

# **EXPERIMENTING, EXPORTING AND OUTSOURCING THE 'HOSTILE ENVIRONMENT'**

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## **A STUDY OF IMMIGRATION CONTROL AT THE UK-FRANCE FRONTIER**

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## ABSTRACT

*Despite increasing academic interest in the impacts of externalised border controls in recent years, the UK's 'exportation' of its border into France has received relatively little attention. A set of bilateral legal agreements gave implemented juxtaposed controls on British and French territory. These have resulted in a blockage of prospective asylum seekers on the Northern French coastline, faced with extremely hostile living conditions, structural violence and a denial of access to UK asylum procedures. This paper argues that these impacts of the juxtaposed controls act as modes of UK immigration control through deterrence and removal, prefiguring the domestic 'Hostile Environment' in 2012. The practise of deflection from the border constitutes collective expulsion, denies the right to remedy and may risk refoulement. Given the extension of UK jurisdiction into France through the exercise of administrative and legal control, the UK should be held legally accountable for this.*

## ACKNOWLEDGEMENTS

In honour of all those blocked at the border, whose migration pathways have been curtailed by walls and wire. All those who even when caught in control zones, refuse to be controlled. And each of those, like Mawda, whose death came at the hands of the UK border regime.

With thanks to the friends who offered support and encouragement throughout. Particularly Luke, whose interest and investment provided so much of the insight in this work.

**‘We are illegal, because you wrote the rules’.**

– Tewodros Aregawe, Syed Haleem Najibi, Goitom Fesshayee, Emirjon Hoxhaj<sup>1</sup>

**‘It would be more honest and, above all, more useful to investigate carefully the juridical procedures and deployments of power by which human beings could be so completely deprived of their rights and prerogatives that no act committed against them could appear any longer as a crime’.**

– Giorgio Agamben<sup>2</sup>

**‘We want to extend the concept of exporting our borders around the world’.**

– UK Home Office<sup>3</sup>

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<sup>1</sup> Phosphoros Theatre Company, ‘Pizza Shop Heroes’ (Theatre performance, London, 21 June 2019).

<sup>2</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (tr Daniel Heller-Roazen, Stanford University Press 1998) 171.

<sup>3</sup> Home Office, ‘Borders, Immigration and Identity Action Plan’ (*StateWatch*, 2007) 11  
<<http://www.statewatch.org/news/2007/jan/uk-borders-id-card-plan.pdf>> accessed 8 September 2019 (Home Office 2007).

## INTRODUCTION

State experiments with immigration control are not new. They have however proliferated in recent decades, with governments trying out increasingly harsh methods to dissuade and prevent ‘undesirable’ migration onto State territory.

The UK’s own moves to criminalise immigration under the Blair government<sup>4</sup> and May’s later implementation of a ‘Hostile Environment’ for undocumented migrants rightfully gained notoriety.<sup>5</sup> Even prior to this, however, the UK was experimenting with sovereign border control beyond its own territory. Since the 1990’s it has gradually exported and outsourced its border into French territory through a set of bilateral agreements known as ‘juxtaposed controls’. These have allowed for British immigration checks to take place beyond British territory on the French coastline and later expanded inland as far as Brussels and Paris.

The juxtaposed controls and successive bilateral border agreements have made of the Northern French coast a ‘buffer zone’ with a tripartite immigration control strategy – prevention, dissuasion and removal. Presented under the auspices of ‘border security’ and ‘crime prevention’, the juxtaposed controls are in fact ‘the very source of insecurity and lack of safety for hundreds of displaced people in the Northern France area’.<sup>6</sup> They have served to create a harshly enforced zone of ‘deterrence’<sup>7</sup> acting as a precursor to the UK’s own domestic ‘Hostile Environment’ policy. Daily life for exiles in the area has been made intolerable, through the perennial destruction of makeshift camps and denial of such basic rights as shelter, food and sanitation. The proliferation of security and surveillance technology across the region, often operated by outsourced private companies, has created a zone of containment and insecurity for those inhabiting it. A reinforced police presence has not decreased ‘illegality’ but rather helped to produce it, with subtle forms of biopolitical governance pushing exiles further into clandestine and invisibilised living situations.

This essay proposes to examine not only the *result* of this ‘illegalisation’ of undocumented migrants<sup>8</sup> on the Northern French coastline but also the legal processes *behind* it. The first section looks at the development of the juxtaposed controls and subsequent bilateral border agreements through a critical lens, seeing them as driven by the UK’s aim to control and reduce undocumented immigration by the exportation of its border controls. The second section examines the implementation of this zone of deterrence through the imposition of hostile living conditions, heightened security and surveillance measures, harsh policing and offshored detention practices. By focusing on the impact on exiles living in the coastal region it hopes to draw attention to the daily human rights violations that have been taking place for over two decades as a result of the UK’s externalised immigration controls. The final section considers the legal impacts of the border arrangements, such as the projection of

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<sup>4</sup> Corporate Watch, *The UK Border Regime* (Corporate Watch 2018) 20-23.

<sup>5</sup> Liberty, ‘A Guide to the Hostile Environment’ (Liberty, 2019)

<[https://www.libertyhumanrights.org.uk/sites/default/files/Hostile%20Environment%20Guide%20%E2%80%993%20update%20May%202019\\_0.pdf](https://www.libertyhumanrights.org.uk/sites/default/files/Hostile%20Environment%20Guide%20%E2%80%993%20update%20May%202019_0.pdf)> accessed 8 September 2019 (Liberty 2019).

<sup>6</sup> Marta Welander, ‘Britain’s Juxtaposed borders: The Human Consequences’ (*Border Criminologies*, 3 September 2019) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/09/britains>> accessed 8 September 2019.

<sup>7</sup> Cabinet Office 2007, 54.

<sup>8</sup> The words ‘migrant’ and ‘exile’ are used inclusively throughout this piece to refer to those crossing state borders, regardless of whether for political, social or economic reasons. The term ‘undocumented’ is used instead of ‘irregular’ or ‘illegal’, except when illustrating how migrants are referred to by other bodies.

'illegality' onto migrant bodies and the legal 'grey spacing' of the border zone as a result of overlapping legal regimes that undermine UK accountability. By scrutinising the UK's practices of interception, detention and expulsion it aims to challenge their legality considering European case law and international legal standards.

This paper draws on a range of law, policy and academic literature as well as informal interviews carried out with experienced NGO workers in Northern France. It is underpinned by the author's experience of working with migrants in Calais and Dunkerque since 2016.

# 1. THE SYSTEMS BEHIND THE ZONE OF DETERRENCE

## 1.1 Geopolitical significance of Calais and Dunkerque

The Northern French coastline occupies a place of geographical specificity within Europe. As the closest point of mainland Europe to the United Kingdom – just 25 km from Calais to Dover – the ports along the coastline have become principal sites not just of commercial but also human transit, for those wishing to enter the UK and blocked from other legal routes. Dover is visible from Calais on a clear day, putting the destination both practically and psychologically within reach.

Since the early 1990's people fleeing conflict and instability in the Balkans, and later in the Middle East and North Africa, have arrived in the port areas seeking passage across the Channel. Throughout this time migrant settlements have been established at various points along the French coastline, with the largest and most mediatised around the port of Calais. The majority of these have been makeshift tented camps, soon followed by securitisation measures and police with a mandate to evict, destroy and move people on again.

As a result of the highly mediatised presence of migrants in the UK-France border zone, the site has become politically fraught and financially costly. Tensions have grown between the UK and France over the responsibility to control undocumented migration to, and settlement in, the area.

## 1.2 Legal system

The geographical positioning and political leverage of the Northern French coastline have been exploited by the UK in order to achieve a neo-colonial set of border arrangements. The ensuing series of domestic legal choices and bilateral treaties have constructed a zone of hostility and deterrence.

### SCHENGEN

The UK chose not to sign up to the 1985 Schengen agreement abolishing internal border checks between signatory States. However, it still requested to sign up to the provisions covering cross-border police and judicial cooperation in the areas of crime prevention, drugs and extradition.<sup>9</sup> This particular relationship with the Schengen area has allowed the UK to retain control of its own borders whilst continuing to tighten immigration control at the UK-France frontier. The French *Défenseur des Droits* identifies this 'unique legal status' of the UK as the reason for the 'difficulties in mobility that exiles in Calais are confronted by',<sup>10</sup> in that those wishing to seek asylum in the UK are unable to cross to UK territory and thus forced to live clandestinely in the Northern French coastal border zone.

### JUXTAPOSED CONTROLS

<sup>9</sup> Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom to take part in some of the provisions of the Schengen acquis [2000] OJ L 131 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000D0365>> accessed 8 September 2019.

<sup>10</sup> Jacques Toubon, 'Exilés et droits fondamentaux : la situation sur le territoire de Calais' (*Le Défenseur des droits*, October 2015) 6 <[https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=16846](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=16846)> accessed 8 September 2019 (DDD 2015).

The UK's prevention of undocumented migration onto its territory has been further reinforced by a series of bilateral border agreements with France. The founding treaty is the 1991 Sangatte Protocol, introducing juxtaposed border controls at the respective entry and exit points of the Channel Tunnel ('Fixed Link'), in Coquelles (France) and Folkestone.<sup>11</sup> These juxtaposed controls have been further extended by the 2000 Additional Sangatte Protocol to cover fixed stops along the Eurostar line ranging from Paris to London,<sup>12</sup> and ferry ports along the French coastline under the subsequent 2003 Le Touquet Treaty.<sup>13</sup>

The Sangatte Protocol established the presence of reciprocal 'Control Zones' as far as London and Paris, in which officers of the adjoining State are permitted to carry out their own frontier control functions.<sup>14</sup> The UK Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, enacting these treaties into domestic legislation allows for the creation of UK detention centres, or Short-Term Holding Facilities (STHFs), on French soil.<sup>15</sup> It also modifies the terms of the Immigration Order (2000) to add 'enters a Control Zone' after 'arrives in the United Kingdom',<sup>16</sup> effectively granting the UK extraterritorial power to deny leave to enter.

The bilateral agreements have in this way served to 'displace the British border to France', and transfer responsibility for immigration management to the French.<sup>17</sup> The French *Commission Nationale Consultative des Droits de l'Homme* (CNCDH) writes that these bilateral treaties intended to restrict migration to the UK 'largely in violation of EU law' in fact result in 'Calais and the surrounding area becoming a zone of containment for exiles with the security issues and humanitarian risks which that entails,' turning France into the 'policeman' of Britain's migration policies.<sup>18</sup> Indeed, undocumented migrants travelling to the UK now find themselves blocked on the French coast, prevented from accessing UK territory on which they may request asylum by layers of security measures, border checks and finally the Channel crossing itself. Recent concerning announcements by the UK Prime

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<sup>11</sup> Protocol between the Government of the United Kingdom and the Government of the French Republic Concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance Relating to the Channel Fixed Link (adopted 25 November 1991, entered into force 2 August 1993) TS 70 (Sangatte Protocol).

<sup>12</sup> Additional Protocol to the Sangatte Protocol on the Establishment of Bureaux Responsible for Controls on Persons Travelling by Train Between the United Kingdom and France (adopted 29 May 2000, entered into force 25 May 2001) UNTS 1747 I-30456 (Additional Sangatte Protocol).

<sup>13</sup> Agreement between the Governments of the United Kingdom and of the French Republic concerning the Carrying of Service Weapons by the Officers of the UK Border Agency on French Territory in Application of the Treaty concerning the Implementation of the Frontier Controls at the Sea Ports of Both Countries on the Channel and North Sea' UKTS 21 (adopted 24 May 2011, entered into force 24 May 2011) (Touquet Treaty).

