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Considering Time in Migration and Border Control Practices

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Abstract: Practices within the area of migration and border control are often analysed through a spatial lens. This is understandable: migration studies deal with movement of people across different places and spaces. International migration involves movement across a very specific type of space: states and their borders. This contribution argues that, despite its apparent emphasis on spatiality, migration, and more specifically migration control, has a distinct temporal element. This temporal element needs to be analysed and understood in a close relationship to the spatial aspect of migration and border control. This will lead to a more multifaceted view of migration and border control practices and assist in revealing their discriminatory or inadequate nature more clearly and easily. The paper also proposes a conceptual grid as an initial framework for such an integrated analysis of spatiotemporality of migration and border control.

Keywords: space; time; border control; migration; David Harvey; US-Mexico border

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FP7 Marie Curies Career Integration Grant. The work leading to this article is part of the project and benefited from the funding received (REA grant agreement PCIG13-GA-2013-618183). Her research interests and publications range across such fields as general public international law, global governance and international constitutionalism/rule of law, human rights with a particular emphasis on women's rights, relationship between Islam and human rights, international refugee and migration law, comparative law and legal cultures, feminist analyses of law, law and humanities.

1 Introduction

Migration and border control practices are intimately linked to international law's view of states. They are also significantly influenced by rules and standards coming from international law, including human rights law. Law takes such notions as space and time as natural, abstract and objective reality. While questions about the spatial limit to law's application or when a particular law starts and ceases to apply are central to any legal inquiry, the notions of space and time as such are not questioned or investigated in law's application and analysis.¹ Surprisingly, this rigidity of law's visions of space and time remains unaffected by the extensive critical literature about the nature of time and space in such disciplines as philosophy or critical geography (see for example works of Martin Heidegger, Stuart Elden, Henry Lefebvre or David Harvey). It also remains resistant in face of globalisation and its challenges.

International migration and border control practices are fundamentally spatial. Therefore, their temporal aspect is rarely analysed. This approach to international migration and border control privileging spatiality is strongly influenced by international law's vision of states as bounded stable territorial units of power. This

article demonstrates that an enquiry into law's underlying presumptions about the nature of space and time is fundamental to the understanding of law's functions, operation and effects in relation to border and migration control. The article proposes a new typology of state migration and border control practices based on the interrelated nature of time and space that integrates insights from the discipline of political geography and provides an efficient tool for disrupting international law's traditional approach to time and space thus allowing a more efficient questioning of certain legal practices.

Since my reflections on these issues are inspired by insights from philosophy and geography about the nature of time and space, I use one of these insights as a theoretical framework for my analysis. David Harvey's writings are chosen as the main reference point because they provide the most explicit discussion of the relationship between time and space that is central to this article's thesis. This focused discussion allows a meaningful introduction of relevant theories. It would go beyond the scope of this article to attempt providing a general overview of the rich literature on the topic. Therefore, the article starts by presenting briefly David Harvey's vision of space, time and their mutual relationship. This will enable drawing upon his theory when discussing the migration and border control strategies. Traditionally, time is considered as irrelevant to the functioning of territory in international law, except as a linear historical time for resolving territorial and boundary disputes. This article argues that the management of migration related issues by states demonstrates how time and temporal strategies are used to intervene into space and existing spatial arrangement to modify them in a way most suitable to the reinstatement of the appearance of stability, unity and predictability as essential features of law. Thus, intervention through particular uses of time into existing spatial arrangements has

become an efficient tool for managing anxiety provoked by migration. Revealing the interrelationships between use of time within states' and law's spatial strategies challenges the image of stability and predictability and opens up ways for developing new visions of law, its time and space. It also allows more efficient challenges to certain legal practices.

After presenting the theoretical framework derived from Harvey's works, the article proceeds to the examination of US-Mexico border control strategies. It is not possible within the framework of this article to provide a detailed picture. However, the most telling features highlighting the link between space and time are discussed. In the final subsection, the conceptual grid for an integrated analysis of spatiotemporality is presented introducing a few additional examples.

2 Conceptualising Spacetime

Through his careful analysis of a variety of phenomena David Harvey demonstrates that time and space are socially constructed categories: 'neither time nor space can be assigned objective meanings independently of material processes' [Harvey, (1990), p. 204]. He emphasises that 'it is only through investigation of the latter that we can properly ground our concepts of the former' [Harvey, (1990), p. 204].

The space we take for granted, is only one way of understanding space in Harvey's classification. It is absolute space, fixed and immovable, that can be measured and calculated. This also means that this space is also a space of individuation: 'individual persons and things, for example, can clearly be identified in terms of the unique location they occupy in absolute space and time' [Harvey, (2009), p. 134]. This in turn allows for an easy creation of exclusionary bounded entities (for example private property, states or administrative units) that can be conceptualised as containers of power. Space in this representation is clearly distinguishable from time

that is represented as a linear infinite trajectory.

