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Accessing Asylum in Europe

Extraterritorial Border Controls and
Refugee Rights under EU Law

VIOLETA MORENO-LAX

OXFORD STUDIES IN EUROPEAN LAW

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*Extraterritorial Border Controls
and Refugee Rights under EU Law*

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OXFORD STUDIES IN EUROPEAN LAW

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Accessing Asylum in Europe

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The aim of this series is to publish important and original research on EU law. The focus is on scholarly monographs, with a particular emphasis on those which are interdisciplinary in nature. Edited collections of essays will also be included where they are appropriate. The series is wide in scope and aims to cover studies of particular areas of substantive and of institutional law, historical works, theoretical studies, and analyses of current debates, as well as questions of perennial interest such as the relationship between national and EU law and the novel forms of governance emerging in and beyond Europe. The fact that many of the works are interdisciplinary will make the series of interest to all those concerned with the governance and operation of the EU.

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Foreword

Whether the refugee in need of international protection has a right to be granted asylum, or even to access an asylum procedure, remains highly contested. The idea was resisted in 1948, when the Universal Declaration of Human Rights was drafted, and again in 1951, when States declined to write even a modestly worded provision on the admission of refugees into the 1951 Convention.

Dr Moreno-Lax rightly appreciates that this is still a live issue, and that comprehensive legal developments, particularly in Europe, demand a new, more subtle and sophisticated approach. This volume provides that perspective, while being also an excellent testament to her scholarship, her breadth of knowledge, and her insights. Its explicit demand for further critical interrogation of EU law and practice will surely re-invigorate the debate not just in Europe, but also in the wider world, where global compacts on refugees and migration are currently on the table. In this present and future climate of uncertainty and apprehension, the effective implementation of international law and standards will likely be contested once again, amidst the population displacements yet to come.

Europe provides many helpful examples of standard-setting within a community in principle committed to harmonization and the rule of law, but equally a record of failure, both internal and external. Dr Moreno-Lax provides the background, which is the essential institutional history of 'integrated border management', a theoretically systematic combination of measures premised on a common borders code in which sovereignty, 'legitimate travel' and irregular migration juggle for attention. Even as EU legislation and policy instruments seem repeatedly to stress commitment to asylum and to the basic international treaties, the 1951 Convention and 1967 Protocol relating to the Status of Refugees, securitization and control offer little space for those seeking asylum. In practice, 'protection' is often the response of last resort—a grudging and reluctant admission that there are limits to how people may be treated, but only once they have overcome the obstacles overtly intended to frustrate their flight and onward movement in search of refuge and their own security.

As Dr Moreno-Lax shows, it is all about keeping the stranger from the gate. The means to that end are many and various and only too visible in the practice of visa denials, carrier sanctions, interception and interdiction, and in the recent histories of displacement and loss. When and where, she asks, do rights and protection step out from the rhetorical and into the world of the practical? Drawing on her own comprehensive knowledge and understanding of the law, the literature and the practice, she tells us clearly where rights, particularly the EU fundamental rights *acquis*, ought indeed to play a part. She convincingly demonstrates the very power of human rights, with their solid roots in general international law and their direct and evolutionary impact on European law, society and democratic governance.

This is especially apparent where that most fundamental instrument of protection, *non-refoulement*, is concerned. We see from her analysis how this basic rule, which requires that no one be sent or returned to where he or she may face the risk of serious harm, has firmly established itself among the limitations that govern the conduct of States. It is the strength of this basic principle that leads States, individually and within regional institutions, to expend such resources on seeking to prevent its activation, rather than on the broader, international humanitarian agenda which would engage with the multiple causes of displacement.

There are difficult questions in this context, but Dr Moreno-Lax does not shy away. Her critical interrogation of the law and practice relating to visas, diplomatic asylum, refusal of boarding, and maritime interdiction opens the way to a deep analysis of asylum, and of the individual's right to what has been seen traditionally as a gift within the sovereign discretion of the State. Dr Moreno-Lax phrases the issues with care and precision. She thus highlights a dimension too often ignored in the literature, namely, that of the necessary link between 'access' to asylum and the right to leave and to seek asylum. With Europe as the centre, she calls in aid the overarching protective principles of the European Convention on Human Rights and their evolution and progressive development within the framework of the EU Charter of Fundamental Rights.

