if the host state is either 'unable or unwilling' to take action against the non-state actors concerned it therefore becomes necessary for the victim state to take action. However, while the concern regarding the subjective nature of determinations that a state is 'unable or unwilling' to effectively prevent its territory from being used as a base for terrorist operations is acknowledged in that Trapp notes that '[s]uch uses of force amount to the substitution (and imposition) of the victim state's views on how to respond to terrorist threats emanating from the host state's territory for those of the host state' (p. 59), the book does not then go on to offer any suggestions as to how this subjectivity could be overcome. Indeed, what is to happen when the acting state believes that a host state is unable or unwilling to take action but other states do not? Could such situations be determined by the UN Security Council? Or the ICJ? Or do we simply have to live with such critical subjective determinations? Again, engaging with such questions would have rounded off what are in other respects solid arguments.

All in all, Trapp has produced a tour de force on the contours of the contemporary legal debates and standing of state responsibility for international terrorism. The book manages to weave much detail and analysis amongst the clearly argued and accessible paragraphs that make up this well-structured monograph. The stated aim of providing a comprehensive coverage of the area has on the whole been achieved, with regime interaction being a notable theme throughout. The arguments are portrayed in an intelligent yet accessible style that opens up the book's readership to students, academics, lawyers, and government advisers. This comes at a particularly poignant moment now that the debates regarding the impact of the events of 9/11 have had a chance to settle.

*Christian M. Henderson**

Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge, Cambridge University Press, 2011, pp. 284. + £63.00.
doi:10.1017/S0922156512000763

When is the tripwire of international refugee law activated? In other words, 'when does the refugee encounter the state' (p. 1)? The most likely answer to this question envisaged by the drafters of the 1951 Convention Relating to the Status of Refugees was when the refugee arrives at a state party's frontier, claiming asylum and crystallizing the state's international protection obligations that flow from the Convention.[1] Over 60 years since the Convention's conclusion, however, a desire to evade responsibility under international law has led to innovative offshoring and outsourcing of border control. Has this creative attempt to subvert responsibility

* Senior Lecturer in Law, Liverpool Law School, University of Liverpool, UK [Christian.Henderson@liverpool.ac.uk].

1 1951 Convention Relating to the Status of Refugees, 189 UNTS 137.

been effective? Or has the extension of border control policies been accompanied by a parallel shift of international law beyond the traditional notions of territoriality and state responsibility?

In his book *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Thomas Gammeltoft-Hansen attributes the difficulty in answering the above questions to the inherent conflict between the universality of human rights law on the one hand, and its manifestation in treaty form on the other. He attempts to clarify what has previously been termed an apparent 'legal black hole' by means of dividing it into three separate sub-issues.[2] First, the question of jurisdiction: to what extent does international refugee and human rights law apply to the exercise of extraterritorial migration control? Second, the question of attribution: when does migration control carried out by private actors give rise to state responsibility under international law? Finally, the practical impact of these practices: how is the actual enforcement of rights affected by the outsourcing and offshoring of border control?

Gammeltoft-Hansen argues that states are engaging in 'late modern sovereignty games' resulting in two separate markets for migration control (p. 38). The first 'horizontal market' is where states participate in jurisdiction shopping by engaging in extraterritorial border control activities (p. 32). The second 'vertical market' consists of the corporate market for migration control whereby states contract out border control activities, both by using formal contractors supplementing national immigration authorities and also by authorizing private actors to act alone, such as where commercial visa processing companies are employed (p. 35). This forms a double hurdle for refugee applicants as the criteria of jurisdiction as a primary norm and attribution and a secondary norm need to be proved before the protection of that state may be claimed. The practical result of this is 'protection-lite', which is explained as 'the presence of formal protection, but with a lower degree of certainty about the scope and/or level of rights afforded' (p. 30). Like 'Coke-lite', the author argues that the brand retains its name but has fewer calories; that is, few substantive rights are protected.

Regarding the applicability of human rights law and refugee law, the author's main focus is on Article 33 of the Refugee Convention, which prohibits the return of refugees to places where their lives or freedoms are endangered on account of race, religion, nationality, membership of a particular social group, or political opinion. The author argues that this principle, also known as non-refoulement, is applicable on the high seas. As such, he is confronted with the difficult task of distinguishing the extensive state practice to the contrary, such as the interdiction by the United States of Haitian migrants in the Caribbean Sea as made famous by the *Sale* case.[3] He cautions against relying too much on such negative practice, remarking that it is uniform neither in space nor in time, and that, for the most part, states engaging in such practice do not claim that it is compatible with international law. It would have

2 R. Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights', (2005) 26 Mich. JIL 739.

3 *Sale, Acting Commissioner, Immigration and Naturalization Service v. Haitian Center Council*, 509 US 155 (Sup.Ct. 1993).

been interesting if the author had probed the question of the creation of customary international law in more depth and assessed the qualification and weight of such practice by states, as, for example, evidence of 'persistent objectors' or of 'specially affected states'. This work, however, is an adaptation of a doctoral dissertation and it is thus understandable that the author left the question open for further study. His final word on the applicability of non-refoulement on the high seas is nonetheless a curious one. He states that, based on the principle of effectiveness and consideration of subsequent developments, Article 33 clearly applies *ratione loci* to the jurisdiction of the acting state. This, however, is followed by the acknowledgement that owing to the disparate arguments put forward on the issue, states have been able to pick and choose the arguments which best justify their practice. It is difficult to see, then, how the author can claim that his analysis leads to a 'clear result' regarding the application of Article 33 (p. 99).

