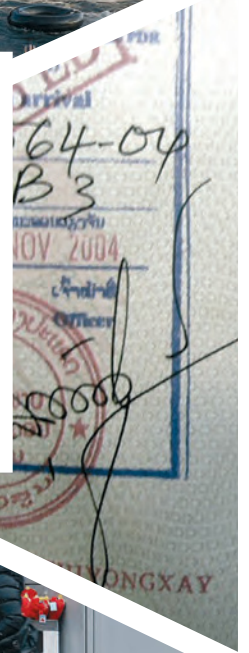




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Verena Risse

**(Recent) Deviations in Border
Control – Challenges for Normative
Strategies of Justification?**

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(Recent) Deviations in Border Control – Challenges for Normative Strategies of Justification?

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Abstract

This paper targets the observation that border control has become increasingly diversified not least since what is commonly referred to as the ‘refugee crisis’. This development, however, prompts the question to what degree conventional normative justifications or legitimization strategies of border control can still acknowledge these diversified practices. Alongside, the discussion allows evoking the more general question at what point a normative argument must take into account diverging practices. This paper consists of two parts: The first part investigates the deviations in border control, thereby structuring these along the lines of externalization, internalization, and privatization; the second part examines whether commonly used normative arguments for the justification or legitimation of border regimes can still be upheld in the face of deviating border control practices. The discussion ultimately allows a reflection upon the relation between theoretical considerations and changing practice in the context of border control.

Keywords

Migration; borders; border control; justification

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During the last years, one could witness not only a considerable increase in refugee movements, migration routes and asylum applications, but also a continuing diversification in border control strategies. This development, however, prompts the question to what degree conventional normative justifications or legitimizations of

¹ Email: verena.risse@tu-dortmund.de. This paper presents several arguments that I have previously published in German language in two papers. Please also refer to them for references: Verena Risse, „Die Diversifikation von Staatsgrenzen – Anlass zu einer konzeptionellen Neubestimmung?“, Berliner Debatte Initial Vol. 29, No. 1 (2018), pp. 62-72; Verena Risse, „Staatsgrenzen als faktische Grenzen der theoretischen Reflexion?“ In: Carlo Masala (ed.), Grenzen: Multidimensionale Begrifflichkeit und aktuelle Debatten, pp. 39-54. Baden-Baden: Nomos, 2018.

border control can still acknowledge the diversified practice. Alongside, the discussion allows evoking the more general question at what point a normative argument must take into account diverging practices. This paper will proceed in three steps.

After brief preliminary definitional remarks in a first section, an investigation of the increasingly diverse practices of border control mechanisms will be made in the second section. In contrast to the standard case of a geographical state border controlled by a state official to prevent unauthorized access to the territory, several deviations can be noted. The dominant deviations can be grouped in three categories, i.e. the externalization, internalization and privatization of border control. Externalization refers to the relocation of border control outside the state territory (as for instance witnessed in Australia's turning-back-the-boats policy). Internalization refers to the relocation of border control within the state territory (exercised e.g. by means of reviewing a person's documents or residence status). Privatization describes delegating the task of border control to non-state agents (as in the case of outsourcing refugee registration or in the established practice of carrier sanctions).

Against the background of these depicted practices of border control, in a third section, it shall be examined whether commonly used normative arguments for the justification or legitimation of border regimes can still be upheld in the face of deviating border control practices. In particular, arguments turning on democracy, autonomy and rights as well as procedural and instrumental justification strategies will be considered. What can be shown by investigating these justifications is first, that they accommodate non-standard ways of border control only insufficiently and second, that the deviations seem to be explicitly tailored to make use of normative gray zones.

To what degree, however, a normative theory must take into account new and diversified legal and political practices is a question that accompanies the discussion in this paper and will therefore be made explicit in section four, before the findings are summarized in a concluding section.

1. Preliminary definitions and clarifications

Before turning to the different deviations of border control and a discussion of the relevant cases illustrating them, a few definitions and clarifications seem appropriate.

