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Sovereignty at Sea: The law and politics of saving lives in the *Mare Liberum*

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ABSTRACT

Every year between 100,000 and 120,000 migrants attempt to irregularly cross the Mediterranean to reach European shores in hope of political asylum or just a better life. The present paper examines how law and politics play together in the encounter between the sovereign and irregular boat migrants on the high seas. On the one hand, it is argued that far from being a "legal vacuum", the high seas represents a legal field that through human rights and maritime law continues to impose various obligations upon states, in particular the legal duty to render assistance to migrants and others lost at sea. Yet, exactly in the context of the Mare Liberum, the precise division and content of these sovereign responsibilities remain contested and subject to varying interpretations. As a result, "the drowning migrant" finds herself subject to an increasingly complex field of governance, in which participating states may successfully barter off and deconstruct responsibility by reference to traditional norms of sovereignty and international law. Thus, rather than simply a space of non-sovereignty per se, the Mare Liberum becomes the venue for a complex game between law and politics.

Drawing on post-structuralist readings, we argue that in order to understand these dynamics, sovereign statehood should be conceived a form of subjectivity, as an identity construction within a wider political-legal order, that connotes the dual meaning of 'subjecthood' and 'being subjected by'. Focusing on the legal framework in particular, this both constitutes particular entities as international legal persons with particular legal rights, duties and responsibilities, and (through this legal status) endows them with a capacity for strategic action within the context of the very framework that constitutes them.

'What men, what monsters, what inhuman race,
What laws, what barbarous customs of the place,
Shut up a desert shore to drowning men,
And drive us to the cruel seas again.'[1]

1. INTRODUCTION

The above verses is the plea of Aeneas, a boat refugee from the fallen city of Troy who instead of arriving in Italy finds himself washed ashore in current-day Libya begging Queen Dido to grant him leave to disembark. As those familiar with Virgil's *The Aeneid* will know, in the end not only did Dido grant Aeneas permission to enter her land, she also granted him access to the royal bed chambers. When Aeneas later abandoned Dido to leave for Italy, the heart-broken queen commits suicide. Albeit with a somewhat reversal of cast, the same scene is essentially being played out on a daily basis today. Every year between 100,000 and 120,000 migrants attempt to irregularly cross the Mediterranean to reach European shores in hope of political asylum or just a better life (ICMPD 2004: 1 [1609]). In 2008, more than 30,000 arrived at the Italian island of Lampedusa alone [Lutterbeck 2009b]. Many others never make it that far. Between 2006 and 2008, 4,677 migrants have been confirmed dead in the attempt to cross either the Mediterranean or the waters between West Africa and the Canary Islands.[2] In reality, the number is probably much higher.

The notion of a Europe being 'flooded' or 'invaded' by boat migrants is one of the most often invoked examples by those arguing that globalisation is fundamentally eroding state sovereignty. The irregular migrant becomes the embodification of the inability to protect and control access to that most sacred property of statehood, the sovereign territory. The response by European governments has been a constant expansion of border controls. Today, the EU border agency, Frontex, has launched a series of operations posting war ships, surveillance planes and radar stations to create a "virtual border" across the Mediterranean. Cooperation agreements have further been forged with a number of North African countries to ensure the right to intercept and return migrant boats both on the high seas and inside foreign territorial waters.

The shift in the venue for control to the high seas of the Mediterranean has both practical and theoretical significance. The high seas are normally defined exactly as a space of non-sovereignty. As Hugo Grotius notes in his famous 1609 treaty on the *Mare Liberum*, the high seas can be subject to no national jurisdictions and governed only by a residual principle of freedom allowing vessels of all nations the right of passage, trade, and exploitation (Grotius 1916 [1609]). At the *Mare Liberum* different and fewer rules apply. What happens here is not necessarily subordinated to the sovereign nation cage and national laws of a single state. This is the truly *inter*-national sphere, containing both inherent and unregulated freedom, but as a result also innate potential for conflict and sovereignty clashes in the absense of neat delineations between competing claims to exercise absolute power. As a non-citizen found in the *Mare Liberum,* the boat migrant thus appears as the ungovernable – both as a matter of praxis and as a matter of law, being subject to little control and fewer rights and protection than the migrant traveling dry land, who can ask for asylum and claim other human rights upon arrival at a state borders.

However, we will argue that this is too simplified a picture of what actually goes on in the encounter between the sovereign and irregular boat migrants on the high seas. Ter-

[1] Vergil, *Aneid*. Bk. I, 760-63 [Dryden's translation].
[2] L'osservatorio sulle vittime dell'immigrazione 2009. The data are based on press reviews and available at: http://fortresseurope.blogspot.com.

ritorial norms notwithstanding, both international maritime law and human rights impose certain sovereign obligations upon states even outside their territorial jurisdiction. Grotius himself cites exactly the above lines by Virgil to underscore that the correlate of the sovereign freedom afforded on the high seas is a common obligation to obey by "the law of hospitality which is of the highest sanctity" (Grotius 1916: 1). Today, that translates into, among other things, the legal duty to render assistance to migrants and others lost at sea and for coastal states to disembark those rescued.

Yet, exactly in the context of the *Mare Liberum*, the precise division and content of these sovereign responsibilities remain contested and subject to varying interpretations. As a result, "the drowning migrant" finds herself subject to an increasingly complex field of governance, in which participating states may successfully barter off and deconstruct responsibility by reference to traditional norms of sovereignty and international law. Thus, rather than simply a space of non-sovereignty *per se*, the *Mare Liberum* becomes the venue for a range of competing claims and disclaims to sovereignty.

2. WITH GREAT POWER, COMES GREAT RESPONSIBILITY: SOVEREIGNTY BETWEEN AUTONOMY AND RESPONSIBILITY

Sovereignty counts as (one of) the defining principle(s) for both international politics as a practice, and International Relations (IR) and International Law (IL) as academic disciplines.[3] Whereas both disciplines have had their squabbles with this core institution, resulting in normative and empirical claims about its redundancy [REF], it has proven difficult to get rid of the 'S-word' (Henkin 1999). Processes of globalisation notwithstanding, sovereign statehood and the concomitant distinction between internal and external affairs remain important factors within international politics. At the basic level, then, both IR and IL identify two sides to the sovereignty coin: the internal dimension of supreme authority over a population and a territory (hierarchy), and the external dimension that connotes the opposite, i.e. the lack of an overarching authority within the international realm (equality, or in IR terms: anarchy) (Hinsley 1986). Yet, despite the consensus of its continuing importance and its dual dimensionality, there is an important difference in conceptualisations of sovereignty and its meaning and/or function within international practice within the two disciplines.

Within mainstream IR theory, the core of sovereignty is traditionally constituted by the internal dimension, translated as autonomy, independence and freedom. The external dimension in that sense can be conceived as the residual category, that which is left outside of state autonomy, and which should not impede upon the sovereign freedom inside the territory an domestic jurisdiction. To put it differently, the substance of sovereignty is defined by the internal dimension, of which the external dimension is only a negation. At its external dimension sovereignty then connotes politics, and international law by definition is an impediment. In other words, by imposing constraints upon state behaviour international law by definition stands in juxtaposition to sovereignty from such a perspective.

This reading of sovereignty as autonomy and independence has perhaps been most clearly expressed by the Permanent Court of International Justice in the paradigmatic Lotus

[3] In this paper reference will be made to IR and IL (in capitals) to indicate the academic disciplines; in small caps international relations and international law signify the empirical and/or practitioner field.

case from 1927. 'International law', the Court states, 'governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions [….] established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed'.[4] In this voluntarist reading of the nature of international law in relation to State sovereignty the scope of former is entirely at the mercy of States as the main subjects of international law and entities endowed with international legal personality.

The link between sovereignty and independence, and its internal and external dimensions, have been reconfirmed in what is considered the authoritative definition of sovereignty in international law, provided by Judge Huber in the *Islands of Palmas case*: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State".[5]

However, at the same time this ruling makes an important nuance with regard to the relationship between sovereignty, independence and international law. Rather than identifying independence as an empirical condition of State entities outside of a legal framework, it is conceived as a right (to exercise). In other words, independence is 'really no more than the normal condition of States *according to international law*', as explicated in yet another classical case on sovereignty.[6] This means that at the bottom line sovereignty connotes a legal status, which renders states as international legal persons discretion to exercise their sovereign power within their territory. But this independence, autonomy, and freedom is dependent upon their status as conferred to them by the legal framework in the first place. This also has consequences for what that sovereign status legally constitutes. Rather than equalling sovereignty with freedom to do as one pleases, the *Island of Palmas* ruling continues to link the right to exercise state functions to a corollary duty, namely to protect within one's jurisdiction the sovereign rights of fellow States, such as their right to integrity and inviolability in peace and war.[7] The ruling hence lays bare a duality of sovereignty that is more crucial to understand its workings within the international realm than the traditional emphasis on internal versus external sovereignty. It is used, on the one hand, to describe the status of a political community: the status of 'sovereign' or 'independent' statehood. On the other hand, sovereignty also refers to the freedoms, rights, duties and obligations that these independent entities are endowed with, by virtue of their status as sovereign entities and international legal personality (Aalberts and Werner 2008). Thus sovereignty at once empowers State entities to act as sovereigns within the international realm, and sets down the basic rules of conduct for their interrelationships (cf. Koskenniemi 1989: 192). In this light the institution of sovereignty can be conceived as a specific way of ordering international life by linking freedom and responsibility.

