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A Legal Pluralist Approach to Migration Control: Norm Compliance in a Globalized World

Jenny Poon

A LEGAL PLURALIST APPROACH TO MIGRATION CONTROL: NORM COMPLIANCE IN A GLOBALIZED WORLD

Jenny Poon[*]

ABSTRACT

This Article proposes a new approach to international cooperation on migration control. More specifically, it proposes a legal pluralist understanding of refugee law, which would explain and capture the relations and interactions between different legal orders and legal regimes. This Article suggests that State and non-State entities maintain an ongoing dialectical exchange that helps to further legitimize and incentivize compliance as well as encourage more dialogue on the compliance of legal norms. Norm formation and compliance may be done through these mutual dialectical exchanges between State and non-State entities, which has the effect of legitimizing legal norms, furthering norm compliance, and promoting additional dialectical exchanges. Third country agreements, such as the EU-Turkey Agreement and the Italy-Libya Memorandum of Understanding, will be used as examples.

INTRODUCTION

In an increasingly globalized world, cooperative migration controls have become the new norm. Cooperative migration control may take many forms, but with the same aim of deterring claimants from reaching the shores of sovereign territories to claim asylum.[1] An example of cooperative migration control may take the form of agreements with third countries where, in the European Union (EU) context, claimants are sent towards a non-EU country deemed "safe."[2]

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[*] Jenny Poon, B.A. (Hons), J.D., LL.M., is a Ph.D. candidate from the Faculty of Law at Western University. She was previously a Visiting Fellow at the University of Oxford's Refugee Studies Centre and a Visiting Researcher at the Max Planck Institute of Comparative Public Law and International Law. Her research focuses on access to justice in Europe and the principle of *non-refoulement* as it is interpreted and applied in the Common European Asylum System. Her research interests include refugee law, human rights, and migration control. The author wishes to thank Dr. Valerie Oosterveld for helpful comments on a previous draft, and Dr. Ryan Liss for revision comments on her doctoral thesis.

[1] James Hathaway & Thomas Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence* 106 (Univ. of Mich. Law & Econ., Working Paper, 2014).

[2] Jenny Poon, *Non-Refoulement Obligations in EU Third Country Agreements*, EUROPEAN

Many of these third country agreements are negotiated and signed on the basis of fighting "irregular" migration or protecting territorial integrity.[3] States are continuously establishing new measures to fight "irregular" migration, including using mechanisms suggested by some scholars to be deterrence measures in an effort to discourage asylum claimants from entering a State's territory.[4] While international law places limits upon States to ensure compliance with minimum standards, often States are permitted to determine how they will implement the international standards into domestic law.

This Article explores how a nuanced understanding of norm compliance may potentially inform a new approach to viewing international cooperation on migration control. Given the multiplicity of actors involved in a migration control scenario and the complexities of each of their roles—especially the difficulty in determining complicity—it is important to examine the underlying reasons for and against State compliance, and what motivates State behavior. This Article will begin by positioning a legal pluralist understanding of refugee law. Next, traditional international law and international relations theories on compliance will be discussed, including the reasons and relevance for a legal pluralist understanding of compliance. The third and final section of the Article will examine how a legal pluralist approach to refugee law may inform a new understanding of international cooperation on migration control.

I. SETTING THE STAGE: A LEGAL PLURALIST UNDERSTANDING OF REFUGEE LAW

A legal pluralist approach to refugee law explains and captures the relations and interactions between different legal orders (for example, international and European law; European and national law) and different legal regimes (human rights law and refugee law).[5] In an increasingly globalized world—with the multiplicity of actors involved and the interplay between different legal orders and legal regimes—determining complicity for the acts and omissions of such

DATABASE OF ASYLUM LAW, 2018.

[3] *See, e.g.*, EU-Turkey Statement, European Council (Mar. 18, 2016); Libya-EU Memorandum of Understanding, Council of the European Union (Feb. 2, 2017) [hereinafter Italy-Libya MOU].

[4] Hathaway & Gammeltoft-Hansen, *supra* note 1.

