Policing the Other

State Instrumentalization of Citizens in the Policing of Foreign Nationals and People on the Move, a series of contemporary case studies

The policing of migration is growing in pervasiveness and form. A manifestation of this approach is seen in the ways civil society becomes entangled in the enforcement of State migration objectives. This is visible through the intent to instrumentalise civilians, or non-State actors, for the policing of people on the move and that of other foreign nationals. Several examples of this exist worldwide in migration management structures including, amongst others

1. The Kefala labour migrant sponsorship system in the Middle East and the Arab Gulf;

2. The Search and Rescue Code of Conduct presented by the Italian government to European civil society operating in the Mediterranean Sea in July 2017; and

3. The expedited recruitment of civilians into border patrol authorities in Hungary.

Using a number of case studies (as identified above) this paper aims to conduct a comparative analysis of State practice in the context of the policing of people on the move and foreign nationals, both regular and irregular, and in sovereign territory, as well as externalised border zones.

Key words: kefala, policing, civilians, civil-society, migration

Introduction

In the context of migration management, State instrumentalization of citizens in the policing[1] of foreign nationals and people on the move[2] occurs via attempts by States to extend or reinforce their policing through non-State actors. This is driven by the fostering of division between nationals and foreigners, thereby undermining solidarity, and incentivising citizenry to give preference to protection of sovereign borders over the rights of all people on the move. Several instances, both long-standing and current, can provide examples of this, including the Kefala sponsorship system that guarantees a migrant worker's status through a citizen (Kafeel) in the Middle East and the Arab Gulf; the instigation of a Search and Rescue Code of Conduct that seeks to bind civil society actors rescuing people in mixed movements to border protocol over humanitarian obligations in the Mediterranean Sea; and Hungary's active, accelerated recruitment of citizens into the so-called "border hunter" authorities to guard its periphery against arrivals along the Balkan route. In these instances, the State extends, or doubles down on, policing of people on the move to non-State actors, primarily citizenry and civil society. That is not to say that the State forgoes control and surveillance of foreign nationals as a result of this referral, on the contrary, such an approach serves to reinforce existing, expansive policing practices of these individuals entering and moving throughout a given country's territory. This paper delves into several of these case studies, to provide insight into the actions of States driven primarily by their sovereign migration management agendas, rather than the opportunities presented by migration or the protection of individuals on the move.

Despite migration's historical role as an inherent component of human development, structural inequalities informed by a person's ethnicity, income level or country of origin continue to perpetuate the global mobility hierarchy as it stands skewed in favour of a privileged minority.[3] This is evident in the selectivity of States towards pathways for regular movement, whether affecting those in search of International Protection, better income opportunities, family reunification or otherwise. Despite the reality that "extending equality of opportunity means uncaging human potential"[4] by greater investments in mobility, State priorities towards migration control continue to hamper the right to life, the most fundamental right of every human being regardless of borders or lottery of birthplace.[5] Furthermore, opportunities for entry are increasingly linked to migration control in countries of origin, externalising State responsibilities and making opportunities for mobility contingent on the successful policing of borders over the human rights of people on the move.[6] A lack of accessible legal pathways for mobility compels people to move in irregular mixed flows for diverse motivations (a

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1 Policing of foreign nationals and people on the move, as it is referred to in this paper, can be defined as the use of mechanisms that regulate the border entry or exit, internal movement and working situations of foreign nationals, most commonly under domestic legislation (as opposed to the international, regional or domestic human rights frameworks). Of late, this has led to such tactics as pushbacks at borders, both land and sea, and administrative or criminal detention of people on the move during processing or prior to deportation.

2 Discursive framing of people on the move directly informs the manner in which migration policy and humanitarian response are designed, increasingly undermining the human rights of all people, irrespective of legal status. Though categorisation is indispensable to migration policy formulation, the act of doing so remains complex. This is particularly pertinent when considering the Middle East context, given that no country within the region has signed the 1951 Refugee Convention without limitations, meaning that the legal concept of a "refugee" varies broadly across State legislation (where present), and is supplemented or supplanted by the definition outlined within UNHCR's mandate (who essentially serve as a junior partner for State-led refugee response). To further illustrate, asylum seekers in Lebanon have been explicitly defined as "a person seeking asylum in a country other than Lebanon". In such contexts, a lack of opportunities for long-term integration and contribution to the host country environment place asylum seekers in similar situations to those of irregular migrants, compelling people to work informally, restricting their movement and criminalising their entry and presence through measures that can lead to detention and deportation. As is also the case along the various Mediterranean routes towards Europe, individuals compelled to embark upon irregular journeys may do so on the basis of composite and shifting motivations other than, or in addition to, "a well-founded fear of conflict or persecution", including better opportunities for work, education or healthcare. Bearing these factors in mind, alongside the increasingly mixed nature of flows on the ground as a result of a lack of coherent migration management structures in the Middle East, or along the Eastern Mediterranean route, 'people on the move' and 'foreign nationals' will be used here to refer to any individual present within the territory of a country outside of their State of origin.

3 Tspourapas, Gerasimos (2018) Labor Migrants as Political Leverage: Migration Interdependence and Coercion in the Mediterranean, International Studies Quarterly, doi: 10.1093/isq/sqx088

4 Ford Foundation (2016) Michael Clemens on Inequality and Migration, 29 July 2016

5 United Nations General Assembly (UNGA) (2017) Unlawful Deaths of Refugees and Migrants, Note by the Secretary General, Seventy-second session, Item 73 (b) of the provisional agenda, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, 15 August 2017

6 Danish Refugee Council (DRC) Policy Brief (2017) Implications of the EU's Outsourcing of Protection Responsibilities and Migration Control, March 2017; Mixed Migration Platform (2017) Towards Safety and Opportunity: Regular pathways towards Europe for refugees and other migrants in the Middle East, November 2017

lack of income opportunities; conflict and insecurity; family reunification; education; healthcare), a situation to which States, on the whole, currently prefer to invest in securitised response rather than improved migration opportunities. As the policing of migration becomes increasingly central to State priorities in the current political climate, so too does the policing of those undertaking such journeys.