This also means that the role of law within the sovereignty game entails more than just the regulation of international affairs between pre-existing State entities; rather, it helps to constitute the very players of the game in the first place by legitimating their participation, empowering their international capacity, *and* by

[4] *Case of the S.S. Lotus* (France v. Turkey), 7 September 1927, Permanent Court of International Justice, PCIJ Series A, No. 10, p. 14

[5] *Island of Palmas Case* (Netherlands v. United States), Permanent Court of Arbitration, 2 RIAA 829, 1928, p. 838.

[6] Separate opinion of Judge Anzilotti in the *Austro-Geman Customs Union Case* (Austria v. Germany), Advisory Opinion, Permanent Court of Justice, PCIJ Series A/B, No. 41, 1931 (emphasis added)

[7] *Island of Palmas Case,* 2 RIAA 829, 1928, p. 839.

defining the framework within which they can exercise their independence. As a consequence, the content or substance of sovereignty is contingent upon normative developments in international society. As the Permanent Court stated in the *Nationality Decrees in Tunis and Morocco* case (1923): 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations'.[8] This at once breaks down the distinction between inside/outside as separate politico-legal spheres, as was confirmed by the International Court of Justice in its advisory opinion in the *Aegean Sea* case: '[I]t hardly seems conceivable that in such a convention terms like "domestic jurisdiction" and "territorial status" were intended to have a fixed content regardless of the subsequent evolution of international law'.[9]

Hence we can identify a more intricate and intrinsic relationship between sovereignty and international law than the zero-sum game that often transpires from traditional IR analyses: on the one hand the legal framework constitutes and regulates the meaning and scope of sovereignty (Werner 2004: 134); on the other hand, the development of international law itself is dependent upon international society as an interpretative practice. This can be clearly seen from the shift in the content of sovereign responsibilities from the *Island of Palmas* ruling onwards. What Judge Huber in that case identified as sovereign responsibility was the minimum rules of international law to respect the mutual rights of another sovereign (to territorial integrity, non-use of force, etcetera), which basically comes down to a duty to refrain from action. With the advance of (liberal) international society however, the obligations borne by sovereign states today in their exercise of authority arguably stretch much further and include positive duties, not only towards one's own citizens, but increasingly towards mankind as such.

The international human rights regime constitutes a prime example of the expansion or 'thickening' of such sovereign obligations as a result of the post-WWII developments in international relations. By virtue of signing on to the various human rights instruments – in itself a sovereign act – states agree to be bound to respect the rights laid down to anyone within their sovereign territory and jurisdiction. In our case the refugee thus constructs states as responsible by demanding protection and an exception to the otherwise sovereign right of states to decide who may and may not enter and stay within its territory.[10] Yet, a state's legal obligations towards refugees are as a rule reactive or 'palliative' (Hathaway 1995). They reconfirm the territorial basis of sovereignty in the so-called Westphalian model, as the obligations flow from the state's sovereign sphere of control and normally only are triggered when

8 *Nationality Decrees in Tunis and Morocco* (Britain v. France), PCIJ, Series B, No. 4, 1923, p. 24. See also the *Wimbledon Case*.

9 *Aegean Sea Continental Shelf* (Greece v. Turkey), ICJ, Contentious Cases, 1978, pp.32-33.

10 Neither the 1951 Refugee Convention, nor any other binding human rights instruments offer a right to asylum as such. In the Refugee Convention the compromise became the principle of *non-refoulement* (Art. 33), which prohibits states from sending back refugees to places where they face a risk of being persecuted. In practice this principle will normally require states to undertake an asylum procedure, though some countries have been keen to designate certain origin and transit countries as generically "safe" in order to avoid or reduce this obligation [Hathaway 1992].

the refugee arrives at the territory and utters the magical word "asylum".[11]

One important exception to the territoriality principle as the starting point for dividing sovereign responsibilities regarding refugees pertains to international maritime law and the duty of rescue, which is particularly concerned with the high seas as a non-sovereign space.[12] Under the UN Convention on the Law of Sea, every state must require the captain of a ship flying its flag to "render assistance to any person found at sea in danger of being lost" and "to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance".[13] Beyond imposing an obligation for both official and private vessels to rescue anyone encountered in distress, coastal states further have a positive duty to maintain "an adequate and effective search and rescue service" and to ensure coordination of search and rescue operations.[14] To that end the international search and rescue regime has divided the high seas into different search and rescue zones, within which each coastal state is responsible for ensuring that distress calls are responded to.[15]

As we will argue in this paper, the search and rescue regime illustrates not only a thickening of international cooperation that bears upon sovereign rights and obligations, but also its expansion to non-sovereign spaces like the high seas, which is increasingly governed through an expansion of territorial logics to define mutually exclusive zones of sovereign responsibility. At the same time, however, the high seas are subject to more loosely organised governance structures and overlapping legal regimes that on the one hand impact the scope and content of sovereign rights and duties (i.e. constitute the meaning of sovereignty), but on the other hand also provides leverage for playing the sovereignty game and disclaiming sovereign responsibility. The underlying understanding of sovereignty as a constituted and contingent claim is hardly a novel claim for anyone familiar with constructivist readings in International Relations. The identification of sovereignty as a social construct has

[11] Most rights under the 1951 Refugee Convention are specifically reserved for refugees who are physically present within the territory or have some form of lawful stay or residence within the receiving state. Only in the "exceptional" instances where states are deemed to exercise "effective control" and thus jurisdiction extraterritorially does the Refugee Convention apply extraterritorially, and even then the obligations are limited to certain core rights. Yet for a few rights, most importantly the principle of *non-refoulement* (Art. 33), no specification is given as to its geographical scope of application. This question has been subject of considerable debate. A number of countries, including the United States, maintain that even this provision is strictly territorially limited. Others, including the majority of European countries, agree that the *non-refoulement* principle must be respected also when migration control is carried out e.g. at the high seas, but that on the other hand it does not apply when states carry out migration control in foreign territorial waters, for then it falls under the sovereign responsibility of thát state. For an extended legal analysis of the scope of the *non-refoulement* principle, see Gammeltoft-Hansen (2009: 76-133)

[12] One of the earliest examples of sovereignty responsibility extending universally to the high seas is the obligation to combat piracy. Under international law, the crime of piracy is considered a breach of *jus cogens*, a peremptory norm of international law. All states are thus under an obligation to combat piracy wherever encountered.

[13] United Nations Convention on the Law of the Sea (UNCLOS), Art. 98(1) and 1974 International Convention on the Safety of Life af Sea (SOLAS), Chapter V, Regulations 10(a) and 33. This entails a positive duty on flag states to adopt domestic legislation that imposes penalties on shipmasters who ignore or fail to provide assistance (Pugh 2004). In practice however, many states have failed to do so and enforcement is difficult (Cacciaguidi-Fahy 2007: 94). [Sophie Cacciaguidi-Fahy (2007) 'The Law of the Sea and Human Rights', *Sri Lanka Journal of International Law*, 19:1, 85-107]

[14] UNCLOS, Art. 98(2).

[15] SOLAS, as amended.

been widely accepted by now, even by scholars working in more mainstream traditions.[16] In conjunction with an increasing focus on norms and rules in international politics, this has also loosened the traditional juxtaposition between sovereignty and international law. However, in their opposition to mainstream rationalism, and getting away from the rationalist premises of methodological individualism combined with a materialist focus, many constructivist analyses emphasise the socialisation and internalisation of norms and ideational factors, and argue how the Logic of Appropriateness prevails over a rationalist Logic of Consequences.

As a consequence, there seems to be a tendency to neglect strategic agency that is constituted by the very same [speech act]. While emphasising sovereignty as a social product of interaction and focus on the transformation of state identities in accordance with normative developments in international society, less attention is being paid to how within the (legal) framework that constitutes international legal personality and sovereign identity, there is a possibility for strategic action. Taking a cue from Foucault's [REF 1989: 312] elaboration of subjectivity as connoting both 'object of knowledge' and 'subjects that know', it is argued with post-structuralist readings that states are indeed the product of international protocols and regimes of knowledge (including the legal framework) that empowers them as subjects (international legal persons) in the first place. However, as 'subjects that know' their identity as sovereign entities also endows them with a capacity for strategic action within the very framework that constitutes them. Hence the structure is constitutive, indeed, but this should not lead to overdeterministic claims, or an underdetermination of the possibility for state action within and through the normative framework.

