II. Migration Crisis

Deterrence as Legal Innovation: Management of Unwanted Mobilities and the Future of Refugee Protection

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Abstract: In this chapter, we focus on deterrence as a legal innovation intended to manage unwanted mobilities. Our starting point is the discrepancy between the global commitment to human rights and the practical implementation by states of refugee protection with respect to protection seekers from former colonial countries. In the first part of the chapter, we contextualize deterrence as legal innovation within the framework of the broader shift to restrictive deterrence policies by states of the Global North and argue that the division or difference in treatment of various groups of migrants that propels the adoption of externalization measures is an inherent feature of international law, revealing its deep colonial structure. We then analyse the different ways and methods of deterring asylum seekers that have been increasing in numbers in Australia, the U.S. and the European Union, and their justification of deterrence of asylum seekers in response to various ongoing 'crises'. In the second part of the chapter, we evaluate the various responses to these crises, and the role played by the law in guiding and restraining state responses. We conclude by showing how the law, when migrants are wanted, can be swiftly and effectively used as a protective tool, and how the true crisis of international human rights law actually applies to the international law of the Global North that has emphasized and protected its own interests through the increasing exclusion of unwanted protection seekers.

I. Introduction

In this chapter, we focus on deterrence measures affecting international refugee law and policy as innovations intended to limit the numbers of people seeking protection in the Global North. Our starting point is the human rights and humanitarian crisis enshrined in the discrepancy between the commitment of the states to international law on human rights and their practical implementation by states regarding refugee protection, in particular with respect to people from former colonial countries. We argue

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that recently, the crisis became particularly amplified by the increased use of deterrence measures by the states of the Global North.

We conceptualize the various deterrence measures as innovations adopted in response to certain events as markers of crises with the objective of externalizing refugee protection. We use the concept of migration crisis as a catalyst of innovations and creative legal thinking which, as a result of the flashpoints of these catalysts, such as the surge of Haitians towards the United States in the 1980s and 1990s, Australia's response to the Tampa Affair (enabled by 9/11) in 2001, and the European refugee crisis in 2015–16, contributed in turn to the crisis of human rights and refugee protection. We argue that these flashpoints enabled the development of these innovations and secured societal support for them. However, these would not have taken place without pre-existing ideas about who a genuine refugee is and who therefore deserves protection. In this context, we conceptualize deterrence measures as legal and policy innovations – creative solutions and strategies – intended to prevent certain unwanted groups of people from reaching jurisdictions of states of the Global North where state responsibility for the protection of their rights arises. In line with Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen, we define legal innovation in the migration law of the Global North as 'creative legal thinking', where states operate on the fringe of international law. They write '[s]uch policies tend to work in between the normative structures established by international (…) treaties, exploiting interpretative uncertainties, overlapping legal regimes, reverting on soft law standards or establishing novel categories and concepts on the basis of domestic or other parts of international law.'[1] In such a manner, for instance, Ayelet Shachar uses the concept of legal innovation in international migration law when discussing the structure of a *shifting border* aimed at re-bordering mobility through extensive 'externalization strategies.'[2]

Our conceptualization of innovation in the context of the migration regime of the Global North is therefore an ambivalent or negative one. While legal innovations in the protection of rights and refugee protection exist (such as, for instance, the 1951 Refugee Convention and the refugee protection regime in general), they have often been trumped by new innovations

1 Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 2.

2 Ayelet Shachar, 'The Shifting Border: Legal Cartographies of Migration and Mobility' in Shachar and others (eds), *The Shifting Border* (Manchester UP 2020) 14–15.

which significantly reduce access to asylum and protection by preventing people from arriving and preventing the formation of a jurisdictional link between the person and the country, which would mean the existence of the obligation of protection. To be sure, we recognize the existence of positive examples of humanitarian innovations, such as the response to the people from Ukraine seeking protection from Russia's aggression. The launch of a Temporary Protection regime in the EU can be considered a positive innovation in the form of a short-term solution in response to the mass arrivals. Overall, however, we can notice a more general trend in the law of moving outside the territorial jurisdiction of states, in order to diffuse or relieve the state of the legal liability and human rights obligations with respect to those seeking protection. In this chapter, therefore, we discuss the expanding deterrence paradigm and focus on deterrence through the externalization of migration control in the migration law of the Global North. We show that the most recent developments in the context of externalization of protection, such as the UK-Rwanda agreement, are the next steps in the ongoing expansion of the deterrence paradigm, the origins of which date back to at least the Haitian Refugee Crisis in the U.S. in the early 1980s.

We start with historical examples and show how these innovations, such as the U.S. response to Haitian refugees, have been creatively adopted in the case of other destinations, for instance Australia's Pacific Solution, the 2015 refugee crisis in Europe, or the most recent UK–Rwanda agreement. Below, we first define deterrence measures as simultaneously being innovations in response and catalysts of further crises, and identify events and measures aimed especially at the externalization of protection. We then trace the journey of these innovations from the 1980s to the 2020s by identifying concrete migratory events and concrete legal and policy responses. Overall, we show how refugee protection has been coupled in international law with measures aimed at limiting this protection in the law of the Global North over the years. We also focus on the international law of the Global North. Even though our task for this chapter was to focus on innovations at the level of international law, the exclusionary migration regime is the regime of the Global North representing its interests and aimed at benefitting the Global North itself.[3] We therefore focus on the deterrence paradigm not

3 Thomas Spijkerboer, 'The Geopolitics of Knowledge Production in International Migration Law' in Catherine Dauvergne (ed), *Research Handbook on the Law and Politics of Migration* (Edward Elgar Publishing 2021), <www.elgaronline.com/edcollbook/ed-

as a feature of international law as such, but rather as an innovation of international law of the Global North. We argue that the development of the deterrence paradigm is based on historical and ongoing imbalances in wealth, power and control and is firmly embedded in the development of the international protection regime designed by the countries of the Global North as a means of controlling refugees and in order to maintain their dominant position.[4]

II. The Crisis

II.1. What is a 'migration crisis'?