[5] For a discussion of other approaches to constructive human rights pluralism, *see generally* Cathryn Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law*, 19 IND. J. GLOB. LEGAL STUD. 19, 2012, at 257–303. *See also* Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking*, OXFORD UNIV. PRESS, 2016; Galina Cornelisse, *Legal Pluralism in the European Regulation of Border Control*, RES. HANDBOOKS IN EUROPEAN LAW, 2018, at 373–91.

actors becomes difficult. Different actors with distinct roles present themselves on the international stage with different interests and agendas. These actors may include: nongovernmental organizations; non-State actors, such as international organizations, States, and State agents; and State-like entities, such as transnational corporations. While each actor may be distinct and play different roles, a legal pluralist approach to refugee law and international cooperation on migration control suggest that these actors and their roles are intertwined. Further, and as a result of the tensions between these actors, a theory that explains how and why States are increasingly incentivized to cooperate internationally on migration control issues may potentially reveal protection gaps.[6] A theory explaining State behavior may potentially point to areas where the law may need to be reformed or clarified. This revelation may lead to more informed policies in enhancing the protection standards of asylum claimants and refugees affected by migration control policies.

Legal pluralism is already present in refugee law. Although some scholars may argue that refugee law is unique in that it gives deference to national courts and decision-makers to determine whether to grant or reject refugee status to an individual seeking asylum in a territory, refugee law itself may be regarded as a combination of administrative law, human rights law, civil procedure, and international law.[7] Refugee law is, therefore, not a self-contained regime. Complicating the pluralism further is the fact that different jurisdictions take different approaches to the implementation of international refugee law into domestic law. Some are monist and automatically incorporate the *Convention Relating to the Status of Refugees* (Refugee Convention), while others are dualist and must transform the Refugee Convention through domestic legislation.[8] There may be tensions between these two types of implementation. There may also be tensions between the way in which States interpret international law. For example, some States may consider refugee law to be *lex specialis*, displacing human rights law in order for refugee law norms to take precedence.[9] Despite

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[6] *See generally* KIRSTEN MCCONNACHIE, GOVERNING REFUGEES: JUSTICE, ORDER AND LEGAL PLURALISM, (Routledge, 2014).

[7] However, it has been contended by some scholars that the human rights treaty regime is a "self-contained" regime. *See, e.g.*, Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17(3) EUROPEAN J. INT'L L. 483, 483–529 (2006). *See also* U.N. GAOR, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* ¶ 159–164, U.N. Doc A/CN.4/L.682 (July 18, 2006). *See generally* Eckart Klein, *Self-Contained Regime*, OXFORD PUBLIC INT'L L. (2006).

[8] For a discussion on monist and dualist traditions, *see generally* JOHN H. CURRIE ET AL., INTERNATIONAL LAW: DOCTRINE, PRACTICE AND THEORY (Irwin Law 2d. ed. 2014).

[9] Jenny Poon, *Non-Refoulement in the International Refugee Law Regime: A Lex Specialis?* 3 CORNELL INT'L L.J. ONLINE, 31–33 (2017).

these tensions, legal pluralism explains the underlying reasons as to why and how different jurisdictions coexist alongside one another and can work together.

The theory of legal pluralism may be applied to refugee law in specific and concrete ways. For example, the legal pluralist approach to refugee law may affect one's interpretation of the ongoing phenomenon between State compliance and non-compliance with international refugee law norms such as *non-refoulement*.[10] A State's compliance or lack of compliance with *non-refoulement* may affect the status of the norm. For example, *non-refoulement* is considered by many to be customary international law.[11] However, this status as customary international law depends, in part, on State practice. The fact that State practice differs between States can, *prima facie*, call into question the status of the norm. However, legal pluralism brings nuance into this questioning. Under a legal pluralistic approach, divergence among these legal orders and legal regimes may be positive where higher standards are applied by a different legal order, thus protection for stakeholders may accordingly also be increased.[12] In other words, the existence of higher standards may reinforce *non-refoulement* as a customary norm. The recognition of the extraterritorial scope and application of *non-refoulement* is an affirmation of the position taken by the United Nations High Commissioner for Refugees (UNHCR), as well as an affirmation of *non-refoulement* beyond the treaty norm.[13]

II. EFFECT OF NORMS: FORMATION, INTERPRETATION, COMPLIANCE, AND ENFORCEMENT

As stated earlier, a legal pluralist approach to refugee law may inform one's understanding of State behavior, which may potentially assist in identifying protection gaps in international cooperation on migration control scenarios. Compliance theories examine the underlying reasons for State behavior, analyzing why States comply or do not comply with certain legal norms. The section below sets out different compliance theories and explains how a legal

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[10] Some scholars have suggested that the approach to State compliance with the principle of *non-refoulement* itself may be contentious, citing different approaches to implementation of the international law norm to domestic practice. *See* Ellen D'Angelo, *Non-Refoulement: The Search for a Consistent Interpretation of Article 33*, 42 VAND. J. TRANSNAT'L L. 279, 279–315 (2009).