The Case of the Kefala System

In selected countries in the Levant and the Arab Gulf[7], the Kefala sponsorship system remains the predominant model for policing of migrant workers. Migrants seeking employment in any one of these States can only gain access to entry and work upon guarantee of a local employer-sponsor, or Kafeel. This role is reserved exclusively for citizens who become, by proxy, responsible for the legal entry and exit, status, and work contract of the migrant in question. Though work visas and labour regulations are mandated by the respective Ministries of Labour and Interior of the receiving country, this system, by its very nature, has allowed for the development of a parallel regulatory environment for migrants, either by excluding them from labour law or integrating them with limited regulations afforded on the basis of sector (for instance, agriculture, domestic work, construction) or nationality. Furthermore, there remains no pathway to citizenship or civil rights for migrant workers in this region, regardless of time spent in the country. Through such an approach, the migrant workforce remains expendable under national legislation (despite evidence highlighting the indispensable contributions of both formal and informal migrant workers across these countries). All this considered, it is fundamentally the citizen herself who must satisfy the legal requirements put forth by the State in employing a migrant worker, thereby occupying the role of secondary law enforcement in this parallel migration management system. Furthermore, the prominent role played by citizens in the policing of migrants does not exclude the policing that migrants face at the hands of local authorities or security forces, but instead serves to reinforce existing law enforcement.

Mechanisms of the Kefala system

There are a series of control mechanisms that form the basis for and facilitate State extension of migrant policing to its citizens. These include fragmented labour policy that discriminates on the basis of nationality or sector, for instance, considering that domestic and agricultural workers (predominantly migrant-populated sectors) are explicitly excluded from Lebanese Labour Law[8], while non-nationals such as Palestinians are prohibited from working in the public sector where social security and labour protections are typically more prevalent.[9] In this way, more power is afforded to the citizen in the regulation of migrants under their employment. The same can be said of States in the Arab Gulf, where more than half of the labour force is comprised of migrants, in some cases reaching 80 or 90% of the total workforce.[10] Migrants in these countries are predominantly found in the private sector following recruitment by a network of agencies that extends into migrant-sending States.[11] In the Gulf Cooperation Council (GCC) countries,[12] for instance, this is illustrated by the fact that foreign workers have constituted between 50 and 90% of the private sector workforce, compared with less than 20% of nationals, according to data gathered between 2009 and 2013.[13] This model again further entrenches the extension of migrant labour regulation to non-State actors, a profitable

7   Countries where Kefala is still being implemented in the Arab Gulf are Bahrain, Kuwait, Oman, Saudi Arabia, Qatar and the United Arab Emirates (UAE), alongside Jordan and Lebanon from the Levant region.

8   Human Rights Watch (2015) Lebanon: Recognize Domestic Workers Union, Add Labor Law Protections for These Employees, 10 March 2015; International Labour Organisation (ILO) Labour Inspection Country Profile: Lebanon

9   Forced Migration Forum (2018) Palestinian Refugees in Lebanon: The Neglected Crisis, 14 February 2018; European Training Foundation (ETF) (2015) Labour Market and Employment Policy in Lebanon

10   Connor, Phillip (2016) Middle East's Migrant Population More Than Doubles Since 2005, Pew Research Centre, 18 October 2016

11   Interview with Dr. Adam Hanieh, Department of Development Studies, School of African and Oriental Studies (SOAS), 4 June 2018

12   The Gulf Council Cooperation (GCC) is a political and economic coalition of six countries in the Middle East, including Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Bahrain, and Oman.

13   Hertog, Steffen (2014) Arab Gulf States: An Assessment of Nationalisation Policies, No. 1/2014, Gulf Labour Markets and Migration (GLMM) Research Paper Series

venture for all involved, yet often least the migrant herself. State authority towards migrants is once again passed down from State to recruitment firm and subsequently to citizen, depriving the migrant herself of any possible agency.[14] Despite providing the indispensable service at hand, she is perceived to be utterly dispensable through a structure which dehumanises and commodifies migrants through their labour value alone.

Another of these control mechanisms implemented at the State level is illustrated by the bilateral agreements held between migrant-sending and receiving States that define a variety of wage levels below the national minimum wage, alongside restrictions upon migrants founding trade unions, complicating collective bargaining by migrant communities, promoting segregation and blocking political organising. In Jordan, for instance, as of the end of 2017, the minimum wage for migrant workers in the garment sector was 110 Jordanian Dinar (JOD) monthly, compared to 150 JOD for other sectors, highlighting the disparity in minimum wage standards within the migrant community, not to mention when compared with the national minimum wage at 290 JOD.[15] Further, though Collective Bargaining Agreements have given way to improved rights reserved for garment factory workers in Jordan's extensive Qualified Industrial Zones on paper, recent assessments indicate that the right to freedom of association is rarely upheld in practice.[16]