<sup>14</sup> Sangatte Protocol, Part II Art 7.

<sup>15</sup> The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, art 13 (Juxtaposed Controls Order).

<sup>16</sup> Ibid schedule 2(4).

<sup>17</sup> Maryline Baumard, '«La Grande-Bretagne nous paie pour que nous gérons, sur notre territoire, son immigration»' *Le Monde* (17 January 2018) <[https://www.lemonde.fr/societe/article/2018/01/17/la-grande-bretagne-nous-paie-pour-que-nous-gerions-sur-notre-territoire-son-immigration\\_5243206\\_3224.html](https://www.lemonde.fr/societe/article/2018/01/17/la-grande-bretagne-nous-paie-pour-que-nous-gerions-sur-notre-territoire-son-immigration_5243206_3224.html)> accessed 8 September 2019 (Baumard 2018).

<sup>18</sup> CNCDH, 'Avis sur la situation des migrants à Calais et dans le Calaisis' (2 July 2015) 1-2 <[https://www.cncdh.fr/sites/default/files/15.07.02\\_avis\\_migrants\\_calais\\_0.pdf](https://www.cncdh.fr/sites/default/files/15.07.02_avis_migrants_calais_0.pdf)> accessed 8 September 2019 (CNCDH 2015).



Minister and Home Secretary suggest that even those arriving on UK territory by boat are subject to direct return to France.<sup>19</sup>

### 1.3 Rationale

These treaties were produced in response to political and social developments at the domestic and global levels. As migration has become an increasingly politicised issue, countries particularly in the Global North have begun experimenting with different forms of immigration control such as fence building,<sup>20</sup> offshore detention<sup>21</sup> and third-country cooperation.<sup>22</sup>

The UK's own approach has focused on border externalisation under the guise of 'protective security',<sup>23</sup> including the responsabilisation of transit countries and the creation of a hostile environment at its border zone – later to be implemented domestically. The UK Home Secretary has justified these measures on the grounds that 'it is far better to stop people entering the country illegally than to have to send them back, with all the time wasting and expense that that entails'.<sup>24</sup>

#### **BORDER 'PROTECTION' AND SECURITY**

But what exactly was envisioned by these accords? The discourse from both States has focused on security and border protection, with language such as 'illegal migrants' and 'evil criminal gangs' evoking a threat to public order.<sup>25</sup> The bilateral agreements, Marta Welander states in an interview, give both States a 'moral alibi' in a process of 'scaffolding of legitimacy' – whilst the UK may use sovereign border protection to legitimise its own closed border measures, France polices the border zone in the name of upholding public order.<sup>26</sup> This has marked a series of brutal, and deadly,<sup>27</sup> measures creating a zone of deterrence in order to 'reduce the incentive for would-be illegal migrants to travel towards Calais or to remain there'.<sup>28</sup>

<sup>19</sup> Secretary of State for the Home Department, *Migrant Crossings* (UKHC vol 652 col 85 2019) <<https://hansard.parliament.uk/Commons/2019-01-07/debates/FD3F5D45-F095-4ED7-A089-C347E93DD7B2/MigrantCrossings>>; Paul Davies, 'Boris Johnson warns illegal Channel migrants: We will send you back' *ITV News* (23 August 2019) <<https://www.itv.com/news/2019-08-23/pm-warns-migrants-trying-to-illegally-enter-uk-we-will-send-you-back/>> accessed 8 September 2019.

<sup>20</sup> 'President Bush signs Secure Fence Act', *White House Archives* (26 October 2006) <<https://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026.html>> accessed 8 September 2019.

<sup>21</sup> 'The Pacific Solution revisited' *Parliament of Australia* (4 September 2012) <[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/PacificSolution#\\_Toc334509636](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution#_Toc334509636)> accessed 8 September 2019.

<sup>22</sup> Bill Frelick, Ian Kysel, Jennifer Podkul, 'The Impact of Externalization of Migration Controls' (2016) 4(4) *JMHS* 190, 206 <[https://www.hrw.org/sites/default/files/supporting\\_resources/jmhs.pdf](https://www.hrw.org/sites/default/files/supporting_resources/jmhs.pdf)> accessed 8 September 2019 (HRW 2016).

<sup>23</sup> Cabinet Office, 'Security in a Global Hub', (*StateWatch*, 2007) 46-7 <<https://www.statewatch.org/news/2007/nov/uk-border-review-report.pdf>> accessed 8 September 2019 (Cabinet Office 2007).

<sup>24</sup> HC Deb 2 December 2002, vol 395, col 614 <<https://api.parliament.uk/historic-hansard/commons/2002/dec/02/northern-france>> accessed 8 September 2019.

<sup>25</sup> 2015 Joint Declaration.

<sup>26</sup> Telephone interview with Marta Welander, Executive Director, Refugee Rights Europe (27 August 2019) (Welander interview).

<sup>27</sup> 'Deaths at the Calais Border' (*Calais Migrant Solidarity*, August 2019) <<https://calaismigrantsolidarity.wordpress.com/deaths-at-the-calais-border/>> accessed 8 September 2019.

<sup>28</sup> 'Managing Migratory Flows in Calais: Joint Ministerial Declaration on UK-French Co-operation' (*Home Office*, 8 August 2015) (2015 Joint Declaration) art 10

In reality, these bilateral treaties give legal backing to the securitisation, militarisation and surveillance of the UK-France border. They result in double the number of physical immigration checks for those crossing to the UK from France, alongside the increased border guards, control points and security infrastructure which this entails. Further to this, Le Touquet treaty authorises UK Border Agency (UKBA) officers to carry service weapons in the Control Zones in France, 'in contrast to the national practice of the overwhelming majority of British law enforcement'.<sup>29</sup>

The most recent bilateral treaty, the 2017 Sandhurst Treaty, explicitly mandates increased removal of those residing in the Nord and Pas-de-Calais departments without legal authorisation.<sup>30</sup> Whilst this is the first of the major treaties to make mention of 'humanitarian' provisions such as accommodation facilities in the Calais and Dunkerque areas and the legal transfer of unaccompanied minors, these fall under the stated aim to 'reduce migratory pressure at the shared border'.<sup>31</sup> The new apparent migrant-centred framing of border policy evokes Walter's notion of the 'humanitarian border', in which humanitarian language is intended to legitimise securitisation and immigration control.<sup>32</sup>

## EXTERNALISATION

In addition, these agreements have extended management of the border as far as possible from UK territory. A focus on 'tackling illegal migration and its causes upstream' has included support for 'hotspots' where people can be quickly identified, processed and removed, as well as deportation arrangements with source countries.<sup>33</sup> Similar 'upstream work' has included forms of 'thought policing'<sup>34</sup> such as 'dissuasive and educational information campaigns'.<sup>35</sup>

The exportation of border management to source countries, generally in return for development aid or for tacit political support, mirrors the wider 'Europeanization of migration control'.<sup>36</sup> This approach has become popular among governments attempting to contain prospective migrants in transit

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<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/455162/Joint\\_declaration\\_20\\_August\\_2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/455162/Joint_declaration_20_August_2015.pdf)> accessed 8 September 2019.

<sup>29</sup> Mary Bosworth, 'Juxtaposed Border Controls and Penal Power on the French North Coast' (*Border Criminologies*, 24 February 2016) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/02/juxtaposed-border>> accessed 8 September 2019 (Bosworth 2016a).

<sup>30</sup> Treaty Between the United Kingdom and France Reinforcing Concerning the Reinforcement Of Cooperation For the Coordinated Management of Their Shared Border (18 January 2018) (Sandhurst Treaty) art 7.

<sup>31</sup> Ibid art 1(2).

<sup>32</sup> William Walters, 'Foucault and Frontiers: Notes on the Birth of the Humanitarian Border' in Ulrich Bröckling, Susanne Krasman and Thomas Lemke (eds), *Governmentality: Current Issues and Future Challenges* (Routledge, 2011).

<sup>33</sup> 'Joint action between the UK and France on migrant pressure' (*Home Office*, 29 July 2015) <<https://www.gov.uk/government/news/joint-action-between-the-uk-and-france-on-migrant-pressure>> accessed 8 September 2019.

<sup>34</sup> Leanne Weber and Sharon Pickering, 'Constructing Voluntarism: Technologies of 'intent management' in Australian Border Controls' in Helen Schwenken and Sabine Ruß-Sattar (eds), *New Border and Citizenship Politics* (Palgrave Macmillan, 2014).

<sup>35</sup> Home Office, 'United Kingdom-France Summit: Declaration on Immigration' (Press Release, 2 November 2010) 3 <<http://image.guardian.co.uk/sys-files/Politics/documents/2010/11/02/02112010UKFranceSummitImmigrationDeclaration.pdf>> accessed 8 September 2019; Sandhurst Treaty art 8.

<sup>36</sup> Christina Boswell, 'The 'External dimension' of EU Immigration and Asylum Policy' (2003) 79 *International Affairs* 619, 622 <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-2346.00326>> accessed 8 September 2019.

countries, such as the Italy-Libya agreement requiring Libya to stem the number of migrants arriving to and departing from the country.<sup>37</sup>

Among the earliest examples of the border externalisation trend is the US's 1981 Interdiction Agreement authorising the Coast Guard to intercept Haitian vessels on the high seas and return the passengers.<sup>38</sup> A US Court ruling on this 'provided the justification' for externalisation policies,<sup>39</sup> finding that 'a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent'.<sup>40</sup>

States' practice of externalising their border controls to third countries are however criticised for violating both the right to seek asylum and *non-refoulement* obligations. Frelick, Kysel and Podkul argue that this practice 'prevent[s] migrants from ever coming under the jurisdiction of destination States'<sup>41</sup> and the protections which that would entitle them to, and places them under heightened threat to life, security and health encountered as a result of dangerous journeys across high seas or securitised land borders.

Hathaway has termed this deflection of potential asylum seekers the politics of *non-entrée*, a mode of 'insulating developed countries from *de facto* compliance with the duty of *non-refoulement* even as they left the duty itself intact'.<sup>42</sup> Indeed for States, 'intercepting migrants before they reach their territories is one of the most effective measures to enforce their domestic migration laws and policies'.<sup>43</sup>

The UK's juxtaposed controls agreements can be seen as another early experiment in externalised frontiers. They have not only externalised immigration control for anyone wishing to cross the Channel, but indeed have exported the very border itself, beyond the maritime border line '30 minutes west of the Greenwich Meridian'.<sup>44</sup>

However, whilst the UK-France border agreements act as a prototype of externalisation, or *non-entrée* border policy, they rarely feature in academic literature on the topic. Focus on the harsh conditions for exiles in the border zone has too often been disconnected from the legal and political systems underpinning them. The unique legal status the UK has constructed for itself has granted it exceptional power over its immigration controls at the frontier with France, allowing it to export and secure its border against prospective asylum seekers.

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<sup>37</sup> Libya-Italy Memorandum of Understanding, *Odysseus Network* (2 February 2017)

<[http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM\\_translation\\_finalversion.doc.pdf](http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf)> accessed 8 September 2019.

<sup>38</sup> HRW 2016, 199.

<sup>39</sup> Moria Paz, 'The Law of Walls' (2017) 28(2) EJIL 601, 610 <<http://www.ejil.org/pdfs/28/2/2760.pdf>> accessed 8 September 2019 (Paz 2017).