At the same time, this should not be misunderstood as introducing rationalism through the backdoor. Whereas the above conclusion about strategic use of the rules and regulations of international law might at face value appear to run parallel to Krasner's (1999) identification of sovereignty as 'organised hypocrisy', in our view such an methodological individualistic analysis, focusing on the level of behaviour only, misses the more intricate dynamics of the politics of law that constitutes sovereigns as subjects and objects in the first place and thus forms the condition of possibility of their 'being' and latitude. Rather, our claim is that strategic action is informed by the larger set of rules that underlies and constitutes the game (and its players) in the first place. In this context the following discussion of 'governing the drowning' provides an empirical analysis of the theoretical claim that states are not primordial given entities that are autonomous of international society, including the legal framework that empowers them as international legal persons. Rather, they are constituted within the confines of a sovereignty game that identifies them as the main actors, and thus endows them with agency. Thus, while international law poses constraints to states' autonomy and their room of manoeuvre, it also opens a field of agency and possibility for legitimised strategic behaviour.

Following Walker's (1993: 13) observation that 'claims to sovereignty involve very concrete political practices, [which] are all the more consequential to the extent that they are treated as mere abstractions and legal technicalities', this paper aims to denaturalise sovereignty, i.e. moving beyond the abstract notion or legal bickering by showing the routines of statecraft that (re)constitute claims to sovereignty, and, in particular *disclaiming* practices which rely on the very legal regime that con-

[16] While accepting the basic social ontology of sovereignty, however, rationalist approaches do not take that to bear on their mainstream analyses. See Aalberts (2006).

stitutes sovereign responsibility (international legal personality) in the first place. The legal nexus surrounding search and rescue and the case of illegal boat migration is a particularly illustrative example of such sovereignty practices, because it transposes the sovereignty game from the territorial areas which traditionally constitute its defining context, to the non-sovereign space of the *Mare Liberum*.

3. THE GEO-POLITICS OF SEARCH AND RESCUE IN THE MEDITERRANEAN

On Thursday 24 May 2007, the Maltese tug boat, "Budafel", discovered 27 migrants clinging on to a floating tuna fish pen some 60 miles off the coast of Libya. The migrants, all men, had set off from the Libyan port of Al Zwarah 9 days earlier and came from different countries including Ghana, Nigeria, Sudan, Ivory Coast, Niger and Senegal. On their sixth day at sea they came across the tuna pen and managed to leave their water-logged boat and catch on to a 50 cm-wide walkway and some buoys holding up the net. When the captain of the Budafel found them 24 hours later he alerted the Maltese maritime authorities, but refused to take the migrants onboard for fear that they would assume control over the ship.

From hereon a diplomatic standoff ensued. The Maltese authorities refused to let the Budafel tow the migrants to Malta. The migrants had been encountered in international waters, 23 nautical miles outside Malta's Search and Rescue (SAR) zone. Instead they alerted the Libyan authorities, asking them to respond to the incident, since it occurred within the Libyan SAR zone. At the same time, Malta initially refused any knowledge about the incident following enquiries from both journalists and the Italian coastguard. Libya on its side did not see fit to launch a rescue operations intercepting the tuna pen, and Libya has long contested the SAR zone divisions in the first place, in particular that the international rules entail any responsibility for disembarkation of persons rescued on the high seas. Only after three days of clinging on to the tuna pen did an Italian navy vessel rescue the 27 migrants and brought them to the Italian immigration centre at Lampedusa.[17]

The situation attracted further international attention when the UK newspaper, *The Independent,* carried a front-page photo (figure 1) of the incident with the headline "Europe's Shame".[18] Yet the incident does not stand alone. Over the last years the governments of the Mediterranean have repeatedly locked horns over respective obligations vis-à-vis migrants lost at sea, claims have made that neighbours were deliberately dumping rescuees in foreign SAR zones and regular testimonies provided by survivors about both commercial vessels and navy ships ignoring pleas to assist migrant boats in distress.[19] The situation not only has dire consequences for the migrants and refugees caught in the middle, it also fundamentally speaks to the difficulties and complexities pertaining to the high seas as a site of governance intertwines with sovereignty practices.

[17] Consiglio Italiano per i Rifugiati. "Report Regarding Recent Search and Rescue Operations in the Mediterranean". 1 June 2007

[18] *The Independent*, 28 May 2007

[19] See e.g. Comisión Espanola de Ayuda al Regiado. "Report on Certain Border Externalisation Practices Pursues by the Spanish Government That Violate the Rights Both Now and in the Future of Immigrants Who May Seek to Reach Spain Via the Southern Border". 30 May 2007. Consiglio Italiano per i Rifugiati. "Report Regarding Recent Search and Rescue Operations in the Mediterranean". 1 June 2007.

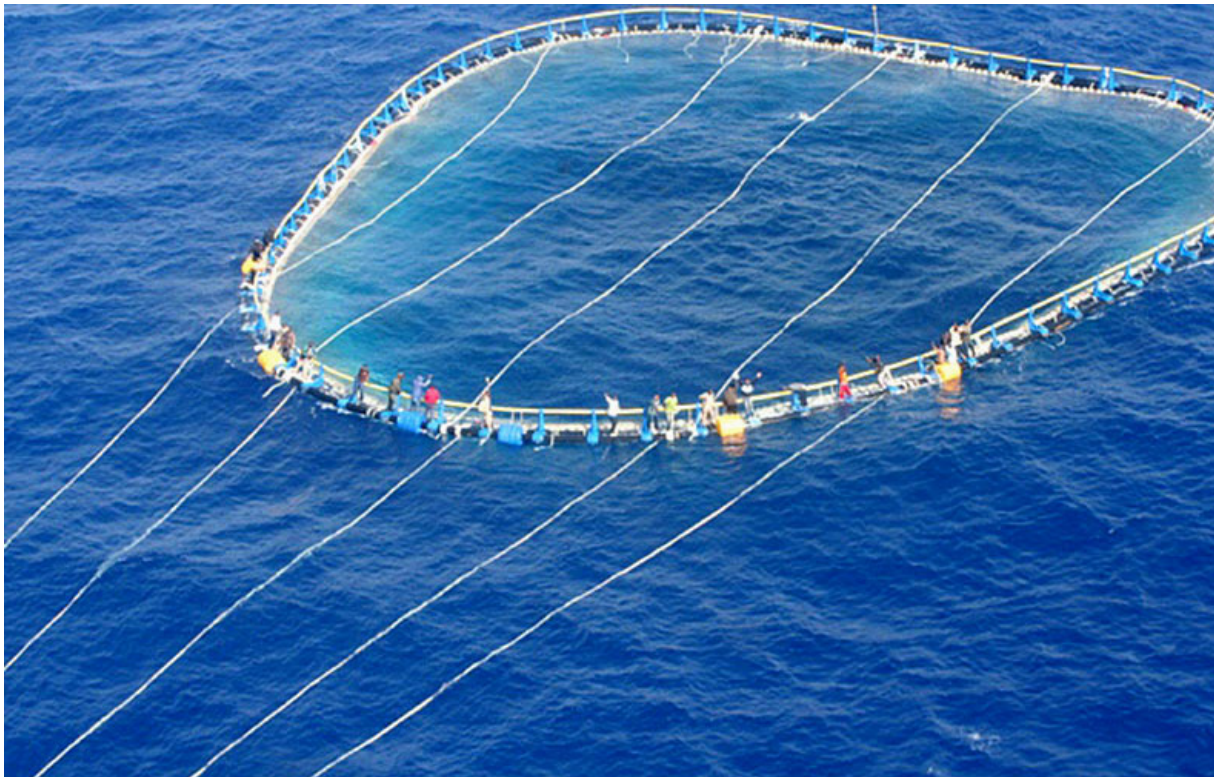

Figure 1: 'Europe's Shame' – picture of the Budafel incident (copyright SIPA Press)

Within international law the high seas, or *Mare Liberum*, is defined exactly as a space of non-sovereignty (Grotius 1916 [1609]). It connotes all the world's seas outside of the territorial waters of individual sovereign states.[20] It is subject to no particular domestic legal order and, as the word suggests, organised mainly around a residual principle of freedom for both states and individuals occupying it. None of the national institutions that normally guarantee human rights and refugee protection can be assumed available here.