[11] *See, e.g.*, U.N. High Comm'r for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, THE UN REFUGEE AGENCY (Nov. 1997).

[12] Cathryn Costello, *Human Rights of Migrants in European Law*, OXFORD UNIV. PRESS (2016).

[13] *See* U.N. High Comm'r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, THE UN REFUGEE AGENCY (2007).

pluralist understanding of refugee law is distinct from traditional compliance models and how it may inform a new way of understanding international cooperation on migration control.

According to scholars, States comply with international law, not through coercion, but through a cooperative model whereby States interact through justification, discourse, and persuasion.[14] Yet others have suggested that transnational legal processes explain the reasons for and against State compliance with international law. For instance, Professor Harold Koh has suggested that the interaction, interpretation, and internalization of international law norms into domestic legal structures provide a thick explanation of compliance with international obligations.[15] This Article suggests instead that a legal pluralist approach to refugee law may inform a new interpretation of international cooperation on migration control. For instance, while the theory of transnational legal processes contends that States comply with international law norms as a result of transnational interactions that help to constitute the identity of a State where transnational actors act and react through a series of interactions, this Article suggests that international law is a function of not just State-to-State interactions, but dialogues between and among non-State actors, transnational corporations and entities, and international organizations through local, national, regional, and international levels.[16] Further, this dialogue is contrary to the traditional notion that international law decision-making is hierarchical.[17] This framework is then applied to refugee law and international cooperation on migration control.

International cooperation, specifically on migration control, may be analyzed through a legal pluralist understanding of refugee law. This approach to understanding refugee law may explain tensions between different legal orders and legal regimes, while at the same time offering a new way of thinking about the issues of international cooperation and migration control. For instance, the dominant narrative suggests that migration control is a collection of tools or methods used by States to deter migrants from entering their territories and/or

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[14] ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 109–11 (HARV. UNIV. PRESS 1995).

[15] Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599–2659 (1997). *See also* Harold Koh, *Transnational Legal Process*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY 181–207 (1996).

[16] *See, e.g.*, Paul S. Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 311 (2007). For a discussion of international and constructivism, *see* Jutta Brunnee,& Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19–74 (2000).

[17] Berman, *supra* note 16, at 309.

gaining access to asylum procedures.[18] Some examples of these tools or methods include visa regimes, carrier sanctions, third country agreements, and pushback operations.[19] Still other scholars have contended that migration control measures may be ways in which States circumvent their international law obligations, including the principle of *non-refoulement*.[20] Some have even gone further to assert that international law obligations such as the norm of *non-refoulement* may be contracted out of through the use of bilateral agreements or agreements with third States.[21] Examples of these bilateral agreements, whether formal or informal, may include the EU-Turkey Agreement and the Italy-Libya Memorandum of Understanding.[22] As compared with other migration control measures, third country agreements may exacerbate the likelihood of claimants being sent back to persecution, thus violating the principle of *non-refoulement*, where these agreements permit the sending of claimants to a third State, without an individual assessment as to the merits of their claims.[23]

There is another way, however, to look at migration control measures. International cooperation on migration control may reveal a State's compliance with legal norms at its core. For instance, State behavior, as in a State's compliance or non-compliance of norms, affect State practice, which in turn may reveal what is custom when supported by *opinio juris*. In the same way, what is deemed international custom may also influence State behavior.[24]

III. INTERNATIONAL COOPERATION ON MIGRATION CONTROL

This Article's main thesis suggests that interactions among States; agents of States; non-State actors; and international organizations in the local, national, regional, and international arena form a dialogue that explains compliance behavior.[25] A good example of this dialogue is international cooperation on

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[18] Hathaway & Gammeltoft-Hansen, *supra* note 1.

[19] *Id.*

[20] Nula Frei & Constantin Hruschka, *Circumventing Non-Refoulement or Fighting "Illegal Migration"?*, EU IMMIGR. & ASYLUM L. & POL'Y, Mar. 23, 2018.

[21] William Worster, *Contracting Out of Non-Refoulement Protections*, 27 TRANSNAT'L L. & CONTEMPORARY PROBLEMS 77, 103 (2017).

[22] For further discussion of the EU-Turkey Statement, *see* Jenny Poon, EU-Turkey Deal: *Violation of, or Consistency with, International Law?*, 1 EUROPEAN PAPERS 1195, 1195–1203 (2016). For further discussion of the Italy-Libya Memorandum of Understanding, *see* Jenny Poon, *Libya-EU Memorandum of Understanding: Implications for Non-Refoulement and Compliance with International Human Rights Law?*, CAMBRIDGE INT'L L. J. BLOG (2017).