In addition to the absolute space Harvey describes two other understandings of space: relative and relational. Relative space is characterised by the idea that ‘all forms of measurement depend upon the frame of reference of the observer’ [Harvey, (2009), p. 136]. A good example of the relative view of space is the measurement of proximity not in kilometres but in terms of associated costs, time needed to go from one point to another using a particular mode of transport or connections established between different points by different transportation networks. The idea is also well expressed in the novel by Michel Houellebeck, where the protagonist observing the flight schedule at the Shannon Airport in Ireland observes: ‘Thus free-market economics redrew the geography of the world in terms of the expectations of the clientele, whether the latter moved to indulge in tourism or to earn a living. The flat, isometric surface of the map was substituted by an abnormal topography where Shannon was closer to Katowice than to Brussels, to Fuerteventura than to Madrid.’ [Houellebecq, (2012), p. 36] These examples demonstrate that the relative view of space implicates time. Harvey distinguishes absolute space and absolute time from relative space and its connection to time by designating this latter view of space as ‘space-time’. The ‘space-time’ becomes ‘spacetime’ (‘the hyphen disappears’) in Harvey’s terminology when we move from the relative view of the space to the relational view of it.

Spacetime is ‘open, fluid, multiple, and indeterminable’ [Harvey, (2009), p. 137]. For this reason identification and individualisation as well as measurement become problematic, if not impossible. As Harvey illustrates: ‘Many individuals assembled in a room to consider political strategies, for example, bring to their discussion within that absolute space a vast array of past experiences, memories, and dreams

accumulated directly or indirectly (through reading for example) from their engagements with the world, as well as a wide array of anticipations and hopes about the future.’ [Harvey, (2009), p. 137] Because the relational conception does not allow dismissing dreams and memories as irrelevant, mathematics, poetry and music merge together.

These three ways of understanding space and time are not exclusive, but ‘need to be held in dialectical tension with each other’ [Harvey, (2009), p. 141]. Space is produced through human practices and these practices might privilege one or another view of space and establish hierarchies or preferred frames of reference. However, one observation Harvey makes about the relationship between these different views of space is important to keep in mind: ‘relational space can embrace the relative and the absolute, relative space can embrace the absolute, but absolute space is just absolute and that is that’ [Harvey, (2009), p. 136].

Harvey’s analysis of space superimposes another dimension on this first dimension of the three views of space. This second dimension is derived from works of a French philosopher and sociologist Henri Lefebvre. In this second dimension space is analysed in a threefold manner: as experienced, as perceived and as imagined. Experienced spaces, more commonly referred to as spaces of material practice or material spaces, is the world as it arises ‘out of material circumstances of our lives’ [Harvey, (2009), p. 142 and Harvey, (1991), p. 218]. The perceived space refers to our representations of space. This is usually done through such abstract representations and concepts as maps, graphs, and pictures. Finally the imagined spaces or spaces of representation refer to ‘the way we humans live – physically, affectively, and emotionally – in and through the spaces we encounter’ [Harvey, (2009), p. 142]. These three conceptualisations of space are also not conceived as

exclusionary but as mutually influencing each other.

According to Harvey combining these two dimensions of space (each of which consists of three analytical categories standing in a dialectical relationship: three views of space as abstract, relative and relational and Lefebvre's space as perceived, experienced and imagined) allows us to better capture the multidimensionality of space and time and provides a useful modality of thinking about space and time when analysing a particular phenomenon, experience or practice [Harvey, (2009), p. 145-148].

In addition to these two dimensions of space Harvey points out another possible classification related to spatial practices themselves more than to the actual understandings of space. He draws this from 'more conventional understandings' and presents the four following aspects to spatial practices: accessibility and distanciation (how humans overcome the friction of distance that is a barrier to their social interaction); appropriation of space (ways in which space is occupied by objects, activities, individuals and groups); domination of space (how individuals and groups dominate organisation and production of space); and production of space itself (Harvey, 2009).

Combining the three views space (absolute, relative, and relational), Lefebvre's classification of space (perceived, experienced, and imagined) with the aspects of spatial practices (accessibility and distanciation, appropriation, domination, and production of space) we can develop a very useful analytical approach to any issue implicating space and spatial practices and their link to time. One important feature of Harvey's view of these various classifications is his emphasis on their interrelated nature. Relations emerge between different categories within dimensions, but also across different categories of different dimensions.

