxically, nations that have led the way in developing “rights-sensitive standards and procedures for assessing protection claims of asylum-seekers within their jurisdictions have simultaneously established barriers that prevent asylum-seekers from setting foot on their territories or otherwise triggering protection obligations” (Frelick et al., 2016). Migrants are effectively prevented from showing up on the EU’s doorstep, seemingly freeing the EU Member States from the human rights obligations that they have accepted. By removing the doorstep to the EU and access to asylum procedures and decent reception conditions, unauthorized third country nationals have been “consigned to countries of first arrival or transit that have comparatively less capacity to ensure rights and process claims in accordance with international standards” (Frelick et al., 2016). Following human rights law, though, those exercising authority and power are responsible for how this power is exercised and for the consequences thereof. Where a state’s politics implies harm to third country nationals, a certain responsibility to protect and assist emerges (Vandvik, 2008). That is, the execution of power is associated with a certain responsibility that extends the duties of states and implies further restrictions on how they exercise their power. Nation states
become responsible for the destitute situation of non-citizens if they have contributed to it. Certainly, it can be difficult to pinpoint the actions and involvements that have caused a certain condition due to many complex and interrelated actions, and thus ascribe responsibility. However, powerful actors such as nations, multinationals and international economic organizations can influence or abstain from influencing underprivileged nations in harmful ways, and at least certain decisions can be seen as contributions to the unjust global order. If nation states were to take this obligation seriously, many of the current migration control practices would have to be abandoned.

6. The Permissibility of Extra-territorial Border Governance: The Case of Libya

Having highlighted some restraints on the discretionary power of sovereign states and the limits of sovereignty-based externalized migration governance, an assessment of the EU’s current collaboration with a key partner in migration management – Libya – will be made. More precisely, the justifiability of the EU’s assertion of migration control over this foreign territory and alien subjects will be critically discussed.

Drawing on Neo-republican theory, which claims that the need for restraints on migration controls depends on the intensity and extent of the domination that nation states exercise over outsiders (Honohan, 2014), rather strong restraints on the EU’s extra-territorial migration governance in third countries such as Libya can be warranted. In Libya, and in the waters between the EU and Libya, migration control is both intensive and extensive due to the pooled resources and concerted actions of an affluent and stable union of sovereign states. This is a system that is unparalleled in its extension, and it effectively seals a region.

In the case of Libya, due to the encompassing migration governance initiated and coordinated by the EU, many non-EU citizens are subject to de facto interference in the form of legally and morally questionable interventions such as pushbacks, forced returns and detainment. Such conduct can, along the reasoning of Honohan, be labelled domination. Under the EU’s agreement with Libya, an as-yet unstable democracy, non-authorized agents are involved in migration management, as well as in sensitive matters like incarceration. In this way, apprehended and detained sans-papiers are subjected to unchecked power and, hence, to domination. Migrants who embark from Libya with the aim of reaching Europe are, when intercepted by the Libyan coast guard, typically prevented from access to ordinary asylum procedures and from the opportunity to question the foreign states that exercise their authority via local agents in a third country. In such ways, the state that executes its power becomes more remote from and less visible
to those concerned under externalized than under domestic migration governance. Concomitantly, the migrants’ chances of influencing it are circumvented. They cannot make their asylum claims effectively, nor can they contest the ways in which their cases are processed or neglected as citizens would be able to. Non-citizens are also subject to an omnipresent threat of interference even if no actual interference takes place. Non-citizens are dominated in that they are systematically vulnerable to the exercise of arbitrary, unchecked power due to their status as unauthorized migrants (Honohan, 2014). Non-citizens who are subjected to the EU’s authority in Libya do not have the chance to influence or contest the authority that shapes their situation to any considerable extent (as members would be entitled to do), thus giving rise to domination and unjustifiable coercion.  

It can be said to follow from the Neo-republican account of sovereignty that sovereign receiving nations have an obligation to listen to the individual claims of migrants whom they affect. This requirement seems hard to align with the Schengen Member States’ joint efforts to block access to the region, preventing unauthorized migrants from “showing up on the doorstep” to begin with and, furthermore, from the opportunity of asking for admission by filing (individual) asylum claims. This requirement would at least require that today’s strict entry requirements, interdictions and detainment conduct were paired with channels through which migrants could voice their interests and also be heard when located in a third country. Such channels have been discussed between the EU Member States. The much-debated regional protection programmes (see EC, 2005) are one example of a proposal complementary to the current asylum system under which individuals in need of relocation should file asylum applications in “safe havens” outside Europe. Yet another way in which restrictions on the nation states’ discretionary power can be motivated is the jurisprudence of the European Court of Human Rights (ECtHR), according to which nation states are held accountable for the effects of any act carried out under their jurisdiction, even if such effects take place outside their territory (Vandvik, 2008). Arguably, there is a strong causal connection between the EU’s exercise of power and the many lives lost in the Mediterranean Sea (McAuliffe and Ruhs, 2018). First, the EU closed legal avenues of entry which made migrants undertake risky irregular journeys and rely on human traffickers and smugglers in order to relocate. In a