The history of obstructing the movement of those in search of refuge is hardly one of unqualified or lasting success, and experience strongly suggests that only a more enlightened and informed approach, which looks beyond narrowly constructed notions of security and control to the drivers of displacement, can have any hope of impact. Dr Moreno-Lax accurately characterizes extra-territorialized border and migration control and surveillance from the perspective of EU law, and navigates the complexities of different legal regimes apparently applicable at one and the same time. She responds imaginatively, but concretely, with the techniques of 'integrative interpretation' and 'aggregate standards', the end result being a striking amalgamation of *non-refoulement*, in its refugee and human rights aspects, with asylum, in its combination of rights to leave, to seek, and to due process. Her analyses of the extensive case law, focused on the rulings themselves and their implications, are extremely sound and as are her comparable assessments of institutional developments. She shows exactly what is required of States if they are to fulfil their international obligations effectively and in good faith, marking out clearly the line between frustrating the right to leave, on the one hand, and 'managing' irregular movement within the law, on the other. A 'duty to grant territorial protection has crystallized in European practice', she concludes, which is the natural corollary, among others, of the Charter's stated intention, 'to strengthen the protection of fundamental rights in the light of the changes in society ...' This means that pre-entry control measures need to conform to and be applied consistently with the right to asylum. Within the European Union, this is not yet the case, particularly when considered from the perspective of proportionality, when visas are denied, boarding is refused, carrier sanctions are imposed, or those 'interdicted' are denied all procedural opportunities to claim protection.

What Dr Moreno-Lax demonstrates so clearly is the extent to which EU law, and the policies and practice behind the law and thereafter developed around it, fails to make the necessary and required distinctions between the third country national, strictly so called, and the person seeking and in need of international protection. She shows the extent to which the border has been detached from territory, and how security and control have subsumed the goal of protection, for all the apparent commitment to fundamental rights. Protection and solutions have likewise been detached from the individual seeking refuge, whose agency is ignored and whose identity is swept up and away in yet another host of statistics.

She does not pretend that the 'sovereign rights' of States can be wished away. On the contrary, she reminds us that these are rights within the law, to be exercised consistently with the law. Given where the law now stands, this demands a positive re-orientation towards the individual, whenever action is being taken extra-territorially to deal with so-called irregular movements. Only then and thereby can that gap be bridged between the right to leave in search of asylum and the grant of protection where due; and the law to make up that bridge is already there.

The gap currently existing between the ideals professed politically and the harsh reality of closure and obstruction has been only too evident in recent years. Whether that is merely the reflection of institutionalized hypocrisy or something yet more determinedly negative will still be contested in the future, as desperation in its various forms continues to drive the movement of people between States. Thankfully, through her rigorous analysis and the strength and depth of her scholarship, Dr Moreno-Lax has ensured that the debate to come, within Europe and beyond, will be both constructive and principled.

Guy S. Goodwin-Gill
All Souls College

Oxford
May 2017

Series Editors' Preface

This is a very timely book which deals with a pressing issue of contemporary European law and policy, namely to what extent the European Union's system of external border control is compatible with EU and international human rights law governing the rights of refugees and asylum seekers. The author situates her analysis at the interface between three important and intersecting issue areas, namely border surveillance, migration management, and refugee protection in the European Union.

She sets out to describe in some detail the EU's system of integrated border control, and in particular the range of ways in which the EU establishes advance control over the influx of people from outside the EU. The book explains how the EU's "pre-border" control policies treat all potential entrants from outside the EU in the same way, without distinguishing between refugees and other migrants. At the same time, even though the EU's pre-border policies are extra-territorial in their scope of application, there is no recognition on the part of the EU that the human rights of refugees are relevant in these circumstances, or conversely that the human rights obligations of the EU may have extraterritorial application.

After several chapters setting out the content of the EU's pre-border policies, including the Schengen system of border control, the common visa policy, carrier sanctions and maritime interdiction, the second part of the book moves on to consider the implications for the rights of refugees and asylum seekers of this array of EU policies. The author examines the relationship between international law and EU law in the area of human rights, and surveys the various sources of EU human rights law, including in particular the Charter of Fundamental Rights. She argues for an 'integrative' approach to the interpretation of EU human rights law, whereby the provisions of the EU Charter are to be read in light of other international standards and integrated with them. The remaining chapters contain in-depth treatment of the principle of *non-refoulement*, and the right to asylum in EU law. Throughout the book Moreno-Lax challenges the view that the obligations of a state (or political entity such as the EU) to refugees apply only within the territory of that state, and seeks to integrate and explain the obligations flowing from several different sources of law: EU law, general international law, international refugee law and international human rights law, all of which have relevance to the pre-border control policies of the EU.