Even this very brief introduction of various categories that can be used to analyse space and its relationship to time demonstrate how closely related time and space are. They also illustrate the dynamic, changing and fluid nature of space that contrasts with our common sense view of space. We realise that space is not something given, outside there to be discovered and appropriated or protected, but an integral part of our existence that is produced and re-produced through our social practices, including law. These two insights (that time and space are interrelated and even inseparable (1) and that space is shaped by our social practices (2)) are the main points for developing further arguments in this article. Public international law privileges the absolute space and thus a complete separation between space and time. Although contemporary developments, especially phenomena usually analysed under the heading of globalisation, triggered some relative views of space, the absolute space remains dominant. An interesting tendency that can be observed relates to the more attention paid to relative views of space and related readings of international practices by scholars as opposed to the portrayal of these same practices in terms of absolute view of space by official discourses of legal regulations, decisions etc. This absolute view of space is constantly challenged by various social practices, migration being one of the most obvious examples. These challenges provoke anxiety within law (official legal discourse and state practices) and push states toward adoption of a series of strategies aimed at maintaining the appearance of the dominance of the absolute space. These various strategies appear as spatial at the surface and are couched in spatial terms. However, the article demonstrates that their efficacy is determined by the use of time and temporal strategies. This use of temporal strategies to intervene into spatial arrangement and practices reveals a very close link between space and time and even their inseparability. Uncovering this link between space and

time in states' own strategies of managing anxiety subverts the very goal law and states attempt to achieve: reinstating the domination of absolute space making law and states appear stable and predictable. Absolute space is separated from time. If the link between spatial arrangements and temporal strategies becomes apparent, it is not possible to maintain the absolute vision of space. I will return to the vision of space and time that thus emerges in the final section.

3 At the Borders: Control through Time and Space

Public international law's discourse on the relationship between states as bounded territorial units of power and migration is developing around the principle according to which 'States have the undeniable sovereign right to control aliens' entry into and residence in their territory.'² The notion of the entry into the territory becomes crucial for the ascertainment of states' nature as bounded territorial containers of power. A straightforward literal interpretation of what it means to enter a territory, namely crossing the line that constitutes a border between states and being physically present on the territory of a state, has almost no legal significance in the contemporary regulation of migration. Some of the examples used later in this article will illustrate this point. In order to ascertain their control over territory and thus their stable and bounded nature states resort to a series of strategies fully recognised by international law that make appear individual physically present at the territory of a particular state as legally not yet present. This allows states to appear 'in control' of their territories. These strategies are usually presented and analysed as spatial arrangements (see eg Gammelthof-Hansen 2010 or Davidson 2003). As demonstrated below, several of these strategies are mixed arrangements involving both time and space. The urgency of understanding and bringing to light their temporal aspects relates to the necessity of understanding as fully as possible the ways in which time and space intervene into the

operation of law and impose certain visions of space. This will also allow for envisaging re-conceptualisation of law in new directions.

Below, the functioning of border control as a spatial arrangement aimed at preventing challenges coming from unwanted migration is presented. This apparently spatial arrangement and strategies developed by states around it is analysed as implicating temporal strategies. The US-Mexico border is selected as a starting point for this discussion because it represents in essence all the main tensions surrounding borders and territories but also because it was the first contemporary effort at developing several border control strategies that were subsequently emulated in other parts of the globe.

3.1 US-Mexico Border

A very high level of control as compared to other borders characterises the US-Mexico border today. This was achieved through increase in the intensity and density of border patrol measures, but also through the building of physical infrastructures, mainly fences that make the physical crossing of the border very difficult and even impossible in certain areas. Describing the operation Gatekeeper, a series of measures announced in 1994 by the US government with the aim of ramping up border enforcement and patrol in the San Diego sector leading to the present-day state of the US-Mexico border, one author states: 'Foremost among state practices associated with Gatekeeper are militarization of the U.S.-Mexico border, criminalization of undocumented immigrants, and legitimization of state practices.' [Huspek, (2001), p. 54] To illustrate the apparent impact of these measures another author affirms: '[A] semblance of order has replaced the image of chaos that once seemed to reign in the urbanized border region of San Diego.' [Nevins, (2000), p. 101]

An apparent movement from chaos to order can be observed here. This movement is traditionally associated with law. [Shaw, (2014), p. 1] In this particular instance an intimate link to the introduction of a spatial arrangement is also established. Thus, measures that lead to this appearance of transition from chaos to order are not necessarily and not exclusively legal. Construction and production of space and imposition of a particular view of space becomes central in achieving two goals: preventing unwanted migrants from coming and thus creating the appearance of order replacing chaos. Militarisation of the border, including the erection of barriers, is a material spatial practice that allows appropriation of space by the state, thus affirming its stable and bounded nature, and creation of impediments to the accessibility to this space for those who are not considered as being desirable members of this state/community. By creating barriers and separations, inside and outside, this strategy contributes to the imposition of the absolute view of space. The criminalisation of migration as a legal element can also be analysed as a spatial arrangement in relation to the definition of the US population. The imagined space of security/insecurity comes to the forefront here: migrants crossing the border without permission are presented as occupying an imagined space of insecurity that they can bring with themselves into the US. This in turn justifies their exclusion from the US both virtually (by labelling them as illegal or unlawful) and materially (by continuing to erect more fences and sending them back to the other side). The line between outside and inside that reinforces the absolute view of space is reinforced.