Traditionally, a crisis in the context of refugee protection is proclaimed as a result of a mass influx of people seeking protection, which significantly affects the administrative, logistical, or economic capacities of the host states and affects host societies in other significant ways. However, such proclamations of migration or refugee crises have often been criticized by migration scholars, pointing out that what is defined as a migration crisis is often a manifestation or a result of a combination of factors, including deeply embedded inequalities enshrined in the law or migration policies. As can be seen in the case of the most recent 'crises' in the EU, such as the so-called migration and refugee crisis of 2015 or the crisis at the Polish-Belarussian border, they have been rather conceptualized as solidarity[5] or humanitarian[6] crises accompanied by violations of human rights of migrants. These crises took place for various reasons, such as lack of preparedness, a lack of solidarity, but also as a result of the unequal treatment of different groups

coll/9781789902259/9781789902259.xml> accessed 14 March 2024; Achille Mbembe, 'The Idea of a Borderless World' (*Africa is a Country*, 11 November 2018) <https://africasacountry.com/2018/11/the-idea-of-a-borderless-world> accessed 14 March 2024.

4 Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (Rowman & Littlefield Intl 2017); Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Routledge 2018); Spijkerboer, 'Geopolitics of Knowledge Production' (n 3).

5 Maarten Den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607.

6 Grupa Granica, 'Humanitarian Crisis at the Polish-Belarusian Border' (2021) <https://konsorcjum.org.pl/storage/2023/10/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf> accessed 13 March 2024.

of people seeking protection,[7] often due to policies and practices aimed at preventing the arrival of unwanted migrants. For instance, Thomas Spijkerboer diagnosed the 2015 situation as a perfect storm, an accumulation of a number of symptoms, situations and problems that, often known for a long time, when happening at the same time, created a crisis, including the refugee crisis arising from the war in Syria, major underfunding for hosting refugees in the region, minimal resettlement coupled with a prohibition to travel outside Syria, systematic underestimation of the conflict, failure of the Common European Asylum System and the exploitation of the conflict by politicians in the EU undermining support for people seeking protection.[8] Therefore, deterrence measures, such as the prohibition of arrivals, are among the contributors to such crises, even though they are often proclaimed as having been adopted in response to them. In particular, they contribute to the unequal treatment of asylum seekers and adversely affect the implementation of human rights protection standards. As we show in this chapter, these measures are often adopted to limit rather than improve the state's responsibilities or avoid such responsibilities altogether.

To be sure, a common response of states to people seeking access to their territories to gain protection is currently to devote significant resources to preventing and frustrating this access. In order to pursue this goal, states have developed a wide range of measures, often referred to as 'repulsion' or 'deterrence', appearing within the broadly described 'deterrence paradigm.'[9] Such a proliferation of deterrence measures often exists at the boundaries of, if not in direct violation of, international law, although in many cases commitment to international law is still present in the state's rhetoric even if not in the state's practice. The United States and Australia are particularly

7 Magdalena Kmak, 'Between Citizens and Bogus Asylum Seekers: Management of Migration in the EU through the Technology of Morality' (2015) 21 Social Identities 395.

8 Thomas Spijkerboer, 'Europe's Refugee Crisis: A Perfect Storm' (*Faculty of Law Blogs/University of Oxford*, 10 February 2016) <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/02/europe's-refugee> accessed 13 March 2024.

9 Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2014) 53 Columbia Journal of Transnational Law 235; Thomas Gammeltoft-Hansen and Nikolas F Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 Journal on Migration and Human Security 28; David S FitzGerald, *Refuge beyond Reach* (Oxford UP 2019).

noteworthy for their respective offshore policies in the Caribbean and the Pacific.[10]

Thomas Gammeltoft-Hansen and Nikolas Tan group deterrence measures into five main categories: 1) non-admission policies limiting access to asylum procedures, 2) non-arrival measures preventing access to the territory of asylum states through migration control, 3) offshore asylum processing and relocation of refugees to third countries, 4) criminalization of irregular migration and human smuggling, and 5) indirect deterrence measures intended to make the asylum country less attractive.[11] In this chapter, we focus on how deterrence measures function within the ongoing externalization of migration control, 'the process of shifting functions normally undertaken by a State within its own territory, so they take place, in part or in whole, outside its territory.'[12]

According to Jeff Crisp, externalization encompasses 'measures taken by states in locations beyond their territorial borders to obstruct, deter or otherwise avert the arrival of refugees, asylum seekers and other migrants who do not have prior authorization to enter their intended country of destination.'[13] Further, as Inka Stock, Ayşen Üstübici, and Susanne Schultz show, imbalances in global power are central to policies of externalization, describing 'the extension of border and migration controls beyond the so-called 'migrant receiving nations' in the Global North and into neighbouring countries or sending states in the Global South.'[14] States in the Global North retain the right to admit those from the Global South that they consider needed or wanted, while repelling the unwanted remainder through increasingly sophisticated systems, which often rely on the active participation of Global South partner states.

