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CARRIER SANCTIONS AND THE CONFLICTING LEGAL OBLIGATIONS OF CARRIERS: ADDRESSING HUMAN RIGHTS LEAKAGE

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ABSTRACT

Carrier sanctions, by which transport companies are penalised if they do not refuse embarkation to undocumented persons, play a role in perpetuating harms (denial of refugee protection; death) against migrants. They do so because transport companies are obliged to, by legislation of destination states in Europe, North America and Australia. The potential accountability and responsibility of carriers for these harms has not been addressed in literature on human rights law. This article fills this gap through the application of Iris Young's social connection model to address the contemporary harms of carrier sanctions. We propose that, faced with conflicting legal obligations, carriers have moral and legal obligations to remedy, through strategic actions, the harms to which they contribute. We outline a number of possible practices that carriers can use to do so.

Keywords: Carrier sanctions; human rights leakage; Iris Marion Young; accountability; migration law

Introduction

Debates on the legal and moral responsibilities of non-state actors have enjoyed widespread interest among scholars from a variety of disciplines.¹ A central argument in response to this question is that corporations do have moral and legal human rights responsibilities; those responsibilities have been codified in the UN Guiding Principles on Business and Human Rights.²

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¹ A. Clapham, 'Non-State Actors' in D. Moeckli, S. Sangeeta & S. Sivakumaran (eds), *International Human Rights Law*, Oxford: Oxford University Press 2010, pp. 561-582; J. d'Aspremont, A. Nollkaemper, I. Plakokefalos & C. Ryngaert, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction', *Netherlands International Law Review* 2015, pp. 49-67; S. Deva & D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge: Cambridge University Press 2013

² United Nations Office of the Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework',

While these debates have been instructive, the literature has so far largely ignored the intersection of migration, corporations, and human rights. A recent overview of immigration ethics in a Special Issue of the *Critical Review of International Social and Political Philosophy* does not include a discussion of the corporation, even when privatisation and externalisation have been two of the major focuses of immigration scholarship over the past two decades.³ On the other hand, studies on business and migration mention human rights but fail to engage with the potential human rights obligations of corporations.⁴ Questions about how corporations contribute to harm and suffering of migrants, and how we can address corporate responsibility and accountability for migrant suffering are warranted given the increasing roles that corporations play in controlling migration. In the literature so far, there has been a discussion as to whether transport companies may exercise elements of governmental authority, with the consequence that states may be responsible for the acts of these entities under international law.⁵ However, the distinct question whether these private entities may be responsible in their own right (directly under international law, or under domestic law made in pursuance to international law – think of the example of chemical weapons) will not be addressed.

This article intends to amend this lacuna. Migration is an important business issue, especially for carriers which transported 3,9 billion passengers in 2017,⁶ and had a turnover of \$534 billion.⁷ In doing so, they are implementing migration policies of destination states in Europe, North America and Australia. Carrier sanctions is the term used for carriers (airlines, shipping companies) being penalised for transporting insufficiently documented or undocumented travellers. The result of carrier sanctions is that passengers without proper documentation are refused boarding, because carriers do not want to be fined. Effectively, carriers are implementing the border controls of destination states. Carrier sanctions have been addressed in the literature on the privatisation and externalisation of migration control, and human rights issues arising from such control

HR/PUB/11/04, New York and Geneva: United Nations 2011. The literature on business and human rights is wide and growing, and we make no effort to review it all here. For introductory materials see H. J. Steiner, P. Alston & R. Goodman, *International Human Rights in Context*, Oxford: Oxford University Press 2007, pp. 1387; N. Connolly & M. Kaisershot, 'Corporate power and human rights', *The International Journal of Human Rights* 2015-6, pp. 663-672; and the Business and Human Rights Resource Centre at: <http://business-humanrights.org/en>.

³ J.H. Carens, 'An overview of the ethics of immigration', *Critical Review of International Social and Political Philosophy* 2014-5, pp. 538-559; C.E.G. Akakpo & P.T. Lenard, 'New challenges in immigration theory: an overview', *Critical Review of International Social and Political Philosophy* 2014-5, pp. 493-502.

⁴ T. Gammeltoft-Hansen & N. Nyberg Sørensen (eds), *The Migration Industry and the Commercialization of International Migration*, Abingdon and New York: Routledge 2013.

⁵ For example, see Article 5 of the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts*. The ILC's commentary mentions that "(p)ivate or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine", see 'Materials on the Responsibility of States for Internationally Wrongful Acts', United Nations Legislative Series, ST/LEG/SER.B/25. New York, NY: United Nations 2012. See on this J. Crawford, *State Responsibility*. Cambridge: Cambridge University Press, 2013, pp. 126-132.

⁶ World Bank Data 'Air transport, passengers carried', at: <https://data.worldbank.org/indicator/IS.AIR.PSGR> (accessed on 5 November 2018).

⁷ Statista 'Worldwide revenue with passengers in air traffic from 2005 to 2019', at: <https://www.statista.com/statistics/263042/worldwide-revenue-with-passengers-in-air-traffic/> (accessed on 5 November 2018).

mechanisms.⁸ In the discussion of carrier sanctions, normative and ethical theory has received less attention than standard human rights arguments.⁹ In order to address the gap between human rights arguments relating to carrier sanctions, and debates in corporate moral responsibility, this article introduces Iris Young's social connection model of accountability to the human rights debate concerning carrier sanctions.

The article proceeds as follows. The article argues that carrier sanctions are not well addressed by human rights law. We identify five points of 'human rights leakage' (for this term see paragraph II, *infra*), and note that the analysis is complicated further by the fact that the harms on which we focus are structural. We then introduce Iris Young's social connection model of accountability and responsibility and consider the contribution of this model to human rights practice in the field of carrier sanctions.