First of all, it is necessary to point out that 'deviation' inherently implies that there is a standard case from which new or altered cases differ. This standard case of

border control is as follows: A state official prevents unauthorized access to the state territory at the geographical state border. Several elements are important here. First, with regard to the actor, it is a civil servant acting in the name of the state when performing the duty of border control. Second, the location of border control usually is the geographically defined state border delimiting the state territory. Third, the aim of the action is to prevent unauthorized access, i.e. to prevent access to those persons who do not produce the necessary documents or reasons to enter. This standard case is still at work at numerous borders, but has been complemented by different variants of border control as will be laid out in the next section.

Furthermore, in this paper, a border shall be understood as the point where those measures are carried out in which the access of foreigners to a state territory is being controlled. It seems noteworthy that this definition links a geographical place with a targeted action.

2. Systematizing deviations in border control mechanisms?

Deviations in border control mechanisms cannot only be witnessed during the last couple of years, but constitute an ongoing development. Still, one might consider that today there is a new degree of differentiation to these deviations², forging mechanisms that target certain groups or even individuals ever more specifically.

In order to structure this wide range of diverse border control mechanisms, this paper will concentrate on three kinds of deviations that center on spatial and actor-specific changes: externalization, internalization and privatization. The following paragraphs will define and conceptualize these deviations in more detail and illustrate them with examples.

a. Externalization

The first case, which will be discussed here, is the spatial deviation of externalization. Border control is being externalized when the decision of whether someone is admitted to a country is relocated outside the state territory.³ This is to say, the effective action of border control takes place before the would-be immigrant reaches state territory. The places where the externalized border control is carried out could be third or neighboring countries, the migrants' home country or international zones.

² Among many others, see e.g. Heintel, Martin et al. (2017): *Grenzen – eine Einführung*, pp. 1-15.

³ Other scholars refer to a similar set of cases as “extraterritorialization”. See e.g. Hoesch (2017): *Grenzpolitiken und Flüchtlingsschutz*, p. 315.

But not only the places, also the precise mechanisms and actions through which externalized border control is being executed differ as the following cases show.

One of the oldest and most commonly practiced variants of an externalization of border control is the practice of carrier sanctions⁴. Carrier sanctions are incurred if airlines or other shipping and transport companies transport passengers to their destination who do not carry the necessary documents required for entry into this country. The sanctions take the form of pecuniary fines and – in some cases – the denial of landing privileges. In addition, the transport company is required to transport the person back to the country of origin. The duty to check the documents is thus conferred upon the carrier personnel handing out boarding passes. These employees, however, are not trained border officers. Rather, they perform this check alongside a number of other professional duties. It might be assumed that in the aim of avoiding a fine for their employer, the personnel in charge will carry out the check rather strictly. Carrier sanctions are thus a form of externalization by which border control is relocated to any airport with which an air connection is being upheld.

Another example for the externalization of border control is Australia's "Turning Back the Boats Policy".⁵ Here, Australian marine ships intercept refugee boats on the High Seas to prevent them from reaching Australian shores and (ideally) divert them back to their country of origin. This practice is predicated on the fact that on the High Seas international law applies, but not the more detailed Australian migration law.

A slightly different case, but effectively also an emanation of an externalization, are emigration controls at countries of origin or in transit states in order to explicitly prevent migration movements towards (specific) third countries. One of the best-known examples for this practice is the control of Northern African shores to prevent boats from leaving towards Europe across the Mediterranean. Another example are French officials preventing migrants from crossing the channel to Britain. Usually, these practices are stipulated in bilateral agreements between the countries involved. Between Italy and Libya, for instance, several agreements have been concluded in which Libya commits to secure its Northern maritime borders so that no refugee

⁴ For an extensive discussion of the legal background and normative implications of carrier sanctions, see Bloom, Tendayi; Risse, Verena (2014): *Examining Hidden Coercion at State Borders. Why Carrier Sanctions Cannot Be Justified*, p. 65-82. Also see Kritzman-Amir, Tally (2011): *Privatization and Delegation of State Authority in Asylum Systems*, pp. 193-215.

⁵ Klein, Natalie (2014): *Assessing Australia's push back the boats policy under international law: Legality and accountability for maritime interceptions of irregular migrants*, pp. 414-444. Schloenhardt, Andreas; Craig, Colin (2015): *Turning Back the Boats. Australia's Interdiction of Irregular Migrants at Sea*, pp. 536-572.

boats can leave for Italy, while Italy commits to support Libya financially and in the training of its border staff.⁶ It is thus the border officers of a foreign country, who in this emanation of an externalization of border control practices, protects another state's national border. The border control is thus externalized in the sense that it is relocated to another country.

