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Guest editorial

The ‘where’ of asylum

“The earth hath bubbles, as the water has ...”

Banquo in *Macbeth* act 1, scene 3

Does law produce spaces where it no longer applies? Does it, in other words, set up spaces of lawlessness? The question seems almost rhetorical given the growing body of work inspired by Agamben’s notions of ‘the camp’ and ‘state of exception’. Indeed, in the past decade or so, this question has been guiding much research in various disciplines, with human geography probably at the forefront, and unsurprisingly so given that the question is as spatial as it is legal. But this is not the first encounter between law and geography. There are, in fact, two different theoretical strands to human geographers’ engagement with the relationship between law and space, one rooted in the critical legal studies movement, and the other, more recent one, in Agamben’s work. The former, usually called critical legal geography, is animated by a concern to see law not as timeless and independent of social life, but as shaped by, and in turn shaping, social relations, identities, and power structures—to see law, as Delaney (2003) succinctly put it, “as a thing of this world”. Law, in this view, is not merely prohibitive, but also productive; it is constitutive of the spaces of social life. Furthermore, it has a geographical specificity; despite its claim to universality, the *where* of law matters. The latter strand is more concerned with the spatiality of law and sovereign power. What animates this growing body of work is the idea that law may actually be involved in producing spaces of lawlessness, although what is in question is not the absence of law as such but violence committed through law. It is this latter strand that seems to be the more prominent one in contemporary legal–spatial research.

This shift in focus from *spaces of law* to *spaces of lawlessness* is not simply rhetorical (‘because Agamben had this idea...’), but circumstantial. This is perhaps best evidenced by the recurrent references to Guantánamo and military campaigns in Afghanistan and Iraq, which have become the paradigmatic examples of much writing on space, law, and sovereignty.⁽¹⁾ Compared with such high-profile examples, however, the issue of asylum has received relatively little attention, despite the worrying developments in the European Union’s (EU) asylum law and policy in the past decade or so. This is not to suggest that asylum has been completely neglected by geographers; nor that the institution of asylum is in good health elsewhere in the world. However, the shape EU asylum law and policy has been taking deserves attention from the perspectives both of spaces of law and spaces of lawlessness as it has spatial manifestations in a variety of forms (detention centres, transit zones, appropriated city streets) and a range of places, including those *beyond* the territorial boundaries of member states. It not

⁽¹⁾ Although the practices of the US government in the aftermath of September 11 brought onto the stage the issue of detention of foreigners, Dow (2004) shows that an appalling and largely obscure system of detention for so-called ‘illegal immigrants’ had existed in the US well before that. Therefore, detention-related human rights abuses and legal violations in Afghanistan, Iraq, and Guantánamo were not such a novelty; they were, in a sense, a continuation of similar practices at home towards detained immigrants, practices that violate fundamental rights (presumption of innocence, the right of habeas corpus, the right to humane and decent treatment), remain arbitrary, opaque, and wanting public scrutiny.

only points to the role that law and policy play in the production of space—spaces of law, or legal geographies—but also to the ‘where’ of law, and suggests that some of those spaces constructed through law may be raising pressing legal, political, and human rights issues—spaces of lawlessness.

Given the increasing preventive measures and entry restrictions of the EU and its member states, “ninety per cent of asylum seekers”, Oxfam (2005, page iii) estimates, “are forced to enter the EU irregularly”. There are also many thousands who never reach it: between 1993 and 2006, more than 7000 migrants and asylum seekers died while attempting to reach EU territory (half of them in a period of only three years, between 2003 and 2006). And this is only the documented number of deaths; the actual number is probably much higher (Clochard and Rekacewicz, 2006). For those who manage to reach EU territory, one response has been the setting up of detention camps. In the past ten years, “detention camps for foreigners have mushroomed across the European Union”; there are now more than 200 *formal* detention camps in EU countries, housing more than 30 000 asylum seekers and migrants awaiting deportation (Brothers, 2007). But in terms of detention, this is not the end of the bad news.

Detention, expulsion, banishment

In the last week of 2008, on 24 December, the Directive “on common standards and procedures in Member States for returning illegally staying third-country nationals” was published in the *Official Journal of the European Union*. Alternatively called the ‘Returns Directive’ (by officials and more moderate observers) or the ‘Directive of Shame’ (by activists mobilized against it),⁽²⁾ the directive was first approved by the European Parliament back in June 2008, to be adopted later by the Council in early December. EU member states, apart from the UK, Ireland, and Denmark, now have until December 2010 to bring their domestic legislation in line with the standards and procedures defined by the directive.⁽³⁾