I. Conflicting Obligations

Carrier sanctions result in serious harm. Although human rights norms are primarily addressed to states, private business is not absolved from any responsibility and accountability under human rights. In this section, we briefly outline carrier sanctions, and the relation between private business and human right.

I.1. Carrier sanctions

Carrier sanctions are an integral part of a system of migration control which results in migrants being unable to access the protection to which they are entitled under international law, and in

⁸ R.I.R. Abeyratne, 'Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees', *International Journal of Refugee Law* 1998-4, pp. 675-687; T. Bloom & V. Risse, 'Examining hidden coercion at state borders: why carrier sanctions cannot be justified', *Ethics & Global Politics* 2014-4, pp. 65-82; S. Collinson, 'Visa Requirements, Carrier Sanctions, 'Safe Third Countries' and 'Readmission': The Development of an Asylum 'Buffer Zone' in Europe', *Transactions of the Institute of British Geographers* 1996-1, pp. 76-90; A. Cruz, 'Carrier Sanctions in four European Community States: Incompatibilities Between International Civil Aviation and Human Rights Obligations', *Journal of Refugee Studies* 1991-1, pp. 63-80; E. Feller, 'Carrier Sanctions and International Law', *International Journal of Refugee Law* 1989-1, pp. 48-66; A. Francis, 'Removing barriers to protection at the exported border: Visas, carrier sanctions and international obligations', in J. Farrall & K. Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World*, Cambridge: Cambridge University Press 2009; V. Moreno-Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees', *European Journal of Migration and Law* 2008-3, pp. 315-364; F. Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?', *International and Comparative Law Quarterly* 1997-3, pp. 586-634; T. Rodenhauer, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control', *International Journal of Refugee Law* 2014-2, pp. 223-247; S. Scholten & P. Minderhoud, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands', *European Journal of Migration and Law* 2008-2, pp. 123-147; S. Scholten & A. Terlouw, 'Private carriers as experts in immigration control', in M. Ambrus, K. Arts, E. Hey & H. Raulus (eds), *The Role of 'Experts' in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?*, Cambridge: Cambridge University Press 2014.

⁹ Bloom & Risse 2014, *supra* footnote 8.

migrants dying on their way to Europe, North America, Australia, and other areas of the world.¹⁰ The carrier, as a transnational corporation, is a crucial actor in migration control.¹¹ Migrant decisions are impacted by carrier sanctions – some travel with falsified or counterfeit documents in order to avoid refusal of boarding, and others take risky and dangerous routes overland or by sea to avoid such refusal. Furthermore, according to recent fieldwork findings on carrier sanctions in the Netherlands and the UK, “moral considerations hardly played a role in the decision on whether or not to carry a passenger”.¹² As such, carrier sanctions are part of a normative landscape which governs ‘indifference’ towards the lives of migrants and refugees.¹³ Carrier sanctions lead to two forms of harm. First, if the refusal of embarkation concerns people who qualify for refugee status but do not get protection in the country where they find themselves, it results in denial of refugee protection. Second, if the refusal of boarding concerns someone who will subsequently try to reach the destination state in an irregularised¹⁴ manner (smuggler boat, lorry), it results in the risk of death. It is carriers’ structural roles in a business that produce these harms which raise moral and legal concerns about their accountability and responsibility.

A number of terms have been employed to describe the privatised and externalised way of preventing migrants and refugees from entering into destination states and accessing protection, such as ‘buffer zone’;¹⁵ ‘third party liability systems’;¹⁶ ‘remote control’;¹⁷ and ‘hidden coercion’.¹⁸ These terms each point to carrier involvement in migration control, and highlight the ways in which states seek to avoid responsibility for harms towards migrants. McNamara has argued that states evade their obligations through carrier sanctions, raising issues about state jurisdiction and the meaning of ‘effective control’.¹⁹ The key question implicit in the terminology used in this literature is whether states, by imposing carrier sanctions, are acting in contravention of human rights law. In the following passages, we want to enquire whether not states but carriers might be contravening human rights norms by effectively enforcing the migration laws of the countries of destination. The potential accountability and responsibility of carriers under human rights law has so far not been addressed in academic literature.

¹⁰ Abeyratne 1998, Cruz 1991, Feller 1989, Moreno-Lax 2008, Nicholson 1997, Rodenhauer 2014, all *supra* footnote 8.

¹¹ S. Scholten, *The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control*, Leiden: Koninklijke Brill NV 2015.

¹² Scholten 2015, *supra* footnote 11, p. 276

¹³ T. Basaran, ‘The saved and the drowned: Governing indifference in the name of security’, *Security Dialogue* 2015-3, pp. 205-220.

¹⁴ The term irregularised is used instead of the more common term irregular in order to emphasise that the irregular character of the mode of travel is a result of state-made legislation and is not inherent in migrant travel.

¹⁵ Collinson 1996, *supra* footnote 8.

¹⁶ J.A. Gilboy, ‘Implications of “Third-Party” Involvement in Enforcement: The INS, Illegal Travelers, and International Airlines’, *Law & Society Review* 1997-3, pp. 505-530.

¹⁷ Scholten & Minderhoud 2008, *supra* footnote 8.

¹⁸ Bloom & Risse 2014, *supra* footnote 8.

¹⁹ F. McNamara, ‘Member State Responsibility for Migration Control within Third States – Externalisation Revisited’, *European Journal of Migration and Law* 2013-3, pp. 319-335

I.2. Business and human rights

Human rights are formulated in the relation between states (as the entities bearing responsibility) and individuals (as rights bearers), whereas in our context we have to look at human rights in the relation between corporations (as the entities possibly bearing responsibility) and individuals. For the purposes of this article, we will assume that the UN Guiding Principles on Business and Human Rights²⁰ are an appropriate restatement of law, without engaging with the underlying issues with the Principles.²¹ These Guiding Principles evidently are not international law, but seek to develop a position whereby “business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights.”²² In the following, we will assume that transport corporations are required to respect human rights; we will not address the question whether this would be done directly through international law, or via domestic law which is enacted in order to comply with international law.