In all, the book contains a very detailed and thorough account of an important set of EU policies affecting the rights of refugees, with a strong normative argument as to the human rights implications of these policies and the human rights obligations of the EU. It should be of interest to all those concerned with European refugee law and policy

Paul Craig
Gráinne de Búrca

Acknowledgements

This book is the culmination of a long process of reflection on the matters surrounding access to asylum in this contemporary climate of turbulence and anti-refugee policies. The journey started back in 2007 with the help of a PhD scholarship from the University of Louvain, under the enlightening supervision of Prof. Olivier De Schutter. That period saw the development of the key structure of this work through research and inspiring conversations with Matthias Sant'Ana, Prof. Jean-Yves Carlier, and Prof. Sylvie Saroléa on different aspects. The ODYSSEUS Network has also been a splendid platform to revise ideas and gain further insights from others in the field. I am particularly grateful to Prof. Philippe de Bruycker and Dr Lilian Tsourdi, from the coordination team, for their friendship, motivation, and constructive feedback. The arguments put forward in these pages have also been refined through stays at the Migration Law Centre of the University of Nijmegen, the Centre for Studies and Research of The Hague Academy of International Law, and the Refugee Studies Centre of the University of Oxford. Institutional funding from the Belgian *Fond National de la Recherche Scientifique* (FNRS), the Spanish *Caja Madrid* Foundation, and the Spanish *Rafael del Pino* Foundation made these Research Fellowships possible. During that period, contacts with several colleagues have been particularly enriching, including Dr David Cantor, Dr Cathryn Costello, Jean-François Durieux, Dr Elena Fiddian-Qasmieh, Dr Karina Franssen, Dr Madeline Garlick, Prof. Matthew Gibney, Dr María-Teresa Gil-Bazo, Dr Mariagiulia Giuffré, Prof. Kees Groenendijk, Dr Olaf Kleist, Dr Francesco Maiani, Dr Emanuela Paoletti, Dr Efthymios Papastavridis, Prof. Steve Peers, Dr Claudia Pretto, Dr Marina Sharpe, Dr Sophie Scholten, Prof. Roger Zetter, Prof. Katja Ziegler, Dr Ruvi Ziegler, and Dr Karin Zwaan. My subsequent terms of employment at the University of Liverpool and my current home, Queen Mary University of London, offered me the possibility of further maturing the argumentative line developed in this volume. Conversations with Prof. Michael Dougan, Prof. Helen Stalford, Dr Firat Cengiz, and Dr Michelle Farrell were particularly illuminating. A debt of gratitude is also owed to Prof. Małgosia Fitzmaurice and Prof. Valsamis Mitsilegas, without whose continuous encouragement the publication of this piece would have suffered additional delay. Discussion with colleagues within the Centre for European and International Legal Affairs (CEILA), including Dr Paul Gragl, Dr Angelos Dimopoulos, and Dr Mario Mendez, have equally been very helpful in placing the reasoning against its wider international and constitutional context. I also thank Prof. Bernard Ryan, from the University of Leicester, for reading parts of this work, and Prof. Andrea Biondi, from King's College London, and Prof. Pepe López, from the University of Murcia, for their constant support. Above all, I am exceptionally indebted to Prof. Guy S. Goodwin-Gill, from the University of Oxford, and Prof. Elspeth Guild, from the Universities of Nijmegen and Queen Mary. It is thanks to their mentorship, patience, and inspiration that this book has eventually seen the light of day. Their guidance has been decisive in the completion of this project. Finally, if it were not for my loved ones, especially Marco, my husband, caring for me all throughout this process, its final realization would have been much harder. I remain infinitely grateful to them.

They say books are never finished; they are simply abandoned. This one in particular was deserted at the end of 2016 and covers legal developments, to the best of my knowledge, up to 1 October 2016—that is, prior to C-638/16 PPU *X and X*

ECLI:EU:C:2017:173, which has been addressed in a separate piece drawing on arguments herein (*Asylum Visas as an Obligation under EU law: X, X v. Belgium*, OMNIA Network: EU Migration Law Blog, 2017). It strives to offer exhaustive forensic analysis of the law in its wider context, with the objective of assisting researchers, practitioners, and decision makers in the field. Students with an interest in the intersection between borders, security, and asylum will hopefully also find these pages informative. The narrative is at times dense, as it engages with sources faithfully, in a detailed and systematic way, in a bid to demonstrate that 'all the law we need' is already there. What is missing is the leadership and political vision to realize it in practice. With this mind, the final aspiration is to serve the cause of protection seekers around the world, re-configuring (mis-)understandings of 'abuse', and contributing to restoring their dignity as (full and equal) human rights holders.