<sup>40</sup> *Sale v Haitian Centers Council* 509 U.S. 155 (1993) p 183

<<https://supreme.justia.com/cases/federal/us/509/155/>> accessed 8 September 2019.

<sup>41</sup> HRW 2016, 196.

<sup>42</sup> Thomas Hammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53(2) Col.Jour.Trans.Law 235, 242 <<http://jtl.columbia.edu/non-refoulement-in-a-world-of-cooperative-deterrence/>> accessed 8 September 2019 (Hathaway 2015).

<sup>43</sup> IOM & UNHCR, 'Refugee Protection and Migration Control' (2003) 22 Refugee Survey Quarterly 111, 115 <[https://academic.oup.com/rsg/article/22/2\\_and\\_3/111/1618529](https://academic.oup.com/rsg/article/22/2_and_3/111/1618529)> accessed 8 September 2019.

<sup>44</sup> Agreement between the French and British Governments relating to the Delimitation of the Continental Shelf (24 June 1982) <<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/FRA-GBR1982CS.PDF>> accessed 8 September 2019.

## 2. IMPLEMENTATION OF THE 'HOSTILE ENVIRONMENT' ABROAD

The multiple political and legal agreements between France and the UK, as well as domestic policy choices, have had harsh impacts on exiles living on the border zone. These are not simply a by-product of the border security measures in place but rather represent a careful engineering of a zone of deterrence across Northern France. This acts as an experiment in the construction of a hostile environment for undesirable migrants, intended to dissuade them from arriving in the border zone, prevent them from being able to remain, and remove them whenever possible.

The perpetuation of degrading living situations over the last thirty years, as a result of the juxtaposed controls, thus appears an early experiment in the 'Hostile Environment' strategy. The juxtaposed controls were established 'to detect and deter potential clandestine illegal immigrants before they are able to set foot on UK soil'.<sup>45</sup> Having 'proved their worth in cutting illegal migration through the channel ports',<sup>46</sup> a further deterrence policy was implemented formally at the UK domestic level in 2012, similarly aimed at 'identifying and reducing the number of immigrants in the UK with no right to remain'.<sup>47</sup>

### 2.1 Hostile living conditions & 'politics of exhaustion'

Life for migrants in settlements across the Northern French coastline over the last thirty years has been characterised for the most part by degrading and hostile living conditions. Much of this has been underpinned by the French authorities' stated fear of encouraging migration to the area<sup>48</sup> and steadfast pledge that 'Calais and Dunkirk do not remain points of fixation'.<sup>49</sup> Although these hostile policies are not new as a migrant deterrence strategy, as Hagan argues France is here 'enforcing a hostile environment very literally' in that 'shelter-building is constantly suppressed by police, and the displaced are routinely stripped of possessions and forced to live life in literal exposure to the hostilities of the natural environment'.<sup>50</sup>

This is not enforced by France alone. The zone of deterrence has been posited as an extension of the UK's own domestic 'Hostile Environment' policy in its aim to 'intimidate and oppress the displaced population by making their existence as difficult as possible'.<sup>51</sup> It is certainly true that the harsh

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<sup>45</sup> Cabinet Office 2007, 7.

<sup>46</sup> Home Office 2007, 11.

<sup>47</sup> 'Impact of 'Hostile Environment' Policy', House of Lords Library (11 June 2018) 1 <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2018-0064>> accessed 8 September 2019 (House of Lords 2018).

<sup>48</sup> 'G. Collomb : éviter un 'appel d'air' à Calais' *France Info* (23 June 2017) <[https://www.francetvinfo.fr/france/hauts-de-france/migrants-a-calais/g-collomb-eviter-un-appel-d-air-a-calais\\_2251483.html](https://www.francetvinfo.fr/france/hauts-de-france/migrants-a-calais/g-collomb-eviter-un-appel-d-air-a-calais_2251483.html)> accessed 8 September 2019.

<sup>49</sup> 'Ministère de l'Intérieur : Gérard Collomb nous livre ses priorités' *Le Parisien* (5 June 2017) <<http://www.leparisien.fr/politique/ministere-de-l-interieur-gerard-collomb-nous-livre-ses-priorites-05-06-2017-7017948.php>> accessed 8 September 2019.

<sup>50</sup> Maria Hagan, 'Inhabiting a Hostile Environment: The Sanitary Politics of Life at the Post-Camp Calais Border' (*Society and Space*, 13 May 2019) <<http://societyandspace.org/2019/05/13/inhabiting-a-hostile-environment-the-sanitary-politics-of-life-at-the-post-camp-calais-border/>> accessed 8 September 2019.

<sup>51</sup> Anya Edmond-Pettitt, 'Territorial Policing and the 'hostile environment' in Calais: from policy to practice' (2018) 2(2) *Justice, Power and Resistance* 314, 323 <<http://www.ejpress.org/papers/territorial-policing-and-%E2%80%98hostile-environment%E2%80%99-calais-policy-practice>> accessed 8 September 2019.

crackdown on migrants in the coastal region has served the same purpose as the domestic 'Hostile Environment', with routine violence, detention and deportations marking attempts to dissuade migrants from seeking entry to and asylum in the UK.

These practices were also in place, however, prior to the declaration of the UK's own 'Hostile Environment' in 2012, indeed since the outset of the bilateral border agreements. Fassin's reflection on camps in Calais in the 1990's shows France's securitisation measures to have coincided with the British beginning 'to refuse to assess some requests for asylum and to send undesirables back to France'.<sup>52</sup> Likewise, Rygiel's recollection of 'the destruction of the makeshift camps of cardboard and plastic sheeting setup in the bushes' around Calais in 2009<sup>53</sup> is a reminder that these politics were at play in the UK border zone even before they came into force on the UK mainland.

The hostile living conditions in Northern France have been widely criticised for having 'deleterious effects on exiles' fundamental rights'.<sup>54</sup> Courts have on multiple occasions found inhuman and degrading treatment of migrants.<sup>55</sup> During near-daily evictions there are frequent allegations of aggression,<sup>56</sup> destruction of property<sup>57</sup> and a lack of legal justification given for the operations.<sup>58</sup> The brutally enforced denial of shelter leads to a cycle of displacement within displacement or 'forced nomadism'<sup>59</sup> in which respite in physical or psychological terms is impossible. When makeshift camps do spring up, access to safe drinking water and sanitation facilities is limited<sup>60</sup> if not blocked entirely.<sup>61</sup>

Welander has described this 'combination of migration management policies and practices that reproduce 'people's continued experiences of uncertainty, illegality, lack of access to rights, information and protection, and physical, psychological and structural violence' as a 'politics of

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<sup>52</sup> Didier Fassin, *Humanitarian Reason* (UCP 2011) 134 (Fassin 2011).

<sup>53</sup> Kim Rygiel, 'Bordering solidarities: migrant activism and the politics of movement and camps at Calais' (2011) 15(1) *Citizenship Studies* 1, 1  
<<https://www.tandfonline.com/doi/pdf/10.1080/13621025.2011.534911?needAccess=true>> accessed 8 September 2019 (Rygiel 2011).

<sup>54</sup> DDD 2015, 82.

<sup>55</sup> Tribunal administratif de Lille 1508747 [2 November 2015] paras 7-13  
<<https://www.asylumlawdatabase.eu/en/case-law/france-administrative-tribunal-lille-2-november-2015-association-medecins-du-monde-et-al-no>> ; Tribunal administratif de Lille 1702397 [22 March 2017], para 11  
<<http://lille.tribunal-administratif.fr/content/download/94432/908817/version/1/file/1702397.pdf>>; Tribunal administratif de Lille 1705379 [26 June 2017], para 3 <<http://lille.tribunal-administratif.fr/content/download/104162/1042470/version/1/file/1705379.pdf>> accessed 8 September 2019; *Khan v France* no 12267/16 (ECtHR, 28 February 2019) paras 76-95.

<sup>56</sup> Michael Garcia Bochenek, 'Like Living in Hell': Police Abuses Against Child and Adult Migrants in Calais' (*Human Rights Watch*, 2017) 15 <[https://www.hrw.org/sites/default/files/report\\_pdf/france0717\\_web\\_3.pdf](https://www.hrw.org/sites/default/files/report_pdf/france0717_web_3.pdf)> accessed 8 September 2019 (HRW 2017).

<sup>57</sup> Ibid 25.

<sup>58</sup> Human Rights Observers Project, 'Forced Evictions in Calais and Grande-Synthe' (*Help Refugees*, June 2019) 5 <<https://helprefugees.org/wp-content/uploads/2019/06/Forced-Evictions-in-Calais-and-Grande-Synthe-ENG-1.pdf>> accessed 8 September 2019 (HROP 2019).

<sup>59</sup> DDD 2015, 11.

<sup>60</sup> OHCHR, 'France urged by UN experts to take effective measures to bring water and sanitation services to migrants' (OHCHR, 4 April 2018)  
<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22917>> accessed 8 September 2019.

<sup>61</sup> Aïcha Noui, 'Le bois du Puythouck, base arrière d'une centaine de migrants errants' *La Voix du Nord* (2 May 2017) <<https://www.lavoixdunord.fr/156730/article/2017-05-02/le-bois-du-puythouck-base-arriere-d-une-centaine-de-migrants-errants>> accessed 8 September 2019.

exhaustion'.<sup>62</sup> In an interview she explained this lens as 'a way to make sense of the different smaller forms of violence [at the border] which individually don't make sense, to understand how inherent violence is in keeping the British border closed'.<sup>63</sup> The containment of exiles within a mental and physical space of banalised violence is posited at the heart of the policy to prevent people from establishing any semblance of permanent presence in the area.

Can this be construed through Mbembe's notion of 'necropolitics'?<sup>64</sup> For Mbembe, figurative '*death-worlds*' are created in which States deliberately exclude and maintain certain racialised populations in abject conditions to be 'kept alive but in a state of injury',<sup>65</sup> that is to say active exposure to death or suffering. Davies, Isakjee and Dhesi present a compelling thesis on the 'necropolitics' of migration management in Calais, looking at forms of structural and bodily violence delivered by 'policies which seek to govern through the calculated withholding of the means to live'.<sup>66</sup> The UK-France bilateral border agreements certainly make scant reference to provision of structures of care for migrants and denial of basic living structures is commonplace.

However, the notion of '*violent inaction*' [my italics] and neglect does not fully account for the increasingly calculated forms of abandonment that are seen in this border zone. What Davies et al. term being 'abandoned to informal existence'<sup>67</sup> may be better understood as deprivation of formal existence when we take into account the active blocking of livelihood provision such as food and shelter.<sup>68</sup>

In the context of Australian offshore detention sites, Loughnan points to the '*active neglect*' [my italics] of States who do not simply passively withdraw services and with them responsibility, but rather '*intend to produce suffering*'.<sup>69</sup> She likens this to the case brought to the International Criminal Court against European Union States for their 'premeditated' program to reduce Mediterranean migration flows including actively ignoring requests for assistance at sea.<sup>70</sup> On France, Hagan notes the move from 'neglectful tolerance' and 'reactive' violence during the Calais 'Jungle', to 'active' deterrence following its destruction in 2016.<sup>71</sup>

Indeed, in the UK-France border zone, it is not enough to view the two respective States simply as having withdrawn. Treaties are drawn up, policies written, security companies contracted out and

<sup>62</sup> Marta Welanders and Leonie Ansems De Vries, 'Refugees, displacement, and the European 'politics of exhaustion' (*Open Democracy*, 30 September 2016) <<https://www.opendemocracy.net/en/mediterranean-journeys-in-hope/refugees-displacement-and-europ/>> accessed 8 September 2019.