Guiding Principle 11 holds that businesses should respect human rights, which means that they should avoid infringing on the human rights of others and that they should address adverse human rights impacts in which they are involved. The commentary to this principle explicates that this responsibility is independent from states’ ability and/or willingness to fulfil their human rights obligations and exists over and above compliance with national laws and regulations protecting human rights. Principle 13 seeks to delineate the scope of corporate human rights responsibility. It states that business enterprises should avoid causing or contributing to adverse human rights impacts, address them when they occur, and that they have to seek to prevent or mitigate adverse human rights impacts that are directly linked to their activities even if they have not contributed to those impacts. Principles 17-21 make business responsibility more operational through the concepts of due diligence, human rights impact assessment, tracking procedures and external communication.

The Principles are one condensation of a wider development in legal doctrine. Wood argues that a company’s ‘ability to influence’ those with which it has a ‘relationship’ gives rise to responsibility, even if the company is not directly contributing to human rights abuse (but may be in support of a state in violation of human rights).²³ Wettstein, arguing from a human rights advocacy standpoint and building on the concept of corporate ‘complicity’ in human rights abuse, reasons that corporations have positive obligations to protect.²⁴ Clapham suggests extending responsibility beyond the individual to the corporation in international law through the notion of the ‘legal

²⁰ United Nations Office of the Commissioner for Human Rights 2011, *supra* footnote 2.

²¹ See *inter alia* R. Davis, ‘The UN Guiding Principles on Business and Human Rights and conflict affected areas: state obligations and business responsibilities’, *International Review of the Red Cross* 2012-887, pp. 961-979; D. Davitti, ‘Refining the *Protect, Respect and Remedy* Framework for Business and Human Rights and its Guiding Principles’, *Human Rights Law Review* 2016-1, pp. 55-75; B. Fasterling & G. Demuijnck, ‘Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights’, *Journal of Business Ethics* 2013-4, pp. 799-814; F. Wettstein, ‘Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment’, *Journal of Human Rights* 2015-2, pp. 162-182.

²² United Nations Office of the Commissioner for Human Rights 2011, *supra* footnote 2, pp. 1.

²³ S. Wood, ‘The Case for Leverage-Based Corporate Human Rights Responsibility’, *Business Ethics Quarterly* 2012-1, pp. 63-98.

²⁴ F. Wettstein, ‘The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy’, *Journal of Business Ethics* 2010-1, pp. 33-47.

personality' and 'complicity' in rights violations carried out by states.²⁵ According to Clapham, if the corporation is complicit in state crimes (or commits them outright) then it can be held liable in both national and international law, following a causal model of assigning collective responsibility. These developments in legal doctrine have so far not found expression in positive law. There are examples of litigation in which corporations are held liable for human rights violations,²⁶ but the field is clearly in its infancy.

This juxtaposition (obligations following from carrier sanctions and from human right law) results in carriers having conflicting legal obligations. On the one hand, they have to avoid the commission of criminal offences (transporting insufficiently documented passengers); on the other hand, they have to avoid human rights infringements, and have to address (prevent, mitigate) adverse human rights impacts in which they are involved. Abiding by their responsibility under carrier sanctions will lead to human rights violations of persons denied boarding; preventing human rights violations will imply committing criminal offences.

II. Human Rights Leakage

What would application of these principles mean for the harm inflicted on insufficiently documented people when they are prevented from boarding airplanes and ferries? We identify five kinds of leaks. With human rights leakage, we refer to the phenomenon that, while it is evident that subjective rights of identifiable persons are violated, this cannot be addressed in the current legal framework because no actor who is accountable or responsible for these harms can be identified. As a result, there is a man-made rights violation, but no accountability and responsibility.

II.1. Leak one: refusal of boarding

First, refusing a person entry to a boat or airplane is not in itself a harmful act, nor is having clear conditions for boarding with the effect that many people never even try. This happens at all ports and airports, primarily by asking a price for the transport services offered. Those who cannot afford a ticket will not be allowed on board. Arguably, it is the refusal in combination with knowledge about the consequences of refusal which may create a human rights responsibility.²⁷ Imagine a situation where a person seeks to enter an airplane with the secret service at her or his heels, while it is clear that the secret service is about to torture the prospective passenger. In such a case, the carrier arguably has to accept the passenger because refusing to let the person board would be an act with the foreseeable consequence that the person will be subjected to torture. Such complicity can be considered a violation of the prohibition of torture. But such an exceptional situation apart, the act of refusing boarding in itself has not been considered to constitute an act which foreseeably results in harm.²⁸

II.2. Leak two: positive obligations

The second 'leak' we run into in the application of the UN's Guiding Principles to carrier sanctions, is that the human rights violation in which the carrier may be implicated will often be a

²⁵ A. Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups', *Journal of International Criminal Justice* 2008-5, pp. 899-926.

²⁶ E.g. *Oguru, Elanga and Milieudensic/Shell*, 30 January 2013, Rechtbank Den Haag ECLI:NL:RBDHA:2013:BY9850.

²⁷ Cf. Bloom & Risse 2014, *supra* footnote 8.

²⁸ Bloom & Risse 2014, *supra* footnote 8, pp. 66-67.

violation of a positive obligation.²⁹ The usual situation will be that the person who was refused boarding is not in the country where she or he has a well-founded fear of being persecuted, but in a third country where there may be no or insufficient protection – including denial of basic social and economic rights.³⁰ If the person is a refugee, the harm consists not of a refugee remaining in the country where she or he faces a real risk of being persecuted, but of denial of the protection to which refugees are entitled under international law.³¹ The state in which the refugee has to remain is, in this situation, violating international refugee law by not living up to its obligations to respect refugee rights. It is the failure to act on that state's part which would constitute the violation.