10 Daniel Ghezelbash, *Refuge Lost* (Cambridge UP 2018); FitzGerald (n 9).

11 Gammeltoft-Hansen and Tan (n 9) 34.

12 David Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law' (2022) 34 International Journal of Refugee Law 120, 120.

13 Jeff Crisp, 'Externalization and the Erosion of Refugee Protection' (*The University of Melbourne*, 25 November 2019) <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/externalization-and-the-erosion-of-refugee-protection> accessed 13 March 2024.

14 Inka Stock, Ayşen Üstübici and Susanne U Schultz, 'Externalization at Work: Responses to Migration Policies from the Global South' (2019) 7 Comparative Migration Studies no 48, 1.

II.2. Coloniality and the myth of difference

We argue that the division or discrepancy in the treatment of different groups of migrants that propels the adoption of externalization measures is an inherent feature of international law, revealing its deep colonial structure that manifests itself most strongly in the context of human mobility in general, and refugee protection in particular.[15] Initially, under modern refugee law, access to the territories of the Global North was limited in the 1951 Refugee Convention to refugees from Europe. As B.S. Chimni[16] and Lucy Mayblin[17] argue, through its original territorial limitation that has only been removed by the 1967 Protocol Relating to the Status of Refugees, the refugee regime has been designed to exclude those coming from present and former colonies from protection. The exclusion has been supported by the so-called *myth of difference* – building the notion of the ideal refugee as being a white male anti-Communist, and asylum seekers and refugees from the outside of Europe as ultimately different from that ideal refugee.[18] The 1967 Protocol removed the geographical limitation of the Refugee Convention, although the difference in treatment has remained and has been enshrined in the increased limitations of access to asylum for people arriving from the former colonies through various deterrence measures, including externalization. Thomas Spijkerboer describes this limitation in access to protection as being governed through the global mobility infrastructure and respective shadow mobility infrastructure. These infrastructures substantively reflect the exclusionary law of the Global North regulating mobility – there is one law for those who enjoy access to the global mobility infrastructure, and another kind of law for those who are denied such access.[19]

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15 Spijkerboer, 'Geopolitics of Knowledge Production' (n 3); Karin de Vries and Thomas Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights' (2021) 39 Netherlands Quarterly of Human Rights 291; Lucy Mayblin and Joe Turner, *Migration Studies and Colonialism* (John Wiley & Sons 2020); Mbembe (n 3); Simone Browne, *Dark Matters: On the Surveillance of Blackness* (Duke UP 2015); Mayblin (n 4).

16 BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 350.

17 Mayblin (n 4).

18 Chimni (n 16) 351.

19 Thomas Spijkerboer, 'Marathon Man and "Our European Way of Life"' (*openDemocracy*, 27 October 2020) <www.opendemocracy.net/en/can-europe-make-it/marath

The myth of difference is played out in various state responses to refugee crises described in this chapter. For instance, in the U.S., refugees from Cuba in the 1960s were, in principle, accepted as refugees escaping Communism and therefore welcomed, while the refugees from Haiti in the 1980s were considered different, escaping generalized violence, and therefore not real refugees. Most recently, in the EU, the distinction between genuine and bogus asylum seekers has been played out, particularly in how stricter measures towards various groups of people seeking protection affected those differentiated on the basis of their citizenship or race.[20] In this context, the situation of pushbacks at the Polish–Belarusian border as a result of a migrant smuggling operation orchestrated by Belarus needs to be compared with the response to people from Ukraine seeking protection. For instance, while the Polish border has been almost completely closed to migrants and asylum seekers from the geographically, ethnically and religiously distant countries during the Covid-19 pandemic and later following the escalation of Russia's war against Ukraine, asylum seekers from neighbouring countries, such as Belarussians following the suppression of protests by Lukashenko's regime in 2020, as well as economic migrants and, later, people seeking protection from Ukraine were allowed to enter,[21] again referring to the protection policies as reproducing the myth of difference.

III. Crises causes and responses

In this section, we discuss three events we consider to be markers of crises or catalysts that followed with the introduction of *innovative* legal and policy measures enhancing deterrence: the Haitian refugee crisis, 9/11 and its impact on the Tampa Crisis, and the 2015–2016 so-called refugee crisis in the EU. We show how the responses to these crises – in the case of this chapter, the externalization of protection – have contributed to the spreading of deterrence policies throughout the Global North and affected the human rights of people seeking protection.

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on-man-and-our-european-way-life/> accessed 13 March 2024; Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2020) 22 European Journal of Migration and Law 452.

20 Witold Klaus, 'The Porous Border Woven with Prejudices and Economic Interests. Polish Border Admission Practices in the Time of COVID-19' (2021) 10 Social Sciences 435, 435.

21 ibid.

III.1. Haitian Refugee Crisis

Haitians started to migrate to the United States in large numbers in the early 1970s, many seeking asylum and fleeing authoritarian rule in their homeland. Despite evidence that rejected Haitian asylum seekers suffered persecution upon their return, the U.S. authorities upheld few asylum claims. The continuing influx of Haitians ultimately led to the U.S. Migrant Interdiction Program (MIP) in 1981, under which intercepted Haitians were typically returned to Haiti after summary screening. The U.S. Coast Guards intercepted approximately 38,000 Haitians at sea during the eight months following the military coup in Haiti in 1991.[22] The United States responded to the crisis by suspending screening procedures for Haitian asylum seekers, fearing a mass exodus from Haiti were it to bring interdicted Haitians to the United States.[23] Two major innovations allowed for increased deterrence and offshore processing throughout the whole period of the Haitian crisis, setting the stage for further developments in Australia and Europe. The first was offshore processing, first at sea and then at Guantanamo Bay, while the second was the judgment in the *Sale* case.