<sup>63</sup> Welanders interview.

<sup>64</sup> Achille Mbembe, 'Necropolitics' (2003) 15(1) *Public Culture* 11 <<https://read.dukeupress.edu/public-culture/article/15/1/11-40/31714>> accessed 8 September 2019.

<sup>65</sup> Ibid 21.

<sup>66</sup> Thom Davies, Surindar Dhesi, Arshad Isakjee, 'Violent Inaction: The Necropolitical Experience of Refugees in Europe' (2017) 49(5) *Antipode* 1263, 1270 <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/anti.12325>> accessed 8 September 2019.

<sup>67</sup> Ibid 1271.

<sup>68</sup> HROP 2019.

<sup>69</sup> Claire Loughnan, 'Active Neglect: The New Tool for the 'Externalisation' of Refugee Protection' (*Border Criminologies*, 16 July 2019) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/07/active-neglect>> accessed 8 September 2019.

<sup>70</sup> Omer Shatz and Juan Branco, 'EU Migration Policies in the Central Mediterranean and Libya' (Communication to the Office of the Prosecutor of the International Criminal Court, 2019) <<http://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>> accessed 8 September 2019.

<sup>71</sup> Maria Hagan, 'Disassembling the Camp' (2018) *Criminal Justice, Borders and Citizenship Research Paper No. 3274536*, 19 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3274536&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274536&download=yes)> accessed 8 September 2019 (Hagan 2018).



police deployed all for the purposes of implementing the hostile environment for migrants at the basis of this 'zero-tolerance policy'.<sup>72</sup> Whilst the UK may have carefully externalised and outsourced responsibility in order to avoid being made accountable, its control over certain groups of people is still ubiquitous.

## 2.2 Securitised zone

Alongside creating a hostile living situation, France and the UK have focused on securitisation not only of the ports but also across the wider Northern coastal area in order to create a 'new offshore line of defence'.<sup>73</sup> Security infrastructure such as scanning equipment, barbed wire fencing<sup>74</sup> and a border wall<sup>75</sup> have served to impose multiple physical barriers to mobility, inviting comparison with sites such as the Mexico-US border that similarly 'wall up' democracy against prospective migrants.<sup>76</sup>

Securitisation has altered the very landscape of the border zone. Welander points to how the street lights near the site of the old 'Jungle' camp have been turned away from the road so as 'not to light up the motorway but rather than other side of it, to shed spotlight on possible 'trespassers''.<sup>77</sup> Border crossing and mere living alike have been targeted. Allen describes the 'huge barbed wire fences around petrol stations [...], fencing beneath motorway bridges where people were sleeping [...], the removal of a hedgerow where the Eritrean community used to live' in an attempt to prevent people being able to stay in the area. She sees these 'irreversible changes in the natural landscape' as 'one of the most permanent manifestations of the hostile environment', with walls now a permanent feature of the region.<sup>78</sup>

This has been almost entirely financed by Britain. UK Border Force (UKBF) spent over £315 million on securing the border in France between 2010-2016,<sup>79</sup> with David Cameron declaring that 'we rule nothing out in dealing with this very serious problem'.<sup>80</sup>

Olivier Cahn writes on the imbalanced and neo-colonial nature of this funding relationship resembling 'the relationship between developed and developing countries'. It 'implies that France is ready to accept that the situation in Calais is doomed to persist and that the French authorities are willing, in exchange for financial compensation, to assume control of immigration towards the UK'.<sup>81</sup> Indeed, whilst the UK willingly incurs financial cost for the management of its outsourced border, France incurs

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<sup>72</sup> Hagan 2018, 19.

<sup>73</sup> Cabinet Office 2007, 31.

<sup>74</sup> Emmaus-France, 'Non au 'mur de la honte' a Calais' (*Emmaus*, 28 November 2014) <<https://emmaus-france.org/non-au-mur-de-la-honte-a-calais/>> accessed 8 September 2019.

<sup>75</sup> Alice Ross, 'Work begins on Calais wall to stop refugees trying to board lorries to UK' *The Guardian* (20 September 2016) <<https://www.theguardian.com/uk-news/2016/sep/20/work-calais-wall-refugees-lorries-uk>> accessed 8 September 2019.

<sup>76</sup> Juanita Sundberg, 'Delimiting democracy: witnessing along the US-Mexico borderlands (2013) 33 *Political Geography* 53 <<https://www.sciencedirect.com/science/article/pii/S0962629812001540>> accessed 8 September 2019.

<sup>77</sup> Welander interview.

<sup>78</sup> Telephone interview with Maddy Allen, Calais Field Manager, Help Refugees (7 September 2019) (Allen interview).

<sup>79</sup> Letter from Home Office re FoI response 41250 (28 April 2017) <[https://fullfact.org/media/uploads/foi\\_response\\_41250\\_-\\_r.pdf](https://fullfact.org/media/uploads/foi_response_41250_-_r.pdf)> accessed 8 September 2019.

<sup>80</sup> 'Calais migrant crisis: PM offers extra fencing and dogs' *BBC News* (1 August 2015) <<https://www.bbc.co.uk/news/uk-33729024>> accessed 8 September 2019.

<sup>81</sup> Baumard 2018.

political and social cost for administering the former's immigration control on its own soil, resembling a micro-version of the broader European Neighbourhood Policy.<sup>82</sup> This has led to calls from French ministers to scrap Le Touquet treaty following the UK's withdrawal from the EU.<sup>83</sup>

Investment in border securitisation shows no signs of slowing down. Much of the security infrastructure is operated by private companies who reap profits from contracts with the UK Home Office or UKBF. This spans from Eamus Cork Solutions who check vehicles and run detention facilities, to the company Wagtail which provides dogs and dog handlers as part of a £9.3 million contract with UKBF.<sup>84</sup> In 2016 the UK quietly announced an £80 million contract for Calais border security, under EU funds.<sup>85</sup> There has been no announcement since regarding which company has obtained the contract, but it is clear that for as long as private businesses make profit from the extra security measures being put in place, border control technology will only increase.

### 2.3 Surveillance

Expanding security infrastructure around the border zone has also included new surveillance methods and technologies enacting offshore control in a more 'electronic, invisible, and ephemeral' way.<sup>86</sup> As far back as 2003, 'new British detection technology' was promised to Calais, with plans to extend it to seven maritime ports by early 2004.<sup>87</sup> Since this, forms of surveillance across the coastal zone have only multiplied. The UK now funds CCTV, infrared technology and drones<sup>88</sup> around the Eurotunnel as well as a control room in Coquelles feeding live information to local police.<sup>89</sup> The Home Office itself boasts of its border security techniques at the juxtaposed controls, 'including detection dogs, carbon

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<sup>82</sup> María López and Mario Damen, 'The European Neighbourhood Policy' (*Europarl*, April 2019) <<http://www.europarl.europa.eu/factsheets/en/sheet/170/the-european-neighbourhood-policy>> accessed 8 September 2019.

<sup>83</sup> Cynthia Kroet, 'Macron wants UK border moved as Eurotunnel warns of post-Brexit migrant flood' *Politico* (28 June 2016) <<https://www.politico.eu/article/macron-wants-uk-border-moved-as-eurotunnel-warns-of-post-brexit-migrant-flood-reports/>> accessed 8 September 2019.

<sup>84</sup> Corporate Watch 2018, 138-141.

<sup>85</sup> 'United Kingdom-London: Public security, law and order services: Contract Notice' (Tenders Electronic Daily, 14 July 2016) <<https://ted.europa.eu/TED/notice/udl?uri=TED:NOTICE:241269-2016:TEXT:EN:HTML&src=0>> accessed 8 September 2019.

<sup>86</sup> Nick Vaughan-Williams, 'The UK border security continuum: virtual biopolitics and the simulation of the sovereign ban' (2010) 28(6) *Environment and Planning D: Society and Space* 1071, 1073 <<https://journals.sagepub.com/doi/pdf/10.1068/d13908>> accessed 8 September 2019.

<sup>87</sup> 'Discours de M. Jacques Chirac sur la coopération franco-britannique dans la lutte contre l'immigration clandestine et le trafic de drogues' (Vie Publique, 24 November 2003) <<https://www.vie-publique.fr/cdp/notices/037000359.html>> accessed 8 September 2019.

<sup>88</sup> Charlotte Boitiaux 'Des drones dans le Pas-de-Calais pour repérer les départs en mer' *Infomigrants* (26 March 2019) <<https://www.infomigrants.net/fr/post/15921/manche-des-drones-dans-le-pas-de-calais-pour-reperer-les-departs-en-mer>> accessed 8 September 2019.

<sup>89</sup> 2015 Joint Declaration, art 12(2-3).



dioxide detectors and motion detection technology' in place to 'detect stowaways hidden deep within vehicles'.<sup>90</sup> [See **Figure 1**, infra-red detection of migrants at sea]:<sup>91</sup>



**Figure 1**

Surveillance has also become outsourced to local residents under the auspices of 'community engagement'.<sup>92</sup> This extends to regular citizens who are encouraged to report 'unusual night-time gatherings' [see **Figure 2**, 'community engagement' poster]<sup>93</sup> or other presumed suspicious behaviour along the coast. The implicit assumed distinction between 'policeman citizen' and 'illegal migrant' further reinforces the creation of a zone in which policing the identity and legitimacy of migrant bodies becomes a collective responsibility, and in which migrants' very presence becomes suspect.

Security and surveillance measures have been stepped up since December 2018 in response to an increase in people attempting to cross the Channel by boat.<sup>94</sup> This resembles Frontex's Mediterranean

<sup>90</sup> 'Fact sheet: The UK's juxtaposed border controls' (*Home Office News Team*, 11 July 2017)

<<https://homeofficemedia.blog.gov.uk/2017/07/11/fact-sheet-the-uks-juxtaposed-border-controls/>> accessed 8 September 2019.

<sup>91</sup> PREMAR Manche, 'Anti-trafficking operation' (*Twitter*, 22 November 2018)

<[https://twitter.com/premarmanche/status/1065548121592205312?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etwetembed%7Ctwterm%5E1065548121592205312&ref\\_url=https%3A%2F%2Fwww.infomigrants.net%2Ffr%2Fpost%2F13681%2F1a-mysterieuse-explosion-des-traversees-de-la-manche-pour-rallier-l-angleterre](https://twitter.com/premarmanche/status/1065548121592205312?ref_src=twsrc%5Etfw%7Ctwcamp%5Etwetembed%7Ctwterm%5E1065548121592205312&ref_url=https%3A%2F%2Fwww.infomigrants.net%2Ffr%2Fpost%2F13681%2F1a-mysterieuse-explosion-des-traversees-de-la-manche-pour-rallier-l-angleterre)> accessed 8 September 2019.

<sup>92</sup> 'Joint action plan by the UK and France on combating illegal migration involving small boats in the English Channel' (*Home Office*, January 2019) para 7(a)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/773403/UK\\_France\\_declaration\\_24\\_Jan\\_13.00.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/773403/UK_France_declaration_24_Jan_13.00.pdf)> accessed 8 September 2019.

<sup>93</sup> 'Aidez-nous a sauver des vies' (Poster, *Ministre de l'Interieur*, 2019)

<[https://www.interieur.gouv.fr/content/download/117011/938521/file/Ministere\\_interieur\\_embarcations.pdf](https://www.interieur.gouv.fr/content/download/117011/938521/file/Ministere_interieur_embarcations.pdf)> accessed 8 September 2019.