The argument would be that by refusing boarding, the carrier (a private actor) exposes a person to a state's failure to act – such as the failure to secure even the most basic social and economic rights. This can be argued, but under current human rights doctrine it is not obvious that such a construction of responsibility of private actors would be accepted. The human rights analysis is even more complicated when we turn to the right to life of a migrant who, by the carrier's refusal, sees no other option than to travel in an irregularised manner to the destination country. The argument has been made that the states of destination may be seen as violating the right to life by not investigating the relation between the innovations in the border policies and the increasing loss of life, and by not adapting their policies accordingly.³² It is not obvious that corporations can be held accountable if they have exposed a person to a foreseeable risk of being exposed to non-compliance with a positive obligation by states of departure (social and economic rights of refugees) or by states of destination (border deaths). In addition, it is hard to foresee whether the particular individual who is refused boarding will be subjected to a violation of a positive obligation.

II.3. Leak three: which person?

A third 'leak' is that it is quite difficult for the carrier to identify who is a refugee among the aspiring passengers who are not or insufficiently documented, or, even more, who among them will see no other option than taking the risks inherent in irregularised border crossings. How can they determine at the check-in counter who is a refugee, where destination states have extensive and complicated procedures to do so? How are they to determine who will try to cross the Mediterranean in a flagless vessel? This third 'leak' may be limited by focusing on groups of people who are *prima facie* refugees, such as Syrian and Eritrean nationals. But for other migrants, the limited possibilities for the carrier to identify who might be exposed to an adverse human right impact are a complication.

²⁹ A positive obligation is the obligation of a state to *act* in order to respect a human right, as opposed to the classical obligation to *refrain from acting* contrary to human rights law (as in the obligation *not* to torture, *not* to kill, *not* to detain, *not* to restrict free speech or religion). Although the distinction between positive and negative obligations is widely acknowledged to be problematic, it remains one of the cornerstones of the case law of the European Court of Human Rights. See *inter alia* M. Beijer, *Limits of Fundamental Rights Protection by the EU*, Mortsel: Intersentia 2017, pp. 42-46; F. Megret, 'Nature of Obligations', in Moeckli, Sangeeta & Sivakumaran (eds), *supra* note 1, pp. 124-149, at 130-132; and generally D. Harris, M. O'Boyle, E. Bates & C.M. Buckley, *Law of the European Convention on Human Rights*, 2nd edition. Oxford: Oxford University Press 2009, pp. 18-21.

³⁰ See extensively J.C. Hathaway, *The Rights of Refugees Under International Law*, Cambridge: Cambridge University Press 2005.

³¹ Abeyratne 1998, Cruz 1991, Feller 1989, Moreno-Lax 2008, Rodenhauer 2014, all *supra* footnote 8.

³² T. Spijkerboer, 'Are European States Accountable for Border deaths?', in S. Juss (ed), *Research Companion to Migration Law and Theory*, Aldershot: Ashgate 2013, pp. 61-76.

II.4. Leak four: what harm?

A fourth ‘leak’ is that of the causal relation with harm. If a carrier refuses boarding and subsequently the person concerned is run over by a car, the accident would not have occurred if the person had been on board of the airplane or ferry. For the purposes of legal analysis, however, there is no causal relation between the refusal and the accident because the accident was not foreseeable. From this example, we can see that causality in law is different from causality in empirical contexts. For empirical purposes, the refusal of boarding was a necessary condition for the accident to happen, and in that sense, it was a crucial contributing condition. The legal concept of causality, related as it is to liability, in contrast, has foreseeability and proximity as important elements.³³ The third ‘leak’, discussed above, was about foreseeing *who* could be exposed to an adverse human rights impact which is proximate to the corporation. The problem we identify here is foreseeing *what* the adverse human rights impact might be. Even if we think of the “easy” case of a Syrian national in Lebanon trying to board a plane headed for Europe, it would be hard for the carrier to find out whether this particular person, if refused boarding, could go back to a UN-run refugee camp, or would have to survive on the streets, or whether this person would see no other option than to face the hazards inherent in irregularised sea travel.

II.5. Leak five: applying the law

A final ‘leak’ is that, by refusing undocumented or insufficiently documented passengers, carriers are complying with international, European, and domestic law. International legal instruments include annexes to the 1944 Chicago Convention on International Civil Aviation as well as the Palermo Protocols to the United Nations Convention Against Transnational Organized Crime.³⁴ Article 26 of the Schengen Implementing Agreement requires European states to introduce in their domestic law obligations for carriers to return undocumented passengers to the port of departure and to introduce fines for transporting undocumented passengers.³⁵ Most states from the global North, including all European states, have adopted such provisions. In the EU, carriers face fines ranging from €3,000-5,000 for each undocumented or insufficiently documented passenger, or a lump sum of €500,000 maximum for each infringement.³⁶ As a consequence of these fines, transporting undocumented passengers would undermine the very economic basis of carriers because the fines are much higher than the potential profit for transporting an insufficiently documented passenger. Also, if they systematically transport undocumented passengers, their landing or docking rights would most likely be cancelled. This would not only endanger the corporation, but it would also lead to a human rights situation which is identical to the situation we were hypothetically seeking to remedy. Refugees and migrants stay in the country where they find themselves – in one case because the carrier refuses boarding, in the other because the carrier is not active anymore.

³³ See e.g. the crucial role of foreseeability in *Soering v The United Kingdom*, Judgement of 7 July 1989, ECHR (Ser. A), *Vilvarajah and others v. The United Kingdom*, Application Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991

³⁴ For discussion see Rodenhauer 2014, *supra* footnote 8.

³⁵ The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Official Journal L 239, 22.9.2000.

³⁶ Art. 4, Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985. Official Journal L187/45, 10.7.2001.