Order seems to emerge from the fact that the state is able to control its borders and prevent unwanted entries into its territory: only the state itself decides what comes into its territory. Thus, the US 2006 Secure Fence Act³ the only piece of legislation dealing *directly* with this type of spatial arrangements⁴ defines the

operational control over borders as ‘the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband’ [Secure Fence Act, sec. 2(b)]. While the Act does not cover all the aspect of the situation, some aspects remaining conditioned by extra-legal factors and decisions, it brings to light the underlying mechanisms and reasoning. The Act views physical infrastructures on the border and surveillance of the borders as a means of achieving operational control over borders thus confirming the mixing of purely material with administrative and legal actions.

The measures adopted under the Act create an impression that everything unwanted will be stopped at the border, at least in the majority of cases. However, as the observation by the second author quoted at the beginning of this section highlights, this is just an impression, a semblance. As demonstrated below, the situation of migrants crossing this border without permission highlights some of the most important paradoxes.

Migrants attempting to cross the border and enter the US without permission find themselves in very difficult life-threatening conditions. Existing studies and reports provide an extensive evidence of the frequency of migrants’ deaths (see eg Jimenez, 2009).⁵ On the margins of its report on the practice of immigration detention in the US the Inter-American Commission on Human Rights noted harmful effects of certain immigration border control measures, including erection of physical barriers and immigration policies resulting in deaths of migrants (Inter-American Commission, 2010). As was argued in one of the attempts to challenge this border control system in a 1999 petition lodged with the Inter-American Commission on Human Rights (Inter-American Commission, 2005):

the State is responsible for violating Article I of the American Declaration of the Rights and Duties of Man ..., based upon an initiative, known as “Operation Gatekeeper”, whereby the United States has endeavored to prevent illegal migration into its territory by channeling migrants eastward out of the San Diego region of California and into the more hostile terrain of the Tecate mountains and the Imperial desert, where the alleged victims are said to have died. The Petitioners claim in particular that the United States has organized and implemented its immigration and border control policies in a way that has knowingly led to the deaths of immigrants seeking to enter the United States (...). [Inter-American Commission, (2005), para.2]

The petition was dismissed on the basis of non-exhaustion of domestic remedies. However, the concurring opinion of the President Clare K. Roberts is revealing of inherent mainstream opinion with regard to this allegation. She starts by reaffirming that ‘states have historically been afforded considerable discretion under international law to control the entry of aliens into their territory, and that exercising such control can constitute one element of a state’s obligation to guarantee the security of its population.’ [Inter-American Commission, (2005), concurring opinion] Then she turns to the situation described by the petitioners:

The information on the record indicates that the State has relied upon the natural barriers along its border, including mountains, deserts and waterways, as a deterrent against individuals who seek to enter its territory unlawfully, and that some immigrants have nevertheless chosen to risk the hazards presented by those barriers. I cannot

accept that these circumstances, in and of themselves, are sufficient to engage the State's responsibility to guarantee the rights of the individuals concerned. Indeed, accepting the Petitioners' arguments would suggest that states are required to ensure that individuals who chose to enter their territories unlawfully can do so with a minimum risk of danger from the natural environment, a proposition for which I see no basis under the American Declaration or other applicable instrument. [Inter-American Commission, (2005), concurring opinion]

This vision of the situation misinterprets the petitioners' argument. It turns a blind eye to the fact that the US government is not simply relying on natural barriers and not helping migrants to cross US borders without a risk from natural environment, but that the US government is erecting artificial barriers on the border to make the journey of migrants more difficult knowing that migrants will not stop attempting to cross the border and knowing that these additional difficulties created by artificial barriers will result in more deaths. [Inter-American Commission, (2005), para. 24]

The US government is aware of the fact that the only effect produced by the construction of the artificial barriers is the increase in the number of deaths of migrants. [Inter-American Commission, (2005), para. 23] Neither the knowledge of the increased danger of the journey, nor the knowledge of the increased chances of the lethal outcome of the journey had any significant impact on the number of migrants attempting the crossing of the border (Slack et al., 2013; Jimenez, 2009). Thus, the government by continuing these border control policies, including the erection of artificial barriers on the border, does not deter migrants from coming to the US but relies on the increased number of deaths to decrease numbers of migrants establishing

themselves in the US. Thus, physically, the migrants do find themselves at the territory of the US. The material borders and barriers do not fulfil the function they are created for according to the letter of the Act: prevention of unlawful entries. However, they are efficient tools in creating a space of representation wherein the US appears as a bounded container of power in full control of its borders and population. It can be suggested that what matters is not the real success of migration deterrence and control strategies but the impression they produce in the minds of the US public opinion. Here the function of migration policies at the US-Mexico border is to produce the *appearance* of control and stability as one of the components of homogeneity and bounded nature of the state. In this regard, the appeal to the imagined space of security/insecurity introduced by legal measures that intervene when migrants are physically present at the territory of the US is of fundamental importance. By linking unwanted migration and insecurity within the imagined space of unlawfulness the state is able to justify its material spatial practices and create the impression that these practices are effective despite any contrary evidence.