<sup>94</sup> 'Britain and France to strengthen joint action against small boats' (*Home Office*, 30 August 2019)

<<https://www.gov.uk/government/news/britain-and-france-to-strengthen-joint-action-against-small-boats>> accessed 8 September 2019.

operations replacing rescue missions with surveillance drones.<sup>95</sup> However, aid associations claim that it is in fact as a result of border securitisation that people have begun attempting more dangerous forms of border crossing such as by dinghy and even swimming.<sup>96</sup> Allen of Help Refugees described in an interview how as ‘safer’ irregular routes, such as hiding in the backs of lorries, has become more difficult, dinghy and boat crossings have dramatically increased. August 2019 saw the first deaths of migrants trying to cross to the UK by sea.<sup>97</sup> Government policies, Allen stated, are ‘pushing people into the sea’.<sup>98</sup>



Figure 2

## 2.4 Policing

<sup>95</sup> Daniel Howden, ‘Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over’ *The Guardian* (4 August 2019) <<https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu>> accessed 8 September 2019.

<sup>96</sup> May Bulman, ‘Brutal’ border policies in Calais condemned after surge in attempted Channel crossings’ *The Independent* (23 August 2019) <<https://www.independent.co.uk/news/uk/home-news/calais-crossings-channel-refugees-migrants-uk-home-office-a9076636.html>> accessed 8 September 2019.

<sup>97</sup> ‘PRESS RELEASE - Tragic disappearance of woman at UK border is a symptom of wider problem’ (*Refugee Women’s Centre*, 22 August 2019) <<https://www.dunkirkrefugeewomenscentre.com/single-post/2019/08/22/PRESS-RELEASE---Tragic-disappearance-of-woman-at-UK-border-is-a-symptom-of-wider-problem-Lack-of-access-to-legal-routes-of-passage-must-be-addressed>>; May Bulman, ‘Body of Iraqi man who ‘tried to swim to UK’ wearing makeshift life vest of plastic bottles found off Belgian coast’ *The Independent* (27 August 2019) <<https://www.independent.co.uk/news/world/europe/iraqi-refugee-drowns-migrant-dead-belgian-belgium-channel-uk-a9080121.html>> accessed 8 September 2019.

<sup>98</sup> Allen interview.

Alongside the expanding security regime in Calais and Dunkerque, there has been an increasingly ruthless police presence across the region intended to identify, remove and detain 'illegal migrants'. This is echoed in the UK's own 'Hostile Environment' policy aimed at 'identifying and reducing the number of immigrants in the UK with no right to remain'.<sup>99</sup> Whilst the UK has refused any direct participation in the policing of migrants,<sup>100</sup> a 2013 Borders Inspectorate report states that Ministry of Defence police have been deployed on the French side of the border.<sup>101</sup> This is in addition to three UK police cells 'discovered [...] in the British controlled area' above a Coquelles STHF.<sup>102</sup>

Nonetheless, the political cost of brutal policing measures is still conveniently borne by the French government, which has over the years created a *de facto* military zone characterised by violence, restrictions on mobility and forced removal of migrants. The French government strategically deploys *Compagnies Républicaines de Sécurité* (CRS) police to Calais, a mobile unit primarily used for crowd control,<sup>103</sup> framing the presence of migrants as a problem of public security. In January 2018, despite the number of migrants being estimated around 400,<sup>104</sup> there were 1,130 police stationed in Calais alone.<sup>105</sup> Edmond-Pettitt argues that this disproportionately high police presence across the region 'allows the number of refugees arriving in Britain to remain rather low by physically extending the 'hostile environment' to Calais' and preventing migrants from being able to attempt the border crossing in the first place.<sup>106</sup>

Allegations of police brutality and excessive use of force have gone hand in hand with this police presence. Violence has been reported in many forms, from physical to psychological to structural. Rygiel recalls that in the Calais 'Jungle' camp of the early 2000's, police 'would randomly attack migrants at the food depot [...] including random visits to pepper spray inside the tents and the migrants' blankets in particular'.<sup>107</sup> Such descriptions of police violence enacted during even the most banal of daily activities – eating, travelling, sleeping – have continued to recur. Thirteen years after Rygiel's observation, a research study heard experiences of 'how police chased migrants by baton from public parks, corralled them into police vans only to abandon them miles out of town, destroyed

<sup>99</sup> House of Lords 2018, 1.

<sup>100</sup> 'Calais migrant crisis: Sending UK police ruled out' *BBC News* (5 November 2014)

<<https://www.bbc.co.uk/news/uk-29902959>> accessed 8 September 2019.

<sup>101</sup> Independent Chief Inspector of Borders and Immigration, 'An Inspection of Juxtaposed Controls' (*Gov.uk*, August 2013) para 5.113

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546809/An-Inspection-of-Juxtaposed-Controls\\_Aug\\_2013.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546809/An-Inspection-of-Juxtaposed-Controls_Aug_2013.pdf)> accessed 8 September 2019 (ICIBI 2013).

<sup>102</sup> HM Chief Inspector of Prisons (HMIP), 'Report on unannounced joint inspections of Coquelles and Calais non-residential short-term holding facilities' (*Justice Inspectorates*, 2013) p 5

<<https://www.justiceinspectorates.gov.uk/prisons/wp-content/uploads/sites/4/2014/03/calais-coquelles-2012.pdf>> accessed 8 September 2019 (HMIP 2013).

<sup>103</sup> Nicolas Boring, 'Police Weapons: France' (*Law of Congress Library*, September 2014)

<<https://www.loc.gov/law/help/police-weapons/france.php#Equipment>> accessed 8 September 2019.

<sup>104</sup> 'Macron to ask Britain to pay up to save Calais border deal' *France 24* (16 January 2018)

<<https://www.france24.com/en/20180116-macron-france-brexit-le-touquet-french-border-deal-calais?ref=tw>> accessed 8 September 2019.

<sup>105</sup> Emmanuel Macron, 'Discours devant les forces de sécurité à Calais' (16 January 2018)

<<https://www.elysee.fr/emmanuel-macron/2018/01/16/discours-devant-les-forces-de-securite-a-calais>> accessed 8 September 2019 (Macron 2018).

<sup>106</sup> Anya Edmond-Pettitt, 'The 'hostile environment' – the lived experience in Calais' in 'Humanitarianism: the unacceptable face of solidarity' 22 <[https://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism\\_the\\_unacceptable\\_face\\_of\\_solidarity.pdf](https://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism_the_unacceptable_face_of_solidarity.pdf)> accessed 8 September 2019 (IRR 2017).

<sup>107</sup> Rygiel 2011, 11.

their settlements, stole or pissed on their belongings, and contaminated their water supplies with CS gas'.<sup>108</sup>

Following the French government's policy of 'no fixation points' on the coastline,<sup>109</sup> this state-sanctioned violence has only risen.<sup>110</sup> Human Rights Watch's 2017 investigation into police harassment of migrants and aid workers in and around Calais found 'excessive and disproportionate'<sup>111</sup> use of force by police officers, in particular the routine use of pepper spray and even beatings.<sup>112</sup> An Interior Ministry-commissioned investigation into these allegations finds evidence of physical violence, excessive use of tear gas, destruction of personal belongings<sup>113</sup> in contravention of the policing Code of Ethics.<sup>114</sup> However, little seems to have changed since.<sup>115</sup>

Police are now authorised to carry out identity checks within a ten-kilometre radius of Calais and Dunkerque with the intention of 'preventing and searching for offences linked to transborder criminality'.<sup>116</sup> This effectively expands the perimeters within which citizenship is questioned and individuals may be presumed 'illegitimate' or criminal. Reinforced security is sanctioned in order to police 'suspect' bodies, creating an almost carceral border zone. Not just border-crossing but any visibility in the region thus poses a risk to migrants, where they might end up in interrogation, detention or removal from the country.<sup>117</sup>

## 2.5 Detention

A dual detention regime operates on the UK-France border, with several separate detention sites run by both countries. This paper focuses on the more insidious presence of British detention centres, established under the Juxtaposed Controls Order 2003.<sup>118</sup>

There is scarce information available on these sites due to restrictions on research visits and infrequent HM Inspectorate of Prisons (HMIP) visits. It appears that there are currently four UK Short

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<sup>108</sup> Joe Rigby and Raphael Schlembach, 'Impossible protest: no borders in Calais' (2013) 17(2) Citizenship Studies 157, 160 <<https://doi.org/10.1080/13621025.2013.780731>> accessed 8 September 2019.

<sup>109</sup> Macron 2018.

<sup>110</sup> IRR 2017, 23.

<sup>111</sup> HRW 2017, 15.

<sup>112</sup> HRW 2017, 24.

<sup>113</sup> *Inspections générales de l'administration, de la police nationale et de la gendarmerie nationale*, 'Evaluation de l'action des forces de l'ordre à Calais et dans le Dunkerquois' (23 October 2017) 28-32 <<https://www.interieur.gouv.fr/Publications/Rapports-de-l-IGA/Rapports-recents/Evaluation-de-l-action-des-forces-de-l-ordre-a-Calais-et-dans-le-Dunkerquois>> accessed 8 September 2019.

<sup>114</sup> Code de déontologie de la police nationale et de la gendarmerie nationale <<https://www.interieur.gouv.fr/Le-ministere/Deontologie>> accessed 8 September 2019.

<sup>115</sup> HROP 2019.

<sup>116</sup> Code de procédure pénale, arts 78-2 <<https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006071154&idArticle=LEGIARTI00006575160&dateTexte=&categorieLien=cid>> accessed 8 September 2019.

<sup>117</sup> 'Impunité d'une prefecture qui expulse vers des pays en guerre' (*La Cimade*, 7 October 2015) <<https://www.lacimade.org/calais-impunite-dune-prefecture-qui-expulse-vers-des-pays-en-guerre/>> accessed 8 September 2019.

<sup>118</sup> Juxtaposed Controls Order, art 13.

Term Holding Facilities (STHFs) on the French coast, one in both Calais and Dunkerque and two in Coquelles.<sup>119</sup>

This extraterritorial detention would seem to fit Mountz's analysis of offshore detention centres as geographical and legal 'sites of exclusion' used to 'capture liminal populations [...] not able to legally become refugees or asylum seekers because of their location at a distance from sovereign territory'.<sup>120</sup> However, as Bosworth notes, the UK STHFs in France operate within the bounds of the UK-France juxtaposed controls agreements which contain migrants outside of UK jurisdiction.<sup>121</sup> These detention centres function thereby as a form of 'black site', not 'exceptional' in Schmittian terms of operating in suspension of the law<sup>122</sup> but rather carefully enacting the aims of the bilateral border agreements.<sup>123</sup>

No inspection visits were made to these centres for a period of almost ten years due to 'lack of jurisdictional clarity'.<sup>124</sup> Subsequent HMIP visits find a concerning lack of safety, hygiene and access to independent legal advice. Nicknamed 'dog kennels',<sup>125</sup> they are described as 'unfit to hold adults and wholly inappropriate to hold children'.<sup>126</sup> Persistently poor conditions such as inadequate food provision<sup>127</sup> and a lack of on-site healthcare<sup>128</sup> breach the Home Office's STHF Rules.<sup>129</sup> The regular detainment of children<sup>130</sup> and no referral pathways for potential victims of trafficking<sup>131</sup> have drawn harsh criticism from HMIP throughout its reports.

