
Book Reviews

Itamar Mann, ***Humanity at Sea: Maritime Migration and the Foundations of International Law***. Cambridge: Cambridge University Press, 2016. Pp. 244. £69.99. ISBN: 9781107148765.

In early January 2017, *The Independent* reported ‘a love story which delivers some optimism in the bitterness of the refugee crisis’.¹ The story about a Macedonian border guard and an Iraqi refugee who fell in love, married and were awaiting a child might be called a trivial anecdote, yet it underlines an important point. No matter how abstract the language of border securitization and irregular migration gets on a policy level, their enforcement will involve the actual encounter of persons – with all the unpredictability that this entails.

The encounter of persons at the border, particularly in the context of maritime migration stands at the centre of Itamar Mann’s reflections in *Humanity at Sea*. In question is not the possibility of a love story but, rather, the very basis of rights. Mann’s theory of the encounter as a basis of human rights law is an intellectual contribution that could not be timelier, especially for a European audience. And it is a contribution that advances innovative ideas for a field often framed as mere interplay between largely ineffective laws and interest-driven politics – the access to territory and asylum.

Generally, few rules limit states in their discretionary decision of whom to admit to their territory. The laws of refugee protection form one important exception. Yet while the principle of non-refoulement applies at the border, no explicit rules hinder states to deter persons from reaching the border.² Various strategies of deterrence have been subject to scholarly discussion and numerous court decisions, and they continue to develop in response to evolving legal constraints.³ Itamar Mann’s book does not contradict the analyses of those tensions, yet it offers a change of perspective, reconstructing the human rights claims and obligations from the moment of encounter in the case of maritime migration and the interdiction or surveillance of boats. Even though measures of deterrence may be designed to escape legal constraints, Mann suggests that the situation of encounter as such can constitute a source of law, a source of human rights claims and obligations.

The book is organized in six chapters along historical events. The theoretical argument develops successively with reference to those events, which might disappoint readers looking for a concentration of the theory in one place. Yet there are good reasons for this method. Not only is this a book worth reading from beginning to end, for the stories and historical summaries are highly instructive by themselves. The incremental reasoning also corresponds to the author’s

¹ W. Worley, ‘Iraqi Refugee and Macedonian Border Guard Marry after Falling in Love at Muddy Border Crossing’, *The Independent* (4 January 2017), available at www.independent.co.uk/news/world/europe/iraq-refugee-macedonia-border-guard-marry-fall-in-love-serbia-kurdish-muslim-orthodox-christian-a7509441.html (last visited 15 March 2017).

² This has been labelled the ‘schizophrenic attitude’ of states towards international refugee law. Hathaway and Gammeltoft-Hansen, ‘Non-Refoulement in a World of Cooperative Deterrence’, 53(2) *Columbia Journal of Transnational Law* (2015) 235.

³ Cf. T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011), at 149ff; Paz, ‘Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls’, 34(1) *Berkeley Journal of International Law* (2016) 10.

reconstructive rather than constructive approach. He does not offer a theory that he subsequently substantiates with examples. Rather, his theory evolves from a detailed consideration of diverse material, including court decisions, the opinions of judges and of scholars as well as public debates reflected in media reports. The selection and assessment of this material inevitably introduces the individual view and position of the author. It could not be different, as Mann stresses (at 20). That human rights constitute universalist claims does not mean we can think about them from a universal, disembodied standpoint.

The first chapter tells the story of the ship *Exodus*, given that name in 1947 while on its way towards Palestine with around 4,500 Jewish refugees on board (at 37). Intercepted by the British navy, they were returned to Europe, yet many of them ultimately made their way to Israel (at 38). Mann's focus lies on the interception of the *Exodus* as discussed in a British Court of Appeals case. Sailing towards Palestine, the migrants were determined to either reach the land or 'embarrass' the British authorities by 'putting themselves in their hand' (at 47). This invocation of one's own humanity *vis-à-vis* a person who has the power to save one's life is what Mann views as one side to the 'rights of encounter' (at 42). The defenceless presence of a powerless party triggers a 'command of the conscience' (at 12) because the very basis of human existence is at stake.⁴