The directive is called ‘Returns Directive’ because it has been presented as an instrument to regulate the ‘return’ of third-country nationals irregularly staying in EU member states. However, an examination of the text shows that the directive is as much about ‘return’—or, better yet, expulsion⁽⁴⁾—as it is about *detention* (a word that does not occur in its rather long title). Furthermore, in a less explicit manner, it is also a potentially very effective and restrictive *border management tool*, as we will see below. The primary purpose of the directive is *not* to improve the fundamental protections of affected people, such as those in detention, but to make their expulsion more effective. It sets common rather than minimum standards, some of which, as the European Council on Refugees and Exiles (ECRE) pointed out, “are actually lower than the current practices in several EU countries” (2008, page 6). Amnesty International emphasized that the directive

⁽²⁾ The Ecuadoran president Correa also referred to it as a “directive of shame”. The Bolivian president Morales, in an article published in *The Guardian* (2008), qualified the directive as “hypocritical, draconian and undiplomatic”.

⁽³⁾ If the member states have ‘better’ or more generous standards, it is in their discretion to follow the directive or not. However, they will not be allowed to apply harsher standards than those defined in the directive.

⁽⁴⁾ Although during the debates the key objective of the directive was presented as encouraging ‘voluntary return’, a term the final text published in the *Official Journal* also uses extensively, it really is about expulsion. As ECRE (2008) maintains, the use of the term ‘voluntary’ in this context is highly misleading as what is in question is not voluntary return—which would mean a person has freely decided to repatriate even if he or she has no legal obligation to do so—but ‘mandatory return’, which means that he or she no longer has a legal basis to stay in the territory and is required by law to leave. As the directive is about the return of irregularly staying third-country nationals, the nature of the return is never voluntary, but either mandatory or, if the person fails to consent, forced.

“does not guarantee the return of irregular migrants in safety and dignity” (2008). Indeed, although the final text emphasizes that third-country nationals *in detention* “should be treated in a humane and dignified manner with respect for their fundamental rights” (paragraph 17),⁽⁵⁾ there is no provision in it that would allow for monitoring to see if the returns are indeed safe and dignified.⁽⁶⁾ It is no wonder, then, that the directive has also been referred to as a ‘Directive of Shame’, which, apart from the general concerns raised above, arises mainly from three specific instruments provided in the text: entry bans, and limits and conditions of detention.

The directive provides that the expulsion of a third-country national be (if no voluntary departure period has been granted or if the person does not comply with the obligation to return) or may be accompanied by a EU-wide entry ban of up to five years, with the possibility of imposing a longer, *even permanent*, ban “if the third-country national represents a serious threat to public policy, public security or national security” [Article 11(2)], although what constitutes ‘serious threat’ is left unspecified in the text. It is now possible, therefore, for member states to ban from EU territory people who may have lived there for a long time with established families and relationships (this may also include asylum seekers with failed applications, who sometimes reside several years, with a legal basis, in the host country because of long asylum procedures). This instrument, disproportionate as it is, also neglects the possibility that circumstances in a person’s country of origin may change, giving rise to a need for international protection (UNHCR, 2008a). Therefore, one of the highly probable outcomes of entry bans will be to encourage the already widespread use of irregular channels to enter the EU, contributing further to the criminalization of asylum seekers, not to mention the risks involved in their efforts to cross boundaries.

Regarding the limits of detention, the directive provides in Article 15(5) that detention for removal may not exceed six months, but in the following paragraph gives member states the possibility to extend it a further twelve months, thus allowing for a detention period of up to 18 months; that is, *a year and a half*, awaiting deportation, without having committed any crime.⁽⁷⁾ Two factors allow for an extension of detention: lack of cooperation by the individual, or “delays in obtaining the necessary documentation from third countries” [Article 15(6)(b)] to which the individual will be returned, which is *not necessarily the country of origin*. The directive expands the scope of ‘return’ to include transit countries or other third countries, which are likely to be even less willing than countries of origin to accept expelled individuals, rendering the obtaining of necessary documents a long process. Therefore, it is possible even for those who comply with the return order to find themselves detained up to 18 months for reasons beyond their control. In addition to the entry bans, it is this excessive duration of detention, which implies an 18-month suspension of the right of liberty of the person who has not committed a crime, that has led critics to call the

⁽⁵⁾All references to the directive refer to the text published in the *Official Journal of the European Union*.

⁽⁶⁾Apparently this issue was raised in a report by the European Parliament Civil Liberties Committee (LIBE) in September 2007, which urged the registration and monitoring of all returns in order to evaluate their impact on the returned persons (Was the return executed in a dignified manner? Are the returned persons in fact being *refouled*? Are they able to (re)integrate in the host community?) and on the receiving country. However, LIBE’s amendment was not retained in the final version of the directive, which also failed to take into account any recommendations made by the NGOs and UNHCR (see ECRE, 2008, pages 5 and 7).

