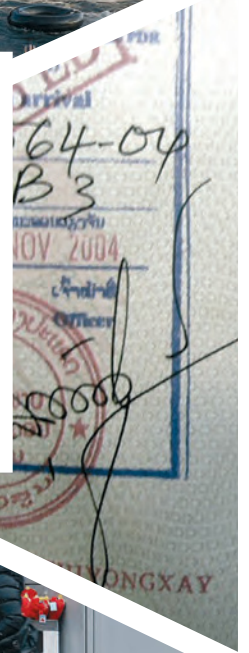




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Matthias Hoesch & Lena Laube (eds.)



Matthias Hoesch

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

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Matthias Hoesch

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

Matthias Hoesch<sup>1</sup>

Cluster of Excellence “Religion and Politics”, University of Münster

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## Abstract

This paper comments on a talk given by Verena Risse at the 2018 ZiF Workshop “Studying Migration Policies at the Interface Between Empirical Research and Normative Analysis”, September 2018, in Bielefeld. Risse describes three general concepts of how border control tends to deviate from the standard case of a state official performing control at the geographical border. Then, she attempts to establish that these developments create a situation that is not covered by classical approaches of the normative justification of border controls. Though I agree with many of Risse’s observations, I doubt that there is a straightforward link from those three general concepts to normative problems. Therefore, if we want to evaluate border policies, we need a much more fine-grained apparatus of, on the one hand, normative principles, and, on the other hand, information about the nature and consequences of these border policies. Risse’s paper is available under doi: 10.17879/95189433777.

## Keywords

Cluster of Excellence “Religion and Politics”; asylum; refugees; border control; externalization

## DOI

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I am very thankful that Verena Risse’s paper highlights one of the core issues that form the motivation of the conference. In my view, addressing current border policies and questioning what we should think about them from a normative perspective is an

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<sup>1</sup> Email: [matthias.hoesch@uni-muenster.de](mailto:matthias.hoesch@uni-muenster.de).

exceedingly important task for academic research and especially for interdisciplinary research. Risse's attitude is certainly in line with a common critical stance towards recent developments in border policies that is shared by many empirical researchers. However, what distinguishes her approach from the current literature is that she combines empirical observations with explicitly normative reasoning so that her normative conclusions are not spun out of whole cloth, but have a basis that can be rationally discussed. In her view, recent developments like the externalization, the internalization and the privatization of border control do not find justification in the established arguments presented in favour of border control – Risse mentions arguments based on the value of democratic decisions, arguments based on the idea of rights and autonomy, and instrumental arguments. These new kinds of border control thus appear in an unflattering light, so long as we cannot find new kinds of justifying arguments.

As much as I endorse that approach in general, I am not sure if Risse's discussion brings us far enough in the direction of a firm evaluation of border control mechanisms (by now, I have similar doubts towards my own attempt that I developed in Hoesch 2017). In my comment, I would like to focus on what Risse calls the 'externalization' of border control, that is the fact that border control is increasingly located outside the territory of a state. Risse views externalization as a 'deviation', since she defines the standard case of border control as an act of a state official at the geographical border. Externalized border control, in contrast, is performed far away, usually by officials of other states or by private companies. What do the normative justifications of border control Risse discusses tell us about externalized borders?

To start, let me introduce a distinction between two levels of normative justification that might be helpful in addressing the issue: we can distinguish between the legitimacy of general policy goals and the legitimacy of concrete measures to reach those goals. To illustrate, here is a simple example not from the area of border control, but from integration policies: It is surely a legitimate goal to enable immigrants to speak the dominant language, but it would not be legitimate to achieve that goal by incarcerating those who do not display any effort to learn the language. The same distinction applies to border policies. I regard the existing philosophical debate on open and closed borders as a debate about the legitimacy of a general policy aim: are states generally entitled to restrict immigration, or is restricting immigration an illegitimate aim? If we answer that question in some sense affirmatively (and almost everybody in the debate gives an affirmative answer under certain circumstances), we can next ask whether concrete border control policies that aim to achieve that general goal are justified. That is an independent step, since it could turn out that, though the



general aim to restrict immigration is legitimate, some measures to reach that goal are not, since they violate some further normative principle or are disproportionate. It could even turn out that there is no legitimate way to achieve a certain aim that as such would be legitimate.<sup>2</sup>

As I see it, Risse addresses both of these levels: sometimes she discusses arguments on the level of justifying immigration restrictions in general, and sometimes she refers to arguments on the level of justifying measures to restrict immigration. However, is the former really relevant for evaluating the current deviations in border control? Risse offers possible reasons for why there should or should not be immigration restrictions in general: enhancing the rights and autonomy of refugees; protecting culture or democratic institutions etc. Though I believe that discussing that level of justification is, of course, of great importance, I don't believe that it tells us anything about how to evaluate, say, externalized borders.

