

International Journal of Refugee Law/2014/Issue 4, December/Reviews/Book Reviews: Europe and Extraterritorial Asylum - Int J Refugee Law (2014) 25 (4): 847

International Journal of Refugee Law

Int J Refugee Law (2014) 25 (4): 847

1 December 2014

Book Reviews: Europe and Extraterritorial Asylum

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Maarten den Heijer, *Europe and Extraterritorial Asylum*, Hart Publishing, Oxford and Portland, Oregon, 2012, xx + 321pp, ISBN 978-1-84946-270-9

The disaster off the coast of **Lampedusa**, Italy, in October 2013, in which several hundred migrants and asylum seekers drowned after their overloaded boat capsized, highlights both the desperation of people on the move and the failure of states and the European Union to come up with an adequate response to the problem of global migration. Maarten den Heijer's latest book, *Europe and Extraterritorial Asylum*, deals with some of the issues surrounding this problem.

While the title of the book gives the impression that the author addresses the activities of the EU in the field of extraterritorial asylum, this is not exactly the case. The author focuses mostly on the obligations of the state, but refers to 'EU member states', giving the impression that there is some additional or distinct obligation on the part of the EU. The author could as well have referred to 'any state bound by international human rights norms'. However, in the concluding chapter, the role of the EU in the development of a comprehensive and protection-sensitive framework for extraterritorial asylum is discussed. By focussing primarily on extraterritorial asylum and addressing the issue from various angles -- international law, human rights law, state responsibility, the law of the sea, the EU's mandate -- the author exposes and manages to deal with the complexity of global migration, in general, and extraterritorial asylum, in particular, in an excellent way.

The central dilemma of the book is how to balance state obligations based on international human rights and refugee law with the perceived need to control migration. In other words, the book explores the tension between the desire to prevent illegal migration and the need to protect asylum seekers. The key issue underlying this dilemma is the willingness of states to prevent migrants from entering their territory through the use of extraterritorial migration control. In the discussion of this dilemma, the author acknowledges that it is virtually impossible to distinguish between those in need of protection (asylum seekers) and other (illegal) migrants, which significantly complicates the issue.

The extraterritorial effect of human rights is examined by focussing on the concepts of jurisdiction and sovereignty in the field of extraterritorial asylum and migration control. These concepts are not applied in isolation, but are triggered when there is a ('jurisdictional') link between the individual and the state or states. The situations in which a state can operate on another state's territory are well defined by international law and, therefore, not problematic per se. However, things become more difficult when a state operates without the consent of the migrant/asylum seeker's 'host' state, or when human rights are not complied with either

by the host or the 'sending' state. By comparing the territorial clauses in the CSR51, the ICCPR66 and the ECHR50, as well as relevant case law such as the *Bankovic* case, the extraterritorial application of human rights is ascertained. The 'jurisdictional' link is operationalised *through* the 'effective control' doctrine, which is important, if not decisive, in determining the extraterritorial application of human rights. However, ultimately, the author considers this doctrine insufficient to determine a state's positive human rights obligations in extraterritorial asylum cases. The author points out that due diligence and the intention to adhere to human rights must also be taken into account in determining a state's human rights obligations.

Much to the approbation of human rights lawyers, one of the main conclusions drawn, initially in chapter 2, but throughout the whole book, is that:

'...human rights obligations serve as a code of conduct for all activities of a state, regardless of territorial considerations, and ... exercises (or omissions) of factual power by the state which directly affect a person in their enjoyment of human rights are sufficient for considering that person to be under the jurisdiction of the state'.

One may question whether or not this conclusion is overstressing the importance of human rights? Arguments supporting this conclusion are made throughout the book, for instance, when addressing the specific rights related to asylum, namely, the right to grant asylum, the right to obtain asylum, including different aspects and sources of *non-refoulement*, and the right to seek asylum, including the right to leave a country.

In relation to the extra-territorialisation of migration and asylum control, the principle of *non-refoulement* is of major importance. However, there is no overall agreement on what constitutes *non-refoulement* and, in particular, whether or not it prohibits push-back operations on the high seas, the prevention of people from entering territorial waters, or keeping them in a transit zone. After an in-depth analysis of the relevant treaties and their drafting histories, the author identifies different lines of reasoning, not only in relation to the principle of *non-refoulement*, but also in relation to the broader concept of the extraterritorial application of human rights obligations.