⁽⁷⁾France limits detention to a maximum of 32 days, lowest among the member states. The highest include Malta and Germany (18 months) and Latvia (20 months). In eight countries, including United Kingdom and Denmark, which are not affected by the directive, there is no upper limit on the duration of detention. Overall, however, the 18-month upper limit set by the directive exceeds that of most member states.

directive a 'shameful' one. There is, however, one more issue that has particularly outraged the critics, and that relates to the detention of children and vulnerable persons, and the conditions of detention.

The directive allows member states to detain—again up to 18 months—and deport children (including those unaccompanied) and vulnerable persons (pregnant women, elderly or disabled people, or victims of torture, rape, or other forms of violence). Worse still, it allows their detention in ordinary prisons, if specialized detention facilities—where foreigners who have not committed a crime, in principle, should be detained—are not available or when there are “emergency situations” such as “exceptionally large number of third-country nationals to be returned” and “unforeseen heavy burden”, none of which are clarified in the text (Article 18).⁽⁸⁾ More than 200 000 ‘illegal migrants’ were arrested in the EU during the first half of 2007, and fewer than 90 000 were expelled (*Le Monde* 2008). Migreurop (a network of activists and researchers) estimates that there are 235 camps in the EU for the detention of foreigners. The capacities of 150 are known, which adds up to about 30 000 people. It is difficult to calculate such figures accurately, but, if these are indicative, it is inevitable that many foreigners will either be detained in overcrowded facilities or in ordinary prisons.⁽⁹⁾ The directive does not seek to remedy this problem. Nor does it address the problem of the systematic detention of migrants and asylum seekers *upon arrival* in many southern European countries, such as Malta and Italy, where asylum applications are filed, and their outcome awaited, in detention, often in dreadful conditions.

There are, then, sound reasons to be concerned about the possibilities opened up to member states with this directive. There is a risk, according to Amnesty International (2008) of “promoting prolonged detention practices in EU Member States and impacting negatively on access to the territory.” UNHCR (2008a, page 3) maintains that, even though member states are free to opt for higher standards, “standards on removals are likely to drop as a consequence of this text”, one highly probable consequence being the generalized use of prisons to detain third-country nationals, including children and vulnerable persons (ECRE, 2008).

In many ways the directive, which should be seen as part of a package on immigration and asylum, follows a trend in asylum and migration policies of late, characterized by the regression of fundamental protections and the progression of tools and practices of deportation and prevention of access to EU territory. In addition to the many worrying possibilities outlined above, it also raises a serious risk of removal for potentially a great number of people seeking international protection. Article 2 states that “Member States may decide not to apply this Directive to third-country nationals who... are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in the

⁽⁸⁾ Article 18 is about ‘emergency situations’ and allows member states to derogate from their obligations regarding judicial review periods, places of detention, and conditions for the detention of families. The derogations are sustained “as long as the exceptional situation persists”.

⁽⁹⁾ Prisons are notoriously overcrowded in France, and this may well be the case in some of the other member states as well. France was severely criticized in a recent memorandum by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, who pointed not only to overcrowded prisons, but also to overcrowded and ‘dehumanized’ detention centres for foreigners [CommDH(2008)34, Strasbourg, 20 November 2008]. Just about a week before the publication of the directive in the *Official Journal*, the daily *Libération* put a film, shot by the frontier police, on its website that showed the dreadful conditions in a detention centre in Mayotte, a French overseas territory in the Indian Ocean, where more than 200 people (including children) were detained in a facility conceived to accommodate 60 people. The article that accompanied the film referred to Mayotte as a “space of lawlessness” (*zone de non-droit*).

Member State.” This is curious because it implies that the safeguards contained in the directive would apply only to those who entered the EU regularly. However, it is widely recognized that many people seeking international protection are obliged to enter the EU irregularly given various entry restrictions (only one in ten asylum seekers enter the EU through regular channels, according to the Oxfam report cited above). With this directive, they now risk removal even if they are in need of protection, and this without the safeguards that would have applied to them had they entered the territory regularly (which has serious implications regarding effective legal remedy and judicial review of detention, and for the removal of unaccompanied children, who may not benefit from special protections). Thus, the directive, which “in principle was intended to regulate the situation of those third country nationals staying irregularly in the Member States, has been developed into a *non-entry tool* to complement EU border management instruments” (ECRE, 2008, page 8, emphasis added). Hyndman and Mountz (2008) refer to such restrictive border management tools as “*neo-refoulement*”, which involves spatial practices that deny access to asylum before individuals can even reach the state’s territory. This adds to the question of ‘where’ of asylum, which is a serious one given the direction in which EU asylum law and policy is headed.