Take the argument that border control diminishes the rights and autonomy of refugees. It is certainly true that states use the externalization of borders as a means to avoid refugees reaching the states' territories. However, does that give us a reason to oppose externalized borders? Is it really the externalization that appears in an unflattering light? I don't think so. On the contrary, externalized borders could even help to improve the situation of asylum seekers, by opening up the possibility to select from the millions who would like to migrate those who are in greatest need. So, the problematic aspect from the perspective of normative reasoning is not, in my view, the deviation from the standard case, but what states try to achieve with that deviation. Therefore, we should not oppose externalized borders, but we should oppose the states' policy to deny entrance to refugees.

If we have a closer look, even this claim is too general. No state has the obligation to admit all asylum seekers that would like to enter that state. There is a discussion about whether states are entitled to restrict the admission of refugees to what would be their fair share within a scheme of burden-sharing amongst all states, or if states have to admit refugees up to a maximum reasonable level of investment in the interests of foreigners. Whatever position you favour in that debate, you should acknowledge that states have normative reasons to restrict admission in some way. Given that, externalized border controls can be a useful means to achieve the legitimate aim of limiting the number of asylum seekers to the required number. It could even turn out that externalized border controls are, from a moral point of view, the best means to achieve that goal. To sum up, the correlation of certain border

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<sup>2</sup> Such a view is put forward in Sager 2017.

control policies and the enhancement of the rights of refugees is a complex one, and we should not argue that externalized borders generally are hostile to refugee protection. Instead, we should criticize the fact that most Western states use externalized borders in an illegitimate way. That, in turn, compels us to engage in more detailed normative discussion about what are legitimate and illegitimate ways of enforcing border control.

Risse also addresses the level of the justification of certain measures to restrict immigration. I take the discussions of transparency and of access to courts as two examples of a discussion on that level. When it comes to externalized border controls, nobody knows what really happens, Risse argues. Since coercive actions of state officials need democratic control, according to her, the lack of transparency is a serious threat for the legitimacy of those externalized borders. Certainly, there is some truth in that statement. However, is the lack of public transparency a sufficient reason to doubt externalized borders in principle? Firstly, even externalized borders could be organized in a way that makes them more transparent. Secondly, although public transparency is an important democratic value, usually it is assumed that public transparency is not a necessary condition for a policy to be legitimate. We would need a much more elaborated account of which kind of transparency is needed for which kind of public action in order to make a firm argument against non-transparent borders. In many cases, I believe, we should be satisfied if there is some opportunity to achieve transparency via judicial examination, instead of creating public transparency from the outset.

That observation, of course, brings me to the next point Risse raises: access to courts. According to Risse, externalized borders entail a lack of opportunity to resort to legal measures. Those who are arrested by the Libyan coastguard do not have the opportunity to litigate at a European court against the policy of European states to support the Libyan coastguard. This effect is even stronger when externalization is combined with the privatization of border controls: those who are denied entry to an aeroplane by the staff of an airline do not have the opportunity to lodge an objection against that decision at an administrative court. I think that Risse really does raise a strong point here. However, this point is also only marginally linked to the externalization of borders. Externalized borders are in fact compatible with access to courts, as is demonstrated by the right to litigate against Visa decisions even if the person is situated outside the country in, say, German law. In the case of the staff of private companies, bilateral contracts could provide a remedy. And concerning the Libya example, I'd say that a lack of opportunity for those affected to litigate is only a minor problem. There are numerous NGOs who try to do this in their stead. The

greater problem is that, as far as I know, international law does not provide a sufficient basis to stop those practices conducted by single EU states and the EU as a whole.

Let me summarize. Risse describes three general concepts of how border control tends to deviate from the standard case of a state official performing control at the geographical border: the externalization, internalization, and privatization of borders. Then, she attempts to establish that these developments create a situation that is not covered by classical approaches of normative justification of border controls. Though I agree with many of Risse's observations and arguments, I doubt that there is a straightforward link from those three general concepts to normative problems. I claimed that parts of the arguments Risse discusses address the issue of justifying the general aim to restrict immigration. Since concrete border control policies are just a means to restrict immigration, a change of border policies does not affect the justifications of the general aim. Further arguments Risse discusses are indeed situated on the level of evaluating border control policies. However, the normative problems Risse talks about are only linked marginally to the general concepts she had used before. As I see it, we should stop complaining about those general tendencies in the development of border policies. The externalization of border controls as such is neither good nor evil. Instead, it is certain goals that states strive for with the externalization that are problematic. Therefore, if we want to evaluate border policies, we need a much more fine-grained apparatus of, on the one hand, normative principles, and, on the other hand, facts about the nature and the consequences of these policies. Risse has taken a step in the right direction, but we are still far away from secure judgements about what would be a morally defensible way of organizing border control.

## References

- Hoesch, Matthias (2017): Grenzpolitiken und Flüchtlingsschutz. *Zeitschrift für Rechtssoziologie* 37(2), pp. 313-336.
- Sager, Alexander (2017): Immigration Enforcement and Domination: An Indirect Argument for Much More Open Borders. *Political Research Quarterly* 70(1), pp. 42-54. Available at SSRN: <https://ssrn.com/abstract=2997257>.