Two further themes appear here and are pursued in the following chapters. The universality of the question raised by (the appearance of) the powerless party, whom Mann in this sense frames as the universal boatperson, and the transnational audience, in front of whom the encounter takes place. Chapter 2 explores the notion of the universal boatperson and the meaning of her human rights claim by looking at refugee situations in the decades after the adoption of the 1951 Refugee Convention,⁵ especially the case of boat people from Vietnam. Chapter 3, in turn, discusses the side of the human rights commitment, with reference foremost to refugees from Haiti arriving on the coasts of the United States in the 1990s and the famous *Sale* decision regarding the legality of interception on the high sea.⁶ Mann's chapters interpreting these situations, the decision and Judge Blackmun's dissent (at 117) draw on the thought of Hannah Arendt in various aspects. The arrival of boat people, who have no established right to enter the territory, are concrete instances that raise the question of the 'right to have rights',⁷ constituting a 'test for law' (at 71). For the receiving community, their arrival entails the question about the basis of law and politics. While the idea of the social contract draws the picture of a static community, the arrival of refugees brings to mind the omnipresent histories of migration, asking how far '[w]e the people' can include '[w]e refugees' (at 119).

Chapter 4 examines situations of maritime migration and interdictions along the Australian coast, thereby exploring the significance of the transnational audience to the encounter. Mann reconstructs how both parties seek to shape, to provoke or to prevent how and whether the encounter takes place. The policies of offshore processing constitute attempts to prevent migrants from addressing themselves to particular persons with the 'universal boatperson's message' (at 149). Migrants in turn confront these attempts by 'generat[ing] their emergencies' (at 136). The battles about what pictures are produced and reach the public indicate how

⁴ As Judith Butler puts it, '[t]o kill the other is to deny my life. ... that sense of my life which is, from the start, and invariably, social life'. J. Butler, *Frames of War* (2009), at xxvi.

⁵ Convention Relating to the Status of Refugees (Refugee Convention) 1951, 189 UNTS 150.

⁶ *Sale v. Haitian Centers Council*, 509 US 155 (1993) (US SC). In question stood an executive order foreseeing that undocumented migrants could be intercepted and repatriated. While the Court of Appeals had held that the protection of the Refugee Convention and the US Immigration and Nationality Act, 79 Stat. 911, applied, the Supreme Court ruled that its application was limited to the territory of the USA.

⁷ H. Arendt, *The Origins of Totalitarianism* (1951), at 296ff.

the defenseless presence can amount to a powerful argument and underline how the rights of encounter relate to questions of visibility. Very insightful in this context is the discussion of 'moral risk' and 'moral blackmail'. Blaming persons for 'moral blackmail' when they put themselves at risk, first, expresses the moral relevance the presence of the refugee has (at 157) and, second, reflects a certain offense felt about the active part that the powerless party thereby plays (at 159).

With regard to the audience or spectators to the encounter, two different aspects are at stake, the distinction of which remains rather vague. On the one hand, the public is the audience in front of which the individual encounter takes place. On the other hand, the addressed public constitutes a party to the encounter in a more abstract sense. The public as participant in the encounter is the subject of the following two chapters, which deal with migrants crossing the Mediterranean towards Europe. Chapter 5 develops how surveillance works as a way to control migration and, at the same time, avoid individual contact, seeking to 'eliminate the encounter' (at 174). Chapter 6 in turn examines narratives of European self-conception in light of the arrival of refugees. The question here is the 'imaginary encounter' between Europe and refugees (at 197), who according to the 2015 State of the Union address by Jean-Claude Juncker, which Mann analyses, 'receive the bread' (at 199).

Both for the encounter between individuals and for the encounter on a more abstract level, the third party – the audience – is crucial. On the individual level, the background presence of the public transforms private emotions into political reasons, as Mann illustrates in the postscript when retelling the story of Moses' exposure and rescue (at 231). In the moment of encounter, the person able to save a life is confronted with the 'test of law' (at 71, see also above), which goes beyond a moral question in a detached bilateral relationship. First, affirming the link between human existence and basic rights, the individual makes a judgment about more than the concrete situation. Second, the possible later judgment of others is present in the situation of the encounter. Both sides are thus involved in constructing the encounter in a way that is favourable for them in the eyes of 'a transnational audience of third-party observers' (at 178). In the case of the abstract encounter, the object of judgment concerns the collective self-understanding of a community.