Also certain forms of detention centers outside a state's territory have been established, e.g., by the United States, and add to the externalized border complex.⁷ The European „hot spots“, which have been established in Greece and Italy since 2015, are not entirely of the same kind. These centers are indeed located on European territory and are officially meant to facilitate the registration and the check of the entry documents of the arriving migrants. However, first analyses suggest that especially the Greek hot spots are rather used to intercept migrants and send them back to third countries or transit states and most importantly to Turkey.⁸

The various examples for an externalization of border control, that were given here, differ regarding the form through which the externalization is executed, the external location (i.e. several countries in the case of carrier sanctions, one country in the case of border controls in countries of origin or no national territory in the case of Australia's turning-back-the-boats policy) as well as regarding the actors charged with carrying out the border control (i.e. foreign state officials or private [economic] actors).

b. Internalization

A deviation that takes the reverse direction is the internalization of border control. Border control is being internalized when the decision of whether someone is admitted to or authorized to stay in a country is relocated inside the state territory. In this form of internalized border control, it will most often be checked whether a person holds the required legal status or residence permit to stay in the country. This

⁶ Bialasiewicz, Luiza (2012): Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean, pp. 843-866.

⁷ Mann, Itamar (2018): Maritime Legal Black Holes: Migration and Rightlessness in International Law, pp. 347-372; for a legal analysis, see Costello, Cathryn (2012): Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law, pp. 257-303.

⁸ Ziebritzki, Catharina; Nestler, Robert (2017): Abschiebung statt Umsiedlung? EU-Hotspots in Griechenland und die EU-Türkei-Erklärung – Ein Überblick aus rechtlicher Sicht. 74-94. For a more general appreciation, see Guild, Elspeth et al. (2015): Enhancing the Common European Asylum System and Alternatives to Dublin, pp. 1-67.

is to say, despite having physically crossed the state border, a migrant can still be subjected to scrutiny that can result in her expulsion.

The most important cases of this kind of deviation are inspections of the residence status of foreigners (or assumed foreigners) residing inside the country. The inspection of the residence status can be undertaken by different actors as well as in different situations and settings. First, there are situations and actors in the context of which an inspection of the residence status seems rather natural in that the identification of a person is part of a bureaucratic procedure. Among these are inspections by police officers or inspections in public administrations. However, there are other circumstances, too, in which an inspection of the residence status is legally required. In the USA and the UK, for example, landlords have to check the residence status of would-be tenants and are required to report illegal residents.⁹

A slightly different example for internalized border controls are border controls along the inner European borders or inside Schengen member states. Generally, the external, i.e. the outer border of the Schengen Area is the location where the decision is being taken of whether or not a person is admitted to all signatory countries of the Schengen Agreement without additional border controls when entering another Schengen member state. However, most member states require travelers (including residents of member states) to carry identification documents.

Another, albeit special, case of internalization of border control are reception centers where e.g. the identity and legal status of asylum-seekers are being checked. Here, too, the border has technically already been crossed, but the migrant has not been cleared yet. Therefore, the reception centers are more similar to actual border control than to a posterior control as in the first examples of internalization.

In all given examples, as already stated, the border has technically already been passed when the control is taking place. Still, it seems justifiable to cite all these cases of internalization as a form of border control in that first, the consequences of the control are similar to controls at the border, because persons without the necessary legal title will have to leave the country. Second, these internal controls seem to be intended to serve as a backup if the actual (first) borders have been porous in letting people in that were not intended to be allowed to enter and therefore can be said to “thicken” the border.

⁹ For the introduction of this obligation in Britain, see Bate, Alex; Bellis, Alexander (2017): *Right to Rent: private landlords’ duty to carry immigration status checks*, pp. 1-45.

c. Privatization

The third deviation that will be discussed here is the privatization of border control. Border control is being privatized when the decision of whether someone is admitted to a country or authorized to stay is taken by no state officials. This kind of deviation does not relocate the effective border control to another place, but puts it in the hand of a different, i.e. a non-standard actor.