All of these mechanisms are underpinned by a fundamental understanding of nationals as superior and foreigners as inferior or subordinate. It is on the basis of this Othering[17], and the extinguishing of any possible solidarity, that States ensure the policing of migrants is reified via citizens. Practically, this is enacted through the minimal provision of economic, political or social rights by States to migrants. In Lebanon, migrant women, the dominant demographic within the domestic work sector, face particular discrimination as a result of exclusionary State policy, with no additional rights granted for women who give birth in Lebanon or marry a Lebanese national. On the contrary, groups of migrant women have even been deported in recent years for the alleged 'crime' of having children within Lebanese territory.[18] In the Arab Gulf, non-nationals similarly have no pathway to citizenship or civil participation of any kind, resulting in what have been referred to as "dual societies".[19] This dichotomy can also be observed at the ethnic level, in a manner which transcends State borders, demonstrated by a shift towards employment of non-Arab migrants in the place of Arab nationals. One such example can be found in the preference of GCC countries for non-Arab migrant labour over Palestinian, Egyptian or other Arab nationals, due to the possible implications of being mired in ongoing political conflicts, or the infiltration of "more radical social and political concepts" into the region.[20]

14 The concept of 'human agency' in relation to migration "is not simply about 'choice' as is often portrayed in policy debates, but rather about 'understanding decision making, the room for manoeuvre, opportunity structures and migration trajectories' within the contexts of modern nation States and the global capitalist system. The issue at hand is thus not about choice or free will, but rather how even on the edges of States and societies, faced with formidable levels of marginalization, people continue to resist, find room for negotiation, and exploit these narrow margins". See Mainwaring, Cetta (2016) Migrant agency: Negotiating borders and migration controls, School of Social and Political Science, University of Glasgow, Migration Studies Journal, Volume 4, No. 3, 2016, 289-308

15 Better Work (2018) Better Work Jordan Annual Report 2018: An Industry And Compliance Review, May 2018; Reznick, Alisa (2018) As Jordan's garment sector grows, activists push for better migrant workers' rights, 13 January 2018; Steffen Hertog (2014) Arab Gulf States: An Assessment of Nationalisation Policies, No. 1/2014, Gulf Labour Markets and Migration (GLMM) Research Paper Series ; Van Panhuys, Clara; Kazi-Aoul, Samia; Binette, Geneviève (2017) Migrant access to social protection under Bilateral Labour Agreements: A review of 120 countries and nine bilateral arrangements, Working Paper No. 57, Extension of Social Security (ESS) Research Paper Series, Social Protection Department Labour Migration Branch Conditions of Work and Equality Department, International Labour Office, Geneva

16 Better Work (2018) Better Work Jordan Annual Report 2018: An Industry And Compliance Review, May 2018

17 "Othering" has been defined by Powell and Menendian as "as a set of dynamics, processes, and structures that engender marginality and persistent inequality across any of the full range of human differences based on group identities. Dimensions of othering include, but are not limited to, religion, sex, race, ethnicity, socioeconomic status (class), disability, sexual orientation, and skin tone. Although the axes of difference that undergird these expressions of othering vary considerably and are deeply contextual, they contain a similar set of underlying dynamics." Menendian, Stephen; Powell, John A. (2018) The Problem of Othering: towards inclusiveness and belonging

18 Human Rights Watch (2017) Lebanon: Migrant Domestic Workers With Children Deported, 25 April 2017

19 Fargues, Philippe (2015) Immigration vs. Population in the Gulf, The Gulf Monarchies Beyond the Arab Spring. Changes and Challenges, European Universities Institute

20 Khan, Azfar and Harroff-Tavel, Hélène (2011) Reforming the Kafala: Challenges and Opportunities in Moving Forward, ILO Regional Office for the Arab States

Beyond State policies towards migrant policing, deeply ingrained and pervasive xenophobia and discrimination towards migrants within the host society help to uphold the hierarchy of citizen versus migrant worker, a structure evident through widespread social attitudes towards treatment of employees. In Lebanon, evidence depicts how employer-sponsors that treat their employees with a fairer hand often face stigma and social pressure to maintain the existing hierarchy, fuelled by stereotypes of 'unclean', 'disloyal' migrants.[21] In this manner, the Kefala system is bolstered by a social climate that promotes maximum division and minimum solidarity between citizens and migrants, undoubtedly shaping the way in which citizens enact their role as monitors and enforcers of the law.

At the level of the employer-sponsor (Kafeel), policing of migrants is enforced through another, additional set of mechanisms. Firstly, the threat of irregularity, and subsequent detention, prosecution or expulsion, grants undue power to the citizen responsible for the legal presence of the migrant in question. The transition from regularity to irregularity can occur if a migrant worker terminates the contract prematurely or unilaterally changes employer. In the case of overstaying a visa, or violating the terms of contract, a migrant instantly loses all privileges as a visible entity within the social, economic and legal structure of the host country.

The power of the Kafeel in policing the migrant is typically reinforced by a lack of government oversight of migrant-populated labour sectors (though this varies across sectors and country contexts, domestic work is particularly consistently excluded here). Evidence has demonstrated, in Jordan for example, that labour inspectorates that are functioning tend to prioritise detection of irregular migrants over genuine inspections of migrant rights and working conditions in contexts devoid of firewalls, a fundamental guarantee for vulnerable migrants working within a system at such high risk of exploitation.[22]

The policing of migrants is furthermore actualised through the restriction of movement by employer-sponsors. Passport confiscation is still reportedly prevalent across sectors in a large number of the countries regulated by Kefala, a practice widely prohibited but less commonly punishable by criminal penalty across these States.[23]

Incentives for States in policing through Kefala

The extension of policing of foreign nationals to citizens via Kefala presents myriad incentives for States, complicating its abolition or integration of migrant workers into the national framework. Firstly, the labour sponsorship system provides States with abundant supplies of expendable labour. With minimal oversight or obligations for recruitment or administrative management required, States are able to populate sectors (as previously mentioned, overwhelmingly private sector across all GCC countries aside from Bahrain) underserved by the local workforce, further reinforcing divisions between host country and foreign nationals.[24]

Another profitable knock-on effect of inflexible migration procedures that prevent migrant integration is the production of irregularity. As soon as migrants become irregular they become "illegal" and are subsequently stripped of all rights and therefore bargaining power. Easily exploitable and deportable, informal sectors (and arguably private sectors with limited oversight) thrive upon the profiteering of precarious