The book abstains from exploring more closely the relationship between the two levels of encounter. How does the experience of individual encounters inform the political debate, and how does the knowledge about present and future encounters influence political decisions at the individual level? The question about the relationship between law and politics pervades the book but remains somewhat ambiguous. Mann opposes 'the primacy of politics over law' (at 221), and it is a great strength of the book that it conceptualizes the encounter as being shaped by the agency of migrants without reducing it to an instance of struggle and political confrontation. Yet the description of 'non-positive human rights law' (at 221) is easily misunderstood as a pre-political law, which judging from the overall argument is not the claim Mann wants to make. The reference to a third party audience together with the notion of judgment⁸ suggest that a political dimension is inherent in these norms and that we should read the rights of encounter along the lines of a non-hierarchical, equiprimordial relationship between law and politics.⁹

This brings us back to the proposition the book sets out with – the dual foundation of international law, as based on state sovereignty, on the one hand, and the encounter between

⁸ No explicit concept of judgment is discussed, yet the close alignment with Arendtian thought might indicate an understanding of judgment in that direction. See H. Arendt, *The Life of the Mind* (1971), at 195. For an interpretation, cf. Zerilli, "'We Feel Our Freedom': Imagination and Judgment in the Thought of Hannah Arendt', 33(2) *Political Theory* (2005) 158.

⁹ For such understanding with reference to Hannah Arendt's thought, see C. Volk, *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (2015), at 173ff.

individuals, on the other (at 13). What we can certainly draw from Mann's concept of the encounter as a normative-political moment is that law is not limited to deliberately agreed and drafted rules. This conception applies to law on various levels, be it local rules, domestic law, supra- or international law. It follows that the qualification of the rights of encounter as foundation of international law seems both too narrow and too broad: it is too broad when equating human rights norms with international law, and too narrow when linking the significance of the rights of encounter solely to the international level. The instances of encounter discussed in the book can be understood as a source of human rights obligations, be they in their international or national law guise. Also the decision-making processes within sovereign states appear linked to those instances of encounter, which inform the political process and are duplicated by the 'imaginary encounter' of the political community (at 197, see also above).

In my reading, the book answers a question more specific than the foundation of human rights but still extremely fundamental in nature: the non-abstract foundation of rights at the territorial boundaries of a political community. Against conceptions of human rights grounded in abstract morality, it has been pointed out that rights are effective and meaningful only in connection with some form of political relationship. Hannah Arendt's critique of the idea of inalienable rights,¹⁰ and the ensuing reflections about the possibility of a 'right to have rights', constitute a focal point in this regard. Recognizing the tension between the universality of universal rights and the concreteness necessary to make them meaningful, scholars have offered interpretations of the 'right to have rights' as the object of declaration,¹¹ thus of universal rights as outcomes of continuous political processes and struggles.¹² This concrete, more political interpretation of human rights, however, tends to focus on relations between persons who are already co-present. Mann's theory of the rights of encounter addresses the gap that many critical approaches have left unaddressed – the rights of the person at the border, of the person not yet present on the territory and within the community. It does so in a way that bridges demands of concreteness and universality: the 'rights of encounter' are concrete in that the moment of encounter between particular persons brings them about, and they are universal in that they arise from a sense of universal equality, which makes the mere knowledge of the other person's humanity sufficient for an obligation to save her life.

There remain many themes to be pursued: The relationship between the two levels of encounter, the imaginary and the actual. The relationship between the powerless party's power of presence and the role of her agency. And, correspondingly, the relationship between the mere survival at stake in the situation of encounter and a person's political existence and membership, which is what Mann references with freedom (at 78, 234). The book makes arguments and takes positions in these questions, but it does not present a closed case and offers a rich basis for taking up lines of thinking.