London, June 2017

List of Abbreviations

ACHR	American Convention on Human Rights
AFSJ	Area of Freedom, Security and Justice
AI	Amnesty International
AJIL	American Journal of International Law
ALO	Airport Liaison Officer
APD	Asylum Procedures Directive
API	Advanced Passenger Information
APID	Advanced Passenger Information Directive
ARIO	Articles on the Responsibility of International Organisations
ASR	Articles on State Responsibility
ATV	Airport Transit Visa
BYIL	British Yearbook of International Law
CAT	Convention Against Torture
CATCom	CAT Committee
CCC	Common Core Curriculum
CCI	Common Consular Instructions
CCV	Community Code on Visas
CEAS	Common European Asylum System
CETS	Council of Europe Treaty Series
CFR	Charter of Fundamental Rights
CIRAM	Common Integrated Risk Analysis Model
CISA	Convention Implementing the Schengen Agreement
CLD	Carriers' Liability Directive
CM	Common Manual
CMLRev	Common Market Law Review
Corr.	<i>Corrigendum</i>
CRC	Children Rights Convention
CSR51	Convention on the Status of Refugees 1951
DR	Dublin Regulation
EBCG	European Border and Coast Guard
EBCGT	European Border and Coast Guard Team
EC	European Community/European Council
ECHR	European Convention on Human Rights
ECJ/CJEU	European Court of Justice/Court of Justice of the European Union
EComHR	European Commission on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EEA	European Economic Area
EEZ	Economic Exclusive Zone
EJIL	European Journal of International Law
EJML	European Journal of Migration and Law
ELJ	European Law Journal
ELRev	European Law Review
EMN	European Migration Network
EU	European Union
EUROSUR	European Border Surveillance System
EWCA	England and Wales Court of Appeal

EWHC	England and Wales High Court
EXCOM	Executive Committee of the High Commissioners' Programme
FAL	Convention on Facilitation of International Maritime Traffic
FCC	Frontex Code of Conduct
fn.	footnote
FR	Frontex Regulation
FRA	Fundamental Rights Agency of the EU
FRO	Fundamental Rights Officer
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
FRR	Frontex Recast Regulation
FRS	Fundamental Rights Strategy
GCDCAF	Geneva Centre for the Democratic Control of the Armed Forces
HRC	Human Rights Committee
HRLR	Human Rights Law Review
HR&ILD	Human Rights and International Legal Discourse
HRW	Human Rights Watch
HTP	Human Trafficking Protocol
I-AComHR	Inter-American Commission on Human Rights
I-ACtHR	Inter-American Court of Human Rights
IATA	International Air Transport Association
IBM	Integrated Border Management
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTY	International Criminal Tribunal for the former Yugoslavia
IHRL	International Human Rights Law
IJMCL	International Journal of Marine and Coastal Law
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILM	International Legal Materials
ILO	Immigration Law Officer/International Labour Organization
ILOR	ILO Regulation
IMO	International Maritime Organization
IOM	International Organization for Migration
ITF	International Transport Workers Federation
JCMS	Journal of Common Market Studies
JHA	Justice and Home Affairs
JIANL	Journal of Immigration, Asylum and Nationality Law
JICJ	Journal of International Criminal Justice
LBT	Local Border Traffic
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LTV	Limited Territorial Validity Visa
MGD	Maritime Guidelines Decision
MichJIL	Michigan Journal of International Law
MLR	Modern Law Review
MMST	Migration Management Support Team
MPI	Migration Policy Institute
MSP	Migrant Smuggling Protocol

MSR	Maritime Surveillance Regulation
NJIL	Nordic Journal of International Law
NYIL	Netherlands Yearbook of International Law
OJLS	Oxford Journal of Legal Studies
OYEL	Oxford Yearbook of European Law
PACE	Parliamentary Assembly of the Council of Europe
PCIJ	Permanent Court of International Justice
PIL	Public International Law
PNR	Passenger Name Record
QD	Qualification Directive
RCD	Reception Conditions Directive
RPAS	Remotely Piloted Aircraft System
RPSD	Registration of Passenger Ships Directive
RSD	Refugee Status Determination
RSQ	Refugee Survey Quarterly
RTP	Rail Travel Permit
SAR	Search and Rescue (Convention)
SBC	Schengen Borders Code
SEA	Single European Act
SIS	Schengen Information System
SOLAS	Safety of Life At Sea (Convention)
SSHD	Secretary of States for the Home Department
SSR	Search and Rescue Region
STC	Safe Third Country
TCN	Third-Country National
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the EU
UDHR	Universal Declaration on Human Rights
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
UNRIAA	United Nations Reports of International Arbitral Awards
UNTS	United Nations Treaty Series
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
VIS	Visa Information System
VR	Visa Regulation
WA	Working Arrangement

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