Spaces of law, spaces of lawlessness

The preamble to the directive states that “it is legitimate for Member States to return illegally staying third-country nationals, *provided that fair and efficient asylum systems are in place* which fully respect the principle of non-refoulement” (paragraph 8, emphasis added).⁽¹⁰⁾ This, however, is a demanding—and unrealistic, given the current situation—requirement for legitimacy as it is widely recognized that there are significant differences between member states’ asylum procedures. Even the European Commission itself explicitly recognized this as a “critical flaw in the current CEAS [Common European Asylum System]”, which “goes against the principle of providing equal access to protection across the EU” (European Commission, 2008, page 3). One clear indication of this flaw is the differences in recognition rates. For example, 0% of Chechens, one of the largest groups of asylum seekers in Europe since 2003, were granted asylum in Slovakia in 2005, whereas 90% of Chechen applicants were successful in Austria in the same year (ECRE, 2007). An Iraqi asylum seeker has virtually no chance of a successful asylum application in Greece (provided he or she can manage to apply), a major EU entry point for the majority of Iraqis. Indeed, concerns about Greece’s ability to ensure access to a fair and efficient asylum system have reached such a point that the UN Refugee Agency recently published a position paper advising governments “to refrain from returning asylum-seekers to Greece under the Dublin Regulation until further notice” (UNHCR, 2008b, page 1).⁽¹¹⁾

⁽¹⁰⁾ The principle of non-refoulement prohibits states signatory to the 1951 United Nations Refugee Convention to return refugees to territories where they would be exposed to persecution or risk their life or liberty on account of race, religion, nationality, membership of a particular social group, or political opinion. The full respect of the principle of non-refoulement, however, cannot be taken for granted as far as the practices of member states go. The UK’s return of rejected asylum seekers to Zimbabwe in 2005, and Italy’s systematic returns of irregular migrants to Libya are but two reminders of this.

⁽¹¹⁾ The Dublin Regulation was originally conceived to deter multiple asylum applications and increase efficiency. It sets out the criteria to determine the member state responsible for examining an asylum claim made by a third-country national, which is usually the member state through which an asylum seeker first enters the EU territory (unless he or she has family members in or prior issuance of visa or residency permit by another member state). For example, if an Iraqi asylum seeker arrives in France and files an asylum application, but has first entered the EU via Greece and had his fingerprints taken there (which would be stored in the EURODAC database), he may find himself sent back there for the examination of his claim.

Furthermore, it is not clear where the expelled people will be returned to since the directive has a rather broad definition for 'return'. It could be a transit country which they passed through on their way to the EU territory, or another third country with which they may have no links at all. Return countries may even have a well-deserved reputation for the violation of human rights. This is particularly the case with Libya, concerning in particular the treatment of 'illegal' migrants and asylum seekers, where detention centres have been built with funding from Italy. The cooperation of Italy and Libya in this domain has been further consolidated with a bilateral relationship treaty signed on 30 August 2008. Given such agreements and the changing nature of EU asylum law and policy, it is not unimaginable—nor unlikely—that affected third-country nationals will be deported to camps in transit countries bordering the EU.

The EU is at a turning point in the domain of asylum. Earlier EU initiatives sought to limit the number of asylum seekers and refugees through restrictive measures and increased border controls. Although such measures are certainly not off the agenda, the recent initiatives are marked by a common logic of moving asylum overseas; that is, receiving or transferring asylum seekers, and processing their claims *outside* EU territory as part of a stated aim to create a 'Common European Asylum System' by 2010. This shift was brought to the EU agenda by the UK's 2003 proposal—the so-called 'New Vision'—to move the processing of asylum claims in regions of origin or transit, an idea which, as Noll (2003) showed, was neither new nor visionary. Although the proposal was quickly discredited on moral, legal, and political terms, it reemerged shortly after; first, in the joint proposal of the Italian and German governments to establish asylum-processing 'camps' in Libya and Tunisia, and more recently, in the Hague Programme adopted by the European Council in 2004. Thus, the idea of moving asylum overseas has entered the official EU agenda for the next five-year period of its asylum law and policy 'harmonization' process. Another five-year plan is due to be adopted later in 2009 under the Swedish EU presidency.

This shift in the spatial scope and strategy of EU asylum law and policy raises pressing legal and human rights issues concerning state responsibility and the treatment of asylum seekers. There are reported concerns about the practices of asylum processing in some of the countries considered as potential partners of the EU in this domain, some of which, such as Libya, do not even have domestic legislation and structures to deal with asylum claims. Even among the EU member states themselves, as we have seen above, differences remain in the treatment of asylum seekers and processing asylum claims. What this implies is that an asylum seeker's chances of access to a fair and effective procedure without degrading treatment depend on his or her geographical location. In other words, the '*where*' of asylum matters, and it will become all the more important with the prospect of offshore asylum processing. Asylum 'in' the EU seriously runs the risk of becoming yet another paradigmatic example of how effectively spaces of law can turn into spaces of lawlessness—if, that is, it has not become so already.

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