III. Structural harm

The two forms of adverse human rights impact which have been at the centre of attention here (denial of refugee protection, and border deaths) are examples of what has been characterised as ‘structural risk’³⁷ or as ‘structural violence’.³⁸ Human rights law as it is conceptualised today seems poorly equipped to deal with forms of harm (including serious harm such as death) which occur on a structural scale, either at the hand of non-state actors or from natural causes (as in the case of femicide or border deaths), or at the hand of state actors who are constructed as at most infringing on rules of engagement (as with police killings of African Americans in the US), or from insufficient state action (as with increasing suicide rates during economic crises). It should be noted that, in all these contexts, harm does not occur randomly, but emerges from patterned, structural sources. If we limit ourselves to border deaths: the most reliable data show that European border deaths overwhelmingly are of African men between 20 and 40 years.³⁹ More generally, structural harm affects marginalised groups. Is this because it is an empirical fact that subdominant groups fall victim to large scale harm? Or could it be that human rights law is constructed and conceptualised in its most forceful form when it addresses harm affecting dominant groups, and in a much weaker form when it is about harm affecting marginalised groups?

At the conceptual level, human rights law is well equipped to address harm directly resulting from state acts. Problems in such cases do arise, and may relate to evidence, adjudication, and access to justice. In legal doctrine, authors do consider state responsibility for the harms caused by carrier sanctions. Gammeltoft-Hansen demonstrates that the migration control industry “brings about certain responsibility and accountability gaps, which risks further undermining human rights of migrants and refugees.”⁴⁰ Arguing from the bounds of the liability model, he questions the “feasibility of leaving human rights fulfilments to private companies,” and argues that the privatisation of migration control “serves to partially insulate states from legal responsibility, but also provides an institutional distancing of control practices away from the state,” and that forms of

³⁷ F.C. Ebert & R.I. Sijniensky, ‘Preventing Violations to the Right to Life in the European and Inter-American Human Rights Systems: From the *Osman* Test to a Coherent Doctrine of Risk Prevention?’, *Human Rights Law Review* 2015-2, pp. 343-368. Structural risk is defined as “any risk to the life of an individual that is fostered by prevalent social structures, such as racism or sexism, often resulting in patterns of widespread violence against members of a certain group”, *ibid.*, pp. 362-363.

³⁸ D.E. Martinez, R.C. Reineke, R. Rubio-Goldsmith & B.O. Parks, ‘Structural Violence and Migration Deaths in Southern Arizona: Data from the Pima County Office of the Medical Examiner, 1990-2013’, *Journal on Migration and Human Security* 2014-4, pp. 257-286. Structural violence has a longer history of usage, coined by Galtung, to refer to patterns of violence which do not arise from identifiable individual causes, but from political, economic, or social institutions or processes whereby a single actor (or number of actors) cannot be proximately identified, J. Galtung, ‘Violence, Peace, and Peace Research’, *Journal of Peace Research* 1969-3, pp. 167-191.

³⁹ See T. Last, ‘Challenging the anonymity of death by border sea: Who are boat migrants?’, in *Migrants at Sea*, edited by V. Moreno-Lax and E. Papastavridis, Leiden: Brill 2016, pp. 79-116.

⁴⁰ T. Gammeltoft-Hansen, ‘The rise of the private border guard: Accountability and responsibility in the migration control industry’, in T. Gammeltoft-Hansen & N. Nyberg Sorensen (eds), *The Migration Industry and the Commercialization of International Migration*, Abingdon and New York: Routledge 2013 p. 144.

“institutional monitoring and public accountability” are needed.⁴¹ With regard to carrier sanctions themselves, Nicholson examines possibilities for recourse to domestic and international courts⁴², Abeyratne argues that States bear the greatest responsibility,⁴³ and Francis demonstrates how carriers are expected to uphold human rights.⁴⁴ These analyses are evidence of the various ways in which carrier sanctions are part of a regime of ‘shifting liabilities’⁴⁵, each exemplifying an application of the liability model of responsibility. Thus, while these authors offer important insights into how to think through corporate harm and international law, by remaining within the framework of the liability model they are fixated on the responsibility of states for acts of corporations which the states have conditioned through carrier sanctions. In doing so, they overlook the possibility of corporate responsibility for structural harm, which can result from a combination of acts by different actors which in themselves are not harmful, but which together create a situation in which large numbers of people die or are denied access to refugee protection.⁴⁶ These analyses illustrate that human rights law is based on the concept of proximate liability.⁴⁷ It only finds a violation if an identifiable actor has committed a concrete act with harm as an immediate consequence. If a violation is found, it follows that the actor is liable for past harm as well as obliged to refrain from the harmful act in the future. If this high threshold is not met, actors have no legal obligations.

One might conclude that human rights analysis, or an application of UN principles on business and human rights, is not fruitful for remedying these harms. However, international human rights supervisory bodies annually give thousands of decisions on individual cases concerning family life, freedom of expression, detention and fair procedures. These are important cases, but they fade compared to the thousands of people who are unable to get international protection or lose their lives as a result of carrier sanctions. It seems counterintuitive to conclude that human rights law has much to say about these comparatively nuanced issues but remains silent on a phenomenon which is both large-scale and concerns the right to life and the right not to be subjected to inhuman treatment. Therefore, an alternative to concluding that human rights have not much to offer would

⁴¹ Gammeltoft-Hansen 2013, *supra* footnote 40, pp. 140, 143, 144. Such institutions may remain imperfect however: “even where a clear contractual relationship is established, accountability and public scrutiny may still remain insufficient” *ibid.*, p. 142.

⁴² Nicholson 2013, *supra* footnote 8.

⁴³ Abeyratne 1998, *supra* footnote 8. Cf. V. Moreno-Lax: *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford: Oxford University Press, 2017. Empirically, Scholten & Minderhoud 2008, *supra* footnote 8, find in the Netherlands that, through a system of ‘contiguous measures’, states remain in control in persuading carriers to comply with legislation.