[23] Poon, *supra* note 22.

[24] *See e.g.*, Jack Goldsmith & Eric Posner, *Understanding Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 640–72 (2000).

[25] Costello, *supra* note 12, at 316. It has been suggested, for example, that "the statist migration

migration control. First, the tensions created by a legal pluralist society encourage the legitimacy of legal norms.[26] Second, legitimacy of certain legal norms encourages further compliance with the same legal norms, which may in turn inform the establishment and preservation of customary norms of international law. Third, regardless of whether these customary norms are implemented into domestic law, the dialogue between and among actors at varying levels are not static, but rather dynamic, and mutually influence the respective norm compliance of the other.

A. Norms as Legitimacy

Dialogue between States, agents of States, non-State actors, and international organizations act to reinforce international law norms. Instead of acting as passive observers, agents of States, non-State actors, and international organizations all have roles to play in the local, national, regional, and international arena, which legitimizes their respective role and significance at each level. In an increasingly globalized era, where international cooperation between States and non-State entities flourish, such as in third country agreements and migration control on the high seas, the use of norms to legitimize actors is readily seen. The dialogue among States and non-State entities can be demonstrated in the most recent EU-Turkey Agreement and the Italy-Libya Memorandum of Understanding.

Despite debates as to whether the EU-Turkey Statement is a formal "deal" or an informal political agreement, the Statement itself is evidence of the ongoing dialogue between State and non-State entities regarding international cooperation on migration control.[27] For instance, some scholars assert that the Statement was signed between each individual Member State of the EU, rather than between the EU itself and Turkey, a non-EU country.[28] During the negotiations for the EU-Turkey Statement, the Heads of State or Government of the EU met with their Turkish counterpart on several occasions, including on

control assumption, which veils the human rights impacts of migration status and migration control measures, is unsettled in this pluralist context." *Id.*

[26] See, e.g., Paul Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1265–1306 (2006).

[27] *See* Gloria Arribas, *The EU-Turkey Statement, The Treaty-Making Process and Competent Organs: Is the Statement an International Agreement?*, 2 EUROPEAN PAPERS 303–09 (2017) (discussing the debate on whether the EU-Turkey Statement is in fact a formal "deal").

[28] *Id.* (noting the general court's determination that the EU-Turkey Statement has no binding effect upon the EU). *See also* Case T-192/16, *NF v. European Council*, 2017.

October 15, 2015, November 29, 2015, and March 7, 2016.[29] On March 8, 2016, the joint services of the European Council and the Council of the European Union published a Statement by the Heads of State or Government of the EU, now known as the EU-Turkey Statement.[30] This EU-Turkey Statement reveals dialogue between State and non-State entities, namely the interactions between, *inter alia*: the EU, an international organization, and Turkey, a non-EU country; Greece, a State, and agents of Greece and the UNHCR, an intergovernmental organization; and EU agencies and other Member States.[31]

More specifically, the EU-Turkey Statement provided that: "The EU, *in close cooperation with Turkey*, will further speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey . . ."[32] The EU-Turkey Statement further stated that: "Turkey and Greece, *assisted by EU institutions and agencies*, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016 . . ."[33] It was also stated in the EU-Turkey Statement that "[m]igrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, *in cooperation with UNHCR*."[34] The provisions within the EU-Turkey Statement seems to suggest that ongoing dialogue between State and non-State entities is essential to implementing the terms of the agreement.

As another example, the Italy-Libya Memorandum of Understanding has similar wording to suggest a dialogue between State and non-State entities in furtherance of international cooperation on migration control.[35] For example, the Memorandum of Understanding aims to reaffirm "the *resolute determination to cooperate* in identifying urgent solutions to the issue of clandestine migrants crossing Libya to reach Europe by sea . . ."[36] The Memorandum of Understanding further states:

> The Italian party commits to provide technical and technologic support to the Libyan institutions in charge of the fight against illegal

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[29] *NF v. European Council*, *supra* note 28, at ¶¶ 1–4.
[30] *Id.* at ¶ 4.
[31] *See* EU-Turkey Statement, *supra* note 3.
[32] *Id.* at ¶ 6 (emphasis added).
[33] *Id.* at ¶ 1 (emphasis added).
[34] *Id.* (emphasis added).
[35] Libya-EU MOU, *supra* note 3.
[36] *Id.* at preamble (emphasis added).

