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Access to Asylum

International Refugee Law and the
Globalisation of Migration Control



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Access to Asylum

Is there still a right to seek asylum in a globalised world? Migration control has increasingly moved to the high seas or the territory of transit and origin countries, and is now commonly outsourced to private actors. Under threat of financial penalties airlines today reject any passenger not in possession of a valid visa, and private contractors are used to run detention centres and operate border crossings.

In this volume Thomas Gammeltoft-Hansen examines the impact of these new practices on refugees' access to asylum. A systematic analysis is provided of the reach and limits of international refugee law when migration control is carried out extraterritorially or by non-state actors. State practice from around the globe and case law from all the major human rights institutions are discussed. The arguments are further linked to wider debates in the fields of human rights, general international law and political science.

THOMAS GAMMELTOFT-HANSEN is Research Fellow at the Danish Institute for International Studies and External Lecturer at the University of Copenhagen, where he teaches international refugee law. He is also an associated legal expert to the European Council for Refugees and Exiles, a former policy analyst with the Danish Refugee Council and a regular consultant to a number of international organisations, governmental institutions and non-governmental organisations.

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Human laws cannot have the unerring quality of scientifically demonstrated conclusions. Not every rule need possess final infallibility and certainty; as much as is possible in its class is enough.

St Thomas Aquinas (*Summa Theologica*, Ia-2ae, xci 3, ad 3)

Foreword

Most refugees today cannot travel to the developed world to seek recognition of their international legal right to protection. They instead face an ever-expanding array of mechanisms – carrier sanctions, border security systems, migration management regimes and the like – which seek to deflect them from wealthy states. This dilemma has been exacerbated in recent years by the rapid expansion of governmental efforts to contract out many migration management functions to transport companies, security firms and other non-state actors. Refugees may thus never be able to reach the territory of a country which has in principle agreed to receive them; they may never be in a position to state their claim to a person with the legal responsibility and authority to protect them; or both.

Distancing himself from those who proclaim a ‘legal black hole’ when refugees are encountered in extraterritorial settings, Thomas Gammeltoft-Hansen effectively shows that refugee law’s core norm of *non-refoulement* is among a small number of vital rights that must be respected wherever a state exercises jurisdiction. And drawing on both principles of state responsibility and the duty of due diligence, he shows also that states cannot blithely invoke the traditional maxim that they bear no liability for private acts as a means of disavowing liability for deterrence effected by the non-state actors refugees are most likely to encounter.

But this book is no simplistic manifesto for refugee rights. To the contrary, Gammeltoft-Hansen forthrightly identifies and explores the critical areas of legal ambiguity – what is jurisdiction? when can private conduct truly be said to be authorised or controlled by a state? what level of diligence can reasonably be expected of a state in overseeing private actors? He rightly concedes that these areas of legal uncertainty afford states crucial ‘wiggle room’ within which to avoid their presumptive protection responsibilities, legally powerful though these may in theory be.

Most importantly, Gammeltoft-Hansen invites us to see the big picture of an asylum system in which powerful governments exploit legal ambiguity to distance themselves both horizontally and vertically from refugees. In his view, the power of extant international law is ironically a significant driver of the ‘offshoring’ and ‘outsourcing’ of protection. It is because international law has evolved to impose responsibility when refugees are subject to control in international spaces such as the high seas that effective avoidance now requires that some other sovereign receive the refugees. And it is because international law increasingly recognises liability for official acts even when committed abroad that wealthy states seeking some measure of control over the deflection process will seek to engage corporate or other non-state entities to exercise management functions for them.

The determination of powerful states to avoid legal strictures thus plays a critical role in generating an international and corporate market for migration control, including dealing with refugees. Because less developed countries with poor human rights records and rudimentary (if any) asylum systems are able to offer the most competitive deflection option, and because corporate or other non-state actors will be guided by concerns of efficiency and profit maximisation, the prospects for refugees are not good – in Gammeltoft-Hansen’s words, likely amounting to no more than ‘protection lite’. Equally disturbing, because scrutiny of protection in such circumstances is difficult if not impossible, even cases arguably governed by international law are less likely to be noticed.