⁴⁴ Francis 2009, *supra* footnote 8, pp. 390-391.

⁴⁵ V. Guiraudon, ‘Enlisting Third Parties in Border Control: a Comparative Study of its Causes and Consequences’, in M. Caparini & M. Otwin (eds), *Borders and Security Governance: Managing Borders in a Globalised World*, Zurich and Münster: Lit Verlag GmbH & Co. KG Wien and Lit Lektorat 2006.

⁴⁶ The liability model rests on causal proximity to harm: the act of the corporation should be identifiable, isolated in time, and the organisation should have committed or allowed to be committed a harm. The liability model thus rests on a causal logic, which allows corporations to be held liable for rights abuses when they commit them or fail to prevent them from happening (and thus is quite useful for case law and judicial accountability) but does not strike at the core of the structure of carrier sanctions and the shared rules, norms, and relations which characterise the abuses which follow from the carrier sanctions regime.

⁴⁷ The liability model causally links the actions of particular actors to specific outcomes which are morally or legally wrongful. The liability model “seeks to identify liable parties for the purposes of sanctioning, punishing, or exacting compensation or redress”, I.M. Young, *Responsibility for justice*, Oxford and New York: Oxford University Press 2011, p. 98.

be to reimagine human rights law. One of the elements would be to argue that carriers have a legal obligation to minimise the harm they inflict for the future, while not arguing that they are liable for past harm. This becomes possible if we distinguish between the responsibilities following from social connection (*infra*) from responsibility following from proximate liability (*supra*). In the remainder of this article, we propose to investigate how that would be possible and, if so, what that could look like.

IV. The Social Connection Model

In this section, we appraise Iris Young's social connection model of responsibility, and how this model may be applied to carrier sanctions. If carriers, and the 'leakages' identified above, are important components in perpetuating structural violence, then re-imagining human rights law and the actors involved in its realisation could be an important step in reducing harm. This section addresses the question how non-state actors can respond to the human rights leakage by applying alternative theories of responsibility to carrier sanctions and outlines the range of actions which carriers could take to reduce harm. Each assessment involves the corporation acting to remedy their harmful activities, based on their position within the structure of injustice.

Iris Young's social connection model says that "all agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices".⁴⁸ In contrast to the liability model, which took centre stage in the previous paragraph and which is prevalent in human rights reasoning, the social connection model deals with responsibility for preventing future harm, without resorting to individual liability for past harms, "because the harms are produced by many of us acting together within accepted institutions and practices, and because it is not possible for any of us to identify just what in our own actions results in which aspects of the injustice that particular individuals suffer".⁴⁹ According to Young, harm is produced collectively, i.e. structurally. Structural injustice is defined in relation to collective deprivation of capabilities or capacities, i.e. the deprivation of a person's opportunities 'to be' or 'to do'.⁵⁰ In Young's words:

Structural injustice exists when social processes put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time as these processes enable others to dominate or have a wide range of opportunities for developing and exercising their capacities.⁵¹

Structural injustice arises "as a consequence of many individuals and institutions acting in pursuit of their particular goals and interests, within given institutional rules and accepted norms".⁵² Thus, everyone who participates in the structure is responsible for perpetuating the 'deprivation of capacities' as they take part in the socio-structural processes which perpetuate them without being identified as a singular totality which can be held liable for a specific action. This is distinct from a liability model which identifies a distinct individual (or an institution like a corporation or a state) which has directed and contributed to morally wrongful acts. Young's conception of social

⁴⁸ I.M. Young, 'Responsibility and global justice: A social connection model', *Social Philosophy & Policy* 2006, pp. 102-130.

⁴⁹ Young 2011, *supra* footnote 47, p. 110.

⁵⁰ I. Robeyns, 'The Capability Approach', in E.N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy*, Summer 2011 Edition, at: <http://plato.stanford.edu/archives/sum2011/entries/capability-approach/>.

⁵¹ Young 2006, *supra* footnote 48, p. 114.

⁵² *Ibid.*

connection resonates with the notion of ‘shared accountability’, which “refers to situations where multiple actors are held accountable for a certain conduct without this conduct necessarily giving rise to responsibility in the formal and breach-based understanding of the term in international law”.⁵³

Obligations arise owing to connection to social processes: “individuals bear responsibility for structural injustice because they contribute by their actions to the processes that produce unjust outcomes.”⁵⁴ The social connection model provides us with a conception of assigning responsibility, which extends beyond individual liability for past harms to morally wrongful outcomes situated among individuals acting in concert according to the rules, positions, relations, spaces, and temporalities of social institutions. Individuals are then connected to structural harms, but not necessarily liable for past harms in the legal sense. ‘Co-ordinated action’ and ‘collective projects’⁵⁵ which generate harmful outcomes (such as deprivation or domination) include individuals with specific roles and relations who act according to institutional rules applicable to particular spaces and times. Criminal, tort, or conventional human rights liability does not suffice to assign responsibility.⁵⁶

Thus, how strong our connection to the harm is, does not matter so much as our position within the social structure which (re)produces harm. Rather than the ‘proximity’ of an individual to the harm, which is emphasised by the liability model, the social connection model emphasises the ‘relation’ and ‘position’ of those who participate in processes which produce and reproduce injustice. In short, if you are involved in a structure which generates injustice, you have a responsibility to transform the structure to remedy the injustice.