> immigration, and that are represented by the border guard and the coast guard of the Ministry of Defence and by the competent bodies and departments of the Ministry of Home Affairs.[37]

The Memorandum of Understanding even goes on to guarantee financial commitment to the migration control efforts: "The Italian party provides for the financing of the initiatives mentioned in this Memorandum […] besides making use of available funds from the European Union, in respect of the laws in force in the two countries."[38]

As both the provisions of the EU-Turkey Statement and the Italy-Libya Memorandum of Understanding suggest, the ongoing dialogue between State and non-State entities, such as intergovernmental organizations, agents of States, and international organizations, reinforce international cooperation on migration control. It is suggested further that not only do these dialogues reinforce international cooperation on migration control, they are also methods by which State and non-State entities attempt to legitimize the actions and omissions of the other. First, international cooperation of migration control through the use of third country agreements, such as the EU-Turkey Statement and the Italy-Libya Memorandum of Understanding, mutually reinforce the EU and Italy campaigns to fight "illegal" migration.[39] Second, mutual reinforcement of actions and omissions has the dangerous potential of norm setting.[40] Third, when norms become widespread and consistent, they have the potential to reveal what is deemed customary, when supported by *opinio juris,* thereby influencing State behavior.[41]

B. Norms as Compliance

Customary forms of international law may be reinforced by consistent and widespread compliance of that norm over time. International cooperation on migration control potentially permits States and non-State entities to establish customary norms of practice by influencing what is deemed customary. This can

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[37] *Id*. at art. 1(C).

[38] *Id*. at art. 4.

[39] EU-Turkey Statement, *supra* note 3, at ¶ 3; Libya-EU MOU, *supra* note 3, at preamble.

[40] *See generally* U.N. GAOR, *First Report on Formation and Evidence of Customary International Law*, U.N. Doc A/CN.4/663 (May 17, 2013).

[41] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands)* Judgment, 1969 I.C.J. Rep. 3, ¶ 41 (Feb. 20). *See also* Roozbeh Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUROPEAN J. INT'L L. 173, 173–204 (2010).

be done in a number of ways. First, consistent State practice through migration control has the potential to encourage further State behavior of the same. Second, consistent State practice of migration control has the potential to become widespread where other States are incentivized to do the same through actions or omissions. Third, consistent and widespread State practice of migration control, supported by *opinio juris*, forms international custom, thus legitimizing the legal norms in question as well as the actors behaving consistent with such norms. These three propositions may again be evidenced by international cooperation on migration control through the use of third country agreements, namely, the EU-Turkey Statement and the Italy-Libya Memorandum of Understanding.

Going back in history, examples from the United States, the United Kingdom, Australia, and the EU demonstrate how consistent State practice may legitimize certain legal norms, potentially creating precedent for following these same norms. The United States began to externalize migration control in the era of former President Ronald Reagan.[42] The case involves an interdiction agreement between the United States and Haiti, which authorized the U.S. Coast Guard to interdict Haitian vessels on the high seas and to return the passengers to Haiti.[43] In *Sale v. Haitian Center*, the U.S. Supreme Court held that Article 33 on the prohibition of *refoulement* did not prohibit the U.S. Coast Guard from intercepting Haitian refugees before they reached the border.[44] This case was subsequently decided against by the Inter-American Commission on Human Rights in *The Haitian Centre for Human Rights et al. v. U.S.*, where the Commission reasoned:

> [T]here has been extensive and virtually uniform adoption of the policy of *non-refoulement* throughout the world. The policy of interdicting Haitians based on their national origin […] and forcibly returning them to Haiti without asylum interviews of any sort, clearly violated the principle of *non-refoulement*.[45]

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[42] *See, e.g.*, Exec. Order No. 12,324, 3 C.F.R. 180 (1981), *reprinted* in 8 USC § 1182 (1981). *See also* Bill Frelick, Ian Kysel, & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGRATION & HUMAN SECURITY 190, 190–220 (2016).

[43] Interdiction Agreement Between the United States of America and Haiti, Sept. 23, 1981, 33 U.S.T. 3559, 3559–60. *See also* Frelick et al., *supra* note 43, at 199.

[44] *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993).

[45] *Haitian Centre for Human Rights et al. v. U.S.*, Inter-Am Comm'n H.R., OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 88 (1997).

In the case of the United States, the legal norm in question pertains to the norm of *non-refoulement*. While international law treaties, custom, jurisprudence, and scholarly opinion have widely asserted the norm's customary nature, the U.S. Supreme Court has opined that *non-refoulement* does not apply outside of a State's territory.[46] It is this persistence in State practice, which follows the ruling of the U.S. Supreme Court, that has the potential to set as custom—when also supported by *opinio juris*—the non-recognition of the extraterritorial scope of *non-refoulement* obligations that is worrisome.[47] Some scholars have even suggested that "actual practice and *opinio juris* are seldom unequivocal in rejecting extraterritorial application of the *non-refoulement* principle."[48] The example below from the United Kingdom may shed light on this assertion.