Initially all interdicted Haitians were held outside United States territorial waters on Coast Guard cutters, but, by late November 1991, the cutters had reached full capacity, holding 2,200 Haitians. With the Coast Guard cutters full, the United States resumed summary screening at sea. Those found to have no credible fear of protection were returned to Haiti,[24] although returns were briefly blocked by U.S. domestic courts. Caught between its determination not to admit Haitians to the U.S. and no return or other accommodation alternative, a swift decision was made to transfer the Haitians to the U.S.-controlled territory of Guantanamo Bay, Cuba,[25] an area under U.S. control since 1898.[26]

22 Arthur C Helton, 'The United States Government Program of Intercepting and Forcibly Returning HAmAN Boat People to Haiti: Policy Implications and Prospects' (1993) 10 NYLS Journal of Human Rights 325, 330.

23 Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (Cambridge UP 2015) 21.

24 Ghezelbash, *Refuge Lost* (n 10) 75.

25 ibid 76.

26 Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, 23 February 1903; Signed by the President of Cuba, 16 February 1903; Signed by the President of the United States, 23 February 1903, Arts 1 and 3; Treaty Between the United States of America and Cuba; 29 May 1934, Art 3.

This decision was not planned; rather, it came as the result of a series of overlapping circumstances preventing the United States from pursuing its preferred course of action.[27] One unexpected development was that interviews held at Guantanamo Bay were more extensive that those held at sea,[28] where factors including overcrowding, sickness and fatigue affected the interview process,[29] which led to an increase in positive screening decisions at Guantanamo.[30] This increase was similarly unplanned, just an unintended result of an improved screening environment, and while the new procedure was an improvement on screening at sea it remained 'procedurally inferior to that available to persons seeking asylum within mainland America.'[31]

Some within the United States saw the camp at Guantanamo as a strong draw factor for asylum seekers, and indeed Haitian arrivals increased during the relatively brief period that the camp was operational. The camp quickly reached capacity, holding 12,500 migrants at its peak, and was closed in May 1992.[32] Many within the U.S. expressed concerns that southern Florida would be overwhelmed by Haitian migrant arrivals and that unseaworthy boats would sink *en route*, leading to a loss of life.[33] Some argued that to deter future arrivals, all Haitians to whom the United States did not owe protection should be returned.[34] Ultimately, under an Executive Order issued by President George Bush (Senior) on 24 May 1992, some 30,000 Haitians were forcibly returned, including over 5,000 whose claims for protection had not been examined.[35]

The second innovation was the judgment in the *Sale* case. Following President Bush's Executive Order, all Haitian vessels were interdicted and those aboard returned to Haiti without any opportunity to file a protection claim.[36] The Executive Order pointed to 'a serious problem of persons

27 Dastyari, *United States Migrant Interdiction* (n 23) 24.
28 Christopher Mitchell, 'U.S. Policy toward Haitian Boat People, 1972-93' (1994) 534 The ANNALS of the American Academy of Political and Social Science 69, 74.
29 Helton (n 22) 331.
30 Mitchell (n 28) 74.
31 Ghezelbash, *Refuge Lost* (n 10) 104.
32 Mitchell (n 28) 74.
33 Michael Wines, 'Switching Policy: U.S. Will Return Refugees to Haiti' (*The New York Times*, 25 May 1992) <www.nytimes.com/1992/05/25/world/switching-policy-us-will-return-refugees-to-haiti.html> accessed 15 March 2024.
34 Helton (n 22) 331.
35 ibid.
36 Mitchell (n 28) 69.

attempting to come to the United States by sea without necessary documentation and otherwise illegally,' maintaining that U.S. international legal obligations 'do not extend to persons located outside the territory of the United States'.[37] The policy was upheld by the United States Supreme Court in 1993 in *Sale v Haitian Centers Council*.[38] The majority found that, because the prohibition of *refoulement* in Article 33 of the Refugees Convention 'cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.'[39] Many critics have pointed to the inadequacy of the judgment. Thomas Gammeltoft-Hansen, for example, argues that the decision 'builds on an erroneous and incomplete reading of both the Refugee Convention and extraterritorial jurisdictional principles,'[40] while Kenneth Regensburg similarly suggests that, as a result of the judgment, the U.S. 'lost any moral high ground it may have held in protesting the treatment of refugees by other governments.'[41] While the Inter-American Commission on Human Rights later rejected the majority's arguments in *Sale,* finding the U.S. to be in violation of the American Declaration on the Rights and Duties of Man,[42] David FitzGerald's contention that 'there is no supranational court that creates binding decisions on the U.S. government' remains true.[43]

The no-screening policy was later suspended by Clinton; however, the more open policy was short-lived. In July 1994, in fear of the high numbers of boat arrivals, the Clinton administration stopped undertaking status determinations, instead offering protection in 'safe havens' in third countries or Guantanamo Bay.[44] Panama offered to take 10,000 Haitians, and Honduras pledged to take 40,000 in exchange for U.S. aid. However, Panama