As mentioned above however, both flag states and coastal states nonetheless maintain certain sovereign obligations under international maritime law in regards to coordinating and undertaking search and rescue operations. The basic duty to provide assistance to persons in distress at sea is long-standing. It was first codified in an international legal instrument in 1910 and today finds expression in a number of maritime conventions and is equally part of customary international law (Willheim 2003: 163-5). While few states have challenged the existence of such a duty, other issues as to the division of responsibilities remain contested. In particular, the search and rescue regime has been marred by the lack of clear rules for de-

[20] A state's territorial waters may extend 12 nautical miles (22 km) from the low water mark or internal waters. This belt is regarded part of the state's sovereign territory for all purposes, save that international maritime law demands that states allow foreign ships innocent passage. Certain sovereign functions may additionally be exercised within an additional contiguous zone extending up to 24 miles from the low water mark. While the contiguous zone is technically considered the high seas, states are allowed to exercise control and checks to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations" (Art. 24(1) of the Geneva Convention on the Territorial Sea and Contiguous Zone)

ciding where rescued persons should be put ashore and an explicit obligation for states to allow disembarkation. This became a particular problematic issue following the rise of "boat refugees" in the 1970s, which made states concerned that asylum processing and protection responsibilities would follow from the hitherto relatively trivial issue of disembarkation and subsequent return to the country of origin of sailors rescued at sea. Historically, this has led to a number of stand-offs where coastal states, flag states of the rescuing vessel and states of next port of call were all arguing against taking responsibility themselves.[21]

Following these controversies, a set of amendments were made to the Search and Rescue (SAR) and Safety of Life at Sea (SOLAS) conventions in 2004.[22] The amendments specify that persons rescued are to be taken to a safe place and that governments are thus responsible for cooperating to ensure disembarkation. The amendments emphasise the division of the high seas into national search and rescue zones within which the coastal state holds primary responsibility for coordinating rescue responses and disembarkation (figure 2).

While the amendments have been broadly celebrated as closing a vital gap in the existing search and rescue regime, continued ambiguity in the wording and the division of obligations on the high seas may however equally facilitate attempts to renounce sovereign responsibility and pass the buck to fellow-sovereigns. The amendments strengthens the claim for geographically delimited rescue obligations and may thereby be used as pretext for disclaiming own sovereign responsibility. This was exactly the argument that Malta made in regard to the aforementioned Budafel incident. By reference to the Libya's primary responsibility under the SAR rules, Malta's disavowed its own responsibility for disembarkation on the basis of maritime customary law. Even though EU Commissioner, Franco Frattini, openly criticised Malta following the tuna pen incident stating that "you cannot hide behind a type of legal bureaucratic argument while letting people die",[23] Frattini essentially made the same argument as Malta with regard to a previous case involving the Spanish trawler La Valletta when arguing that "the vessel had picked up illegal immigrants in Libya's Search and Rescue Area and that therefore Malta is under no obligation to take them in".[24] In international practice following the amendments to the regime, we can identify a number of strategies to barter off responsibilities under that SAR and SOLAS regime, which have been enhanced by the very legalisation that allegedly was supposed to result in a better protection regime for irregular boat migrants.

21 Outside Europe the most notorious example of such a détente concerned the Norwegian ship "MV Tampa" that in 2001 responded to the Australian search and rescue authorities' request to investigate a distress call from an Indonesian vessel, which turned out to carry 433 Afghan asylum-seekers. Australia refused to let the Tampa enter Australian waters. Health problems onboard made the Tampa ignore this and the ship was subsequently boarded by Australian troops. Following another week of negotiations, Australia struck a deal with Papua New-Guinea and Nauru where the asylum-seekers were taken for processing. The incident gave rise to Australia's "Pacific Solution", a plan to to intercept boat migrants and take them to offshore island states for asylum processing (Willheim 2003, Barnes 2004, Pugh 2004, Kneebone 2006).

22 Amendments to Chapter V of the SOLAS Convention, and 2-4 of the Annex to the SAR Conventions. Entry into force 1 July 2006

23 *New York Times*, "EU immigration official criticizes Malta for treatment of migrants", 3 June 2007

24 Department of Information, Malta, Press Release no. 1094. 19 July 2006

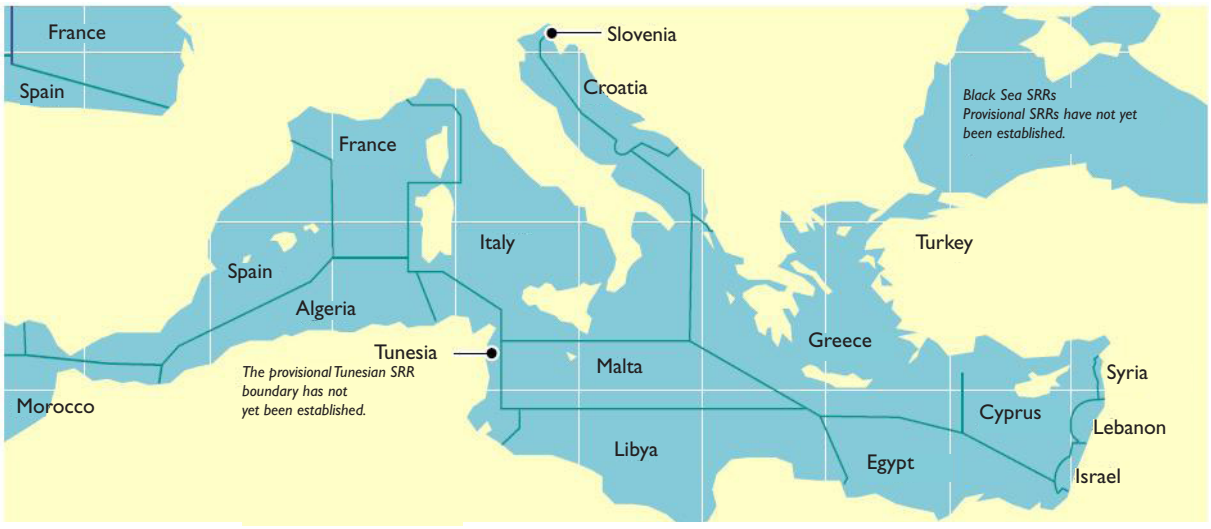

Figure 2: Search and Rescue Regions (SRR) in the Mediterranean according to the 2004 amendments (International Maritime Organization Ocean Atlas.[25]

3.1 Moving migration control from the border to the high seas

Whereas the division of the high seas into SAR zones was supposed to improve protection for those lost at sea by providing legal clarity as to which state is responsible to take care of irregular migrants rescued at sea, the respatialisation of the high seas has opened the door for a number of responsibility-shifting strategies. Previously, maritime law provided little guidance as to the resolution of conflicts between flag states and coastal states over where rescued persons should be put ashore. The new amendments would seem to imply that flagship states can shift this responsibility to the state in charge of the SAR zone.

Under such an interpretation, carrying out migration control and search and rescue operations within North African states' territorial waters and SAR zones naturally becomes a very attractive strategy for EU member states. Indeed, the intensified patrols by EU's border agency, Frontex, means that European patrol ships are increasingly operating inside foreign search and rescue zones both in the Mediterranean and in the Atlantic Ocean off the Canary Islands. As this is still the high seas, these migration control operations do not require formal cooperation agreements.

Yet, if the above interpretation of disembarkation responsibilities is accepted, the 2004 amendments to the SAR regime establish a normative structure for shifting sovereign responsibilities towards North African countries. Under the amended rules, the assumption would be that the respective African states would be responsible for allowing disembarkation and from then on presumably take on any asylum claims or enforce returns

[25] The concepts of search and rescue regions (SRRs) and search and rescue zones are used interchangeably in the literature. Whereas the International Maritime Organization commonly refers to SRRs, the present paper uses the more colloquial SAR zones.

to the country of origin.[26] This seems to be an openly accepted strategy within the EU. A set of proposed EU guidelines on the matter thus emphasises that for persons rescued on the high seas "priority should be given to disembarkation in the third country from where the persons departed or through the territorial waters or search and rescue region of which the persons transited".[27]

What hence emerges in the context of the current search and rescue regime is essentially a new geo-politics of the *Mare Liberum*. Before the SAR and SOLAS amendments, rescue at sea could be described as a traditional non-cooperative sovereignty game, where every coastal state had the possibility to "free ride" by denying disembarkation with reference to their sovereign right of migration control. This clearly disfavoured the flag states not being able to put rescued persons ashore and created a considerable negative economic incentive by delaying commercial vessels. With the 2004 amendments and introduction of national SAR zones, sovereign responsibility in the *Mare Liberum* is instead respatialised. The current normative structures in principle provide a positive obligation for a single state at any point on the high seas. The sovereignty game thus changes from one of territorial retraction to one in which the high seas and foreign SAR zones become venues where migration control can be operated without incurring the correlate responsibilities for disembarkation and subsequent duties in regard to asylum processing or return.