Interestingly, the proposed Border Security, Economic Opportunity and Immigration Modernization Act 2013⁶ keeps this subject matter (border control) at the centre of its preoccupations. In fact, the first substantive title is devoted to border control and various physical installations at the border. It also keeps the migrants and drugs together for the purposes of border control.⁷ Furthermore, the proposed Act perpetrates the vision of migrants as being at fault themselves for their deaths. This is done through inclusion of educational measures about perils of the journey and impediments to establishing themselves in the US in the proposed Act.⁸

The situation at the US-Mexico border is not exceptional. The most telling example is the Greek-Turkish border. The very same pattern of use of territory and

assertion of authority over territory is visible in this part of the European space. The erection of physical barriers on the land territory was conducted with even less formalities than the similar US endeavour. Increased border controls resulting in more human rights violations (Pro Asyl, 2013) are not based on any exceptional legal or regulatory measure, but on the growing desire to reaffirm traditional stability of territory. It has been reported that Greek government has been put under constant pressure from the EU for what is viewed as inadequate border control. The EU even threatened to exclude Greece from the Schengen Area. [Pro Asyl, (2013), p. 4, 14] The result of these measures is exactly the same: migrants are not deterred from coming to Europe and crossing Greek-Turkish border but the way they cross the border becomes more dangerous and perilous resulting in higher number of deaths.

The situation at the US-Mexico border demonstrates that while migrants are able to reach the material or physical territory of the US, they are not considered as being present on the territory and having become part of the population in a legally relevant way. A disconnection between perspectives can be identified here: from the perspective of migrants and from the physical perspective they are well on the territory of the US; from the perspective of international law and the US law, they are in a 'border zone', in a zone of undecidability: they have not yet reached the US territory. This disjunction in perspectives opens up the absolute view of space imposed by the dominant discourse of public international law. The absolute space is measurable and location of anybody and anything within this space is singular and thus identifiable. The situation of migrants crossing the US border without permission demonstrates that this is not entirely true: from one perspective, they are on the territory of the US, from another perspective not yet. This absence of a clear location and identification makes the relative view of space visible within the structure of the

absolute space. As explained above, the relative view of space allows for space measurement and identification recognising that this measurement and identification depend on the perspective of the observer. In Harvey's definition relative space is actually a space-time where a complete separation between space and time is not possible anymore. Thus, we need to understand what role the time plays in states' strategies aimed at controlling their territories. Without this our understanding will not be complete.

3.2 Using Time to Control Space

The aspect of temporality in relation to border and migration control has not yet been focus of doctrinal analysis. Tentatively we can suggest that states adopt at least three different types of temporal strategies: strategies aimed at acceleration or deceleration of time as interdependent and related as well as strategies aimed at the suspension of time as a middle way. Below I demonstrate how states integrate these different temporal strategies in their attempts to control their territories. Therefore, the typology, although making emphasis on time, is actually a spatiotemporal in nature. The emphasis on time is justified by the invisibility of this element in the mainstream representation of states' strategies.

3.2.1 Deceleration

The slowing down effect is the most clearly visible feature of many measures used within the context of migration control. The main aim behind all deceleration measures is to give states more time before the migrant becomes legally established in the territory of the state and thus subject to a stronger set of human rights protection mechanisms and the state subject to more obligations. This time, states might feel, is required for a variety of purposes: from ensuring that this individual fits into the state's vision of an appropriate resident to the possibility of using less burdensome

removal procedure that cannot be applied to persons lawfully admitted to the territory of the state.

These deceleration measures take a variety of forms some of which are well known as spatial measures of controlling states' territory: transit zones at airports, procedures related to admission to territory (the person is physically present on the territory, but a decision needs to be taken that she is admitted (can happen even if the person is legally present but doubts arise)), border controls/barriers. Obviously, these measures are more easily understood as being of spatial (either material or imagined) nature. However, it is as important to grasp their temporal aspect. In order to understand the temporality of these measures it is necessary to link them to their underlying reason. The reason for so many deceleration measures is related to the international law requirement according to which before an individual can benefit from a full range of rights in a particular state and thus become properly included into the population of this state he or she needs to be legally admitted to that state. Here the regulation disregards the physical presence on the territory of a particular state in order to provide the state with sufficient means (and most importantly the required time) to decide whether the particular person can be included in the population of the state without threatening its unity and thus the bounded nature of states. Until this moment, the individual can at most hope to benefit just from some basic human rights. The instrument where this fact becomes visible and that can be used to illustrate the point is the European Convention of Human Rights (ECHR).⁹

Article 1 of the ECHR similarly to other human rights instruments requires states to ensure rights defined in the convention to 'everyone within their jurisdiction.' Potentially, this implies that both nationals and non-nationals constituting population of a state shall be accorded the same degree of protection with

regard to the convention's rights. However, the existence of the Article 1 of the Protocol 7 to the ECHR reveals that this presumption is not completely true. This article addresses the issue of 'expulsion of aliens.'¹⁰ Guarantees provided in this article have to be respected only if the foreign national is a *lawful* resident in the country. Obviously, if states are unwilling to provide these guarantees, they will attempt to extend the time during which they can claim that the foreign national is an unlawful resident as much as possible.