---

8 In addition, the acceptability of the routine measure of placing irregular migrants in Libyan camps over extended periods of time deserves attention. While refugee camps may be justifiable as short-term emergency aid, they cannot be used over time to shield receiving countries from the claims of internationally displaced persons. If detention camps must be used as long-term solutions, they should, at a minimum, protect the basic human rights and dignity of their residents and allow some form of political participation and accountability (Parekh, 2017). None of these requirements are satisfied in the case of Libya.
second step, measures were undertaken to block the remaining irregular exit paths and to detain those who failed to push through the heavily surveilled borders. In the case of Libya, both casualties at sea and atrocities in detention camps were foreseeable harms that, with proper measures, could have been avoided. Unauthorized migration is not suppressed by stifling exit and entry. “If substantial inequalities persist across state borders and border controls are restrictive then the irregular/illegal migration is the only option open to some would-be migrants” (Geddes, 2018, p. 25). Thus, the EU can be considered accountable for the harms caused to third country nationals, on the high seas, and in Libya.

From a Neo-republican perspective, it can also be argued that the EU dominates so-called third countries like Libya. In some sense, Libya has agreed to support the EU’s border control project but, in light of the turmoil following the Arab Spring and the ensuing internal instability, the quality of the consent deserves further attention. Certainly, both parties benefit from the collaboration. While the EU benefits from effective assistance in border protection, Libya gains from substantial financial support from the EU. However, as a resourceful contract initiator the EU has been able to shape both the form and content of the contract in a way that Libya has not been able to. Libya has merely agreed to a proposal that prioritizes the interests of the contract initiator without having had any substantial chance to influence its form and content (Koenig, 2017). If Libya had not agreed, the country would only lose from having to tackle the consequences of Fortress Europe alone. Had Libya been politically stable and economically better-off, the collaborative agreements would probably not have seemed as attractive as under the current conditions. For these reasons, the EU can be said to have taken unfair advantage of Libya’s underprivileged situation. Invoking Honohan’s reasoning on domination, the case can even be made that the EU dominates Libya in that “domination arises when ostensibly independent states are in dependent relationships with stronger states” (Honohan, 2014, p. 38). And at least some aspects of the Malta agreement can be seen as a matter of “jurisdiction shopping”. This is particularly unfortunate since the EU has contributed to the need for relocation by means of human traffickers and the lucrative business of smuggling human beings in that it is closed regular alternatives for unauthorized migrants seeking admission to the EU.

7. Conclusion

Although globalization, in many ways, has challenged state sovereignty, and its functionality has been called into question (cf. Mostov, 2008), today’s unprecedented levels of displaced persons seem to have reinforced the belief in state sovereignty and state autonomy in the context of migration politics (cf. Geddes,
Against the backdrop of the growing importance of external migration politics and extra-territorial governance within the EU, this article set out to investigate the reach of state sovereignty in migration politics. The Malta Declaration and the EU’s extra-territorial migration governance in Libya served as a case in point. It was shown that sovereignty is intimately connected with territory (Agnew, 1994, p. 53), and, even if not an absolute right, that states generally are considered to have a far-reaching mandate to decide on immigration matters. While in this article it has been assumed that legitimate nation states are within their rights to control cross-border movements and restrict access, the range of their discretionary power has been critically discussed, primarily from a Neo-republican perspective on sovereignty, but also with regard to legal principles like those of the responsibility to protect and the responsible exercise of power. On the basis of a Neo-republican approach, the case was made that even if we accept that legitimate nation states are sovereign in certain respects, they must not be free to design their migration politics as they see fit. Nation states, it was shown, may impose restrictions on aliens but only in so far as they are non-arbitrary. Likewise, it was shown that international law imposes restrictions and requires sovereign states to take responsibility for non-members outside their own jurisdictions as well as for the consequences of their execution of power. Drawing on international legal requirements, it was argued that proactive measures should be undertaken to safeguard migrants and, if such requirements were to be respected, current EU migration politics – domestic and external – would need to be significantly altered. Examples were given of arbitrary restrictions imposed by the EU on non-members in the case of Libya, and a general lack of proactive and reactive measures to cater for the needs of third country nationals were highlighted. Thus, on the basis of normative and legal principles, it has been demonstrated that, despite their sovereign status, EU Member States could be ascribed obligations to non-members that exceed those that they are typically expected to fulfil, and that extra-territorial migration governance as conducted in Libya today can hardly be justifiable.

References


© 2020 The Author. *Theoria* published by John Wiley & Sons Ltd on behalf of Stiftelsen Theoria