37 Executive Order 12807 of 24 May 1992: Interdiction of Illegal Aliens, 3 CFR, 1992 Comp, 303–304.
38 *Sale v Haitian Centers Council* 509 US 155 (1993).
39 ibid, para A.
40 Thomas Gammeltoft-Hansen, 'The Refugee, the Sovereign and the Sea: EU Interdiction Policies in the Mediterranean' (2008) DIIS Danish Institute for International Studies 2008/6, 17.
41 Kenneth Regensburg, 'Refugee Law Reconsidered: Reconciling Humanitarian Objectives of Western Europe and the United States' (1996) 29 Cornell International Law Journal 225, 243.
42 *The Haitian Centre for Human Rights et al v United States*, Case 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 1997.
43 FitzGerald (n 9) 85.
44 Ghezelbash, *Refuge Lost* (n 10) 112.

withdrew its offer under international pressure.[45] Following the failure of any effective regional resettlement or transfer arrangements, the Haitian leaders were removed through military intervention. These developments are still affecting the contemporary approach of the Biden administration, which is continuing the policies of expulsion and deterrence of arrivals, resulting in many deaths at sea.

III.2. 9/11 and the Tampa Crisis

The attacks of 11 September, the following multifaceted crisis and the war on terror affected the further spread of externalization policies and offshore processing.[46] In this section, we explain how crisis and political opportunity combined to produce otherwise unlikely policies affecting protection-seeking migrants. The shift in the security discourse in the USA (through the adoption of The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism – USA PATRIOT – Act of 2001, as well as the Homeland Security Act of 2002) and later globally, became a catalyst for the development of the Pacific Solution in Australia, which we consider a second major innovation in the context of the externalization of protection.

Increased global insecurity following the 9/11 attacks has played a key role in the justification of deterrence policies by many states. Australia, a global leader in modern deterrence policies, bases much of its response on unwanted migration in its response to perceived security threats. John Howard, the Australian Prime Minister at the time of the attacks, was on an official visit to Washington on 11 September 2001, and was quick to connect the attacks with threats to Australia's border by asylum seeker boats.[47] In August 2001, following a standoff between the captain of the Norwegian freighter, MV Tampa, and Australian officials, including the boarding of the vessel by troops from Australia's special forces, Howard's government

45 Dastyari, *United States Migrant Interdiction* (n 23) 35.

46 Stephen Phillips, 'Enhanced Vulnerability of Asylum Seekers in Times of Crisis' (2023) 24 Human Rights Review 241.

47 James Rose, 'From Tampa to now: how reporting on asylum seekers has been a triumph of spin over substance' (*The Conversation,* 14 October 2016) <https://theconversation.com/from-tampa-to-now-how-reporting-on-asylum-seekers-has-been-a-triumph-of-spin-over-substance-66638> accessed 15 March 2024.

refused entry for 438 rescued asylum seekers.[48] The final outcome of the incident was Australia's now infamous Pacific Solution, which saw all unauthorized maritime asylum seeker arrivals transferred to processing facilities on Nauru and Manus Island (Papua New Guinea), instead of Australia. The core elements of the Pacific Solution were: 1) the excision of territory by the Australian government for immigration purposes; 2) the interdiction of asylum seekers travelling to Australia by boat; and 3) the establishment of offshore processing facilities in the Pacific region.[49] Howard justified his response in absolute terms: 'I believe it is in Australia's national interest that we draw a line on what is increasingly becoming an uncontrollable number of illegal arrivals in this country.'[50] This perceived threat, coupled with the changed international security environment following the 11 September attacks, became embedded in Australian political debate on asylum seekers and unauthorized migration. The short-term impact of the measures was pronounced, seeing a decline in arrivals from 5,516 people (in 43 boats) in 2001 to one person in a single boat in 2002, followed by 53 people (one boat) in 2003, 15 people (one boat) in 2004, 11 people (4 boats) in 2005, and 60 people in 2006.[51]

This determination to prevent unwanted maritime arrivals, to 'stop the boats,' continues to drive the Australian response to asylum seekers, and is now replicated widely in Europe and the UK.[52] Greg Martin shows how campaigns aimed at deterring asylum seeker boat arrivals 'have all the hallmarks of a classic moral panic,' and succeed 'because they resonate with deep-rooted anxieties about Australia's national identity and way of life, relating, among other things, to fear of Asian 'invasion' and concern with multiculturalism.'[53] Moral panics over asylum seekers, Martin contends, are now 'relatively permanent,' and are 'largely a function of the inexorable 'war

48 David Marr and Marian Wilkinson, *Dark Victory* (Allen & Unwin 2003).

49 Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press 2006) 115–124.

50 National Museum of Australia <https://digital-classroom.nma.gov.au/defining-moments/tampa-affair> accessed 15 March 2024.

51 Janet Phillips, 'Boat Arrivals in Australia: A Quick Guide to the Statistics' (2014) Australian Parliamentary Library Research Paper Series 2013–14 <www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1314/QG/BoatArrivals> accessed 15 March 2024.

52 See the film 'Stop the Boats' (2018) at <https://documentaryaustralia.com.au/project/stop-the-boats/> accessed 15 March 2024.

53 Greg Martin, 'Stop the Boats! Moral Panic in Australia over Asylum Seekers' (2015) 29 Continuum 304, 304.

on terror' where the figure of the Muslim-terrorist-refugee is constructed as a transnational folk devil.'[54] In the Australian polity, boat arrivals and other less visible and quantifiable threats remain conflated and contrived, both linked to global insecurity, equally part of the foundations of the deterrence regime.