3.2 Bilateral treaties, interception practices and the outsourcing of migration control

Not all North African states, however, have simply accepted that the 2004 SAR amendments imply that any persons rescued within their SAR zone is to be disembarked within their territory. The key player on the southern side of the Mediterranean, Libya, has long refused to play any part in European efforts to cooperate regarding migration control and further refuses to acknowledge the existing SAR zone divisions in the Mediterranean. Yet, in August 2008 Italy managed to sign a "Friendship Pact" with Libya involving an Italian promise to provide 5 billion Euro of investments in Libya over the next 25 years.[28] In exchange, Libya has agreed to engage in mutual cooperation as regards irregular migration and, importantly, take back and disembark all persons stopped by the Italian authorities on the high seas. Since May 2009 more than 1,400 boats have thus been stopped by Italian authorities and summarily turned back to Libya.[29]

The Italian-Libyan treaty is just one of example of several bilateral agreements on migration control signed between EU Member States and key transit countries.[30] Though typically equally clad in the form of legal treaties or agreements, their purpose could be de-

[26] Whether this is a correct interpretation is again debatable. Under the 2004 amendments the state within whose SAR zone rescue takes place has the responsibility for "coordinating" that persons rescued are disembarked at a place of safety. The dominant interpretation is that this entails allowing disembarkation at the state's own ports unless disembarkation can be arranged elsewhere. Yet, the language is clearly a compromise and a number of states still resist that the new amendments entail a hard obligation to allow disembarkation.

[27] Proposal for a Council Decision. COM(2009) 658 final, par. 4.1. Notably, the emphasis on disembarkation in third countries is made with no reference to whether persons are within third state or EU SAR zones. The disembarkation is however subject to a concern for refugee and human rights that no person rescued on the high seas should be disembarked in a country where he or she risks persecution or torture.

[28] The Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahriya. 30 August 2008

[29] Jesuit Refugee Service Malta, "Do They Know? Asylum seekers testify to life in Libya". December 2009.

[30] Italy signed a similar agreement with Albania to stop irregular boat migrants in the Adriatic following the emigration boom in 1990s. More recently, Spain has signed agreements with Senegal, Mauritania and Cape Verde to curb irregular migration to the Canary Islands.

scribed as exactly circumventing the ordinary rules set by multilateral treaty law (including the SAR and SOLAS regime) and thereby disclaiming sovereign responsibility. Contrary to the cases above, the Italian agreement with Libya is thus framed as an arrangement exclusively concerned with curbing "illegal migration", thereby supposedly side-stepping both the SAR regime divisions and obligations in regard to asylum-seekers. The patrols are likewise carried out by the Guardia di Finanza, a special paramilitary police force charged with financial crimes, smuggling and drug trafficking, and not the Guardia Costiera, which is the coastguard division in charge of carrying out search and rescue. As a result, vessels are turned back to Libya regardless of which territorial waters or high seas SAR zone they have been intercepted in.

Through different steps, responsibility under international refugee and human rights law is similarly sought disclaimed. Both Libyan leader Muammar Ghaddafi and Italian prime minister Silvio Berlusconi have both claimed that there are no refugees among those returned. Yet, the statistics hardly support this. In 2008, 75% of those arriving at the Italian coast applied for asylum, and of these more than 50% were granted some form of protection in Italy. The question then becomes whether international human rights and refugee law applies on e.g. the high seas and whether Italy or Libya is the responsible sovereign in such a cooperative effort?

Like the United States and a few other states, the Italian government maintains that the 1951 Refugee Convention does not apply outside a states sovereign territory and thus that rejections under the Italian-Libyan agreement do not violate the so-called *non-refoulement* principle, prohibiting states to turn back refugees to a place of persecution. While the correct interpretation of the Refugee Convention remains contested by some governments, the dominant view among legal scholars is that core rights under the Refugee Convention may, like the majority of other human rights instruments, under certain circumstances extend extraterritorially (Gammeltoft-Hansen 2009). More specifically, in a case concerning Italian migration control in the Adriatic, the European Commission on Human Rights ruled that stopping a ship on the high seas (in this case ramming and sinking it) will trigger a state's human rights obligations under the Convention, including the protection against *refoulement* under Art. 3.[31]

Perhaps to distance the current scheme from the precedent set by this case, emphasis is instead put on Libya as an active partner formally in charge of interceptions and returns. Technically, Italy has thus transferred six Guardia di Finanza vessels, 3 larger cutters and three coast patrol boats, to Libya. All of them are manned by joint Italian-Libyan crews, but Libya retains formal authority onboard. This has important implications from a legal standpoint, as the vessels will thus operate under Libyan flag and thereby remain subject to Libyan and not Italian command and legal authority. As a starting point, responsibility for any human rights violations carried out in the course of these pa-

31 *Xhavara and fifteen v. Italy and Albania*. European Commission on Human Rights. Appl. No. 29392/95. 10 May 2001.

trols would thus fall on Libya as the sovereign flag state.[32]

3.3 Shifting migration control to foreign territorial waters and the claiming of the sovereign other

Lastly, legal geography and sovereign territory again comes to matter. The agreement between Italy and Libya not only involves interception on the high seas, but equally grants the jointly manned vessels access to patrol in Libyan territorial waters.[33] Here the shift from the *Mare Liberum* to Libya's sovereign territory again works to disclaim Italian responsibility by referring to the primacy of the territorial sovereign. Compared to situations on the high seas, the existing international human rights case law set even higher requirements for establishing responsibility when states act within the territory of another sovereign (Gammeltoft-Hansen 2009: 172-76). In cases concerning state actions in international air space or on the high seas, international human rights litigation seems to emphasise a functional test for establishing whether a state exercises extraterritorial jurisdiction and can thus be held accountable for any human rights violations as a result of its actions (Gammeltoft-Hansen 2009: 152-60). As seen in the case above, exercising migration control on the high seas is likely to trigger state jurisdiction exactly for the purpose of not sending persons back to torture or persecution.

Yet, when moving migration within the territory or territorial waters of another state, a competing sovereign holding territorial jurisdiction enters the equation. The question is thus no longer simply extending the acting state's human rights responsibility extraterritorially, but equally determining which state is responsible. In practice, human rights courts have in these situations required that the acting state is exercising "effective control", *de facto* nullifying the territorial state's possibility to simultaneously exercise jurisdiction over the human rights victims. This has so far required either exclusive control over a part of the foreign territory, such as in the case of military occupation, or full control over individuals, e.g. by physically detaining them aboard an airplane, ship or offshore detention facility (Gammeltoft-Hansen 2009: 160-76). Anything short of this will result in human rights responsibility being defaulted back to the territorial sovereign. In other words, the introduction of a competing territorial sovereign creates a sovereignty threshold not just in terms of positively extending the acting state's responsibility extraterritorially, but also negatively, in having to overcome the ordinary presumption that the territorial state remains exclusively responsible for human rights violations within its territory.

Underneath the different aspects of the Italian-Libyan agreement there seems to be a consistent pattern to not just outsource migration control itself, but equally construct Libya as the responsible sovereign in respect to any human rights or asylum claims. By referring

32 Customary international law does establish principles whereby a secondary responsibility may fall upon Italy for "aiding or assisting" another state in the commission of an internationally wrongful act.(International Law Commission, Articles on State Responsibility, Art. 16. See Crawford 2002: 148-51 for a commentary.) Yet, in practice this sort of indirect obligation has proved difficult to invoke in regard to human rights, and it demands that both states are bound by the same international treaties [Skogly 2006 Crawford 2002: 148-51]. As Libya has signed neither the Refugee Convention nor the European Convention on Human Rights, Italy therefore cannot be legally held responsible for indirectly assisting breaches of either. In this sense, outsourcing migration control - even if only more formally - seems to create additional barriers for ensuring human rights accountability of the outsourcing state.

