The human rights issues related to extra-territorial control of immigration/asylum systems were highlighted recently by the judgment of the European Court of Human Right in Hirsi Jamaa and others v Italy.\textsuperscript{1} The case – and its outcome – came about due to the Italian policy of preventing the arrival of migrants by sea on Italian territory.

The fundamental question faced by the court was whether the intercepted migrants were within Italian jurisdiction for the purposes of the ECHR50 and its protocols. Contracting states parties are obliged to guarantee Convention rights and freedoms ‘to everyone within their jurisdiction’ (article 1 ECHR50). The precise circumstances in which a state is responsible for the actions of its agents outside its territory have troubled the court since a Grand Chamber ruled in Bankovic\textsuperscript{2} that extraterritorial jurisdiction was exceptional, and did not extend to isolated acts. The general position that the court has subsequently adopted is that extraterritorial jurisdiction arises whenever a state exercises effective control over another place, or its agents exercise ‘physical power and control’ over a person.\textsuperscript{3}

In another case on extraterritoriality, the High Court of Australia held in August 2011 that the Minster for Immigration and Citizenship cannot validly declare a country as a country to which asylum seekers can be taken for processing unless that country is legally bound to meet three criteria.\textsuperscript{4} The country must be legally bound by international law or its own domestic law to: provide access for asylum seekers to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country. In addition to these criteria, the Australian Migration Act requires that the country meet certain human rights standards in providing that protection.

\textsuperscript{1} Application no 27765/09, judgment delivered on 23 Feb 2012 (see Case Law section of this issue).

\textsuperscript{2} Bankovic and others v Belgium and 16 other contracting states, Application no 52207/99, 12 Dec 2001 (Grand Chamber).


The question of when a state has obligations towards an individual outside its territory is the focus of Gammeltoft-Hansen’s book. Through a critical analysis of the various legal issues at stake, Access to Asylum gives an answer – or answers – as to why states cannot avoid their obligations towards individuals in need of protection by ‘jurisdiction shopping’: ‘By moving control activities out of their national territory states are engaging in jurisdiction shopping … most clearly [this] may be observed when states shift migration control into the territory or territorial waters of another state … in these instances, not only is the responsibility of the acting state reduced, but a competing duty bearer is introduced …’ (p 32). This is one of the reasons why ‘today, the classical dictum that a state’s executive power is to be exercised by its own officials and confined within the scope of its territorial borders can no longer be asserted with the same rigour’ (p 3).

The two main issues at stake are, first, where responsibility lies when migration control is exercised outside the state’s territorial jurisdiction and, second, when it is exercised by private actors – or a combination of the two. The concern is that these two ways of outsourcing control ‘are used as a pretext for effectively circumventing basic human rights obligations’ (p 3). However to answer the questions regarding responsibility in this context, an in-depth analysis of responsibility in refugee law and in human rights law needs to be carefully carried out, something that Access to Asylum does thoroughly and with clarity.

At times, while reading this book, the worry was that the author might defend the position that states can circumvent their obligations a little too vigorously – but this is perhaps one of the strengths of this book: it clearly goes through the relevant issues both in refugee and human rights law – the non-refoulement principle obviously being particularly relevant, but also the general discussion of extraterritorial jurisdiction. It lines up the arguments for why there are limits to extraterritorial responsibilities and does so clearly and in-depth (so well that, as mentioned, at times one was left wondering whether the ultimate conclusion would be that states have no responsibilities when they go jurisdiction shopping). However this exercise is clearly needed in order to demonstrate exactly what the issues at stake are and what the various arguments for extending jurisdiction beyond the territory and beyond the direct actions of state actors are.