21   INSAN Association (2011) The Kefala System: When Employers also Accepted to Share their Perspective

22   Mixed Migration Centre Middle East and Eastern Mediterranean (2018) Examining the Protection of Migrants in Vulnerable Situations: in the contexts of Jordan and Lebanon, June 2018

23   Regional Office for Arab States, International Labour Organisation (ILO) (2017) Employer-migrant worker relationships in the Middle East: exploring scope for internal labour market mobility and fair migration

24   Hertog, Steffen (2014) Arab Gulf States: An Assessment of Nationalisation Policies, No. 1/2014, Gulf Labour Markets and Migration (GLMM) Research Paper Series

underground migrant labour. Rigid bureaucratic requirements for both Kafeel and employee in many ways compel both parties to work around the system in order to survive.

In the case of Jordan, for instance, this is evident through the recent expulsion of almost 9,500 migrant workers in 2017 for registration with agricultural permits, whilst working in other sectors legally reserved for Jordanian nationals.[25] Similarly, in Saudi Arabia, 'visa trading' resulted in a significant government regularisation campaign in 2013 to force migrants to register with a real employer (as opposed to a shadow broker allowing them to work informally in other sectors) or leave the country, resulting in the expulsion of 1,000,000 migrant workers.[26] However, indications of a shift in approach, that promotes national over migrant employment, are also visible through the Saudi government's recent announcement of their plans to implement a Closed Professions List this year for jobs in 12 private sector areas, after national unemployment surpassed 12% in the wake of falling oil prices, not to mention the total nationalisation of public sector jobs by 2020.[27] This indicates the extent of the country's current dependency on migrant labour.

The generation of irregular migration through stringent labour migration policy and limited integration prospects is not something unique to these countries at the global level, however this phenomenon in light of the high ratio of migrant to national workers in the Levant and Arab Gulf, coupled with underdeveloped rights-based migration governance frameworks, certainly is and may go some way to explaining the perceived need for such a stringent migrant policing approach.

The Case of the Search and Rescue 'Code of Conduct'

The arrival of significant numbers of individuals in mixed migratory movements - moving due to a complex multiplicity of factors - largely across the Mediterranean and into the European Union from 2013, and the mismanagement of the situation amid a general lack of solidarity across the EU bloc, resulted in complex migration pressures within Europe. As European nations have increasingly sought to restrict the entry of people, largely through irregular means, into their territories, the Mediterranean has become a key frontier where States have increasingly deployed border control measures. In the case of Search and Rescue operations in the Mediterranean, this has led to attempts by the Italian State to extend their migration agenda through civil society actors by attempting to co-opt them into their border management regime. This regime is aimed at reducing arrivals, and enhancing the policing of foreign nationals and people on the move in European territory. The clearest articulation of this attempt to instrumentalise civil society actors working in the Mediterranean can be seen in the attempt of the Italian authorities to induce non-governmental organisations (NGOs) conducting Search and Rescue operations to sign and abide by a Code of Conduct. This Code of Conduct simultaneously sought to restrict their ability to operate in the Mediterranean whilst also seeking to involve them in policing of foreign nationals.[28]

While the Italian authorities initially organised Search and Rescue operations in the form of Mare Nostrum following public outcry over drownings off Lampedusa at the end of 2013, a complex number of factors, including a lack of solidarity between EU States largely unwilling to take in the numbers of new arrivals led to the cessation of funding and operations after one year. This

25   Prieto, Ana V. Ibáñez (2018) 9,448 migrant workers deported in 2017 — Labour Ministry: Most cases include expired work permits or migrants working in sectors reserved for Jordanians, Jordan Times, 23 January 2018

26   Hertog, Steffen (2014) Arab Gulf States: An Assessment of Nationalisation Policies, No. 1/2014, Gulf Labour Markets and Migration (GLMM) Research Paper Series

27   Al Araby (2018) Saudi Arabia Bans Foreigners from a Dozen Professions, 31 January 2018; Abed, George (2017) The three challenges facing Saudi Arabia's crown prince, Financial Times, 22 November 2017

28   Code of conduct for NGOs Involved in Migrants' Rescue Operations at Sea July 2017

operation was replaced by Operation Triton under the European Border Security Agency, Frontex. Since then, European States have invested in measures to extend border control further and further away from their sovereign territory, out into the Mediterranean Sea and beyond. Such migration management measures extend to third party agreements to prevent original embarkation and allow push backs (for instance the EU-Turkey Deal and the Memorandum of Understanding (MoU) between Italy and Libya), clearly prioritising the policing of borders over saving lives. In relation to Search and Rescue explicitly, this migration management regime has manifested in a practice of non-assistance, with no European State operation claiming the primary authority for Search and Rescue, leading civil society actors to initiate their own operations to save lives in what has become the deadliest migration route in the world.[29] In June 2018, for instance, almost one in ten people died or went missing on departure from the Libyan coast.[30]

In the conduct of these Search and Rescue operations, NGOs have faced considerable and increasing pressures. Although, originally, they enjoyed some degree of cooperation with European States, more recently, charges have been levelled against NGOs for acting as a "taxi service" for people making the crossing and of collusion with smugglers[31], as European States sought justification for a crackdown on crossings in the Mediterranean under the guise of fighting trafficking and smuggling. This agenda served both to challenge the intentions of those on the move and those seeking to help them, undermining the solidarity between citizens and people on the move which had led to a call for increased search and rescue and the launch of Mare Nostrum in 2013. In August 2017, NGOs and Search and

Rescue operations came under even greater pressure with the drafting and presentation of the Code of Conduct to NGOs operating in the Mediterranean by the Italian authorities, with the ultimatum that a failure to sign would lead to the denial of entry into Italian ports, critical for the disembarkation of those rescued at sea.