Bosworth describes the facilities as sites of UK administrative power extended into France. They are 'not just symbolic, there is a little bit of the UK in Calais operating on British time. You enter the door and step back one hour, upon exiting, you are propelled an hour ahead'.<sup>132</sup> The juxtaposed controls agreements, however, have allowed the UK to elude the legal accountability that would usually

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<sup>119</sup> HMIP, 'Report on an unannounced inspection of the short-term holding facility at Dunkerque' (*Justice Inspectorates*, 2014) <<https://www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2014/06/2014-Dunkerque-Web.pdf>> (HMIP 2014); HMIP, 'Report on unannounced inspections of the UK short-term holding facilities at Coquelles and Calais' (*Justice Inspectorates*, 2016) <<https://www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2016/12/Coquelles-Calais-Web-2016-2.pdf>> accessed 8 September 2019 (HMIP 2016).

<sup>120</sup> Alison Mountz, 'The enforcement archipelago: Detention, haunting, and asylum on islands' (2011) 30 *Political Geography* 118, 118 <<https://www.sciencedirect.com/science/article/pii/S0962629811000096>> accessed 8 September 2019 (Mountz 2011).

<sup>121</sup> Bosworth 2016a.

<sup>122</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (tr George Schwab, University of Chicago Press, 1985).

<sup>123</sup> See Section III of this paper for a legal analysis of these detention sites.

<sup>124</sup> HMIP 2013, 5.

<sup>125</sup> David Barrett, 'Immigration centres 'like dog kennels' *The Independent* (5 April 2006) <<https://www.independent.co.uk/news/uk/politics/immigration-centres-like-dog-kennels-472885.html>> accessed 8 September 2019.

<sup>126</sup> HMIP 2016, 2.8.

<sup>127</sup> HMIP 2014, 1.45.

<sup>128</sup> HMIP 2013, 1.4, 2.5.

<sup>129</sup> Although these rules do not yet apply to the juxtaposed controls in Calais until an extended statutory instrument is in place, 'the spirit of the STHF Rules should nevertheless be followed there in the meantime.'

'Short-term Holding Facility Rules' (*Home Office*, 2018)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721583/STHF-rules-operational-guidance-v1.0-EXT.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721583/STHF-rules-operational-guidance-v1.0-EXT.pdf)> accessed 8 September 2019.

<sup>130</sup> HMIP 2016, 1.10, 2.8, 3.9.

<sup>131</sup> *Ibid* S2, 1.7.

<sup>132</sup> Mary Bosworth, 'British Border Control on the French North Coast' (*Border Criminologies*, 18 July 2016) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/07/british-border>> accessed 8 September 2019 (Bosworth 2016b).

accompany this extraterritorial control. With the management of these detention centres contracted out to Tascor and Eamus Cork Solutions, the UK government attempts to 'avoid engaging obligations under international and national refugee and human rights law',<sup>133</sup> undermining liability and mirroring the regime of private profit that has been implemented in UK domestic detention centres.<sup>134</sup>

It is exactly this enclosure in a state of 'illegality', or extra-legality, rendering the subject rights-less that Migreurop evokes in its definition of 'detention'. It proposes that dispersion, violence and invisibilisation 'act as prison bars and trace the boundaries of a place to which foreigners are confined'.<sup>135</sup> Indeed, the imposition of hostile living conditions, brutal policing and both figurative and literal detention are purportedly in response to different issues but set out to achieve the same end goal – to deter undocumented migration into the UK. This is achieved by the extension of UK control beyond its own territorial borders in order to discourage or actively prevent people from reaching UK territory. Individuals caught in this zone are at the disposal of, and disposable to, the State.

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<sup>133</sup> Sile Reynolds and Helen Muggeridge, 'Remote Controls: how UK border controls are endangering the lives of refugees' (*Refugee Council*, December 2008) 41 <<https://www.unhcr.org/4d947e5f9.pdf>> accessed 8 September 2019.

<sup>134</sup> Christine Bacon, 'The evolution of immigration detention in the UK: the involvement of private prison companies' (2005) RSC Working Paper Series No. 27 <<https://www.rsc.ox.ac.uk/files/files-1/wp27-evolution-immigration-detention-uk-2005.pdf>> accessed 8 September 2019.

<sup>135</sup> 'Migreurop Definition of Camps' (*Migreurop*, 2005) <<http://www.migreurop.org/article972.html?lang%C2%BCen&lang=fr>> accessed 8 September 2019.



### 3. LEGAL OUTCOMES

The state of apparent rights-lessness into which migrants in Northern France are thrust is engineered by a complex inter-web of administrative and penal processes allowing the UK to ‘exercise considerable arbitrary power and discriminatory sovereignty at this border’.<sup>136</sup> Administered under the juxtaposed controls agreements, these processes of detention and removal produce migrant ‘illegality’ whilst carefully evading accountability under UK law. The agreements themselves, however, result in breaches of international human rights and asylum law, in particular the ban on collective expulsions and the rights to remedy and *non-refoulement*.

#### 3.1 Migrant ‘illegality’

The systematic violence towards migrants in Northern France has over time been rendered legitimate by the casting of migrants in the area as criminal subjects or as threats to be defended against. Fassin’s work on the ‘production of illegality’ focuses precisely on this construction of the ‘illegal migrant’ as a result of ‘the development of an administrative apparatus at the borders and within the territory to control immigration and hunt down the undocumented’.<sup>137</sup> This is particularly relevant for expanding border zones such as that in Northern France, where those already on the margins are pushed into growing spaces of ‘illegality’ in which they are classified as ‘illegitimate’ or ‘criminal’ simply by way of their presence there. At the same time, alternatives to residence in this zone have been restricted following the tightening of legal options such as visa applications<sup>138</sup> and family reunification and child transfer procedures.<sup>139</sup>

De Genova too looks at the ‘legal production of migrant ‘illegality’ and deportability’’, studying not simply the state of ‘illegality’ but the process behind it. Derived from Foucault’s analysis of modern power as ‘productive’, De Genova sees ‘illegalities’ as ‘constituted and regimented by the law [...], with a considerable degree of calculated deliberation’.<sup>140</sup> The process of exclusion *within* rather than *from* the law serves to govern populations by rendering their status precarious and ‘deportable’. This construction of ‘deportability’, or disposability, identifies and creates individuals who will not necessarily be deported or removed but who are put at constant risk of being so.

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<sup>136</sup> Thomas Tyerman, ‘Border struggles: segregation, migrant solidarity, and ethical politics in everyday life’ (University of Manchester, 2017) 76  
<[https://www.research.manchester.ac.uk/portal/files/59282832/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/59282832/FULL_TEXT.PDF)> accessed 8 September 2019 (Tyerman 2017).

<sup>137</sup> Didier Fassin, ‘Policing Borders, Producing Boundaries. The Governmentality of Immigration in Dark Times’ (2011) 40 Annual Review of Anthropology 213, 218  
<<https://www.annualreviews.org/doi/pdf/10.1146/annurev-anthro-081309-145847>> accessed 8 September 2019.

<sup>138</sup> Home Office, ‘UK Visa requirements’ (*Home Office*, July 2019)  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/818794/UK\\_Visa\\_requirements\\_July\\_2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818794/UK_Visa_requirements_July_2019.pdf)> accessed 8 September 2019.

<sup>139</sup> ‘High Court hears challenge to government’s closure of Dubs scheme’ (*Solicitors Journal*, 20 June 2017)  
<<https://www.solicitorsjournal.com/news/201706/high-court-hears-challenge-government%E2%80%99s-closure-dubs-scheme>> accessed 8 September 2019.

<sup>140</sup> Nicholas De Genova, ‘Migrant ‘Illegality’ and Deportability in Everyday Life’ (2002) 31 Annual Review of Anthropology 419, 424 <<https://www.jstor.org/stable/4132887>> accessed 8 September 2019.

In the case of Northern France, migrants are contained a state of precarity through being continually removed from the UK border, into a zone in which they are again re-moved by continual evictions and dispersals, trapped within an infernal cycle of displacement and 'illegality'. Whilst De Genova sees 'deportability' as maintaining individuals within 'the possibility of being removed from the space of the nation-state',<sup>141</sup> for migrants in Northern France faced with the UK's externalised national borders, it is in fact removal from the space of the border zone that is at stake, removal from the site at which they may gain access to the destination State.

Not only is this space of 'illegality' constructed around migrants, but the law is then moulded to punish them for it. In what Stumpf has coined the 'crimmigration crisis', global migration governance has turned to regulating migratory movements through reconfiguring them as criminal offences and enforcing criminal prosecution procedures.<sup>142</sup> This is evident in both the discourse and law surrounding the UK-France border, in which exiles are referred to as 'illegal entrants' or 'criminal gangs' in both media and legal texts.<sup>143</sup> Criminal penalties have been placed on immigration-related offences, such as the UK's sanctioning of vehicle drivers found to be transporting migrants, effectively outsourcing border checking responsibility to private services.<sup>144</sup>

This acts as a parallel with the UK 'Hostile Environment' policy which requires non-government workers such as hospitals, schools and landlords to collaborate in immigration enforcement.<sup>145</sup> In the UK border zone and mainland alike, 'mobility is recast as a criminal act, to which the appropriate State response is punitive and carceral'.<sup>146</sup>

Migrants' stay on French soil is thus cast as illegal, and their activity as criminal.

### 3.2 Legal grey zone

On both a figurative and jurisdictional level then, exiles in the border zone are trapped in a space of questioned and questionable legality. This resembles Yiftachel's notion of 'grey spacing', referring to 'populations [...] positioned between the 'lightness' of legality/approval/safety and the 'darkness' of eviction/destruction/death' which 'exist partially outside the gaze of State authorities'.<sup>147</sup> In the UK-France border zone, migrants are indeed contained in a legal grey zone in which they are subjected to UK law but denied their full set of rights under it. The juxtaposed controls deflect them from UK territory and leave them in transit limbo in the border zone.

This 'grey' legality stretches as far back as the time of the Sangatte camp, which Fassin describes as, 'a place of indeterminate status [...] in which illegal status was not punished [...] but in which the

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<sup>141</sup> Ibid, 439.

<sup>142</sup> Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 Am.U.L.Rev. 368 <<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1274&context=aulr>> accessed 8 September 2019.

<sup>143</sup> See for example the 2015 Joint Declaration.

<sup>144</sup> Immigration and Asylum Act 1999, section 32.

<sup>145</sup> Liberty 2019.

<sup>146</sup> Melanie Griffiths, 'Foreign, criminal: a doubly damned modern British folk-devil' (2017) 21(5) Citizenship Studies 527, 535 <<https://www.tandfonline.com/doi/full/10.1080/13621025.2017.1328486>> accessed 8 September 2019.

<sup>147</sup> Oren Yiftachel, 'Critical theory and 'gray space' Mobilization of the colonized' (2009) 13(2-3) City 240, 243 <<https://www.tandfonline.com/doi/abs/10.1080/13604810902982227>> accessed 8 September 2019 (Yiftachel 2009).



undesirables were rendered invisible – as long as they quickly disappeared by leaving for the United Kingdom'.<sup>148</sup> As the United Kingdom has become more hostile to these people's arrival,<sup>149</sup> however, and extended the juxtaposed controls and security measures in a bid to prevent prospective asylum seekers' departure from France, this transit limbo has become more of a blockage point where people are actively excluded from both directions. Has the 'grey' zone thus turned into a 'black zone', where migrants are invisibilised, criminalised and denied rights? A different kind of 'state of exception',<sup>150</sup> not so much *outside* the realm of law as *constructed* by law.