The obligations on states based on the non-refoulement principle are analysed particularly in view of the ratione loci of the principle – focusing on the meaning of ‘within the territory’, ‘at the frontier’, ‘within the state’s jurisdiction’ and ‘wherever a state acts’. Again, one of the strengths of this book is how it clearly outlined the arguments against an expansive interpretation of the obligation of the non-refoulement principle, only to show how a too-limited interpretation would actually be wrong. This gives the arguments for a more dynamic view of how the principle should be interpreted
a firm basis in existing law and jurisprudence and thus the conclusion is clearly legally sound.

The author also includes a broader contextual analysis looking at human rights instruments which prohibit return of individuals to places where they may face danger – an important element to include since this grants a potentially broader protection than the CSR51 alone. The ample inclusion of international and regional human rights norms and jurisprudence is a very important part of this book and the emphasis on the importance of these mechanisms in enforcing and underlining states’ obligations towards individuals subject to their jurisdiction is very welcome. Perhaps a tiny bit more focus on the state’s obligation to protect would have been useful to emphasise that putting control in the hands of private companies as well as on another territory does not exempt the state from complying with its international obligations. An emphasis on the obligation to protect may also to a certain extent avoid that the territory where ‘abundant leones’ is too large. That said, the author does show how existing law, firmly supported by case law from monitoring bodies, supports the proposition that states ‘may carry due diligence obligations in regard to [both] the conduct of non-state actors and where rights violations or harm occurs outside its [territorial] jurisdiction’ (p 201).

The problem of outsourcing migration control to private actors likewise cannot absolve states from their obligations – admittedly this issue also creates a series of problems since traditionally there has been a rather rigid division between private and public and thus between when states could be held accountable for actions and when not. This distinction retains its importance – but it is not ‘set in stone’ (p 206), and again the due diligence responsibility is highlighted as an important factor in filling a potential responsibility gap.

This book is most certainly a valuable tool for academics, practitioners and students alike. It is difficult to give it the credit it deserves in limited space since it touches upon a series of sub-questions which equally deserve mention – the possibilities for accountability measures to intervene when potential violations have taken place outside the territory of a state, the level of protection in different states and the differences in general enjoyment of human rights across states, the difficulties in gathering knowledge about what actually takes place in off-shore facilities and the difficulties faced by national courts in such cases are but some of the issues discussed.

The book shows how, after a thorough and critical legal analysis, ‘states did not rid themselves of international obligations simply by offshoring and outsourcing migration control’ (p 232) and that ‘contrary to the vivid claims that extraterritorial actions or privatisation are carried out in a “human rights vacuum” or “legal black hole” … the core norms under international refugee law and human rights law, even under the most restrictive reading, undeniably remain applicable in many of these situations’ (p 232).
The book gives anybody interested in, or working with, these issues a solid basis for refuting claims of non-applicability of international obligations of states in these situations and does so without departing from sound legal research and findings.

The author mentions at the very beginning of the book that the Hirsi case was still pending when the book was being written – the outcome of this case clearly shows how the authorities responsible for interpreting state obligations under international law firmly conclude, as does Access to Asylum, that jurisdiction-shopping or outsourcing does not relieve states of their obligations. The European Court’s focus in Hirsi upon effective control over a person suggests that migrants will fall within the jurisdiction of a state in extraterritorial contexts other than by interception and rescue at sea.

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*The views and opinions expressed are those of the author and do not reflect those of IOM.

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If you are busy ‘doing’ protection, the chances are that, from time to time, you are stuck in your organization’s protection culture and that you are not completely au fait with the protection cultures of humanitarian agencies, integrated UN missions, regional organizations or some of the other diverse actors who are today seeking to protect people in a humanitarian crisis. Elizabeth Ferris, in ‘The Politics of Protection – the Limits of Humanitarian Action’, examines the political architecture of protection, provides insights into the various protection cultures and helps develop an understanding of what might be achieved in the protection world. For practitioners who deal with the essence of the humanitarian enterprise – protection – the book highlights the importance of keeping alert to the politics behind our efforts, and for governments, donors, trainers and academics it is full of revelations that both expand the protection analysis and identify the questions that need to be answered with a greater body of evidence before we can move forward.