The notion of the rights of encounter adds a distinct perspective to the debate about legal conditions of access to territory and a tool for interpretation of the rapid and complex developments we see in this regard. The efforts of the European Union towards a rigid migration control through third country cooperation in that sense can be read as attempts not only to avoid legal responsibilities but also to avoid encounters that would 'embarrass' the European public. The remarkable opinion delivered by Advocate General Paolo Mengozzi to the European Court of

¹⁰ Arendt speaks of how 'the very phrase 'human rights' became ... the evidence of hopeless idealism or fumbling feeble-minded hypocrisy'. Arendt, *supra* note 7, at 296.

¹¹ A. Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (2015), at 168ff, with reference to Judith Butler in J. Butler and G. Chakravorty Spivak, *Who Sings the Nation-State? Language, Politics, Belonging* (2007), at 48.

¹² Cf. Rancière, 'Who Is the Subject of the Rights of Man?', 103(2–3) *South Atlantic Quarterly* (2004) 297.

Justice in February 2017 may be read through this lens as responding to Europe's imaginary encounter.¹³ The opinion ends with the image that Mann's book begins with: the picture of the body of Aylan Kurdi washed ashore on the Turkish coast, which stirred the conscience of people worldwide. Relating to it, Mengozzi writes: 'It is commendable and salutary to be outraged. In the present case, the Court nevertheless has the opportunity to go further, ... by enshrining the legal access route to international protection. ... Make no mistake: it is not because emotion dictates this, but because EU law demands it.'¹⁴ The Court did not follow Advocate General Mengozzi.¹⁵ But this does not end reflections about the rights of encounter and law's demands.

Dana Schmalz

Max-Planck-Institute for the Study of Religious and Ethnic Diversity
Göttingen, Germany
Email: schmalz@mmg.mpg.de

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Andrea Bianchi, Daniel Peat and Matthew Windsor (eds). **Interpretation in International Law**. Oxford: Oxford University Press, 2015. Pp. 432. £70.00. ISBN: 9780198725749.

One may make the argument that at the same time all and very few international law books deal with interpretation. In books about international law, questions arise as to the meaning of certain norms and, consequently, these norms are being interpreted. Yet, quite surprisingly, there are few books that can claim to be *about* interpretation in international law. A book about interpretation requires proper reflection and a specific take on the issue of interpretation. The editors and authors of *Interpretation in International Law*, in my view, have managed to write a book about interpretation. In this review, I focus on the first and the last contributions and briefly introduce the other contributions with a noteworthy sentence from their chapters.

In the book's first chapter 'The Game of Interpretation in International Law', Andrea Bianchi describes the process of interpretation as a game of cards. For him, the notion of a game is a metaphor that can be applied to interpretation since the central features of a game – like players, rules, strategies and objects – are also present in interpretation. His approach is characterized by a close observation of the actual practice of interpretation without detailed epistemological explanation. His observation reveals that the rules of treaty interpretation are contingent in nature and have changed significantly over time. The object of interpretation is to persuade the audience; it has a rhetorical function. Regarding the players, the game of interpretation is generally open to everyone, but different perspectives have different weight. As he later states, the 'fight is about controlling the discursive policies of the discipline' (at 43). He perceives interpretation as a card game, the cards being 'mostly those contained in the Vienna Convention on

¹³ Case C-638/16, *X. and X. v. State of Belgium*, Opinion of the Advocate General M. Paolo Mengozzi, delivered on 7 February 2017. (ECLI:EU:C:2017:93). Paolo Mengozzi. The case did not concern an interdiction at sea but the responsibility possibly triggered by a request for humanitarian visa filed by a Syrian family at the Belgian embassy in Beirut. Advocate General Mengozzi interprets European Union (EU) law to require the granting of a visa under those particular circumstances of the case. Since EU law is applied, he argues, the Charter of Fundamental Rights of the European Union, Doc. 2012/C 326/02, 26 October 2012, also finds application and turns the possibility of delivering such visa into an obligation, since the applicants otherwise face inescapable harm to their lives and safety.

¹⁴ *Ibid.*, at, para 175.

¹⁵ Case C-638/16, *X. and X. v. State of Belgium*, judgment of 7 March 2017 (ECLI:EU:C:2017:173).