Perhaps the most notorious element of Australia's Pacific Solution was the transfer of intercepted boat arrivals to Nauru and Papua New Guinea, two of the poorest countries in the region, both dependent on Australian aid. Nauru was not a signatory to the 1951 Refugees Convention, and Papua New Guinea, while a signatory, lacked domestic legislation on refugees, had no system for processing applications for asylum, and maintained considerable reservations concerning its Convention obligations.[55] Susan Kneebone points out that, despite a lack of evidence of *refoulement* by either Papua New Guinea or Nauru, the legal status of the asylum seekers and the manner in which Australia had transferred its responsibility for the intercepted asylum seekers to the International Organization for Migration raised serious concerns. She states: 'Under Australian law, the asylum seekers were "offshore entry persons" and excluded from access to Australia's legal system. Yet they appeared to have few rights under the legal system of their "safe third country".'[56] Nauru, in particular, benefited from an aid package linked to its agreement with Australia, with the initial agreement between Australia and Nauru providing for AUD 26.5 million in development assistance.[57] The initial agreement with Papua New Guinea did not include development aid, although Australia did make investments in infrastructure on Manus Island, and the camp on Manus employed many local residents.[58]

Operation Sovereign Borders, in essence the present-day manifestation of the Pacific Solution, promises that no person arriving unlawfully in Aus-

54 ibid.

55 Susan Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?' (2006) 18 International Journal of Refugee Law 696, 710.

56 ibid.

57 Commonwealth of Australia, Report of the Select Committee on a Certain Maritime Incident, *Chapter 10 – Pacific Solution: Negotiations and Agreements* (23 October 2002) ss 10.37, 10.38 <www.aph.gov.au/parliamentary_business/committees/senate/former_committees/maritimeincident/report/c10> accessed 15 March 2024.

58 ibid s 10.55.

tralia will ever be settled there.[59] On the home page of Operation Sovereign Borders, would-be asylum seekers are told that they have 'Zero Chance,' that the only way to enter Australia is with a valid visa. Operation Sovereign Borders is described as 'a military-led border security operation' established to deliver on the commitment of 'protecting Australia's borders, combatting people smuggling in our region, and importantly, preventing people from risking their lives at sea.'[60]

The overall cost of the policy is difficult to quantify exactly because the costs are spread across various government departments and the Australian military, although a conservative estimate of the cost of Australia's offshore strategy has been around AUD 9 billion since the reinstatement of offshore processing in 2012.[61] The financial element of the policy has relatively little effect on the broader resistance to its ongoing implementation, and it is highly normalized within Australian politics and society.

Australia's offshore processing regime continues to the present day on Nauru, despite the centre there currently hosting very few asylum seekers because of a lack of recent arrivals.[62] However, there have been no further transfers to Manus Island following the 2016 ruling of the Supreme Court of Papua New Guinea in *Namah v Pato* which stated that the detention of asylum seekers was in breach of the right to personal liberty under the Papua New Guinean constitution.[63]

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59 Peter Chambers, 'The Embrace of Border Security: Maritime Jurisdiction, National Sovereignty, and the Geopolitics of Operation Sovereign Borders' (2015) 20 Geopolitics 404; Joyce Chia, Jane McAdam and Kate Purcell, 'Asylum in Australia: "Operation Sovereign Borders" and International Law' (2014) 32 Australian Year Book of International Law 33.

60 Australian Government Department of Home Affairs <https://osb.homeaffairs.gov.au> accessed 15 March 2024.

61 Yearly breakdown: $AUD 721,016,000 in 2013–2014, $AUD 912,631,000 in 2014–2015, $AUD 1,078,064,000 in 2015–2016, $AUD 1,082,894,000 in 2016–2017, $AUD 1,481,985,000 in 2017–2018, $AUD 1,157,520,000 in 2018–2019, $AUD 961,680,000 in 2019–2020, $AUD 818,779,000 in 2020–2021, and $AUD 811,836,000 in 2021–2022 (estimated). 'Offshore Processing Statistics: Costs' (*Refugee Council of Australia*, 13 May 2021) <www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/7/> accessed 15 March 2024.

62 The most recent statistics from the Australian government report 13 people presently detained at the Regional Processing Centre on Nauru. Parliament of Australia, Legal and Constitutional Affairs Legislation, Senate committee, *Estimates* (23 October 2023) 50 <https://t1p.de/ikhzt> accessed 15 March 2024.

63 *Namah v Pato* (2016) PGSC 13; SC1497 (26 April 2016).

III.3. The 2015 Refugee Crisis in the EU

The final crisis that we are analysing in this chapter, which has enhanced the spread of the externalization policy in the Global North is the so-called Migration and Refugee crisis in the EU in 2015–2016. The response of the EU and the Member States to this rapid surge in asylum seeker arrivals was largely a series of restrictive measures designed to prevent access to territory and to make the asylum-seeking experience so difficult that it would discourage those already present and deter those who might be thinking of coming. Before the crisis, in the face of far larger numbers of boat arrivals than either Australia or the United States, the EU resisted the urge to allow for the wholesale prevention of access to its territory. In addition, in *Hirsi Jamaa and Others v Italy*,[64] the European Court of Human Rights (the judgments of which are not binding on the EU but affect the human rights obligations of the EU Member States) clarified the prohibition of interception of migrants on the high seas and return without access to an asylum procedure and without ensuring that a safe return is possible. The 2015–2016 crisis changed that, with Member States and the EU employing a range of measures to deter potential arrivals. As innovations in this respect, we consider a number of measures, including non-admission policies, such as the EU-Turkey deal,[65] and other non-arrival measures, including carrier sanctions, visa regimes, and interdiction, designed to prevent access to the territory of asylum states.