The Code of Conduct contained clauses which both constrained the ability of NGOs to operate and compromised their humanitarian principles. Under the Code, entry into Libyan waters is restricted, with the Libyan Coastguard being given precedence for Search and Rescue. Additionally there is an obligation not to make trans-shipments to other vessels.[32] This is part of the Modus Operandi of small vessels who play a critical role in stabilising and moving people to larger ships, but which face greater challenges in transporting people long distances; and moreover takes boats out of the water for several days by forcing them to sail back to port and return again after each rescue.[33] Moreover, one of the most contentious requirements was an obligation to 'receive on board judicial police officers' for investigation related to trafficking in human beings, among others. Such an obligation, the NGOs in question stated, was in violation of their humanitarian principles, notably neutrality.[34] Moreover, this clause would make NGOs an instrument in the State's policing of people on the move and allow the State to extend their own policing through these actors.

There was no clear need for regulation of such operations as guidance for the conduct of Search and Rescue is already clearly laid out in international maritime law[35] and was designed to ensure that people would be rescued; not setting up mutually exclusive zones and never

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29   European Council on Refugees and Exiles (ECRE) (2017) Mediterranean still the busiest and deadliest gate to Europe, 1 December 2017

30   The Guardian 2018 Mediterranean: More than 200 migrants drown in three days, 3 July 2018

31   Reuters 2017 Aid groups deny rescue ships in Mediterranean are abetting migrant smugglers, March 2017

32   'The transfer of rescued people from one boat to another.' See Q&A: Why MSF didn't sign the Code of Conduct for Search and Rescue 2 August 2017

33   MSF (2017) Why MSF didn't sign the Code of Conduct for Search and Rescue August 2017; and Human Rights Watch (2017) EU: Draft Code for Sea Rescues Threatens Lives 12 July 2017

34   "For us, the most controversial point … was the commitment to help the Italian police with their investigations and possibly take armed police officers on board," Jugend Rettet coordinator Titus Molkenbur said. "That is antithetical to the humanitarian principles of neutrality that we adhere to, and we cannot be seen as being part of the conflict." The Guardian 2017 Aid groups snub Italian code of conduct on Mediterranean rescues, 31 July 2017

35   International Maritime Organisation (adopted 1979, entered into force 22 June 1985) International Convention on Maritime Search and Rescue

envisaging the creation of a competition not to help.[36] The Code of Conduct, however, appears to undermine this, as well as constraining the activities of NGOs, making Search and Rescue harder. MSF have stated that the Code of Conduct "undermines the current reduced capacity", that it "does not have saving lives as its sole core objective", and that the framing was as "a migration policy tool".[37] Even the Italian Transport Minister - to whom the Coastguard was reporting - stated "we are talking about rescue at sea, which is governed by international law, not by the politics of migration control".[38] Moreover, there was very little substantive discussion with NGOs - who were specifically marked out by the Code of Conduct - over the formation of the draft, nor negotiations in good faith. Such a targeted campaign which undermines the work of NGOs, whilst also compromising their principles, with a clear political outcome for the Italian - and broader European - State(s), demonstrates the political nature of the tool, over the practical application to save lives. The outcome of the Code of Conduct for European States would be a step towards their migration management goals, including the prevention of arrivals and policing of people on the move; by trying to force NGOs to cooperate, the Italian State sought to instrumentalise them in achieving these broader migration management goals.

Furthermore, the public questioning of the motives and operations of NGOs contributes to negative stereotypes of migrants and those helping them, likely contributing to reduced solidarity between foreign nationals and citizens, and an uptick in xenophobic sentiments. The suggestion that NGOs are offering a "taxi service" and the emphasis on the need to crackdown on smuggling and trafficking undermines and glosses over the complex motivations and needs of those

undertaking such journeys. Bringing the motivations of those migrating and those helping them into question undermines potential solidarity between citizens (of Europe, in this case) and people on the move and enables a stricter migration control regime leading to migrant suffering and even deaths. The framing of the text of the Code of Conduct is in the same vein, stating, for instance, that NGOs cannot 'facilitate the departure and embarkation of vessels carrying migrants: with the obvious intention not to facilitate contacts with traffickers'.

Ultimately, the Code of Conduct was not signed by all NGOs operating in the Mediterranean and several NGOs were able to negotiate amendments to the language on a bilateral basis before signing (for instance SOS Méditerranée).[39] It also only carried quasi-legal status and several NGO vessels who did not sign the Code of Conduct still operate, albeit with continued pressures and challenges. Several of the NGOs involved also pushed back strongly against cooperation with the police, and have remained unified on the position that they cannot willingly allow the return of people on the move to Libya, in spite of attempts to prosecute some vessels for not giving precedence to the Libyan Coast Guard.[40] On the part of the Italian State, the Code of Conduct in itself was not able to fully co-opt NGOs into their migration management regime, however they have been able to take some steps towards this. Through this exercise, a clear message has been delivered that States are willing to extend their arm of authority into the mandate and actions of civil society and to seek to instrumentalise civil society in their broader migration management regime. Furthermore, in doing so, States have contributed to undermining prospects for solidarity between foreign nationals and citizens.

36   Interview with Daniel Howden, Senior Editor, Refugees Deeply, May 2018

37   MSF (2017) Why MSF didn't sign the Code of Conduct for Search and Rescue, August 2017

38   Daniel Howden 2018 Europe's new anti-migrant strategy? Blame the rescuers, 20 March 2018

39   Ecre (2018) Interview: Civil society extends to the sea, search and rescue NGOs in the Mediterranean, March 2018

40   See for instance: Newsdeeply (2018) How Italy's NGO Boat Seizure Exposes Europe's Dangerous Policy at Sea, March 2018; and The New Arab (2017) An Impossible Choice: Why Save the Children cannot endorse returning refugees to Libya, August 2017

Enabling environment of the Search and Rescue 'Code of Conduct'

The State-led attempts we see in the case of the Code of Conduct to co-opt civil society into the policing of migrants and their broader migration management goals were enabled by a number of factors.