The author then examines the issues which have received less attention in scholarly debate – the outsourcing and offshoring of migration control. The innovation with which states have attempted to evade their international obligations is reflected in the impressive creativity with which Gammeltoft-Hansen tackles these multifaceted issues. His approach touches on various areas of international law, including the law of the sea, human rights law, refugee law, and general public international law. He also adopts an interdisciplinary approach, engaging with political science, economics, and sociology and even drawing an analogy with the fields of Newtonian physics and quantum mechanics to propose a 'border theorem' of human rights obligations.

The author makes a number of claims concerning when, if ever, offshore migration control constitutes effective control for the purposes of attributing state responsibility. First, as regards the claims by states of non-responsibility in 'international zones', he argues strongly that states are not free to withdraw jurisdiction at will. Second, concerning the high seas, he demonstrates the need to establish an effective jurisdictional nexus between the state and the specific rights violation under consideration. In circumstances where activities take place on the territory of another state, the result is a merging of the above two categories to produce the 'exceedingly abstract' effective control test. Jurisdiction is 'a separate test in which the conflicting basis for territorial jurisdiction has to be overcome in order for the "exceptional" situation of extraterritorial jurisdiction to materialise' (p. 146).

The imposition of carrier sanctions, the employment of private contractors at the border to carry out immigration checks, and the use of private visa application agents all illustrate the expansion of private involvement in migration control. The author sees this as raising two questions: first, when are states accountable under international and refugee law for actions of private entities? Second, is state responsibility affected by the geographical venue of such privatized migration? The author correctly notes that the concept of private actors acting with governmental authority was intentionally construed narrowly by the International Law Commission's Articles on State Responsibility. Instead, he advocates the concept of due diligence to assist in filling the responsibility gap. He also alludes to the possibility of codifying

a set of principles, although he acknowledges that such principles would have to closely mirror the factual circumstances at hand and their drafting would thus be difficult. In this respect, it would have been interesting had the author examined the codification of principles in other similar contexts, such as the Montreux Document on Pertinent Legal Obligations for States relating to Operations of Private Military and Security Companies during Armed Conflict to see if they could shine any light on the development of such principles in the context of migration control,[4] and whether such principles would be applicable by analogy in the migration control context.

In line with the broad, multidisciplinary approach employed throughout the book, the author puts these practices in their wider context. Put simply, he states that the offshoring and outsourcing of migration control has resulted in an 'out of sight, out of mind' effect (p. 211). The sparse case law relating to this area is the product of the 'chicken and the egg dilemma' – the lack of access to legal institutions means that cases rarely reach the courts, and even if they do, the sparse evidence available means that most cases are unsuccessful. The lack of judicial clarity creates a grey area which is exploited by states by means of questionable migration control practices (p. 229).

The book puts the legality of many current policies under rigorous scrutiny and ends with the conclusion that states do not simply rid themselves of obligations by outsourcing governmental activities. This has been confirmed by the judgments of the European Court of Human Rights in *Al-Skeini* v. *United Kingdom* and *Al Jedda* v. *United Kingdom*,[5] cases which were decided after the publication of this volume. At the time of writing this review, the case of *Hirsi* v. *Italy* has just been decided by the Court, which further affirmed many of the arguments put forward in this volume and shows that Gammeltoft-Hansen's conclusions were somewhat ahead of his time.[6] That said, this volume is, as Hathaway's foreword puts it, 'no simplistic manifesto for refugee rights' (p. ix). It takes a cautious approach and recognizes that a responsibility gap exists which states attempt to take advantage of. The author links this back to the problem traced throughout the volume – that while human rights law is universal, its codification as treaty law has to be reconciled with the state-centric concepts of territoriality and the public–private distinction which are foundational concepts of public international law.

This work will be of interest to scholars of refugee law, human rights law, and general international law as it is a comprehensive and well-written guide to the legal norms applicable to the phenomena of offshoring and outsourcing of migration control. The real value of this volume, however, lies in the author's awareness of the factual realities of private and extraterritorial migration control. Throughout the book, the author sets the scene, explaining the rationale behind the employment of such policies, how they operate in reality and the practical effect that this has

4 Montreux Document on Pertinent Legal Obligations for States relating to Operations of Private Military and Security Companies during Armed Conflict, agreed at Geneva on 17 September 2008.

5 *Al-Skeini and Others v. the United Kingdom*, Decision of 7 July 2011, [2011] ECHR; *Al-Jedda v. the United Kingdom*, Decision of 7 July 2011, [2011] ECHR.

6 *Hirsi Jamaa and Others v. Italy*, Decision of 23 February 2012, [2012] ECHR.

https://doi.org/10.1017/S0922156512000763 Published online by Cambridge University Press

on the individual asylum seeker. The result is that the legal arguments put forward in the volume are not divorced from the political realities of migration control and that the volume fulfils its aim to 'contribute to a better understanding of how the extraterritorialisation and privatisation practices fundamentally operate at the intersection between law and politics in today's world' (p. 8).

*Bríd Ní Ghráinne**

* BCL (Int.), LLM, Doctoral Candidate at University of Oxford [brid.nighrainne@sant.ox.ac.uk].

https://doi.org/10.1017/S0922156512000763 Published online by Cambridge University Press