Many European countries were not prepared for the mass influx of asylum seekers who came to Europe in 2015–2016. Their reception systems were not designed for such unprecedented numbers and, in many cases, were found to be inadequate.[66] In many countries, there were significant delays in accessing asylum procedures, while basic needs, such as housing, daily living needs and education were not provided for.[67] EU Member States showed varying levels of willingness to improve their systems to meet

64 *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

65 European Council, 'EU-Turkey Statement' (2016) <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 15 March 2024.

66 Birgit Glorius and others, 'Refugee Reception within a Common European Asylum System: Looking at Convergences and Divergences through a Local-to-Local Comparison' (2019) 73 Erdkunde 19.

67 Nikos Kourachanis, 'Asylum Seekers, Hotspot Approach and Anti-Social Policy Responses in Greece (2015-2017)' (2018) 19 Journal of International Migration and Integration 1153.

the new reality, and the role of international law regarding asylum in the EU was tested in a manner and on a scale not seen before by a region confronting its largest mass movements of people since the Second World War.[68]

The EU–Turkey deal constituted one of the three responses to the increased number of asylum seekers arriving in the EU in 2015 alongside the hot-spot and burden-sharing approach contributing to the selective admittance of asylum seekers in the EU. We consider it to be another case of the externalization policy now firmly established in the Global North. The EU started to hold discussions with Turkey as early as in the autumn of 2015, with the EU–Turkey Action Plan signed in October 2015. Its aim was to 'address the current crisis situation in three ways: (a) by addressing the root causes leading to the massive influx of Syrians, (b) by supporting Syrians under temporary protection and their host communities in Turkey (Part I) and (c) by strengthening cooperation to prevent irregular migration flows to the EU (Part II).' Following that agreement, the EU–Turkey Statement was agreed on 18 March 2016. The main premise was to end irregular migration from Turkey to the EU by breaking up 'the business model of the smugglers and to offer migrants an alternative to putting their lives at risk' by ending 'the irregular migration from Turkey to the EU.' This has been implemented by (1) returning all irregular migrants crossing from Turkey into Greek islands; (2) resettling Syrians from Turkey to the EU taking into account the UN Vulnerability Criteria and prioritizing those migrants who had not previously entered or tried to enter the EU irregularly; and (3) preventing new sea or land routes for illegal migration opening from Turkey to the EU, including Turkey's collaboration with neighbouring states as well as the EU to this effect.

The EU response, when viewed alongside earlier examples from the United States and Australia, shows a repeated pattern of policy and rhetoric enacted within a deterrence framework, where unwanted asylum seeker arrivals provoke a decisive response centred on border protection and security. In all of the above examples, offshore asylum processing and relocation of refugees to third countries further created physical and legal barriers to asylum. For instance, a change was also made in the human rights standards in the Council of Europe, which is visible in such judgments as

68 Den Heijer, Rijpma and Spijkerboer, 'Coercion, Prohibition, and Great Expectations' (n 5).

N.D. & N.T. v Spain[69] or *A.A. and Others v North Macedonia*[70] as a result of which the protection of rights became dependent on the conduct of asylum seekers themselves. In *N.D. & N.T.* the Court made an exception to the prohibition of collective expulsions contained in the ECHR by claiming that unlawful behaviour by migrants might disable Spain's liability for the collective nature of an expulsion. In addition, developments in the externalization of asylum were recently pursued during the Covid-19 pandemic,[71] as well as by Denmark[72] and the United Kingdom,[73] as they seek to emulate elements of Australia's offshore approach.

IV. Evaluating the crisis response

At the core of innovation is the notion or even the expectation of change, so if a law or policy response ensures change, can it be innovative without necessarily being new? In this chapter, we discussed the journey of the deterrence policy and its innovative adoption, first in the U.S., then in Australia, and most recently in the EU. Interestingly, what was already old in the 1990s after having been performed in the U.S. was innovative in the Australian context in 2001, just as European (UK and Danish) moves towards offshore processing are similarly innovative in the 2020s. Innovation, therefore, promises novelty, not necessarily originality, and can utilize earlier measures, sometimes with direct reference, regardless of their negative or harmful effects.[74]

69 *ND and NT v Spain* App no 8675/15 and 8697/15 (ECtHR, 13 February 2020).

70 *AA and Others v North Macedonia* App no 55798/16 (ECtHR, 5 April 2022).

71 Daniel Ghezelbash and Nikolas Feith Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection' (2020) 32 International Journal of Refugee Law 668.

72 'Denmark Asylum: Law Passed to Allow Offshore Asylum Centres' *BBC News* (London, 3 June 2021) <www.bbc.com/news/world-europe-57343572> accessed 15 March 2024; 'Press Statement On Denmark's Alien Act Provision to Externalize Asylum Procedures to Third Countries' *African Union* (Ethiopia, 2 August 2021) <https://au.int/en/pressreleases/20210802/press-statement-denmarks-alien-act-provision-externalize-asylum-procedures> accessed 15 March 2024.