In the United Kingdom, the case of *R. v. Immigration Officer at Prague Airport (Ex Parte Roma Centre)* involved the return of six Czech nationals of Roma ethnic origin.[49] The British Court of Appeals held that States have no duty to facilitate the arrival of refugees and that States are entitled to take active steps to prevent their arrival.[50] In the judgment of the House of Lords, the majority agreed with the *Sale* case as held by the U.S. Supreme Court, and decided that "the prohibition of *non-refoulement* may only be invoked in respect of persons who are already present in the territory of the contracting [S]tate, and that [A]rticle 33 does not oblige it to admit any person who has not set foot there."[51] Similar to the situation in the United States, the House of Lords has held that *non-refoulement* is only applicable within the territory of a State, rather than being applicable extraterritorially. Further, the House of Lords has agreed with the *Sale* case, which sets as a potentially dangerous precedent, consistent State practice, supported by *opinio juris*, in the non-recognition of the extraterritoriality of *non-refoulement*.

In the Australian example, the case of *Tampa* demonstrates State practice in the area of migration control.[52] The case involves the interdiction of 533 mainly

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[46] For the customary nature of the norm of *non-refoulement*, *see* CATHRYN COSTELLO & MICHELLE FOSTER, NON-REFOULEMENT AS CUSTOM AND JUS COGENS? PUTTING THE PROHIBITION TO THE TEST, 273–327 (Netherlands Yearbook of Int'l L., 2015). As noted above, however, the Inter-American Commission on Human Rights has decided against the United States Supreme Court's decision.

[47] THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL (Cambridge Univ. Press, 2011).

[48] *Id.*

[49] R v. Immigr. Officer at Prague Airport [2004] UKHL 55, [2005] 2 AC (HL) 1 (appeal taken from Eng.).

[50] *Id.*

[51] *Id.* at ¶ 70.

[52] GAMMELTOFT-HANSEN, *supra* note 47.

Afghan asylum claimants on an Indonesian vessel.[53] Australia reached an agreement with Papua New Guinea and Nauru to host the claimants while their claims were examined.[54] The case was an attempt by Australia to avoid processing asylum applications, rather than a strict circumvention of the principle of *non-refoulement.*[55]

In the situation of the EU, the case of *Hirsi Jamaa* involved the interception of Somali and Eritrean migrants at sea by Italian authorities who had been traveling from Libya and who were sent back to Libya.[56] The European Court of Human Rights held that Italy violated Article 3 (prohibition against torture) of the *European Convention on Human Rights* (ECHR) for its ill-treatment of the migrants in Libya and subsequent repatriation of these migrants to Somalia or Eritrea.[57] The case of *Hirsi Jamaa* is distinguished from the previous cases of *Banković, Medvedyv,* and *Al-Skeini*, where in *Hirsi,* instead of *de facto* control, *de jure* control is also recognized as decisive in establishing the exercise of extraterritorial jurisdiction capable of engaging a State's obligations under the ECHR.[58] However, despite this difference, in all four cases, the Strasbourg court held that, only in exceptional cases, will it recognize that the exercise of jurisdiction can fall outside of a State's territory within the meaning of Article 1 of the ECHR. Again, similar to the American and British examples, the European case suggests that jurisdiction outside of a State's territory is not *prima facie* recognized by courts. This example and others like it set a dangerous precedent where norms are interpreted by courts in such a way that reinforces the State practice, when supported by *opinio juris*, that is becoming widespread for a norm to rise to the level of customary law.

C. Norms as Dialogue

The dialogues between and among actors at varying levels are not static, but dynamic, and mutually influence the respective norm compliance of the other. The assertion has been made by some scholars that judicial dialogue exists to

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[53] *Id*.

[54] *Id*. *See also* Tara Magner, *The Less Than 'Pacific' Solution for Asylum Seekers in Australia*, 16 INT'L J. REFUGEE L. 53, 53–90 (2004).

[55] GAMMELTOFT-HANSEN, *supra* note 47.

[56] *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, Eur. Ct. H.R. (2012).

[57] *Id*. at ¶ 158.