Several of the cases that were above can be cited as examples of privatization of border control as well. The practice of carrier sanctions, for instance, puts the border control in the hands of airline personnel and thus of persons who act as employees of a profit-oriented company and not as state officials. Although airline personnel receive some training to perform this job, it must be taken into account that overall the character of their position differs considerably from the one of border officers.

Also, the above-mentioned example of landlords checking the resident status of would-be tenants constitutes a case of privatization of border control, because here, too, landlords as private economic actors are taking up a sovereign task.

Several aspects, which the privatization entails, must be noted. First, as was pointed out above, the precision and strictness with which private actors execute the task of checking travel documents or residence permits can differ from the one of state actors performing the same task. It can be assumed that private persons act more strictly in case of doubt. This also draws on the fact that, generally, the realm of action of private actors is bigger as opposed to public ones who act in the name of the state. This is due to the fact that the first have a general freedom of action whereas the second need an authorization to act.¹⁰

This links to another notable aspect, which is that in the case of privatization, the state technically exercises pressure on two actors: the person controlling the documents and the person requesting access or residence. Whereas in the case of borders being controlled by state officials, the state official is not external to the state body.¹¹

¹⁰ Waldron, Jeremy (2011): *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, pp. 324-326.

¹¹ Bloom, Tendayi; Risse, Verena (2014): *Examining Hidden Coercion at State Borders. Why Carrier Sanctions Cannot be Justified*, p. 71.

d. General findings and consequences

What the systematization of the deviations in border control and the discussion of the examples so far show is that in the discussed cases border crossings are generally made harder and more difficult to foresee or plan. The latter is the case insofar as all three kinds of deviations, i.e. externalization, internalization and privatization, make it harder to anticipate at what point and by which person the effective border control will be performed.¹²

Moreover, one might wonder whether the deviations have further implications on how borders are characterized. In this regard, it can be assessed to what degree the three mentioned developments change the conceptualization of borders. This has several emanations. First, it seems that due to the described developments, borders are extended from a demarcation line to a wide area, stretching e.g. from Italy across the Mediterranean to Libya. Second, it seems as if borders change from a demarcation line to a network¹³. Indeed, the characterizations of deviating border control practice given above seem to support this idea as carrier sanctions, for instance, literally place borders on the network of connected airports. Yet, considering that not only carrier sanctions, but several different deviations relocate borders, the character of a network is more dense and diverse.

Furthermore, one might wonder whether the described developments change the role of borders. If one reconsiders the definition of borders given at the beginning of this paper, the role of borders can be described as first, marking the contours of a state territory, and second, intercepting the persons intending to enter the state territory so that it can be checked whether they are indeed authorized to enter. Following the slightly broader definition given subsequently, this check, too, is part of the border. Yet, it could be possible that even this more encompassing definition does not cover the role that the deviated borders take up entirely. Against the background of the given characterizations, borders also seem to be employed to prevent people from attempting to cross or to approach them. If, for instance, the departure of refugee boats in direction of Europe is hindered on the other side of the

¹² It should be noted, however, that the development of making border crossings harder and more difficult to plan and anticipate is matched by a countermovement of facilitating border crossings. This is achieved through bi- or multilateral agreements between states by which visa freedom is granted. Yet, these programs usually benefit different groups of people than the ones that are the target of the described deviations of border control. Taken together, these two parallel developments seem to increase one another and both rely on more and more targeted border politics overall.

¹³ This idea of borders as networks has been discussed by several authors from various disciplines. See e.g. Walters, William (2004): *The Frontiers of the European Union: A Geostrategic Perspective*, pp. 674-689.

Mediterranean, this prevention happens at a place still far away from the actual border. Also, one might consider that borders are channeling migrating persons. This can be attributed to the fact that migrants are being diverted at an early stage of their journey, for instance by intercepting migrants' journeys far outside the state territory as is taking place with externalized border control. It is therefore not implausible to assume that these kinds of measures are able to impact on and potentially change migratory routes.

3. Normative Challenges

The deviations in border control, which have been presented so far, prompt the question of whether they constitute normatively problematic developments. This section is therefore aimed at assessing the normative implications of the discussed cases.