33 A similar deal was struck by Spain in 2007, similarly granting access to Spanish boats to patrol inside Senegalese territorial waters as part of the Frontex-coordinated HERA operations to curb irregular migration to the Canary Islands.

to the sovereign authority of Libya, Italy may simultaneously disclaim its own sovereign responsibilities in regard to anyone turned back in the Mediterranean. However, arguing that a country like Libya can be relied on to take any responsibility for asylum-seekers instead of Italy is based on a rather formalistic argumentation that can hardly be substantiated as a matter of fact. Libya has not signed the 1951 Refugee Convention, it does not operate an asylum system, and it offers no material or legal protections to refugees within its territory.[34] On the contrary, reports indicate that those intercepted and returned by Italy have been subject to widespread abuse by the Libyan authorities, detained under inhuman conditions and many finally sold to human smugglers or family in the country of origin.[35]

Nevertheless, Libya has been repeatedly portrayed as a most valuable and important cooperation partner in the field of migration management. This no only is the case in the bilateral relation established by the Italian-Libyan agreement, but the latter in fact appears to be part of a much larger process within the EU to resubjectivise Libya from "rogue state" following the Lockerbie incident, to a "responsible sovereign" and key partner for EU cooperation on migration matters. The embargo against Libya was lifted in 2004, and on the very same day the EU decided to engage with Libya on immigration matters.[36] In 2007 Libya hosted the first pan-EU/Africa meeting on migration, and in November 2008 negotiations were launched to sign an EU-Libya Framework Agreement covering cooperation on foreign policy, human rights, security issues and migration. The EU is also trying to negotiate a common readmission agreement that will allow all Member States to successfully return migrants coming from, or merely passing through, Libya on their way to Europe.[37]

This disparity, between imposed image and actual performance, is perhaps the strongest testimony to the power which sovereignty norms wield in political game to shift human rights obligations. Even the sovereign who does not *de facto* live up to its sovereign responsibilities is nonetheless normatively established as such under the principle of sovereign equality.[38] When Italy or the EU politically seek to resubjectivise Libya as a responsible sovereign, it is exactly this normative framework that is instrumentalised. Yet, contrary to the traditional critique of sovereignty as an impenetrable shield against a state's own human rights abuses, the politics of law here becomes a question of claiming the sovereignty of another state in order to disclaim the outsourcing state's own sovereign responsibilities.

Lastly, the cooperation between Italy and Libya, Spain and Senegal, etcetera could ultimately be seen as a way for other member states and the EU at large to disclaim sovereign responsibilities. These bilateral agreements constitute a somewhat spurious arrangement in an issue area where authority has otherwise been delegated to the community. Since the establishment of free movement within the Union, control of the external borders has been subject to common regulation. If these had been EU agreements, all member states would poten-

[34] Human Rights Watch, "Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers", September 2009, p. 47-52.

[35] Jesuit Refugee Service Malta, "Do They Know? Asylum seekers testify to life in Libya". December 2009; Human Rights Watch, "Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers", September 2009, p. 74-91.

[36] 2664th Council Meeting, Justice and Home Affairs. Luxembourg, 2-3 June 2005. EC Press Release PRES/05/114. 2 June 2005.

[37] EU-Libya: negotiations on future Framework Agreement". EC Press Release IP/08/1687. 12 November 2008.

[38] This observation lies at the heart of a particular strand within liberal internationalism that calls for discriminating between liberal, responsible and illiberal, rogue states. See Slaughter [1992 - law among lib states; 1995], Walzer [REF], Buchanan [REF], and Tesón [REF]. For a discussion, see Aalberts [2006: 150-163]

tially have been liable in cases of human rights violations. Similarly, EU law demands a higher degree of openness and transparency. No member states have so far openly criticised the Italian-Libyan agreement, despite widespread critique of human rights abuses by NGOs and the UN High Commissioner for Refugees. Further, access to the text and detailed terms of the treaties and operational agreements crucial to mount a legal case against Italy or Spain has been refused by Frontex by reference to e.g. Spain's sovereignty (we tried asking Frontex for them). Thus, despite the fact that this area has been communitarised, shifting the level of governance from the EU to a single member state appears to reinvigorate the black box of national sovereignty in both creating a veil of invisibility as to the practices that take place and a legal presumption for the primacy (and exclusivity) of responsibility on behalf of another subject, legally distinct from the EU order and other member states.

3.4 Competing regimes and legal interpretation

The sovereignty game surrounding responsibility for saving lives is not limited to cooperation and confrontations between Southern and Northern states in the Mediterranean basin. Even among European states, norms and policies are increasingly interpreted and designed to shift responsibility to neighbouring states. A remnant from British colonial times, Malta's search and rescue zone is exceedingly large compared to the size of the country, covering 250.000 km2 stretching from the Bay of Tunis almost all the way to Crete (Lutterbeck 2009: 128, see figure 3). It is thus nearly impossible for any boat setting off from Libya or Tunisia and bound for Europe not to pass through the Maltese SAR zone. With a fleet composed of three offshore vessels the Maritime Squadron of the Armed Forces of Malta (AFM) responsible for carrying out search and rescue operations obviously face a huge challenge performing its duties. Yet, at the same time the AFM has been accused of encouraging and even supplying migrant boats with water and fuel to sail on to Italian waters and thereby "pass the buck" (Klepp 2009: 5).[39] Maltese authorities on their side have denied this arguing that in the majority of cases migrant boats have refused to be rescued or appeared not to be in need of assistance.[40]

Such claims are compounded by the fact that none of the maritime conventions provide a solid definition of what constitutes "distress" (Pugh 2004: 58). Instead, the captain of the intercepting ship is given authority to judge when a vessel is in need of rescue and when it is merely unseaworthy by modern standards. Malta consequently appears to apply a more narrow definition. According to a senior officer of the Armed Forces of Malta, distress is defined as "the imminent danger of loss of lives, so if they are sinking it is distress. If they are not sinking it is not distress" (Klepp 2009: 7). In the encounter between European authorities and migrants on the high seas, the sovereign in other words makes use of the discretion to interpret legal rules and/or apply different legal regimes and thus itself define and demarcate

[39] In August 2009, Italian authorities rescued a boat with five Eritreans close to Lampedusa. The 75 other passengers originally onboard had died of dehydration and starvation during the three weeks the boat had been at sea. The survivors claimed that at least ten ships had passed them by without rescuing them. In addition, the Italian Ministry of the Interior accused Malta's Maritime Squadron of spotting the boat two days prior to the Italian interception. According to the survivors, the Maltese authorities had supplied them with water and food supplies but not taken any steps to rescue them. A spokesperson from Malta's Armed Forces acknowledged that they had encountered the boat, but claimed the vessel and passgengers appeared to be "in very good shape" and that the migrants had refused assistance (Klepp 2009: 9). See further Repubblica. 22 August 2009.

[40] Malta Today, "Between a rock and a hard place", 13 September 2009

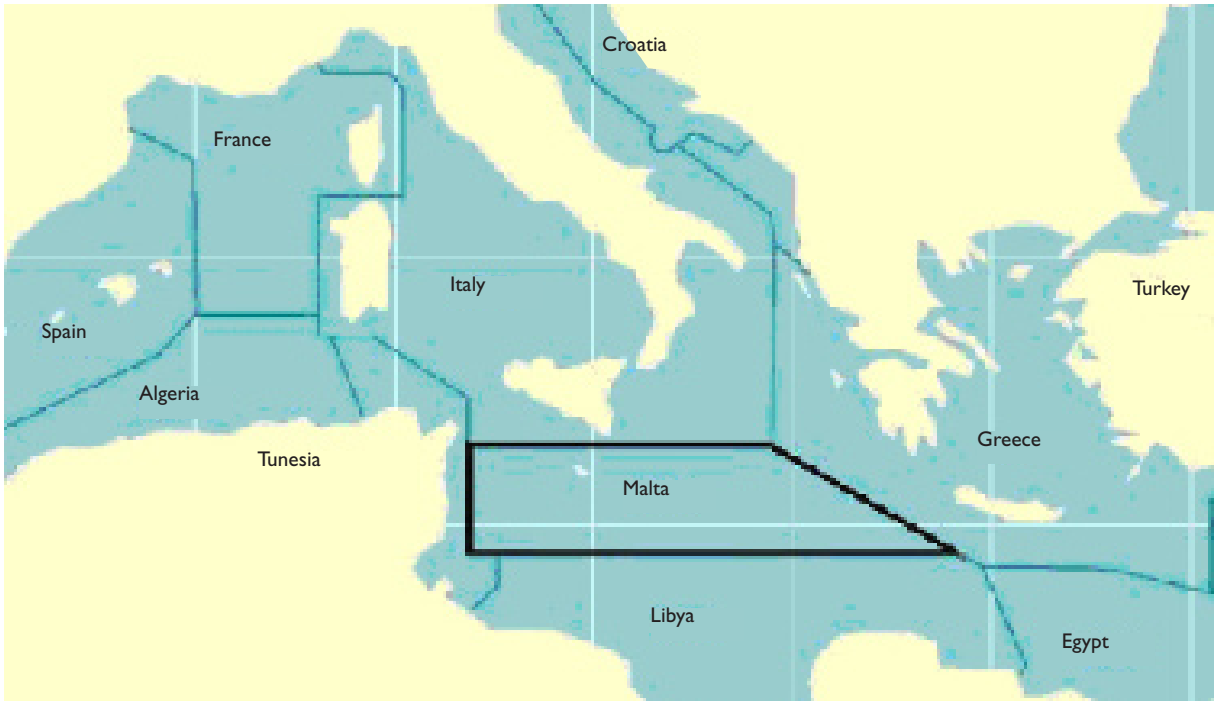

Figure 3: the Maltese SAR zone according to the 2004 amendments

its sovereign responsibility within the normative structures.