Scott writes of the Spanish Ceuta and Melilla enclaves that migrants on the border are in a 'zone of rights exclusion, in legal black holes' of State power 'backed by violence and extra-legality'.<sup>151</sup> The same goes for the UK-France frontier, where the bilateral treaties concretise the bordering process of trapping migrants in 'black holes' in which they are subject to UK sovereignty and yet have no recourse to the rights this would regularly entitle them to.

This extraterritorial control has been examined by Mountz in the context of offshore island immigration controls, in which the 'partial sovereignty' of the territory is used to 'deter, detain and deflect migrants from the shores of sovereign territory'.<sup>152</sup> However, whilst the US and Australian offshore controls examined by Mountz operate outside of domestic law, the form of 'offshoring' implemented by the UK is more ambiguous. The UK has not attempted to withdraw its jurisdiction but rather extend it, selectively, in order to obtain greater criminal powers whilst evading responsibility under asylum law.

The series of overlapping and unclear legal regimes leave those caught in this zone with unclear recourse to justice. The CNCDH outlines the complexity of the juxtaposed controls which effectively create 'four legal regimes of border police, with different applicable rules for the same infraction' depending on where around Calais it is committed.<sup>153</sup> UK border staff themselves are sometimes 'unsure of the extent of the UK Control Zone in Calais'.<sup>154</sup>

### 3.3 Extraterritorial jurisdiction

The juxtaposed controls permit the UK to impose extraterritorial criminal jurisdiction, enforce returns and operate detention sites in Northern France whilst denying full legal responsibility for its presence in the area, leading to allegations of Calais becoming the UK's own Guantanamo.<sup>155</sup>

Whilst Mountz shows that immigration controls 'beyond sovereign territory in 'grayer' zones offshore' act to deny and subvert international refugee law,<sup>156</sup> in Northern France the UK is still very much under

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<sup>148</sup> Fassin 2011, 136.

<sup>149</sup> Ibid 136.

<sup>150</sup> Giorgio Agamben, *State of Exception* (Kevin Attell tr, University of Chicago Press, 2004).

<sup>151</sup> Xavier Ferrer-Gallardo and Lorenzo Gabrielli, 'Ceuta and Melilla as a Euro-African borderscape' in 'Between crises and borders: Interventions on Mediterranean Neighbourhood and the salience of spatial imaginaries' (2018) 63 *Political Geography* 174, 182

<<https://www.sciencedirect.com/science/article/pii/S0962629817302214>> accessed 8 September 2019.

<sup>152</sup> Mountz 2011, 118.

<sup>153</sup> CNCDH 2015, 18.

<sup>154</sup> ICIBI 2013, 1.12.

<sup>155</sup> John Lichfield, 'The Calais Guantanamo' *The Independent* (21 March 2009)

<<https://www.independent.co.uk/news/uk/home-news/the-calais-lsquoquantanamorsquo-1650592.html>> accessed 8 September 2019.

<sup>156</sup> Mountz 2011, 120.

its domestic, regional and international legal obligations to asylum seekers due to the extraterritorial jurisdiction it exercises.

Standards provided for in European case law can be used to ascertain the UK's own jurisdictional responsibility in Northern France. Extraterritorial jurisdiction can be engendered by a series of different factors including effective control of a territory, State agent authority and a State's exercise of public powers abroad.

In European case law, 'effective control' of a territory has traditionally been applied to military occupations abroad,<sup>157</sup> making it less relevant for border interceptions and *non-refoulement*. Hathaway has argued, however, that the UK-France juxtaposed controls agreements allowing the UK to apply parts of its law on French territory may come close to this transfer of territorial control.<sup>158</sup>

More pertinently to the UK's *non-entrée* politics, extraterritorial jurisdiction has evolved to encompass 'State agent authority'. The ECtHR's reasoning was that 'authorised agents of the State [...] not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property'.<sup>159</sup> Case law has expanded this to cover when an individual is taken into the custody of State agents abroad<sup>160</sup> or is under the 'exclusive and continuous' control of another State's authorities,<sup>161</sup> whilst in *Al Skeini v UK*, the Court of Appeal found 'State agent authority' to trigger UK domestic law to also apply abroad.<sup>162</sup> As ruled by the Committee Against Torture, jurisdiction 'must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention'.<sup>163</sup>

This principle is relevant for the UK's presence in Northern France, where 'Border Force officers are there, 24 hours a day, every day of the year'.<sup>164</sup> These officials intercept migrants in the UK Control Zone and may hold them in detention facilities for up to 24 hours.<sup>165</sup> During this time they are 'in the care of the UK Border and Immigration Agency', exclusively and continuously.<sup>166</sup> Their movements are thus controlled by UK State agents, from the moment of interception, to detention, to removal to the French Police aux Frontieres (PAF).

Extraterritorial jurisdiction may also apply when on one government's territory, another government 'exercises all or some of the public powers normally to be exercised by that Government'.<sup>167</sup> Although this concept is not well-defined in international law it does cover security administration as well as

<sup>157</sup> *Loizidou v Turkey* no. 15318/89 (ECtHR, 18 December 1996).

<sup>158</sup> Hathaway 2015, 262.

<sup>159</sup> *Cyprus v Turkey* no 25781/94 (ECtHR, 10 May 2001) para 8.

<sup>160</sup> *Öcalan v Turkey* no 46221/99 (ECtHR, 12 May 2005) para 91.

<sup>161</sup> *Hirsi Jamaa v Italy* no 27765/09 (ECtHR, 23 February 2012) para 81; *N.D. and N.T. v Spain* no 8675/15 (ECtHR, 3 October 2017) para 54.

<sup>162</sup> *Al Skeini and others v UK* no 55721/07 (ECtHR, 7 July 2011) para 81.

<sup>163</sup> *J.H.A. v Spain* (2007) no. 323/2007 UN Doc CAT/C/41/D/323/2007 para 8.2.

<sup>164</sup> 'Fact sheet: The UK's juxtaposed border controls' (*Home Office*, 11 July 2017)

<<https://homeofficemedia.blog.gov.uk/2017/07/11/fact-sheet-the-uks-juxtaposed-border-controls/>> accessed 8 September 2019.

<sup>165</sup> Juxtaposed Controls Order art 14.

<sup>166</sup> 'Written evidence by the Home Office Border Controls at Calais and Coquelles', Select Committee on European Union (*UK Parliament*, January 2008)

<<https://publications.parliament.uk/pa/ld200708/ldselect/lddeucom/60/60we05.htm>> accessed 8 September 2019.

<sup>167</sup> *Banković and others v Belgium and others* no 52207/99 (ECtHR 12 December 2001) para 71.

executive or judicial functions.<sup>168</sup> The public power principle can therefore be ‘an important tool in the fight against cooperative variants of *non-entrée*, allowing liability to be imposed in a number of circumstances that arguably fall outside either the territorial or the personal mode of jurisdiction’.<sup>169</sup>

In France, the Sangatte Protocol grants the UK explicitly criminal jurisdiction<sup>170</sup> as well as power of arrest under domestic law in the Control Zones,<sup>171</sup> and those entering the UK Control Zone are still regarded as ‘illegal entrants’ under UK law.<sup>172</sup> Individuals suspected of illegal transportation too, even when discovered in France, may be found liable under UK law.<sup>173</sup> Along with its exportation of the detention regime, this allows the UK to exercise important public functions on French territory. Hathaway proposes that migration control itself, ‘being a core law enforcement task and exclusive sovereign prerogative’, constitutes a public power that would trigger extraterritorial jurisdiction when exercised beyond a State’s own borders.<sup>174</sup>

The UK’s presence in Northern France should therefore invoke full domestic legal responsibility for those intercepted by and under the control of its Border Force officials, particularly in the STHF sites.

### 3.3 Accountability under refugee and human rights law

As this paper has shown, exiles in Northern France are systematically prevented from being able to claim asylum in the UK through systematic removal of those who come close to its territory. This is achieved by the UK’s externalised border locating British sovereignty ‘beyond the territory of the State in such a way that empowers its border agents to administer bodies and materials according to British law but without certain reciprocal duties’.<sup>175</sup> Migrants are detained and deflected from the Control Zone and in a recent concerning trend those arriving to the UK by boat appear to be being pushed back.<sup>176</sup> If UK extraterritorial jurisdiction is established in Northern France, these *non-entrée* practices contravene the right to seek asylum under international and European law, as well as procedural safeguards such as the ban on collective expulsions<sup>177</sup> and the right to effective remedy.<sup>178</sup>

## COLLECTIVE EXPULSIONS

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<sup>168</sup> *Al Skeini* paras 130-39, 143-48.

<sup>169</sup> Hathaway 2015, 272.

<sup>170</sup> Sangatte Protocol art 38.

<sup>171</sup> *Ibid* art 40.

<sup>172</sup> Juxtaposed Controls Order, schedule 2 art 1(2)(ii).

<sup>173</sup> ‘Dudley lorry driver fined £12k over Calais migrants’ *BBC News* (5 March 2019)

<<https://www.bbc.co.uk/news/uk-england-birmingham-47457788>> accessed 8 September 2019.

<sup>174</sup> Hathaway 2015, 268.

<sup>175</sup> Tyerman 2017, 76.

<sup>176</sup> *n* 19.

<sup>177</sup> Protocol No. 4 to the European Convention on Human Rights (adopted 16 September 1963, entered into force 2 May 1968) ETS 46 (ECHR Protocol 4) art 4; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 32.

<sup>178</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 13.

The prohibition on collective expulsions is enshrined in ECHR Protocol 4 Article 4. It previously represented ‘a large gap in international law’<sup>179</sup> (ASIL) easily exploited to return migrants *en masse*, but ‘has gained importance in the jurisprudence of the ECtHR following the evolution of European border policies’.<sup>180</sup> This began with *Hirsi Jamaa* in which the ECtHR stated that the purpose of this prohibition ‘is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority’.<sup>181</sup> Returns enforced without effective procedural guarantees whilst a State was exercising its jurisdiction abroad would thereby amount to collective expulsion.<sup>182</sup>

The Additional Sangatte Protocol explicitly denies those being controlled by UK Border Force the right to claim asylum from that State.<sup>183</sup> This is reaffirmed by the 2003 Le Touquet Treaty, which states that any asylum claim made to the authorities of either State may only be considered by the State of departure, unless it is made after the departure of the ship.<sup>184</sup> This applies equally even when people are detained in the UK STFs.<sup>185</sup>

More recently, the announcements that the UK has begun removing ‘illegal’ migrants crossing the Channel by boat directly back to France raise concerns that even those who do reach UK territory are not being allowed to claim asylum there.<sup>186</sup>

These returns prevent individuals having their claims for asylum heard in the UK, justified by an insistence on the Dublin agreement’s ‘first safe country’ system.<sup>187</sup> However, the UK’s direct return of prospective asylum seekers to France has been accused of bypassing this system<sup>188</sup> as well as an individual’s right to challenge the ‘safe country’ criteria application.<sup>189</sup>

As Den Heijer argues, *Hirsi Jamaa* established that ‘any interception activity that factually prevents migrants from effectuating an entry [...] may be construed as expulsion’.<sup>190</sup> Following this precedent, migrants’ inability to claim asylum in the UK at the French border, and even beyond it, would constitute collective expulsion as well as a contravention of European asylum law.

## NON-REFOULEMENT

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<sup>179</sup> Jaya Ramji-Nogales, ‘Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights’ (ASIL, 4 January 2016) <<https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights>> accessed 8 September 2019.