In particular, it will be considered whether the diverging border control practice matches standard or traditional justification or legitimation strategies of border control. Three justifications will be evoked here: first, procedural and democratic justification strategies, second, arguments drawing on autonomy and rights, and third, instrumental justification strategies. All three types of justification strategies are used (more or less prominently) to justify border control as such and it will thus be questioned whether they also apply to the deviating practices of border control that were presented in this paper.

a. Procedural and democratic justification

The first group of justification strategies, which will be considered, comprises procedural and democratic justifications. This group assembles two justification strategies, which both generally rely on the idea that public officials ought to act according to a predefined procedure. The democratic aspect adds that the legitimacy of this procedure is determined in public decision-making processes and is also subjected to public control. Rule of law considerations are an essential part of the procedural justification. This encompasses that actions of public actors follow prescribed rules and that they are subject to judicial review.

These procedural requirements also apply to border control as this constitutes a sovereign action generally carried out by state officials. In particular those actions, which are backed by state coercion, must be carried out on the basis of an authorization and must be subject to judicial review.

In order to fulfil the requirements of this procedural justification and democratic control, the actions at stake must satisfy a certain degree of publicity and transparency. These are needed because actions and practices that remain unknown cannot be submitted to public or legal control.

In the light of this group of justifications, the cases of deviated border control seem problematic and this in several ways. To begin with, several of the above-mentioned cases move the effective border control to a certain grey zone. This is to say, it remains unknown, for instance, what exactly happens on Australian marine ships or on the High Seas when refugee boats are being diverted. Consequently, it is hard to determine which legal norms and which (administrative or judicial) procedures are applicable in this case.

Privatized border control presents a different kind of problem in that actions of private or economic actors neither rest on the same legal authorization nor are they subject to the same kind of judicial review as actions by public officials. Instead, as was already indicated above, private actors rely on a general assumption of freedom of action. In opposition, public actors only have an entitlement to act if they are legally authorized.¹⁴ Consequently, it can be assumed that the realm of action of private persons usually exceeds the one of public actors and that this larger scope of discretion also applies in the case of border control.

The degree of discretion is altered by the state exercising coercion on private actors within the limits of its territory. This means that in the case of private actors performing tasks of border control, these persons, too, are subjected to state coercion and can, for instance, incur a fine if they do not perform the relevant action as required. Thus, private persons charged with border control perform actions of state officials, have a greater degree of discretion, which forces them to choose an adequate course of action, and are under the threat of sanctions in case they do not perform these actions properly.

The actions of private persons not only benefit from a larger degree of discretion; they are also not tried by the same courts or subject to the same procedures of judicial review as actions by state officials. This can be problematic when legal action against border-relevant decisions of private persons cannot be taken or can only be taken with difficulties. The requirement of access to courts is thus not fulfilled, the procedural justification incomplete.

¹⁴ Waldron, Jeremy (2011): *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, pp. 324-326.

Similarly, actions by officials of foreign states, as practiced when border control is delegated as a kind of emigration control to Libya, for example, cannot be tried by the courts of the state whose borders cannot be reached (like Italy in this example). Here, too, is therefore a procedural gap between action and legal interest.

b. Autonomy and rights

The justification strategy drawing on autonomy and rights relies on the assumption that rights and autonomy are core values and therefore ought not to be infringed by any means. If an infringement cannot be avoided, this can only be justified if the measure at stake is overall fostering autonomy or rights.¹⁵ Clearly, it is impossible that state institutions, which are inherently coercive, do not impede autonomy or rights. Yet, any such impediment must be weighed against its benefits, thereby considering the enhancement of autonomy and rights. The same reasoning applies to border control, which also constitutes a situation where state coercion is in place (and thus violations of autonomy and rights are imminent), but which can be justified if overall, autonomy and rights are being respected and enhanced.

Against this background, several considerations need to be elaborated on. First, it can be assumed that in the case of border control, there is generally a discrepancy between those persons whose rights and autonomy are protected or enhanced and those persons whose rights or autonomy are threatened. While the first group of persons most likely resides inside the state, which effectuates border control, the second group is formed by the persons arriving at the border from outside. Still, this does not undermine the justifiability of border control if, for example, by way of stable institutions and expectations autonomy and rights are improved.

Second, it does not seem implausible to assume that violations or insufficient guarantees of rights in migrants' home or transit countries can be a reason to justify open borders. This holds true as long as open borders do not worsen the institutional conditions inside the receiving state to a degree that rights are at stake there, too.¹⁶

One might thus assume that border control creates stability of expectations and this for both the population residing inside the state that exercises border control, and the migrants that arrive at its border. This applies if the mechanisms of border control are transparent and predictable.