In response to the so-called "migration crisis", the language of sovereignty and supremacy of national law is increasingly being used by European governments to undercut their obligations under international law, reducing its effectiveness as a mechanism to protect those on the move. In the current climate, the focus on border control is taking precedence over the right to life. For instance, whilst international maritime law details the obligation for Search and Rescue of persons in distress, national immigration laws can "punish the conduct of facilitating illegal entry into a State's territory".[41] Several governments have prosecuted various vessels, including NGOs, on these grounds. Moreover, the United Nations Convention on the Law of the Sea (UNCLOS) also provides that "ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea."[42] This includes "stopping and anchoring ... for the purpose of rendering assistance to persons, ships or aircraft in danger or distress".[43] However, the Code of Conduct contains an "absolute ban on the entry by NGOs into Libyan waters".[44] Associazione per gli Studi Giurdici sull'immigrazione (ASGI) argue that this clause "not only is an exercise of exorbitant jurisdiction by Italy, but it also aims at preventing the exercise by those foreign ships of their responsibility to protect life at sea and of their right of innocent passage under international law. It is thus not in conformity with international law."[45] This is additionally problematic considering that Libya is widely reported as not being a safe place to return to, due to well-documented human rights abuses taking place in the country, often targeted at people on the move, and the fact that Libya is not a signatory to the Refugee Convention.[46] In current conditions, return of people attempting to make the crossing to Libya would 'appear to be at odds with the obligation to provide a place of safety for migrants rescued at sea.'[47]

The lack of solidarity among States in the EU, mostly reluctant to take in arrivals, has also resulted in a crisis of management of migration flows, with EU States unable to come to an agreement on a fair system to share the challenges and opportunities created by new arrivals, as has been well documented.[48] This leaves the burden squarely on the shoulders of frontline States such as Italy, who both have an vested interest in forcing other European States to act (for instance by refusing to disembark vessels carrying people saved at sea[49]), and have to operate in an environment where they must take take full responsibility for those making the crossing (creating an incentive to keep arrivals down).[50] One of the key mechanisms to address this lack of solidarity over migration management has been the establishment of agreements with third countries in order to prevent people from being able to attempt the crossing at all. In the case of the EU-Turkey Deal and the MoU between Libya and Italy, third party States are incentivised to prevent people from being able to make the

41   Hernan del Valle (2016) Search and Rescue in the Mediterranean Sea: Negotiating Political Differences, 8 April 2016

42   United Nations Convention on the Law of the Sea 10 December 1982

43   Associazione per gli Studi Giurdici sull'immigrazione (ASGI) (2017) Position Paper on the Proposed "Code of Conduct for the NGOs Involved in Migrants' Rescue at Sea", July 2017

44   Ibid.

45   Ibid.

46   Amnesty International (2017) A Perfect Storm: The Failure of European Policies in the Central Mediterranean

47   Associazione per gli Studi Giurdici sull'immigrazione (ASGI) (2017) Position Paper on the Proposed "Code of Conduct for the NGOs Involved in Migrants' Rescue at Sea", July 2017

48   For instance Reuters Merkel presses over migration as 'European solution' fails, 24 June 2018

49   Reuters Italy says Malta not taking in migrant ship is 'inhumane', 22 June 2018

50   Heller, Charles; Pezzani Lorenzo (2015) Ebbing and Flowing: The EU's Shifting Practices of (Non-) Assistance and Bordering in a Time of Crisis "the Dublin Convention has played a key role in making southern EU coastal states principally reluctant to assist at sea and disembarkment."

journey across the Mediterranean. The Code of Conduct falls within this pre-existing framework, as the intent and foundation of an externalised[51] agenda was already in place. Through the Code of Conduct, the Italian State could then further support Libyan interceptions which were already taking place, but with the further minimised presence of other actors.

Moreover, the Code of Conduct should be viewed against the backdrop of increasingly xenophobic rhetoric in Europe and a political shift to the right, which has reduced tolerance and political will towards integration and protection of people on the move. Former Italian Minister of Interior, Minniti, was known for his tough stance on immigration and was a key force behind the final shape of the Code of Conduct. It was after the involvement of the Italian Ministry of Interior in the draft that it changed shape, with Minniti having identified a political opportunity to make it harder for NGOs to operate.[52] Such rhetoric again plays its part in undermining solidarity between citizens and foreign nationals and by extension with the civil society trying to help them. In the 2018 elections, immigration continued to be a forefront issue characterised by fear-mongering on the part of politicians, suggesting that there will be no softening in approach; something already playing out in the increasing closures of Italian ports to vessels carrying people on the move.[53]

The Code of Conduct therefore demonstrates an attempt by the Italian State to instrumentalise citizens and civil society actors in the policing of people on the move and their wider migration objectives, which prioritise the policing of borders over the right to life. The lack of solidarity and preparedness in the EU to deal with the unexpected arrivals into Europe caused particular pressures on Italy as a frontline State, leading to incentives for the State to keep numbers down.

With arrivals primarily reaching Italy across the Mediterranean, the Code of Conduct was seen as an opportunity to try to instrumentalise civil society operating Search and Rescue into this migration management goal. As a further means to achieve this, the Italian (and other European) State(s) have given precedence to national laws and the language of sovereignty, as well as engaged in the othering of foreign nationals to undermine solidarity between them and citizens, to justify the policing of borders and, by extension, of people on the move themselves. Ultimately, however, despite the State's intentions, NGOs have resisted their agenda through questioning or refusing to sign the text and continuing to display solidarity towards those on the move, manifested through a continued emphasis on their rights and the legal basis for Search and Rescue in international law.