[58] Violeta Moreno-Lax, *Hirsi Jamaa and Others v. Italy or the Strasbourg Court Versus Extraterritorial Migration Control?*, 12 HUMAN RIGHTS L. REV. 574, 574–98 (2012). *See also Banković and Others v. Belgium and Others*, App. No. 52207/99, Eur. Ct. H.R., (2001); *Medvedyev and Others v. France*, App. No. 3394/03, Eur. Ct. H.R., (2010); *Al-Skeini and Others v. U.K.*, App. No. 55721/07, Eur. Ct. H.R., (2011).

foster interaction among different legal orders and legal regimes—and in an increasingly pluralist society.[59] It has also been contended by scholars that this judicial dialogue may extend to all actors within the community of international lawyers.[60] There is no reason why this dialogue cannot extend to actors beyond the community of international lawyers, and to non-State entities, intergovernmental organizations, international organizations, and beyond. Further, this Article argues that the dialogue between State and non-State entities at the local, national, regional, and international levels is increasingly important in norm formation, interpretation, compliance, and enforcement in today's globalized world.

No dialogue is one-way.[61] Dialogue between State and non-State entities has the potential to foster the compliance of norms through cooperation, negotiation, and facilitation of migration control activities.[62] Examples from the third country agreements, such as the EU-Turkey Statement and the Italy-Libya Memorandum of Understanding, demonstrate how State and non-State entities increasingly cooperate, negotiate, and facilitate migration control activities internationally.

The EU-Turkey Statement evidences cooperation between State and non-State entities, such as the EU as an international organization, and Turkey.[63] This agreement also involves multiple actors and a complex web of relationships among the actors. For example, in the EU-Turkey Statement, there is mention that Turkey and Greece will be assisted by EU institutions and agencies, along with the presence of Turkish officials and Greek officials.[64] Also, paragraph 9 provides that "*the EU and its Member States will work with Turkey in any joint endeavour* to improve humanitarian conditions inside Syria."[65] This Article suggests that this type of cooperation between State and non-State entities reveals an ongoing dialogue between the actors involved, which may have an effect on the formation of and compliance with norms. The Italy-Libya Memorandum of Understanding evidences similar cooperation efforts among

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[59] *See, e.g.* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L. J. 191, 191–219 (2003); Antonios Tzanakopoulos, *Judicial Dialogue as a Means of Interpretation*, OXFORD UNIV. PRESS 72, 72–95 (2016).

[60] Sandesh Sivakumaran, *Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law*, 55 COLUM. J. TRANSNAT'L L. 343, 343–94 (2017).

[61] *Dialogue*, OXFORD ENG. DICTIONARY.

[62] Frei & Hruschka, *supra* note 20.

[63] EU-Turkey Statement, *supra* note 3.

[64] *Id.* at ¶ 1.

[65] *Id.* at ¶ 9 (emphasis added).

State and non-State entities. First, the preamble to the Memorandum of Understanding specifies that the parties reaffirm "the resolute determination to cooperate in identifying urgent solutions to the issue of clandestine migrants crossing Libya to reach Europe by sea."[66] Second, Article 1 suggests that the involved parties "commit themselves to: start cooperation initiatives . . . in order to stem the illegal migrants' fluxes and face their consequences."[67] Third, Italy and Libya have signed the *Treaty of Friendship, Partnership and Cooperation*, which is a bilateral agreement between the two countries on migration.[68]

Besides cooperation between State and non-State entities, negotiation also played a major role in evidencing dialogue, which could potentially strengthen norm formation and compliance. For instance, in order to negotiate the EU-Turkey Statement, the EU Heads of State or Government have held several high-level meetings with their Turkish counterpart on several occasions.[69] The Italy-Libya Memorandum of Understanding also recalled, in its preamble, former negotiations, which resulted in the *Treaty of Friendship, Partnership and Cooperation* between Italy and Libya.[70] Evidence of negotiations taking place between State and non-State entities can also be seen through examples of the EU's presence at the EU-Africa Summit of 2014, which led to the adoption of the *EU-Africa Declaration on Migration and Mobility*, and the Joint Statement adopted in Kazan in 2010 between the EU and Russian Federation.[71]

As shown briefly, dialogue not only exists between States and non-State entities; there are also ongoing exchanges which permit different actors with multiple roles to mutually influence the formation of, and compliance with, legal norms. International cooperation on migration control is one example that demonstrates how this type of dialogue may inform the reasons for or against State compliance with legal norms.

IV. PUTTING IT TOGETHER: A LEGAL PLURALIST APPROACH TO MIGRATION CONTROL

International law has traditionally been a field involving State-to-State

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[66] Italy-Libya MOU, *supra* note 3, at preamble.

[67] *Id.* at art. 1.