Differing interpretations of the legal framework has equally led to conflicts over who should take responsibility for those rescued. Due to the size of its SAR zone, Malta has refused to ratify the 2004 amendments to the SAR and SOLAS conventions for fears that it would impose unrealistic obligations to disembark migrants rescued by other states and private vessels. Malta consequently maintains the interpretation that "a place of safety" means that "the coordinating country's obligation is to disembark rescued persons at the nearest safe port of call".[41] This has led to further tensions between Malta and Italy following a series of incidents where migrants were rescued in Malta's SAR zone yet closer to the Italian islands Lampedusa and Pantellaria Lutterbeck 2009b]. As neither country has been willing to allow disembarkation, the result has been lengthy stand-off during which migrants have died, and a number of confrontations between Italian and Maltese naval vessels literally trying to block each other from entering its territorial waters and disembark rescued migrants (Lutterbeck 2009b).

The general efforts to disclaim sovereignty for migrants lost at sea becomes possible exactly in the combination between the existence of multiple open-ended and overlapping normative structures and the non-sovereign space of the *Mare Liberum*.[42] On the one hand, the actual exercise of power in these situations, while *de iure* falling under the sovereign responsibilities of the respective states, lacks any of the

[41] Malta Today, "Between a rock and a hard place", 13 September 2009.

[42] In addition to the above strategies, another one can be identified in international practice. This concerns the case of Australia, which has been involved in manipulating territorial demarcations in relation to a number of islands near its coastal waters in order to shift humanitarian responsibility of refugee protection. The most well known case in this regard is the Tampa incident (See Budz 2009)

regular accountability mechanisms that usually becomes largely invisible. Compared to the migrant or asylum-seeker arriving at the territory of his or her destination state, migrants who find themselves in distress or encounter migration control on the high seas will have obvious difficulties in accessing NGOs, medias, lawyers, or relevant authorities to plea their case. Few of the accountability and oversight mechanisms, public or private, that we normally rely on to ensure the smooth operation of the rule of law extend beyond the state's sovereign territory (Gammeltoft-Hansen 2008b, Legomsky 2006: 679, Wilde 2005: 754). It may be hard to independently prove where and in which SAR zone rescuees have been picked up, it is left to captains to decide whether boats are actually in distress, and asylum claims are easily "overheard" (Gammeltoft-Hansen 2008a: 183). All things equal, breaking away from the territory as the traditional locus for the exercise of sovereignty eclipses many of the constraints ordinarily imposed in the exercise of government power in this area.

The lack of legal clarity and protection of migrant lives have led some to describe the situation in the Mediterranean with regard to search and rescue as the "Wild West" (Lutterbeck 2009: 131). On the other hand, one should not overlook the extent to which both government and private course of action is nonetheless defined through normative structures. It is by reference to the relevant SAR conventions that states may seek to disclaim their own sovereign responsibility. As the legal framework splits up the high seas into different search and rescue zones, states may strategically seek to relocate rescue operations to foreign SAR zones to strengthen the claim that another state is responsible for disembarkation. Similarly, other bodies of law such as the human smuggling protocol may be relied on to shift legal paradigms and thereby recast migrants and asylum-seekers as subjects of criminal prosecution. Far from a "Wild West" or "legal black hole", governing migration in the Mediterranean in the context of search and rescue appears to be carried out exactly through legal norms, that are then sought interpreted to claim and disclaim different responsible sovereigns and subjects of governance.

4. THE POLITICS OF LAW AT THE INTERPLAY OF SOVEREIGNTY AND GOVERNMENTALITY

How can we account for the developments of the SAR and SOLAS regimes, and their impact on the encounter between irregular boat migrants and sovereign authorities on the high seas? At face value it might fit a governance framework, characterised by '[the] establishment and operation of social institutions … capable of resolving conflicts, facilitating cooperation, or more generally alleviating collective-action problems in a world of interdependent actors' (Young 1994: 53). Thus, 'governance refers to activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance' (Rosenau 1992: 4). Within a governance framework the emphasis hence is on the linkages between formally equal members of the international society (networks of interdependence), whose dealings with each other regarding shared problems take place on an equal footing, without relying on centralised, hierarchical and coercive authority structures to create international order.

Whilst thus having sovereign equality as its starting point, the relationship between governance and sovereignty is somewhat ambivalent. To the extent that governance relates to growing interdependence between a plurality

of actors on the international plane (both states and non-state actors such as multinational corporations, non-governmental organisation, etcetera), as well as the thickening of international regimes and regulation, governance reduces sovereign autonomy and freedom. In this regard, governance pursues to tame egoistic power politics by cooperating in the pursuit of a shared interest regarding acollective and transnational problem. Governance then is conceived as rescuing the international community from 'sovereignty's worst instincts' (Barnett and Duvall 2005: 1). To the extent that governance pertains to a voluntary act of sovereign states to cooperate in common regimes to address transnational problems, it can, on the other hand, be conceived as a reconfirmation of their sovereign status (as was established in the aforementioned *Lotus case*).[43] Hence, it is the sovereigns themselves that, by virtue of their status as international legal persons, sign up to the SAR and SOLAS regimes. This ambivalence on the position of sovereignty within governance structures notwithstanding, in both cases sovereignty is conceived in terms of autonomy and freedom, and works –like traditional conceptions of powe r– as a zero-sum game.Yet, such an understanding misses out on the more intricate relationship between sovereignty, power and international law, between freedom, rule and responsibility. The amendments to the SAR conventions do not just connote a development of the international law of cooperation regarding rescue at sea that limits and/or 'tames' sovereign freedom in the *Mare Liberum.* Rather, the cooperative regime in the international realm involves a transformation of the logic of politics and the functioning of power itself (Neumann and Sending 2007) in relation to the main international players, sovereign states.

Crucially, this functioning of power is not separate from the legal realm but part and parcel of the manifestation of sovereign identity as it is embedded in international protocols and regimes of knowledge that empower states as international legal persons in the international realm. In other words, and contrary to the depiction of sovereignty versus law in governance literature, international regulations do not only entail a limitation of sovereign autonomy and formal constraint to behaviour, but equally connotes a form of productive power, as it 'produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production' (Foucault 1977: 194).

In terms of the legal regimes this means that rights, obligations and legal competences create particular entities in their specific capacities as international legal persons. Moreover, in this conception power is no longer the opposite of freedom, but actually is dependent upon a possibility of choice within a constrained setting (Foucault 1982: 221). In case of the SAR regime, it is the new normative structure that provides the context within which the sovereignty game at the high seas is carried out. In order to further apprehend this more intricate relationship between sovereignty, power and law, one can refer to sovereignty as a form of subjectivity. This denotes the construction of identity within the wider social order and discourse, and captures the dual meaning

[43] See also the Wimbledon case: 'No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign right of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty' (S.S. Wimbledon Case (France, Italy, Japan, United Kingdom v. Germany), PCIJ Series A, No.1, 1923, p.25)

of 'subject-hood' and 'being subjected to'.[44] Whereas originating in the domestic realm, there is a growing body of literature that shows its usefulness to study global politics (see *inter alia* Dillon 1995, Larner and Walters 2004, Neumann and Sending 2010). Translating this to the position of sovereign states in the international realm, sovereign subjectivity would refer to their dual capacity of being subject(ed) to international protocols ('object of knowledge') and as agents operating within the very framework that constitutes them as legal persons ('subjects that know') (cf. Dillon 1995). In other words, it connotes both empowerment through the production of agency, and its delimitation (via rules of conduct and establishment of responsibilities). Conceived as such, sovereignty is no longer only the source of power, but also its effect (of subjectivisation within the social-legal order), too.[45]

This leads to a reformulation of sovereign authority and its relationship with the legal order as mutually constitutive. Law hence can be conceptualised not just as an outcome of sovereign practices, but as a form of productive power itself. It is productive in two ways: by empowering entities as sovereign states with the international legal personality, and by endowing them in this capacity with rights, obligations and responsibilities. More specifically, it can be conceived as a governmental technology, as a tool or a mode of power called 'governmentality'. In the most general sense, this modality manifests itself by 'structuring the possible field of action of others' (Foucault 1982). As such, the international legal order does not work primarily through constraint ('a power that says no'), but by setting the framework for action, i.e. the scope and content of the room for manoeuvre (Shaw 2003: 190). The reconceptualisation of sovereignty from autonomy to responsibility in section 2 can then be further theorised by conceiving sovereignty as a specific way to order international life by linking freedom and responsibility (Aalberts and Werner 2008). In other words,

[44] To be clear, subjectivity is not defined as antonymous to objectivity: the primitive is 'subject' (as noun) rather than 'subjective' (as adjective). As opposed to the constructivist notion of identity, the notion of subjectivity does not rely on an understanding of different layers of identity added to a primordial corporate identity [Wendt 1999], but emphasises how any identity is the effect and articulation of discursive power. In addition, and crucial for our discussion, the notion of subjectivity interrogates the alleged neutrality of rules as opposed to their political effect in terms of the construction of reality.