The Case of Hungary's "Border Hunters"

During the peak of the mixed migratory movement of people through Europe towards Germany and other Western European States in 2015, Hungary became a country of transit for those on the move in large flows. An increasingly hostile State-led approach to migration following these large movements – often characterised by externalisation measures – was demonstrated in the refusal to take part in the 2015 reallocation scheme agreed upon in the EU bloc, rising xenophobic language and an aggressive border control policy. A two-layered border wall was constructed along Hungary's borders with Serbia and Croatia to prevent the physical movement of people into their territory, a July 2016 law allows for push-backs of those who have entered irregularly[54] and Hungary currently significantly limits the opportunities for any kind of regular entry though transit centres set up at the border. In the

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51 Externalisation of migration management is an approach that seeks to extend State responsibilities towards migrants to areas outside of their sovereign territory, through measures that contain and deter movement including, for example, direct actions such as the policing of people on the move through pushbacks and administrative detention, or indirect policies or bilateral agreements with migrant-sending States, such as development aid that remains conditional on irregular migration control. See, for example, IFRC (2013) Externalising Migrant Vulnerabilities and Rights; DRC (2017) DRC Policy Brief: The implications of the EU's outsourcing of protection responsibilities and migration control

52 Interview with Daniel Howden, Senior Editor, Refugees Deeply May 2018

53   HRW (2018) Xenophobia in Italy's Election Campaign, February 2018

54   Human Rights Watch Hungary: Failing to Protect Vulnerable Refugees, 20 September 2016

context of this approach towards migration, the Hungarian government has used the language of national identity in the public sphere and taken a tough stance to garner an image of control, gain popular support and create an othering of those arriving at Hungary's borders which presents them as a threat, minimising solidarity on the part of citizens. In 2016, the government began a campaign to recruit so-called "border hunters"[55], incentivising recruitment with a significant salary, to bring civilians into the State apparatus to police people on the move at their borders through an expedited process. This, combined with a series of restrictive measures on civil society providing any support to people on the move, has further undermined the potential for solidarity and support for them, enabling a migration management regime which prioritises policing of borders rather than the protection of people. The tactics used by the Hungarian authorities provide a worrying case study for how far governments are prepared to go in order to curb migration, and to involve and instrumentalise their citizenry in the process.

In 2016, the National Police Headquarters in Hungary put out a call for the recruitment of 3,000 so-called "border hunters". These "border hunters" were to be given a six-month training - compared to the four years received by the regular police - to join the national police and bolster the 10,000-strong force already patrolling the border with Serbia. The recruitment campaign was highly publicised, with recruitment stalls set up in business centres, on the streets[56], and taking place in secondary schools.[57] Offering a salary of 22,300 Hungarian Forints (HUF)[58] (approximately 680 Euros) per month - well above the minimum 161,000 HUF[59] (approximately 500 Euros) guaranteed for those with secondary education -

the authorities offered a clear financial incentive to apply. Indicative of Hungary's approach to border management and the policing of people on the move, candidates with martial arts experience are stated to be at an advantage[60], and the recruits are trained in judo.[61] It should be noted that there are currently known to have been over 40 investigations launched into instances of excessive use of force by police at the border over a period of 18 months, with most investigations being closed without further action.[62] MSF teams also say that people arriving at the border are reporting being beaten and stomped on by border guards at the Serbia-Hungary border.[63] Whilst the specific involvement of these "border hunters" in such actions cannot be independently verified, they are clearly recruited into a border regime with pre-existing violent tendencies, which includes abuses and push-backs against people on the move.

Simultaneously the Hungarian authorities have been engaging in a crackdown on civil society, most notably under the 'Stop Soros' legislation passed in 2018.[64] Such legislation threatens prison terms for anyone aiding people on the move, severely limiting the activities of civil society. The legislation also restricts the ability of civil society to have a presence in border areas, as the police can issue restrictions to private individuals on the grounds of suspicion that they are supporting illegal immigration, and criminalises any attempt at border monitoring.[65] Thus, any kind of oversight or accountability for actions on the borders is severely restricted. The prevention of interaction with people on the move could serve to undermine actions of solidarity with them. Such restrictive measures are having a severe impact on the work of civil society in the country. Open Society Foundation, for example, closed their office in Budapest and

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55   "Border Hunters" is not an official job title, however those working in these positions have been widely referred to as such in the media

56   Interview with Todor Gardos, Acting Eastern Europe/Balkans Researcher, Human Rights Watch, 14 June 2018

57   Reuters Hungary to arm new 'border hunters' after six month crash course, 9 March 2017

58   Hungarian Police Website Call for Proposals

59   Reuters Hungary to arm new 'border hunters' after six month crash course, 9 March 2017

60   Hungarian Police Website Call for Proposals

61   Reuters Hungary to arm new 'border hunters' after six month crash course, 9 March 2017

62   Amnesty International Hungary: Refugees and Asylum Seekers

63   Doctors Without Borders 2017 MSF denounces the widespread violence on migrants and refugees at the Serbian/Hungarian border, 8 March 2017

64   The Guardian 2018 Hungary passes anti-immigrant 'Stop Soros' laws, 20 June 2018

65   Open Society Foundations 2018 Briefing on the 2018 anti-NGO (stop-soros) bill, 18 June 2018

moved to Berlin in the summer of 2018, stating that "it has become impossible to protect the security of our operations and our staff in Hungary from arbitrary government interference".[66] This tough stance on foreign nationals looks set to continue as, in the Seventh Amendment of the Basic Law of Hungary drafted in May 2018, the onus is projected to be on the individual seeking protection to prove that they could not have received this in any of the countries through which they passed since leaving their country of origin.[67] This, combined with a crackdown on the ability of civil society to support such populations, will make it near impossible for asylum seekers to overcome this burden of proof by themselves; thus, even more drastically curtailing the ability of anyone to claim asylum in Hungary, and preventing those entering its territory from effectively seeking protection or opportunity.[68]