In the context of extraterritorial control of migration, the principle of *non-refoulement* translates into a responsibility by the state to facilitate access for those in need of protection and a responsibility to improve security by preventing illegal migration. However, on the part of the EU there is a distinct focus on the second aim at the cost of the first. This is well documented in the book in the analysis of activities at the EU level, including those of Frontex and the Directive on carrier sanctions. At the same time, the book highlights the lack of an overall EU migration policy, including a

policy on extraterritorial migration control. As a consequence of this policy gap, there is a lack of solidarity among EU member states in addressing the migration problem, member states conclude bilateral agreements with countries for readmission, and Frontex operations are shrouded in mystery because of the non-disclosure of signed agreements. In addition, it is not clear to what extent the Schengen Border Code, which at least includes necessary safeguards in case of interception, applies to the extra-territorial maritime operations of Frontex. This aspect has been indirectly addressed in an annulment procedure before the Court of Justice of the European Union (CJEU), which was mentioned in the book, but had not, at that time, been decided upon. In its ruling on 5 September 2012 (Case C-355/10), the court decided to annul the Council Decision (2010/252/EU) giving broad and executive powers to border guards participating in Frontex operations including interceptions and coercive measures. The court reasoned that such activities could touch upon the fundamental rights of a person and for that (and other) reasons the Council Decision needed to be adopted through the ordinary legislative procedure and not through 'comitology'.

When considering extraterritorial migration control, attention also needs to be paid to the law of the sea. The book points out that the legal frameworks overlap and are ambiguous at certain points. Again, political willingness to share the burden and to contribute equally to addressing the problem of global migration is lacking.

Although it is clear that both private entities and public authorities have an obligation to assist in case of distress at sea, the lack of an accompanying obligation on the part of states or organisations to assist those rescued to disembark, or to provide assistance to rescued persons after they have disembarked, diminishes the willingness to rescue at sea. The result is creativity in the extraterritorial processing of asylum procedures. In some cases states establish migration reception centres outside their territory and do the processing there; in other cases states finance such facilities in other countries. The author suggests that the responsibility of the facilitating state for violations that might occur might be difficult to establish, especially in the latter situation when the processing is conducted by a facility in another country. However, on the other hand, the author emphasises the conclusion that human rights obligations follow the state in its extraterritorial activities and that a state cannot do in another country what it is not allowed to do in its own country. Using this line of reasoning, one can conclude that a state remains responsible for the processing of asylum cases by facilities that it has established or financed outside its territory in the same way as it would for the processing of asylum cases within its own territory. When the processing is outsourced to another country then the outsourcing state bears responsibility if it knew, or should have known, that the other country was not capable of managing the asylum procedure.

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In the case of Australia outsourcing to Papua New Guinea (discussed in chapter 7), the question of whether or not Australia is responsible if human rights violations occur is answered by asking: what is the basis on which Australia believes that Papua New Guinea will be able to process the migration influx when they themselves do not have the capacity to do so? If responsibility can be waived by outsourcing the asylum procedure, this would be an attractive option to those wealthy states that prioritise preventing migration over facilitating asylum.

This line of reasoning fits well with the final chapter, in which the author calls for a more protection-sensitive arrangement and the development of a more 'meaningful human rights strategy which supplements and constrains sea interdiction policy'. As the author states, this can also be achieved by support in the region as extraterritorial asylum is not necessarily wrong, but it needs to be 'embedded in a framework of guarantees safeguarding against the arbitrary exercise of state power'. To this end, the *Hirsi* case (European Court of Human Rights, 23 February 2012, 27765/09), in which the court considered the push-back operations by Italian border guards and the sending back of migrants to Libya, based on a bilateral agreement, a violation of Article 3 of the ECHR⁵⁰ and Article 4 of Protocol 4 (on collective expulsion), is an important step in that direction.

Finally, the author concludes that the EU is an important player that can contribute to the development of a comprehensive and protection-sensitive framework for extraterritorial asylum. Reflecting on the recent disasters involving migrant vessels in the Mediterranean Sea, one can only support this conclusion.