This important book addresses what may well be the most pressing challenges in international refugee law today. It affirms the real power of refugee law even as it challenges us to concede the costs of refugee law’s power. Most importantly, it makes a compelling case for creative engagement with the foundational principles of public international law that inform and constrain the ability of refugee law to mitigate sovereign authority in the interests of human rights protection.

James C. Hathaway
University of Michigan Law School
Ann Arbor
August 2010

Preface

This work reflects the law as it stood, to the best of the author's knowledge, on 20 June 2010. The topicality of the issues covered in this book means, however, that these areas of law are still very much developing. Readers are advised to pay attention to more recent case law. At the time of writing the following cases of particular interest were still pending before the European Court of Human Rights: *Hirsi and Others v. Italy*, European Court of Human Rights, Application No. 277765/09, lodged 26 May 2009 (concerning Italy's high-seas interception and pushback of migrants to Libya); *Al-Skeini and others v. the United Kingdom*, Application No. 55721/07, lodged 11 December 2007; and *Al-Jedda v. United Kingdom*, Application No. 27021/08, lodged 3 June 2008 (both concerning possible extraterritorial jurisdiction for actions of the United Kingdom in Iraq). All website addresses were accurate as at 20 June 2010.

Earlier versions of the author's arguments in the present work have been published elsewhere. Parts of the arguments in chapters 3 and 4 have appeared in 'Growing barriers: international refugee law', in M. Gibney and S. Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010) and 'The refugee, the sovereign and the sea: EU interdiction policies in the Mediterranean', in R. Adler-Nissen and T. Gammeltoft-Hansen (eds.), *Sovereignty Games: Instrumentalizing Sovereignty in Europe and Beyond* (New York: Palgrave, 2008). An earlier version of section 2.3 has been published as part of 'The outsourcing of asylum in the EU and the advent of protection lite', in L. Bialasiewicz (ed.), *Europe in the World: EU Geopolitics and the Transformation of European Space* (Farnham: Ashgate, 2010).

Thomas Gammeltoft-Hansen
Christianshavn, 20 June 2010

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No academic insight is ever achieved in isolation. Beyond the scholars cited in the following, a number of people and institutions have more directly contributed to the process through which this volume has materialised.

This book is an adaption of my doctoral dissertation, which was carried out in co-operation with Aarhus University, the Danish Institute for International Studies and the Danish Refugee Council. The single greatest debt of gratitude is owed to Jens Vedsted-Hansen, who has provided excellent guidance and constant encouragement. I am further indebted to Elspeth Guild, Mark Gibney and Jens Hartig Danielsen, who served as my dissertation committee members, for their critical insights and generous advice on how to improve the manuscript.

Throughout the last five years the Danish Institute for International Studies has provided me with the best possible research environment, professionally and personally. I should like to extend particularly warm thanks to all my colleagues at DIIS, in the migration unit and elsewhere, for providing support and encouragement of the kind that not only makes for great colleagues but also great friends. I am further grateful to colleagues and friends at the European University Institute, Aarhus University and Copenhagen University for providing inspiration and office space at various stages of this project.

For the duration of the present project I have simultaneously been employed by the Danish Refugee Council. I am very grateful to Anne la Cour, Thomas Thomsen and Andreas Kamm for providing me with the opportunity to undertake a Ph.D. with this unique set-up. It is also through the Danish Refugee Council that I have been given the opportunity to work with a number of European refugee-assisting organisations making up the European Council for Refugees and Exiles. The exchange of ideas

with colleagues in both places has provided relief from, as well as stimulus to, the time otherwise spent in the ivory tower.

A number of other people have critically helped shape this book through their ideas and comments. For that I am particularly grateful to Tanja Aalberts, Rebecca Adler-Nissen, Rosemary Byrne, Morten Broberg, Guy Goodwin-Gill, Stefano Guzzini, Peter Vedel Kessing, Anja Klug, Nina Maria Lassen, Jesper Lindholm, Gregor Noll, Jorrit Rijpma, Simon Turner, Finn Stepputat and Ninna Nyberg Sørensen.

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Last, but not least, I am grateful to my family and many good friends for both their support and understanding in this endeavour. This book is dedicated to my parents, who in each their way continue to inspire me to work in this field.

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