[45] For a more extensive analysis of how this relates to Foucault's apparent crusade *against* sovereignty and law, see Aalberts (2009). Those who criticize Foucault for arguing the expulsion of law, often refer to the quote where he states that concomitant to the birth of disciplinary institutions what emerges is 'the growing importance assumed by the action of the norm, *at the expense of* the juridical system of the law' (Foucault 1990: 144, emphasis added). However, if the emphasis is put on another couple of words, the juridical system, Foucault creates room for another understanding of law beyond its traditional embodiment in sovereign-juridical structures rather than dispose of the role of law in society altogether. To put it differently, Foucault separates the legal from the juridical, exchanging law's image as a fixed set of rules of negative constraint for a reimagination of law as a practice, in a way that enables us subsequently to analyse the productive function of law in the constitution of subjects and subjectivity along the lines suggested here (see also Ewald 1990, Rose and Valverde 1998, Tadros 1998, Golder 2008)

through the notion of sovereignty international law present states as free and equal, but also creates subjects (legal persons) that, by virtue of their privileged status are held to respect an extensive set of obligations.[46]

This linking of responsibility and freedom reflects another defining characteristic of governmental power, namely that it does not manifest itself as domination, as a power that does not bear to be contradicted and claims subservient obedience of its subjects. To the contrary, governmental power builds on the agency it itself creates. In this context international law as a governmental technology is also not as much dependent on formal juridical structures and judicial institutions (including concomitant enforcement mechanisms) for it to function as such. Hence whereas understanding sovereignty as subjectivity qualifies the liberal notion of absolute autonomy and freedom as the natural condition of statehood that 'possess' sovereignty by themselves, freedom and agency are indeed a crucial condition for the working of governmentality. To put it differently, as a non-coercive form of power, governmental power operates through the modality of freedom and agency, which is both an end and a means for governing: 'Governing is performed through autonomous subjects, not on passive objects' (Sending and Neumann 2006: 696, see also Dean 1999).

Together this leads to a different reading of the politics of law in the context of the sovereignty game at the high seas. Law does not necessarily work through internalisation and socialisation processes that are singled out by constructivist analyses; nor is it a redundant normative layer to the rationalist sovereignty game where the key players are conceived as atomistic subjects that pursue their self-interested strategies regardless of the international normative context in which they encounter each other. Rather, it is because of the normative framework established by search and rescue regimes, human rights and refugee law that sovereign states take pains to disclaim their sovereignty, rather than jealously guard it.

By addressing the dual capacity of sovereignty subjectivity, the current analysis indeed complements the traditional sovereignty game with a governmentality logic. For our understanding of the geopolitics of the *Mare Liberum* it is important to capture that this logic of sovereignty (as object and subject) is intersecting with a governmental mode of power, together constituting a particular power constellation. In order to illustrate governmentality as a particular modality of power, Foucault makes use of the analogy of govern a ship (Foucault 1991: 93-4). At face value this seems a particularly apt analogy for addressing the encounter between sovereigns at sea and irregular boat migrants. However, what is missing from the picture, as Kalm (2008: 93) aptly points out, is that the government of the ship equally is linked to the government of the seas through international law and customs. If Foucault's ship of the state resembles a 'lonely vessel in open seas' (Dean and Henman 2004: 291, as quoted by Kalm 2008), we have seen that such depiction of the alleged Mare Liberum as an ungoverned space is increasingly outmoded. Apart from the plethora of overlapping and conflicting regimes, the high seas are quite literally territorialised through the SAR regime (see figure 2 above). Moreover, it is precisely the increasing legalisation of the international realm, including the Mare Liberum, that at once creates the necessity of disclaiming practices *and* provides the tools to do so. Moreover, precisely because the high seas still are an exceptional space within the international realm that lacks institutional and judicial structures to resolve

[46] For a further elaboration of how this is reflected in international legal jurisprudence, see Aalberts and Werner (2008)

juridical conflicts, there is more room for governmental power to play out.

In fact, the configuration of power in the *Mare Liberum* can be characterised as balancing on the boundary of these two modes of power, resulting in a constant interplay between sovereign strategising and governmentality, and hence the case is never closed. In the encounter between European authorities and migrants on the high seas, the sovereign in other words makes use of the discretion to interpret legal rules and/or apply different legal regimes and thus define and demarcate its sovereign responsibility under these diverse systems of rules. Even the far-reaching step of spatialising the high seas does not overcome the competing regimes that can be invoked. As such, at the interplay between different modes of power the high seas can be identified as a 'space of deferral' (Hetherington 1997: ix; quoted by Budz 2009), where legal ambiguity is only temporally resolved through shifting configurations of sovereignty, territoriality and governmentality.

5. CONCLUSION

The high seas, *Mare Liberum*, and *terra nullius* remain the only places on earth not subject to power of any particular domestic legal order, which could be said to make the legal framework rather thin, both legally and, especially, institutionally. The lack of a domestic legal order, makes shifts between different imperfect legal regimes easier and subject to few means for contestation and oversight. Enforcing and monitoring the application of maritime regimes thus becomes inherently difficult.

On the other hand it is misguided to think of the high seas as a space of legal exception per se. Other bodies of international law, together constituting a framework of governance, are at work here to rearrange the relationship between autonomy and responsibility by extrapolating sovereign power beyond the territory. But, crucially, this is done so through, and not outside, law. This dynamic is missed in much of the governance literature. Whereas it broadens the traditional agenda of international relations by addressing the 'thickening' of international society, the governance scholarship (including regime theory) still draws on a juxtaposition of sovereignty and law (juridicalisation or constitutionalisation of international politics, development legal regimes and general thickening of international society) in the international realm. In other words, the degree of legalisation is seen as inversely proportional to sovereignty: 'more legalised = less sovereign'.

In their critique of the traditional separation of political reality versus law as ineffective normative layer, many constructivist analyses in turn have identified the constitutive power of law (internalisation, socialisation, logic of appropriateness). However, through this operationalisation of the thickening of the international, this 'thin' version of constructivism substitute self-interest for norms in the international society, and as such downplays the role of politics and power in its productive sense (including the productive power of law). Our analysis has shown that the dynamic of politics of law is more: both subjectivation and strategy. This means that law does not necessarily work as a causal constraint of state behaviour (as thin constructivists maintain), yet it does shape the ways in which policies are developed, articulated and contested (cf. Budz 2009). Addressing law as a governmental technology enables to address this productive power: 'Law is politics, not because law is subject to political value choice, but rather because law is a form that power sometimes takes' [Schlag 1991: 448].

In this paper we have highlighted how the interplay of governance and sovereignty en-

tails a double subjectivity regarding states as international legal persons: they are both subjected to expanding legal regimes, and are the main subjects or agents of those regulations. Such practices of subjectivation are the result of particular configurations of sovereignty, territoriality and governmentality that are discursively constructed when sovereigns encounter irregular boat migrants at high the seas. These regimes of course concern refugees as much as they concern sovereigns. They, too, are confronted with a plethora of legal frameworks (including the Law of the Sea, international criminal law and refugee law, although the scope of application of the latter to the high seas remains contested and at best limited), that are triggered through different subjectivisations of the persons involved (as refugees, illegal migrants, criminals (see Budz 2009).

A new geo-politics of the *Mare Liberum* is thereby created through which states may seek to disclaim responsibilities by repositioning rescue operations to foreign SAR zones and shift between different legal regimes and interpretative strands. While from the perspective of governments these strategies are all coached and enacted in the language of international law, the result easily appears exactly opposite from the perspective of the boat migrant or refugee. Even though refugee and human rights law has woven a net that should provide protections that may be taken everywhere, the boat refugees/migrants find themselves no longer caught in it and consequently out of legality altogether (Arendt 2000: 34-5). The outcome of the increasing legalisation of the maritime refugee regime ironically then results in an increase of possibilities to disclaim sovereign responsibility. The multiplicity of overlapping and incoherent legal regulations in that sense resemble the tuna net of the Budafel incident. The picture of the refugees 'caught' in the loopholes of the tuna net is a painful testimony of this situation. Rather than creating a dense net that will provide for a better protection of the refugees, the legalisation of the *Mare Liberum* has created more loopholes that enable states to barter off their sovereignty at the expense of their responsibility towards people in distress at sea.

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