[68] *The Treaty of Friendship, Partnership, and Cooperation Between the Italian Republic and the Great Socialist People's Libyan Ara Jamahiriya*, Italy-Libya, Aug. 30, 2008.

[69] *NF v. European Council*, *supra* note 28, at ¶¶ 1, 3, 4.

[70] Italy-Libya MOU, *supra* note 3.

[71] Brussels European Council, Fourth EU-Africa Summit: EU-Africa Declaration on Migration and Mobility (Apr. 2–3, 2014); Joint Statement, Russia-EU Permanent Partnership Council on Freedom, Security, and Justice (May 25–26, 2010).

relations.[72] However, the rise of non-governmental organizations, international bodies, multinational corporations, and activist communities began to take place during the post-WWII era.[73] Each of these actors then become involved in norm formation and development.[74] Perhaps, a new way of approaching the migration control thesis, that is, the deterrence of claimants from reaching the shores of sovereign territories to claim asylum, is not through a top-down sovereigntist model, but through a legal pluralist approach, where the underlying rationale for State compliance to relevant legal norms is done through ongoing mutual dialectical exchanges between State and non-State entities.[75] This Article has suggested that norm formation and compliance may be done through these mutual dialectical exchanges between State and non-State entities, which has the effect of legitimizing legal norms, furthering norm compliance, and promoting additional dialectical exchanges.

Scholars have also argued that non-State entities have the potential to develop norms and are involved in international lawmaking.[76] While one of the main criticisms of international law today remains the lack of enforcement mechanisms, a legal pluralist answer will be that lawmaking need not fall under the domain of strictly State-to-State relations, but also through non-State entities.[77] It is by accepting the possibility that non-State entities may be involved in norm formation and in the process of furthering norm compliance that a legal pluralist approach may inform a new understanding of international cooperation on migration control and relevant policies to enhance protection standards for stakeholders. This potential to rethink international cooperation on migration control has two possible implications. First, if non-State entities can contribute towards norm formation and incentivize States to comply with legal norms, the whole playing field changes. Instead of policies directed toward pushing States to comply with legal norms, perhaps policies may also incorporate elements where non-State entities may be involved. For example, one way to involve non-State entities may be to permit them to be involved in negotiations of State policies regarding migration control. Second, if non-State entities have a role in norm formation and compliance on migration control, this has the potential of becoming a *significant* role, given that norm formation may be attributable to non-State entities. The ability to contribute toward norm

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[72] Berman, *supra* note 16, at 309.
[73] *Id.* at 309.
[74] *Id.* at 310.
[75] *See, e.g.*, Berman, *supra* note 16, at 311–16.
[76] Berman, *supra* note 16, at 312.
[77] *Id.* at 312–15. *See also* Bianchi, *supra* note 5.

formation may also raise the issue of responsibility and complicity surrounding a non-State entity's actions and omissions in committing internationally wrongful acts.[78] International organizations, such as the EU, and other non-State entities, such as EU institutions and agencies as well as their agents, all have a shared responsibility toward norm development. This new understanding of international cooperation on migration control suggests that proper training and legal education may help to inform better practices and guidance toward the implementation of legal norms.

CONCLUDING REMARKS

This Article has suggested a potential new way to approach the issue of international cooperation on migration control. It involves looking at migration control through the lens of a legal pluralist understanding of refugee law. A legal pluralist approach to refugee law would recognize the multiplicity of actors involved in a migration control scenario by reimagining the role of non-State entities, such that they can also contribute toward motivating State behavior. In essence, the understanding of international law is no longer hierarchical or top-down, but intersectional, so that the exchanges of dialogues between State and non-State entities (including international organizations, nongovernmental organizations, and transnational corporations) may influence, reinforce, and contribute to norm formation, interpretation, compliance, and enforcement. Such an approach would also consider that the complexities and significance of each of their roles, while distinct, are inevitably intertwined. This Article has further posited that State and non-State entities maintain an ongoing dialectical exchange, which helps to further legitimize and incentivize compliance, while encouraging more dialogue on the compliance of legal norms. This type of dialogue is shown through examples of third country agreements, such as the EU-Turkey Statement and the Italy-Libya Memorandum of Understanding.

With the increasing trend toward international cooperation on migration control, this Article has attempted to present a nuanced way of thinking about norm compliance and migration control in hopes that it may contribute to better informed policies to create higher standards of protection for stakeholders in the not too distant future.

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[78] *See* G.A. Doc. A/66/10 (Vol. II), at 1–16 (Apr. 3–July 12, 2011).