Violeta Moreno-Lax, ***Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law***. Oxford: Oxford University Press, 2017. Pp. 624. £95.00. ISBN 978-0-19-870100-2

Very few news items have made headlines for as long as the 'crisis' of 2015, which was prompted by the large-scale irregular arrival of persons across the borders of the European Union (EU). In that year, Germany received more new asylum applications than any other country.[1] Despite having a fully functional Common European Asylum System (CEAS) – at least on paper – EU member states met week after week within the European Council for high-level discussions on how best to respond to the unfolding developments.

The media was quick to label the 2015 'crisis' as unprecedented and presented Europe as facing the most serious refugee crisis since World War II. This characterization ignored the fact that, already during the 1990s, Europe had faced the large-scale irregular movement of refugees, who were fleeing from conflicts that had resulted from the dissolution of the former Yugoslavia. It was precisely that experience in the 1990s (and the lessons that were learned) that led EU member states to transfer to the EU (the European Community at the time) the competence for asylum matters in the 1997 Treaty of Amsterdam, after decades of keeping this field of law soundly grounded within the international law framework of 'intergovernmental cooperation'.[2] The CEAS, in other words, was established to ensure that the asylum system would also be functional during times of mass influx of refugees. Indeed, the matter was of such overwhelming relevance at the time that the first CEAS instrument to be adopted was the 2001 Directive on Temporary Protection, which afforded interim protection during situations of mass movement.[3] It was negotiated in the record time of eight-and-a-half months after the Commission adopted its proposal and only two years after the end of the Kosovo conflict, which had prompted proceedings against the allies of the North Atlantic Treaty Organization before the European Court of Human Rights[4] and before the International Court of Justice.[5]

In 2015, the EU member states chose not to make use of the very legal framework that they had established to address large-scale movements of asylum seekers. Instead, their approach was based on a number of political conclusions without binding legal effect. Observers who seek the 'comfort' of a rules-based approach might have been troubled by the way in which states ignored the existing legal framework and instead embarked on the much more fluid enterprise of acting within an ad hoc 'soft law' framework. Yet, the approach adopted in 2015 was not necessarily at odds with the EU's general attitude towards asylum; in fact, the practical effect of its course of action was to deprive those arriving irregularly in large-scale movements from the legal avenues precisely established to access such protection. In this regard, the practice of 2015 built on a trend, which is consistent with EU policy and practice in this field, of developing legal frameworks but acting outside of them.[6]

Violeta Moreno-Lax identifies this incoherence of EU asylum policies, claiming that '[t]he question of access to international protection has been obscurely regulated in EU law' (at 4),

1 United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2015* (2016), available at www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html.

2 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, OJ 1997 C 340.

3 Council Directive 2001/55, OJ 2001 L 212/12.

4 ECtHR, *Banković and Others v. Belgium and Others*, Appl. no. 52207/99, Admissibility Decision of 12 December 2001.

5 *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, 15 December 2004, ICJ Reports (2004) 279.

6 Gil-Bazo, 'The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice', 33(1) *Netherlands Quarterly of Human Rights* (2015) 42.

and she identifies the contradictions that emerge from an approach that develops legal frameworks for providing protection but does so in a way that defeats their purpose. As her research shows, the reluctance of the EU legislator to establish clear entry criteria for protection seekers that effectively guarantees the right to access asylum 'plants a seed of ambiguity that confines refugees to irregularity' (at 79). In her argument, the treatment of Syrian refugees is emblematic of the EU's approach to asylum. Moreno-Lax notes that in 2013 Syrians were the top group detected by the European Border and Coast Guard Agency (Frontex) for illegally crossing EU borders, while according to the statistical office of the EU (EUROSTAT), Syrians were also the top nationality of registered asylum seekers and of beneficiaries of protection upon recognition during the same period.