¹⁵ Blake, Michael (2002): *Distributive Justice, State Coercion, and Autonomy*, p. 265. Also see Raz, Joseph (1986): *The Morality of Freedom*, p. 419.

¹⁶ Blake, Michael (2015): *Immigration, Jurisdiction, and Exclusion*, p. 125.

Yet, even if one assumes that border control in general enhances autonomy and rights in that it provides stability of expectation and can thus be justified, it is hard to see how this extends to the cases of deviated border control discussed in this paper. More precisely, it is not clear how these enforced border control mechanisms enhance rights or autonomy (and this for actors on either side of the border); rather, they only seem to threaten them. Therefore, the deviated cases of border control seem hardly justifiable in terms of rights or autonomy when, for instance, at the externalized border fundamental rights and basic freedoms are at stake by not letting migrants approach the border to articulate their quest for asylum.

c. Instrumental justification

The instrumental justification will be discussed here as what might be referred to as a “back-up” justification strategy in that it tends to apply more downstream than the other two justification strategies considered so far. The instrumental justification justifies practices of border control with regard to other goods or values such as culture, or also rights or democracy.¹⁷ It is thus referred to as “downstream” in that it does not address these values directly, i.e. the justification does not follow from these concepts themselves, but relies on the importance of upholding these values.

The idea behind this kind of justification is that border controls are instrumentally good to achieve or to ensure another good that is deemed valuable. This could be the institutional guarantee of rights or democracy, a cultural identity or tradition, or the functioning of the state’s legal-political institutions more generally.¹⁸ Thus, according to this justification strategy, border control would be necessary in order to ensure either of these values.

The instrumental justification strategy of border control has several problems with some being especially severe in the cases of deviating border control discussed here.

The first problem is that it is hard to establish a gapless causality chain where border control is a *sine qua non* condition for the guarantee of either of the values. This is to say, there is no evidence that controlled borders are a necessary (and even less a sufficient) condition for the preservation of culture or the functioning of a

¹⁷ Also see Bloom/Risse (2014): *Examining Hidden Coercion at State Borders. Why Carrier Sanctions Cannot be Justified*.

¹⁸ On culture, see e.g. Scheffler, Samuel (2007): *Immigration and the Significance of Culture*, pp. 93-125. Patti Lenard argues for the instrumental role of culture for the preservation of democracy: Lenard, Patti Tamara (2010): *Culture, Free Movement, and Open Borders*, pp. 627-652.

state's institutions.¹⁹ It can be assumed, however, that an uncontrolled inflow of migrants in a very short period of time could be problematic for the functioning of state institutions and the guarantee of fundamental rights and duties. This argument has been advanced regularly in the German debate after the big migration movements in 2015, however without giving clear evidence as to when the point of institutional collapse is being reached.

With regard to the deviations of border control, another point must be added. Even if one assumes that under certain circumstances the instrumental justification can legitimize border control as such, it seems hard to sustain why it should cover those deviated cases, too. In order to merely prevent people, who are not authorized to enter, from crossing the state border or to close the borders at a point where too many people have already reached the country, it is unclear why, for instance, externalized borders are needed.

4. Lessons to learn for the theory-practice relation?

Notwithstanding the normative problems presented in the third paragraph, the evaluation of practical cases by drawing on theoretical arguments – as has been done in this paper – prompts the question of whether the discussion conducted in this paper provides insight into the relation between theory and practice in the context of migration more generally. This question, of course, would deserve longer considerations than can be given in these few lines. Therefore this discussion will stay close to the cases and arguments made so far.

For the same reason of brevity, no specific understanding of either theory or practice will be developed here. Instead, it will be assumed that practice refers to actions, rules and situations as they appear in real life; while theory denotes the conceptions and arguments that are the object of abstract thinking and which can take the form of generalizations of real life or natural situations. Still, even on the basis of these basic definitions, several lessons can be learned.