This brief presentation of the social connection model shows that it addresses precisely the role of carriers in the harms considered here – denial of international protection and death. If carriers would perform their gatekeeper role in a different manner, at least some people now refused boarding would be able to access asylum systems in privileged parts of the world, and some of them would be able to travel safely.⁵⁷ According to the International Organization for Migration, at least 5,490 migrants have died world-wide in 2017.⁵⁸ If these migrants had been allowed on to the ferry between Tunis and several destinations in Italy and Malta which run several times per week at a cost of between €50 and €100, they would in all likelihood have been alive. All available data

⁵³ D’Aspremont *et al.* 2015, *supra* footnote 1, p. 51.

⁵⁴ Young 2006, *supra* footnote 48, pp. 119.

⁵⁵ *Ibid.*, pp. 102-103.

⁵⁶ Young 2011, *supra* footnote 47, pp. 105.

⁵⁷ In Council Directive 2001/51/EC, which provides the first EU rules on carrier sanctions, recital 3 states that “Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967,” and Article 4 states that penalties are “without prejudice to Member States’ obligations in cases where a third country national seeks international protection.” In other words, the directive acknowledges the tension between carrier sanctions and non-refoulement, and provides an exception for refugees, both in the sense that carriers’ practices must be in accordance with the principle of non-refoulement and that sanctions should be lifted in the case that a passenger applies for or is granted international protection.

⁵⁸ See International Organization for Migration ‘Missing Migrants’ at <http://missingmigrants.iom.int/>, (accessed on 5 November 2018).

indicate that the number of migrant deaths has increased steadily since the introduction of carrier sanctions in the early 1990s.⁵⁹

The social connection model overcomes the limitations of the liability model. Carriers play a crucial role in European policies denying access to international protection to prospective refugees,⁶⁰ and that they play a crucial role in the processes that lead to an increasing number of people dying at borders by pushing some into high risk routes. They share these responsibilities with others, such as European states, human rights violators forcing people to flee, and smugglers offering people unsafe passage. But in the social connection model, it is not required to establish the exact causal contribution of precisely this corporation to the denial of protection or death of precisely this person. The involvement of the carrier in the structures resulting in harm is enough to establish responsibility. From this responsibility follows the obligation to work to remedy this harm.

The social connection model's conception of responsibility could be used to re-interpret human rights law. Transportation companies, in the process of going about their business, commit intentional acts which result in lethal and other serious forms of harm to migrants. Under the social connection model when transferred to human rights law, this involvement in harm would be sufficient to bring about an obligation of transportation companies to "respect human rights."⁶¹ This would enable us to establish the responsibility of a carrier for structural harm to migrants which is the outcome of a social structure in which they participate. Carriers should actively respond to these harms, based on their position within the social structure. Such an obligation to address the harms in which they are involved can be constructed without simultaneously constructing liability for past harm.

V. The Social Connection Model and Carrier Sanctions

A logical next step is to establish what exactly it is that the carrier should do in order to live up to this responsibility for its harmful position. If we introduce Young's model to carrier sanctions, carriers have responsibilities to remedy the harms resulting from their compliance with the requirements of destination states. We sketch three options for carriers to address the adverse human rights impacts in which they are involved.

V.1. Option one: transport everyone

Addressing the human rights leakage outlined above could involve carriers transporting passengers regardless of documentation, or allowing passengers to travel without proper documentation, but requiring the passenger to pay the carrier fine as a supplement to the regular fare.⁶² Costs would shift from the carrier to the improperly documented passenger.

⁵⁹ See e.g. T. Last *et al*, 'Deaths at the borders database: evidence of deceased migrants' bodies found along the southern external borders of the European Union', *Journal of Ethnic and Migration Studies* 2017-5, pp. 693-712.

⁶⁰ Cruz 1991, Feller 1989, Moreno-Lax 2008, Rodenhauer 2014, all *supra* footnote 8.

⁶¹ As *per* United Nations Office of the Commissioner for Human Rights 2011, *supra* footnote 2, pp. 1.

⁶² Thanks to Cathryn Costello and Stephanie Motz for informal discussion on this point.

Human rights supervisory bodies have as standard case law that states have the sovereign right to control migration.⁶³ This assumed right of states itself is not at stake when carriers transport people to countries of destination regardless of their travel documents. If all prospective passengers are transported to their preferred destination, states are still free to control migration. The only thing they are prevented from doing is exercising border control at points of departure (outside their national territory through practices of externalisation) and exercising border control through corporations (by airline and ferry company personnel; privatisation). States could still control migration by detaining all arriving passengers without a right of entry and using the detention period for deciding about admissibility. Transporting everyone would make the non-entrée policies⁶⁴ less effective. In contrast to the creation of extraterritorial processing zones, states would allow passengers to travel to their territory, ensuring public scrutiny and judicial control in countries of destination, rather than leaving people outside in countries of transit or of persecution.⁶⁵ For migrants who have been determined not to qualify for admission, deportation to the country of origin is possible in principle, but hard in practice; this would be another manner in which migration policy would be made less effective.

From the perspective of transport companies, allowing every prospective passenger on board, regardless of documents, could be self-defeating. It would expose them to massive fines and would in all likelihood eventually result in cancellation of their landing or docking rights. The corporation would cease to exist or would have to stop undertaking the particular activity concerned.

Therefore, constructing a human rights obligation of transport companies to take on board any passenger who has paid the price of a ticket (plus possibly the fine) may be considered overbroad for two reasons. First, one may argue that states would be too much restricted in their choice of migration policy instruments. Second, one may find the sacrifices required of companies more than can be reasonably expected. These hesitations may be rejected. It may be observed that it is typical of human rights law to restrict states in their policy instruments (by, for example, outlawing torture in combating terrorism). It may be noted that it is typical to require corporations to cease activities (including lucrative activities) if these contribute to harm (as in the case of chemical firms contributing to chemical weapons).