<sup>180</sup> Jean-Yves Carlier, ‘Collective expulsion or not? Individualisation of decision making in migration and asylum law’ (*EU Migration Law Blog*, 8 January 2018) <<https://eumigrationlawblog.eu/collective-expulsion-or-not-individualisation-of-decision-making-in-migration-and-asylum-law/>> accessed 8 January 2019.

<sup>181</sup> *Hirsi Jamaa* para 177.

<sup>182</sup> *Ibid* paras 202-5.

<sup>183</sup> Additional Sangatte Protocol, art 4.

<sup>184</sup> Touquet Treaty, art 9.

<sup>185</sup> HMIP 2013, para 1.23.

<sup>186</sup> *n* 173.

<sup>187</sup> Parliament and Council Regulation 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection [2013] L 180/31 (Dublin Regulation).

<sup>188</sup> CNCDH 2015, paras 33-6.

<sup>189</sup> Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] L 180/60, arts 35, 38.

<sup>190</sup> Maarten den Heijer, ‘Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case’ (2013) 25(2) IJRL 265, 283 <<https://doi.org/10.1093/ijrl/eet020>> accessed 8 September 2019.

The ban on collective expulsion is closely tied to the principle of *non-refoulement*,<sup>191</sup> the right to not be returned to a country where one's life would be threatened as a result of persecution<sup>192</sup> or where there is a risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment.<sup>193</sup> The *non-refoulement* principle is considered part of customary international law.<sup>194</sup> It is also enshrined in the Refugee Convention, of which Edwards asserts that 'Articles 1 and 33 read together place a duty on States parties to grant, at a minimum, access to asylum procedures for the purpose of refugee status determination'.<sup>195</sup> Without this, 'obligations of *non-refoulement*, including rejection at the frontier, could be infringed'.<sup>196</sup> The UNHCR has emphasised that *non-refoulement* rights can apply extraterritorially given the obligation's focus on *to* rather than *from* which country a person is being returned.<sup>197</sup>

Whilst France is designated a safe country, individuals are generally returned directly from the UK Control Zone to informal camps<sup>198</sup> where they are subject to persistent police brutality and inhuman and degrading treatment as ruled by several court cases over recent years.<sup>199</sup> Inspection reports of the STHFs find that detainees are released without verification of vulnerabilities or attempts to identify victims of trafficking.<sup>200</sup> This presents a risk of *refoulement* under the auspices of European 'safe third country' returns, even though it undermines the sense of article 3(2) of the Dublin Regulation.

The *non-refoulement* principle has been argued with regard to camps in Northern France in the *SSHD v ZAT* case concerning four young Syrians from the Calais 'Jungle'.<sup>201</sup> Grover contends that the refusal of entry to the UK for the four minors constitutes an act of *refoulement* to France and violates the prohibition on inhuman and degrading treatment. This is due to deprivation of reunification with family members and the return of vulnerable individuals to a situation in which their safety and possibly lives are at risk.<sup>202</sup> The same may be proposed for migrants refused entry at the border in France or returned directly from the UK having arrived by boat, without consideration of their identity, individual safety or family situation.

## RIGHT TO REMEDY

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<sup>191</sup> Refugee Convention art 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNTS 1465 (CAT) art 3.

<sup>192</sup> Refugee Convention art 33(1).

<sup>193</sup> CAT art 3.

<sup>194</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (UNHCR, 2001) p 81 <<https://www.unhcr.org/419c74d64.pdf>> accessed 8 September 2019.

<sup>195</sup> Alice Edwards, 'Human Rights, Refugees, and The Right 'To Enjoy' Asylum' (2005) 17(2) IJRL 293, 301 <<https://academic.oup.com/ijrl/article/17/2/293/1548262>> accessed 8 September 2019.

<sup>196</sup> Alice Edwards, 'Tampering with Refugee Protection: The case of Australia' (2003) 15(2) IJRL 192, 197 <<https://academic.oup.com/ijrl/article-abstract/15/2/192/1532464>> accessed 8 September 2019.

<sup>197</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations* (26 January 2007) <<https://www.refworld.org/docid/45f17a1a4.html>> accessed 8 September 2019.

<sup>198</sup> HMIP 2013, HE.38.

<sup>199</sup> n 55.

<sup>200</sup> HMIP 2016, 1.7, 1.8.

<sup>201</sup> *SSHD v ZAT* [2016] EWCA Civ 810.

<sup>202</sup> Sonja Grover, *Child Refugee Asylum as a Basic Human Right* (Springer, 2018).

A key safeguard against collective expulsion and *refoulement* is the right to remedy, as enshrined in ECHR Article 13<sup>203</sup> and Article 13 of the European Returns Directive.<sup>204</sup> This right, in combination with ECHR Article 3, requires a person to have a remedy for expulsion if it would expose her/him to real risk of inhuman or degrading treatment.<sup>205</sup>

In the context of removals, ECtHR case law has found effective remedy to include ‘independent and rigorous scrutiny of a claim’ fearing treatment contrary to Article 3 as well as information on relevant procedures and legal advice<sup>206</sup> through an interpreter.<sup>207</sup> A complaint must moreover be ‘subject to close scrutiny by a ‘national authority’.<sup>208</sup>

The UK’s practices of detainment and removal of migrants in Northern France violate the right to an effective domestic remedy. The juxtaposed controls agreements deny the possibility of claiming asylum in the UK as well as of remedy against removal from the UK Control Zone. UKBF detain migrants in the STHFs with consistently no independent legal advice and ‘irrelevant’ or ‘defunct’ information on UK procedures.<sup>209</sup> They have little to no access to interpreters or translated information,<sup>210</sup> occasionally have telephones confiscated<sup>211</sup> and a 2013 inspection found that the correct paperwork pertaining to the detention of those refused entry ‘had been issued or retained in only 21% of cases’.<sup>212</sup> In the general port controls, the inspection found an ‘inadequate level of detail retained on the file or electronic record to provide justification for the [entry refusal] decision’, with incomplete paperwork in one-fifth of refusal cases.<sup>213</sup>

In the case of migrant push-backs from Melilla in *N.D. and N.T. v Spain*, the ECtHR ruled a violation of Article 13 in light of the applicants not having had their identities established and being refused access to interpreters and legal assistance by Spanish authorities.<sup>214</sup> Whilst this case differs from the UK-France push backs in that it is an external frontier of Europe and thus cannot be argued to fit within the ‘first safe country’ justification, the case nonetheless sets a precedent on countries adjusting their borders to prevent immigration. Pijnenburg argues that the implication of *N.D. and N.T.* is that ‘if border guards prevent an individual from entering the State’s territory, the State has the obligation to secure that person’s right to apply for asylum and not to be pushed back’.<sup>215</sup> This includes access to a domestic remedy against such an expulsion.

The ECtHR has moreover established that an ‘excessively short time’ between the application to a court remedy and removal would not allow for a proper examination of the applicant’s arguments, undermining the effectiveness of the remedy.<sup>216</sup> In the UK Control Zone, ‘illegal entrants’ are handed

<sup>203</sup> Universal Declaration of Human Rights (10 December 1948) UNGA 217 A (III) (UDHR) art 8; ECHR art 13.

<sup>204</sup> Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] L 348/98, art.

<sup>205</sup> Council of Europe, ‘Guide to good practice in respect of effective remedies’ (18 September 2013) 35 <[https://www.echr.coe.int/Documents/Pub\\_coe\\_domestic\\_remedies\\_ENG.pdf](https://www.echr.coe.int/Documents/Pub_coe_domestic_remedies_ENG.pdf)> accessed 8 September 2019.

<sup>206</sup> *Hirsi Jamaa*, para 204.

<sup>207</sup> *I.M. v France* no 9152/09 (ECtHR, 2 February 2012) para 145.

<sup>208</sup> *Shamayev v Georgia and Russia* no 36378/02, (ECtHR, 12 April 2005) para 448.

<sup>209</sup> HMIP 2016, 2.11, 3.13; HMIP 2013, HE.12, 1.23, 2.21, 3.28.

<sup>210</sup> HMIP 2013, HE.33, 1.34, 3.38; HMIP 2014, 1.40.

<sup>211</sup> HMIP 2014, 1.51.

<sup>212</sup> ICIBI, para 1.10.

<sup>213</sup> *Ibid* 1.9.

<sup>214</sup> *N.D. and N.T.* paras 116-122.

<sup>215</sup> Annick Pijnenburg, ‘Is N.D. and N.T. v. Spain the new Hirsi?’ (*EJIL Talk*, 17 October 2017) <<https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/>> accessed 8 September 2019.

<sup>216</sup> *De Souza Ribeiro v France* no 22689/07 (ECtHR, 4 October 2013) para 95.

directly back to the French authorities who may detain or release them,<sup>217</sup> leaving barely any time to lodge a complaint at all. These practices severely restrict the possibility of migrants challenging either detention or removal, a vital safeguard against unlawful procedures.

The very legal agreements governing the UK border have thus been used to deny migrants access to UK law. Challenging the daily violations of both human rights and asylum law taking place on this border requires challenging the basis of the bilateral treaties themselves, and their incompatibility with international and European law.

Tackling such highly politicised issues is challenging, however, 'at a time when it has become commonplace to tolerate the collateral damage caused by border control'.<sup>218</sup> The now decades-long entrenchment of these border controls in both policy and practice has allowed the UK to enjoy relatively little criticism from domestic or EU judicial bodies.

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<sup>217</sup> Bosworth 2016a.

<sup>218</sup> Moritz Baumgärtel, 'Taking the Question of Italy's Involvement in Libyan 'Pullback' Policies to the European Court of Human Rights' (*EJIL Talk*, 14 May 2018) <<https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys-involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights/>> accessed 8 September 2019.



## CONCLUSION

In comparing wider externalisation trends to the creation of the UK-France border zone, the latter appears as an early experiment in different forms of border enforcement and immigration dissuasion. Through the juxtaposed controls agreements the UK has been able to wield political, legal and financial control over parts of Northern France and as far as Paris and Brussels. This has allowed it to carefully construct a hostile environment abroad, where the daily experience of harassment, physical violence and oppressive security and surveillance structures often operated by private companies leads to exhaustion, forced clandestinity and cyclical re-displacement. This procedure of exclusion of ‘undesirables’ has since been replicated in the UK’s formal domestic ‘Hostile Environment’ policy.

The concomitant securitisation of the border and insecurity of migrant bodies in Northern France has created a zone of deterrence, aimed at detecting, detaining and removing exiles before they reach UK territory. Here, migrants are enclosed in camp-like spaces trapped between the two States, forbidden both from settling and from leaving. The only feasible exit that many see – irregular entry to the UK – is placed out of safe reach by the juxtaposed controls’ prevention of the right to claim asylum in the UK. The controls permit UK authorities to operate under the powers of their own domestic legislation in France, with few reciprocal obligations. This extends extraterritorial jurisdiction as set out in ECtHR case law, in particular with regard to State agent authority and the exercise of public powers. As such, legal accountability can and must be ascertained for the UK’s use of indiscriminate push backs. The inability to register asylum claims violates the ban on collective expulsion, whilst the lack of regard for individual situations upon return may amount to *refoulement*. Throughout this process the poor procedural safeguards in place deny the possibility of effective remedy.

A hostile environment is thus enforced on the bodies of migrants, on their living spaces and on their legal rights in Northern France. A process of offshored immigration control excludes prospective asylum seekers from nearing the UK, perpetually deflecting them from its exported borders.



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