Moreno-Lax's book then sets off to analyse accessing asylum in Europe and does so from the perspective of the external dimension of EU policies. This focus is not necessarily novel; others have explored the topic before.[7] Yet Moreno Lax approaches it from an innovative angle by proposing what she calls an 'Aggregate Standards' model. This, she claims, takes into account the complex interactions between the different legal orders regulating aspects of refugee movement, which expand well beyond EU law into international law and involve the simultaneous application of different legal regimes: international refugee law, maritime conventions and human rights. Despite her claim, it is disappointing that, for the most part of her book, Moreno-Lax engages with the 'Aggregate Standards' model implicitly. It is only in Chapter 7 that she attempts to develop the model explicitly, but, even then, she does so without defining it or proposing a theoretical and conceptual framework to ground its development. Having announced that the introduction of the 'Aggregate Standards' model would form the book's key contribution, and that it would be developed by drawing on the rules of treaty interpretation in the Vienna Convention on the Law of Treaties (VCLT)[8] (at 7–8), it is a little surprising to see that Chapter 7 merely presents the sources of human rights in EU law. It is also striking that Moreno-Lax, notwithstanding her impressive bibliography, refrains from engaging with the rich literature on fundamental rights under EU law. Lastly, it is worth noting similarities between Moreno-Lax's 'Aggregate Standards' model and the conceptual framework developed by Michelle Foster in the context of states' so-called policies of *non-entrée*. Like Moreno-Lax, Foster had argued for a holistic approach to the analysis of the rights of refugees across different legal regimes, based on the VCLT.[9]

Notwithstanding these concerns, Moreno-Lax's contribution should not be underestimated. Hers is the first study that actually applies a holistic approach to the core rights enjoyed by refugees, namely the principle of *non-refoulement*, the right to asylum (which Moreno-Lax construes as the right to leave to seek asylum) and procedural guarantees, including the right to an effective remedy. Furthermore, while the conceptual framework for this approach had already been developed, Moreno-Lax applies it to the EU and its member states. In doing so, she engages with the complex peculiarities of the EU as an international legal person. This is no easy task. It requires mastering the details of the complex interaction between an organization invested with supranational powers and its member states, bound by obligations, when acting individually and collectively, under EU law, European human rights law and international law.

[7] See, e.g., T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011); G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (2000).

[8] 1969, 1155 UNTS 331.

[9] Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State', 28 *Michigan Journal of International Law* (2007) 223.

The complexities of this interaction are particular obvious in the case of Frontex, the European border agency. These form the subject of Chapter 6 of the book, which is one of its most interesting. In it, Moreno-Lax discusses Frontex's historical development and the controversies that surround it. In particular, she identifies the ambiguous legal nature of this EU agency, which was only placed on a secure legal footing (a mandatory requirement of any piece of EU legislation) in the recast version of its constitutive regulation in 2011. In fact, Frontex has now become an agency of the EU, with its own legal personality and independence, enjoying 'the most extensive legal capacity accorded to legal persons' under the national legislation of EU member states.[10] Moreno-Lax unpacks the different layers of Frontex and shows that its complex internal structure conflates 'powers and responsibilities between the Agency, the Member States, and third countries' (at 197). Having identified this conflation as a fundamental barrier to the human rights protection of asylum seekers, as it prevents a definite assessment of the international responsibilities of each of the parties that act collectively, it is unfortunate that Moreno-Lax has not taken the opportunity to develop a sound conceptual framework that allows for the analysis of issues arising from the exercise of powers within these collective operations. This is a missed opportunity to make a stronger contribution to the analysis of the complex issue of international responsibility of EU member states when acting collectively within the EU as well as of the international responsibility of the EU itself as an international organization acting through its Frontex agency. Given the work of the International Law Commission in this field, as well as the fact that one of the claimed purposes of the research is to establish the responsibility of EU member states under the international law of state responsibility for the commission of international wrongful acts (at 6), one would have expected to see more depth of analysis in this regard.

Moreno-Lax's contribution has the power of detail. It offers a comprehensive, very well-researched study that demonstrates the internal incoherence of the EU's framework of refugee protection, which is so strongly grounded in security concerns. Moreno-Lax's research offers a critique of EU law, policy and practice based on detailed evidence and analysis. It is this extensive research that allows the author to challenge forcefully the EU's own claim to be a community of values. As long as the EU's entry and pre-entry controls continue to deprive asylum seekers of the protection that they are entitled to as a matter of international and EU law, the EU's own declaration of being founded on the rule of law becomes an empty formal claim.

This book will be useful to all those interested in EU asylum law and, in particular, its relationship with the EU's legislation on border management and the combined effect that these two areas of EU law have on the effective realization of the right of refugees to seek asylum. While there is plenty of literature on each of these two separate, but related, areas of EU law, this is the first book to explore their interaction. Therefore, it makes a contribution to the better understanding of the EU as an international actor in the field of international refugee law by exploring the conduct of the EU and its member states when acting outside their borders, including in the high seas.

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[10] Council Regulation 2016/1624, OJ 2016 L 251/1, art 56.