The situation at the US-Mexico or Greek-Turkish borders is another example where the slowing down process is visible. Physical barriers and border controls have as one of the main purposes the slowing down and ultimately prevention of migrants' arrival to the territory of the state. All these measures are aimed at making the establishment of migrants in the state of their destination more difficult because more ties and connections in a country can later become a basis for claiming the right to remain within the state and be considered part of its population. On the other hand, simultaneously, these very same measures operate as accelerators of time in another direction thus exemplifying the link and interdependency between both types of measures.

3.2.2 Acceleration

Examples of this type of measures include operations at high seas to prevent coming of migrants; controls at airports before boarding, expedient procedures with regard to removal, but also physical barriers at the border and border controls. Measures aimed at acceleration of time identified thus far can pursue one of the following two objectives: preventing arrival of foreign nationals to the territory of the state or as expedient as possible removal of foreign nationals from the territory of the state.

Once again it is important to understand how international law requirements come into play in states' decisions for adopting such measures. Measures linked to the prevention of arrival of foreign nationals are strongly tied to the already mentioned principle of human rights treaties according to which states have to guarantee same rights to everyone within their jurisdiction. The second factor playing a significant role relates to what can be called growth in the degree of protection migrants can potentially claim with the passage of time. Article 8 of the ECHR guaranteeing the right to family life provides the best example. The longer a migrant stays in a particular state, the more probable it becomes that he or she develops family ties in this country and might thus become eligible for residence. Therefore, the faster the authorities of a particular state act in isolating and removing migrants from their territory, the less chances migrants have to acquire and claim this right.

In this regard the interpretation of Article 5(1)(f) by the European Court for Human Rights (ECtHR) in the *Saadi v. UK* case is worth mentioning as another example.¹¹ In this case the ECtHR had to evaluate application of this provision to a person who upon his arrival at a UK airport claimed asylum, was temporarily admitted to the UK territory without detention, reported when required, and subsequently was detained. The ECtHR stated the following in relation to the exception of art. 5(1)(f):

States enjoy an “undeniable sovereign right to control aliens’ entry into and residence in their territory. It is a necessary adjunct to this right that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. (...) (U)ntil a State has “authorised” entry to the country, any entry is “unauthorised” and the detention of a person who wishes to

effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to “prevent his effecting an unauthorised entry”. It does not accept that as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an “authorised” entry, with the result that detention cannot be justified under the first limb of Article 5 § 1 (f). To interpret the first limb of Article 5 § 1 (f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above.¹²

Fundamentally, this statement of the ECtHR suggests that any person arriving at a state border and deemed by the state to be unauthorised has no right to liberty and can be detained. The human rights law creates a mechanism allowing states in a speedy manner to prevent migrants from establishing themselves in the state. Even refugee claimants are not exempt. The fact that acceleration of time plays an important role here is further evidenced by the subsequent discussion of the reasons for detention of the claimant in this particular case. The ECtHR recognised that the detention centre was created to speed up decision-making of asylum claims.¹³ The ECtHR also added: ‘Moreover, since the purpose of the deprivation of liberty was to enable the authorities quickly and efficiently to determine the applicant’s claim to asylum, his detention was closely connected to the purpose of preventing unauthorised entry.’¹⁴

Thus, the human rights law supports states’ claims that the time needs to be accelerated at the expense of the potential legal entitlements of migrants if the territorial stability of the state is at stake. Thus, we can observe the simultaneous use

of the same measure as an accelerating and decelerating device. The effect will depend on the perspective of the state and on the particular benefit from which states want to exclude the migrant: either the access to the territory (being legally established) or the removal from territory in order to prevent acquisition of additional rights and thus fully becoming part of the population of that state. In the case of acceleration measures we can also observe the same intimate ties between spatiality and temporality.

3.2.3 *Suspension*

A good example of the suspension of time is provided by the Australian programme of detention of refugee applicants arriving by boat at excised Australian territories who subsequently for various reasons cannot get status in Australia and cannot be sent back or resettled anywhere. In this case the intimate connection between time and space also becomes fundamental. Australian authorities want to prevent entry and establishment of unwanted migrants on their territory and for this reason declare some parts of what technically still belongs to their territory as having a different status for migration purposes. This spatial arrangement allows Australian authorities to prevent legal establishment of unwanted migrants as part of their population simultaneously providing the authorities with time required to consider how to deal with these migrants. The peculiarity of the resulting situation that is analysed here as a suspension of time arises not out of the desire of Australian authorities as such, but is linked to the spatial requirements of the public international law itself. The recently released decisions of the Human Rights Committee (HRC) illustrate this point.¹⁵ Both cases involve a number of persons who after arriving by boat at the excised Australian territory were *prima facie* recognised as refugees. However, due to adverse security assessment they are not allowed to leave detention facilities to establish

themselves on Australian territory, nor do they have any prospects of being resettled to another country. Obviously, they do not wish to return to their countries of origin where they would face persecution. Moreover, Australian legal system does not allow them to challenge the adverse security assessment or detention. Therefore, they are left for an unknown time in detention: the time is suspended because there are no prospects of change in their situation. They are neither really established on the territory of Australia, nor really outside of this territory. This situation is different from any prolonged detention where there're at least some real prospects for a review and change in the situation of the detainee. However, prolonged detention also illustrates interlinked nature of the suspension, acceleration, and deceleration.