The recruitment of "border hunters" is part of a two-fold approach towards a migration management regime that prioritises the policing of borders, and by extension of people on the move themselves, over their protection. In this case the Hungarian authorities are reinforcing their policing infrastructure by bringing their citizenry into the apparatus of the State. In order to use its citizenry in such a way, the State has provided a clear financial incentive, whilst engaging in a public recruitment drive, combined with highly rhetorical language designed to secure buy-in to the State's goals. Simultaneously undermining the work of civil society, and, in particular, their access to the border areas to provide any oversight or solidarity with migrants, further ensures the objectives of the State border management regime.

Mechanisms allowing this

The policing of people on the move in Hungary can be understood against the backdrop of intensely xenophobic language on the part of politicians in reaction to the arrival of people in mixed migratory movements into Europe in larger numbers in and from 2015. In order to carry out such restrictive border management, the government appeals to notions of the "self-identity" of Hungary, with the seventh amendment of the Basic Law of Hungary, stating that the "quota based distribution of migrants" proposed by Brussels "endangers the safety of our country and would permanently change the population and culture of Hungary".[69] Prime Minister, Viktor Orban, has also used intensely xenophobic language in public debates on migration, making statements such as, "we do not want our colour... to be mixed with others"[70] and has used rhetoric conflating people on the move with terrorists, calling them "a Trojan horse for terrorism"[71], and stating "we cannot let them into Europe". Such language creates an othering of people on the move, which makes it easier to deprive them of their rights and human agency, and to secure public support and cooperation in doing so.

As examined in the Code of Conduct case study, national laws and practice are also used by Hungary as an excuse to fall short on International Human Rights obligations, or act in contravention of international law. For instance, recent amendments to the Asylum Act and the Act on the State Border (July 2016) allow anyone apprehended within eight km of the Serbian-Hungarian or Serbian-Croatian border fence to be escorted back to the external side of the fence, effectively legalising pushbacks and denying protection, in clear breach of obligations under international and European law.[72] This policy, as well as the physical barriers to entry created by the border wall and police presence (reinforced by the recruitment of "border hunters"), mean that people on the move are effectively prevented from entering Hungarian territory altogether and being able to access the rights and protections they are due under international human rights law.

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66   Open Society Foundations 2018 The Open Society Foundations to Close International Operations in Budapest, May 2018

67   Unofficial Translation 2018 Seventh Amendment of the Basic Law of Hungary, May 2018

68   Interview with Todor Gardos, Acting Eastern Europe/Balkans Researcher, Human Rights Watch, 14 June 2018

69   Unofficial Translation 2018 Seventh Amendment of the Basic Law of Hungary, (May 2018)

70   OHCHR 2018 37th Session of the Human Rights Council Opening Statement by UN High Commissioner for Human Rights (26 February 2018)

71   Reuters 2017 Hungary to arm new 'border hunters' after six month crash course, 9 March 2017

72   Hungarian Helsinki Committee (2017) Pushed Back at the Door: Denial of Access to Asylum in Eastern EU Member States

The recruitment of "border hunters" situated in the context of a public campaign, a highly xenophobic narrative which presents people on the move as a threat to society, and a crackdown on civil society, can be seen as an explicit attempt by the State to instrumentalise its citizenry in the support and enactment of its migration management goals. In recruiting "border hunters" the State is not referring responsibility to them but is extending its own policing through its citizenry by inducing them to become part of the apparatus of the State. This is enabled by a fostering of division between citizens and foreign nationals which undermines potential for solidarity and gives undue precedence to notions of national security over individual protection.

Conclusion

Through an examination of these case studies it is demonstrable that the States in question have attempted to instrumentalise citizenry in their migration management objectives, as indicative of a larger trend towards securitisation of migration management. All three case studies appear to demonstrate that States are actively seeking ways to involve or co-opt their citizens into migrant policing, in line with the increasingly hostile approach to migrants. This is not an abdication of the State's own attempts to police migrants, but rather seeks to reinforce and bolster them. An underlying theme in all three cases that helps to enable this approach is the fomenting of distinct sets of rights and the erosion of any possible solidarity between nationals and migrants, reaffirming a hierarchy that deprives migrants of agency and undermines access to the protection and fundamental rights to which they are entitled.

Indeed, such distinctions appear to be perceived as profitable by States in the production of inexpensive, easily exploitable irregular labour and the provision of minimal rights and services to people on the move. Such factors exacerbate and perpetuate this cycle of securitisation and externalised migration governance increasingly prevalent in regions the world over.

Though migration should not be perceived as a problem to be solved or an opportunity to be exploited at the expense of marginalised people, it seems likely that governments will continue to seek new and innovative ways to control migration, as human rights are deprioritised by internal agendas, with the ultimate price paid by people on the move or those living outside their countries of origin.

Mixed Migration Centre

The Mixed Migration Centre (MMC) was established in February 2018. It brings together various existing regional initiatives – hosted or led by the Danish Refugee Council (DRC) – engaged in data collection, research, analysis and policy development on mixed migration issues into a new global network of mixed migration expertise.

The Mixed Migration Centre - Middle East & Eastern Mediterranean, provides quality mixed migration-related information for policy, programming and advocacy from a regional perspective. Our core countries of focus are Iraq, Jordan, Lebanon, Syria, Turkey, Israel/OPT and Greece.

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