73 Nadeem Badshah, 'Protesters across UK Decry "Heinous" Rwanda Deportation Plan' *The Guardian* (London, 16 July 2022) <www.theguardian.com/politics/2022/jul/16/protesters-across-uk-decry-heinous-rwanda-deportation-plan> accessed 15 March 2024.

74 Ben Doherty, '"Stop the boats": Sunak's anti-asylum slogan echoes Australia's harsh policy' *The Guardian* (London, 8 March 2023) <www.theguardian.com/uk-news/202

These migration policy innovations, despite aiming for deterrence, are regularly presented with a humanitarian motivation – intercepting boats stops the loss of life at sea, and asylum seekers must be saved from villainous people smugglers (the lack of other options in the face of multi-pronged deterrence apparatus does not form part of the state-as-a-humanitarian narrative). These creative measures that we discussed in this chapter have, however, resulted in a series of apparent hypocrisies: resettlement programmes and generous donations to humanitarian organizations sit uncomfortably alongside border walls, interceptions and pushbacks, and humanitarian proclamations are accompanied by policies forcing migrants into dangerous, often fatal, journeys. A proposed deterrence measure need not even ever be implemented in practice to have the desired deterrent effect; sometimes the threat of a measure, such as British and Danish promises of processing in Rwanda, is a sufficient demonstration of policy orientation and intent. Conducted within the deterrence framework, both helpful and harmful innovations feed into this framework, sending a clear message of who is welcome, on what terms, and who controls their entry (states) – states can shift policy approaches rapidly to respond to a crisis (or otherwise) when there is sufficient political will – migrant-friendly innovation does not challenge the predominance of deterrence, it reinforces it, by showing very clearly who has control and who the targets of deterrence are. Certainly, not all migration is considered a problem by states in the Global North, not even rapid mass migration such as that caused by Russia's aggression on Ukraine – migration is only a problem for states when it challenges established social, political, and racial orders.[75]

To sum up, the centrality of deterrence in contemporary responses to unwanted migration to the Global North seems far more likely to solidify than diminish. Many of the present measures exist at least within the letter, if not the spirit, of international law, and in any case, there are limited means of enforcement with which to threaten deviant and recidivist states. In this chapter, we argue, however, that the law itself is often not a problem. To be sure, the letter of the law itself remains relevant. The crisis of

3/mar/08/stop-the-boats-sunaks-anti-asylum-slogan-echoes-australia-harsh-policy> accessed 15 March 2024.

75 See for instance Mayblin (n 4); Hagar Kotef, *Movement and the Ordering of Freedom: On Liberal Governances of Mobility* (Duke UP 2015); Spijkerboer, 'The Global Mobility Infrastructure' (n 19); Ranabir Samaddar, *The Postcolonial Age of Migration* (Routledge, Taylor & Francis Group 2020).

international human rights and refugee law lies in particular in how it has become irrelevant in the face of the extensive and ever-growing deterrence infrastructure. Therefore, the crisis of the international law of human rights described in this chapter concerns in particular the international law of the Global North that has emphasised and protected the interest of the Global North to increasingly exclude unwanted protection seekers from arriving within the scope of their jurisdiction. As the developments in Ukraine have demonstrated, the law can sufficiently protect a group of migrants that is wanted due to geographic, racial, or cultural proximity, or political utility. Exceptions can even be made, allowing persons fleeing Ukraine to enter the EU territory without valid international travel documents[76] or with domestic animals without necessary documentation,[77] while people from many other countries remain excluded from access to the EU.

The developments in the Global North discussed in this chapter are, however, criticized and averted by legal institutions outside the Global North. For instance, the Inter-American Commission on Human Rights rejected the majority's arguments in *Sale,* and found the U.S. to be in breach of the American Declaration on the Rights and Duties of Man.[78] Similarly, the Supreme Court of Papua New Guinea decided in 2016 that the practice of detention as such had been in breach of the right of the detainees to personal liberty under the Papua New Guinean constitution.[79] Even though some of the developments are not producing effects of stopping the spread of the policies, they are setting alternative standards that challenge the deterrence paradigm. Therefore, the international human rights and refugee law standards, as interpreted by the states of the Global North, including the legal innovations described in this chapter, need to be analysed not as

76 'Obywatele Ukrainy mogą wjechać do Polski bez paszportu zagranicznego' (Наш вибір: Gazeta dla Ukraińców w Polsce, 29 September 2023) <https://pl.naszwybir.pl/obywatele-ukrainy-moga-wjechac-do-polski-bez-paszportu-zagranicznego/> accessed 15 March 2024.

77 Gerardo Fortuna, 'EU Relaxes Entry Paperwork for Pets Travelling with Ukrainian Refugees' (*Euractive.com,* 27 February 2022) <www.euractiv.com/section/health-consumers/news/eu-relaxes-entry-paperwork-for-pets-travelling-with-ukrainian-refugees/> accessed 15 March 2024.

78 *The Haitian Centre for Human Rights et al v United States*, Case 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 1997.

79 Azadeh Dastyari and Maria O'Sullivan, 'The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah (2016)' (2016) 42 Monash University Law Review 308–38; For a discussion on the importance of the judgment see also Spijkerboer, 'Geopolitics of Knowledge Production' (n 3).

international legal standards in general but as their regional interpretation that is specific to political realities in those countries where the deterrence approach has become normalized as a response to unwanted migration.