The HRC first observes: 'Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time.'¹⁶ Then it states more specifically with regard to detention of asylum-seekers:

Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security.¹⁷

Turning to the specific case under scrutiny the HRC makes the following statement: 'Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the

Committee's opinion, demonstrated on an individual basis that their continuous indefinite detention is justified.'¹⁸

This statement makes clear that the key to the success of claimants was the indefinite character of detention or in my terminology suspension of time. The HRC does not question the power of states to detain migrants arriving without permission. This is also confirmed by the HRC statements in relation to the violation of the claimants' right to be informed about the reasons for detention. The HRC found that the information provided to claimants that they are detained because 'they were suspected of being unlawful non-citizens'¹⁹ is enough to fulfil requirements of the Article 9 (2) of the ICCPR.

Thus, the HRC does not challenge the territorial logic of public international law, but the suspension of time and absence of access to *any* territory becomes problematic. A human being existing in a suspension between time and space challenges the traditional static spatial vision of public international law. One of the fundamental contentions of the spatial arrangement defended by public international law is that all available space on earth is divided between states without overlaps (except for what is considered minor disagreements about precise border-lines) and gaps including the division of all human beings into populations of one or another state. Human beings without access to any territory challenge this principle. The way of framing the finding of a violation of human rights of detained migrants in this particular case aims at re-affirming this fundamental principle of international law's spatial logic.

4. Why Time Matters

The above discussion on the use of time in controlling migration reveals one very significant feature: Time which is taken into consideration is always the time as

viewed through the prism of states and their need to control territory, to maintain the appearance of a homogeneous space and stable spatial organisation. The only situation when the perspective of migrants themselves, when the time of migrants as human beings comes into play, is the extreme case of suspension of time. However, as suggested, even in this case the success is primarily due to the fact that population without territory appears to emerge. Population without territory challenges one of the foundational principles and stability of public international law's spatial organisation. Therefore, the need for intervention by human rights law arises.

Another significant aspect of states' use of time revealed by this typology is the ability of states to use the very same measure both as an accelerating and as a decelerating device depending on their needs with regard to migration control and thus stabilisation of territory. Human rights law through monitoring bodies does not challenge this behaviour of states but accepts the measure as presented by states without any questioning.

The appearance of temporary strategies in the midst of spatial arrangements is the most significant feature that border and migration control measures reveal. The significance is twofold: first, it demonstrates that the ultimate success of spatial strategies depends on the use of the time-element thus revealing time and space as inseparable. This leads to the second significant element: the self-contradictory and self-defeating nature of international law's vision of space. By emphasising bounded and stable nature of states as containers of political power international law privileges and founds itself on the absolute view of space. However, the absolute space is separate from time and recognises time only as a linear progression not affecting spatial arrangements as such. In order to address the challenge posed to the absolute view of space and stability of states as territorial units, states using public

international law tools turned themselves to strategies that unite space and time. The absolute view of space does not hold anymore. This also means that states are not as stable and bounded as they tend to present themselves. If so, why should so much money, effort, and legal regulation be dedicated to border and migration control? If territory and borders are only an unsustainable artificial creation, the more productive way would be to recognise this fact and re-imagine our approach to migration issues and public international law in general taking this artificiality into account. This re-imagination is a task for future projects. This article demonstrated that by hiding the temporal aspects of their spatially-dressed border and migration control strategies states and international law reveal once more that they are not yet ready to abandon the comfortable terrain of calculable and predictable absolute view of space. One of the future tasks for scholars and activists should consist in a deeper and more detailed analysis of links between time and space within public international law as a basis for challenging some of the most disturbing legal practices. Hopefully, this article will provide some inspiration and serve as a starting point for some of these analyses.

References:

- Davidson, R.A. (2003) 'Spaces of Immigration "Prevention": Interdiction and the Nonplace', (2003) 33 *Diacritics* Vol. 33, No. 3-4, pp. 3-18.
- Harvey, D. (1990) *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change*, Blackwell, Cambridge & Oxford.
- Harvey, D. (2009) *Cosmopolitanism and the Geographies of Freedom*, Colombia University Press, New York.
- Huspek, M. (2001) 'Production of State, Capital and Citizenry: The Case of Operation Gatekeeper', 28 *Social Justice* Vol. 28, No. 2, pp. 51-68.