V.2. Option two: transport refugees

A more restricted obligation can be formulated. During the European ‘refugee crisis’, some have argued that European states should have ‘let refugees fly’ in order to avoid the tragedies occurring at the external borders of the EU.⁶⁶ Some categories of passengers, such as presently Syrians and Eritreans (among others) are prima facie refugees, i.e. they belong to a group for which refugee status is to be assumed until rebutted (for example by establishing that they have committed war

⁶³ For example, *Abdulaziz, Cabales and Balkandali v The United Kingdom*, ECtHR, 9214/80; 9473/81; 9474/81, 28 May 1985, 67. For a critical discussion see B. Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy*, Abingdon and New York: Routledge 2012, and M-B. Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford: Oxford University Press 2015.

⁶⁴ T. Gammeltoft-Hansen & J.C. Hathaway, ‘Non-refoulement in a world of cooperative deterrence’, *Columbia Journal of Transnational Law* 2015-2, pp. 235-284.

⁶⁵ G. Noll, ‘Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones’, *European Journal of Migration and Law* 2003-3, pp. 303-341.

⁶⁶ A. Betts, ‘Let Refugees Fly to Europe’, *New York Times*, 24 September 2015, The Opinion Pages, at: https://www.nytimes.com/2015/09/25/opinion/let-refugees-fly-to-europe.html?_r=0.

crimes).⁶⁷ Allowing boarding to prima facie refugees (like Syrians and Eritreans) would be an appropriate measure for carriers to take because it precisely benefits groups of people who are the victim of both forms of harm under consideration. Admittedly, many people who are not prima facie refugees would also fall victim to these forms of structural harm. One may observe, however, that it would be too difficult for corporations to identify these others, and therefore they cannot be required to do so, and it remains controversial whether carriers should be responsible for performing refugee status determination.⁶⁸

However, this modified version could also be considered to be too far reaching. Although from the perspective of migrants it is less effective than the unmodified version, from the perspective of states it is still far reaching. It would reduce the effectiveness of their migration policies for two groups of people who, because of their size and their well-founded claim to refugee protection, are of particular concern. Similarly, carriers would be expected to pay fines for potentially millions of people and may run the risk of being denied landing or docking rights. The objections that may be raised by the original version of the social connection model in human rights law (transport everyone, *supra*) are reduced, but not taken away by the modified version.

V.3. Option three: corporate civil disobedience

Transport companies could begin to meet the responsibility they have as crucial players in the carrier sanction system by engaging in limited and strategic civil disobedience. Human rights duties have been inserted as ‘savings clauses’ in carrier sanctions law (Article 4 of Directive 2001/51/EC; Article 16 and Article 19 of the Smuggling Protocol and Article 14 of the Trafficking Protocol). Carriers could transport a limited number of insufficiently documented Syrian, Eritrean as well as non-refugee passengers to their preferred countries of destination, informing the authorities there about this, and elicit test litigation about the human rights aspects of applying the carrier sanctions system to prima facie refugees as well as other passengers. This would enable a limited number of people to access international protection and travel without running an undue risk of death; it would not be a significant limitation of state sovereignty; and it would not place a disproportionate burden on corporations. Most significantly, it would begin the public debate about the conformity of externalised and privatised migration control with human rights. In this way, corporations would contribute to limiting structural harm by starting a debate about it, and campaigning for legislative change. That would be a very limited contribution, but it is not an unrealistic notion and it would not be so limited as to be insignificant.

Conclusion

On the basis of the above, one might conclude that a reconstituted human rights approach along the lines of Young’s social connection model does not go far enough. Our analysis may be taken to reveal that the system of carrier sanctions is structurally incompatible with human rights law.⁶⁹ If carrier sanctions are an expression of structural injustice, one can argue that it is not enough to

⁶⁷ Article 1F 1951 Refugee Convention.

⁶⁸ UN High Commissioner for Refugees, *UNHCR Position: Visa Requirements and Carrier Sanctions*, United Nations High Commissioner for Refugees, September 1995, at: <http://www.refworld.org/docid/3ae6b33a10.html>.

⁶⁹ S. Peers, E. Guild, D. Acosta Arcaza, K. Groenendijk & V. Moreno-Lax, ‘Carrier Sanctions’, in *EU Immigration and Asylum Law*. 2nd revised edition, Volume 2, Leiden: Brill 2012, pp. 363-384.

‘patch’ the leakages along the lines suggested above, but that carrier sanctions should be abandoned altogether. If the legal system produces structural harms, then legislators have the primary responsibility of changing it. Dismantling the system of carrier sanctions would imply a fundamental change of direction in the politics of refugee protection and border management, which would place emphasis on doing no harm rather than the current emphasis on control and surveillance. While the focus on the duties of carriers can contribute to remedying harms *within* the current legal and political context, one can also argue for *changing* that context by adopting a policy that instead of producing harms, takes the ‘do no harm’ principle as its starting point.

This alternative may but does not necessarily involve an open borders position. Abandoning carrier sanctions may be accompanied by a more liberal migration policy. But it is also conceivable to combine it with detention of undocumented migrants upon arrival, and forcible return of those found to be inadmissible (*supra*). In other words: abandoning carrier sanctions might, but would not necessarily imply abandoning migration control, but only this particular version of externalisation and privatisation.

In sum, this article fills a gap in the literature by focusing on the human rights obligations of carriers. We have done so by introducing the social connection model of corporate accountability and responsibility and its relevance for carrier sanctions. We have critiqued the system of carrier sanctions as resulting in human rights leakage and examined the ways in which corporations can engage with this leakage. We have argued that introducing the social connection model of Iris Young moves us closer to either reducing or ending harms towards migrants produced by carrier sanctions. Carriers have the power and collective ability to reduce the harms towards migrants associated with structural injustice. The transmogrification of the social connection model into human rights practice presents us with the possibility of a shift from liability by proximity (corporation-act-cause-harm) to a relational responsibility that arises from participation in an unjust social structure. Confronted with conflicting legal obligations, carriers have several options for limiting their role in the denial of refugee rights and in thousands of deaths annually.