First, the normative discussion of the cases of deviated border control shows that there is a way in which a thorough engagement with practice and facts allows questioning theoretical concepts or normative arguments, which are intended to apply to these cases. This is to say, matching theory and practice and showing to what degree

¹⁹ The different values also pose additional conceptual problems as to what exactly ought to be preserved.

the theoretical arguments do not cover some relevant practice can shed light on deficits in theoretical arguments.²⁰

When one draws this conclusion, one must, however, be aware that theoretical arguments tend to be tailored for general cases and not necessarily for specific ones (and this for good reasons).²¹ Still, it remains to be determined when (formerly) specific cases are significant enough to skip the threshold to being general enough so that they have to be taken into account theoretically, too. This question would deserve much more consideration than can be given here and will thus be left open at this point.

What can be stated, however, is that even a seemingly specific practice should not be ignored (and especially not be ignored from a theoretical point of view) when this practice is aimed directly at circumventing values inherent to standard justification strategies (be they normative or legal). This means that if, for example, transparency, or the respect of fundamental rights are crucial for justifying the practice of border control, one may consider that measures that are inherently aimed at circumventing these principles are problematic.

Second, the opposite insight also follows from the discussion led in this paper. This is to say, normative arguments or theoretical conceptions more broadly are adequate to investigate a given practice. By way of discussing the three justification strategies, i.e. procedural and democratic justification strategies, arguments drawing on autonomy and rights, and instrumental justification strategies, it could be shown that even if these arguments apply to border control as such (and this sometimes with relevant problems, too), it was hard to see how they could encompass the deviating cases. Such a discussion therefore helps identify where a normatively justifiable practice turns into one that can be considered normatively problematic.

In sum, insofar as bringing together the theoretical argument, which is meant to apply to 'regular' cases of border control, and the deviating cases, the tension and the problematic aspects of the deviations become visible.

5. Conclusion

To conclude, the most important findings of this paper shall be briefly reflected on. In the first part, it could be demonstrated that border control is no longer solely carried out by a state official along the physical border of a state by checking the

²⁰ Verena Risse (2018): Staatsgrenzen als faktische Grenzen der theoretischen Reflexion?, pp. 39-54.

²¹ This does not suggest that there is no need for generalization.

documents of arriving travelers. Instead, it was shown that border control has undergone both spatial and actor-related developments, which were presented along the lines of externalization, internalization and privatization of border control. To illustrate these cases, pertinent examples from the practice of different states worldwide were given. Alongside, it was discussed whether these deviations in border control make border crossings harder and less transparent and whether they are changing the character and role of borders. Several reasons were given to answer these questions affirmatively.

In the second part, these deviations in border control were discussed with regard to their normative implications. In particular, it was referred to procedural and democratic justification strategies, arguments drawing on autonomy and rights, and instrumental justification strategies. The discussion showed that standard justification strategies that are articulated in international political philosophy or theory do not fit the deviating cases of border control in relevant ways.

Against this background, this paper concluded by reflecting on what can be learned from the discussed cases for the relationship between theory and practice in the context of border control. It appeared that as much as a thorough investigation of a practice can shed light on deficits in theoretical reflections and concept-building, an examination of a particular practice through the lens of a given theory can help discover normative problems of the practice. The discussion thus revealed that the practices of deviated border control pose challenges for normative arguments, while the investigation by reference to theoretical concepts was equally able to challenge the practices.

Postscript: Response to Matthias Hoesch

In his comment on that paper²², Matthias Hoesch points out a distinction, which, indeed, has been given less attention in my paper. This is the distinction between general arguments for or against open borders, on the one hand, and normative evaluations of specific border practices (which operationalize open or closed borders), on the other hand. Hoesch is right in that tied to this distinction are two discussions that are situated at different levels of the debate. It is inconceivable, however, that these discussions can be kept entirely separate. Rather, it seems reasonable to assume that those moral arguments, on which the claims for (partly) open or closed borders are grounded, must also be taken into account or seen as a general normative framework when it comes to the question of how these open or closed borders are implemented. This holds especially true when the open borders discussion is led by reference to norms and values that are considered fundamental for

²² Matthias Hoesch (2019): Comment on Verena Risse: (Recent) Deviations in Border Control – Challenges for Normative Strategies of Justification?

society. This objection notwithstanding, Hoesch launches an important appeal when he calls for a more fine-grained approach that brings together normative arguments and detailed facts about borders or migration more generally. As political philosophers, we have to further sharpen our normative tools, but also develop a more nuanced account of relevant legal and political practices.

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