- Gammelthof-Hansen, T. (2010) 'Growing Barriers: International Refugee Law' in
Gibney, M. & Skogly, S. (eds.) *Universal Human Rights and Extraterritorial
Obligations*, Penn.
- Houellebecq, M. (2012) *The Map and the Territory*, Gawin Bowd tr., Knopf, New
York
- Inter-American Commission on Human Rights, (2010) *Report on Immigration in the
United States: Detention and Due Process*, OEA/Ser.L/V/II Doc. 78/10, 30
December 2010.
- Inter-American Commission on Human Rights, (2005) *Victor Nicolas Sanchez et al. v
United States*, Petition No 65/99, 27 October 2005
- Jimenez, M. (2009) *Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border*,
American Civil Liberties Union, San Diego
- Nevins, J. (2000) 'The Remaking of the California-Mexico Boundary in the Age of
NAFTA.', in Andreas P. and Snyder T., (eds.) *The Wall around the West:
State Borders and Immigration Controls in North America and Europe*,
Rowman & Littlefield, Lanham, pp. 99-114
- Pro Asyl, (2013) *Pushed Back. Systematic Human Rights Violations against Refugees
in the Aegean Sea and at the Greek-Turkish Land Border*
- Shaw, M.N. (2014) *International Law*, 7th edition, Cambridge University Press,
Cambridge
- Slack, J. et al, (2013) *In the Shadow of the Wall: Family Separation, Immigration
Enforcement and Security*. Preliminary Data from the Migrant Border
Crossing Study. The Centre for Latin American Studies, University of
Arizona

¹ This does not change in the contemporary efforts to better comprehend the temporariness in international law. The time remains separate from space and viewed as linear through the prism of such notions as continuity, change, beginning, and end. See for example the recent volume of the Netherlands Yearbook of International Law dedicated to the issue of temporariness in international law: Netherlands Yearbook of International Law, 2014: Between Pragmatism and Predictability: Temporariness in International Law, Monika Ambrus, Ramses A Wessels (eds).

² *Amuur v France* App No 19776/92 (ECHR, 25 June 1996) para 41. This statement is repeated in all judgments of the ECHR related to the rights of migrants whatever the particular situation in the case. For some examples see *Sufi and Elmi v United Kingdom* App No 8319/07 and 11449/07 (ECHR, 28 July 2011), para 212; *Chahal v United Kingdom* App No 22414/93 (ECHR, 15 November 1996).

³ Secure Fence Act of 2006, H.R. 6061, 109th Cong. 2nd Session (the Act).

⁴ Obviously all or majority of countries will have legislation regulating the work of relevant border control agencies. Also, immigration legislation of some countries might include provisions on powers of border control agents related to immigration. However, the legislation does not usually address physical installations on the border, including walls and barriers.

⁵ More recent statistics can be found on the web-site of the US Customs and Border Protection: <http://www.cbp.gov/newsroom/media-resources/stats?title=Border+Patrol> (visited 26 June 2015).

However, these statistics are based only on the remains found by Border Patrol.

⁶ Border Security, Economic Opportunity and Immigration Modernization Act of 2013, S. 744, 113th Cong. 1st Session (the proposed Act).

⁷ *ibid* section 1101 (2) definition of rural high trafficked areas reads as follows: ‘Rural areas through which drugs and undocumented aliens are routinely smuggled, as designated by the Commissioner of U.S. Customs and Border Protection.’

⁸ The relevant part of the proposed Act, namely section 1203(b) defines actions that are part of the strategy to prevent unauthorized migration transiting through Mexico. It reads as follows: ‘The strategy (...) shall include specific steps (1) to enhance the training, resources, and professionalism of border and law enforcement officials in Mexico, Honduras, El Salvador, Guatemala, and other countries, as appropriate; and (2) to educate nationals of the countries described in paragraph (1) about the perils of the journey to the United States, including how this Act will increase the likelihood of apprehension,

increase criminal penalties associated with illegal entry, and make finding employment in the United States more difficult.’

⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, Eur. TS No. 5.

¹⁰ The Article reads as follows: ‘1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

- a) to submit reasons against his expulsion,
- b) to have his case reviewed, and
- c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.’

¹¹ Art 5 of the ECHR protects right to liberty and security of person. Para 1(f) of this article provides for an exception to the general right to liberty in cases of ‘the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.’

¹² *Saadi v UK* App No 13229/03 (ECHR, 29 January 2008) para 64, 65.

¹³ *ibid* para 76.

¹⁴ *ibid* para 77.

¹⁵ *F.K.A.G. et al. v Australia*, Communication No 2094/2011, CCPR/C/108/D/2094/2011, 20 August 2013 and *M.M.M. et al. v Australia*, Communication No 2136/2012, CCPR/C/108/D/2136/2012, 20 August 2013. The detention was challenged as a violation of Art 9 (1), (2) and (4), Art 7 and 10 (1) of the ICCPR. The relevant provision for our purposes is Art 9 (1) and (2). It reads as follows: ‘(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.’

¹⁶ *M.M.M. et al. v Australia*, para 10.3.

¹⁷ ibid

¹⁸ ibid para 10.4

¹⁹ ibid para 10.5.