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**THE REFUGEE, THE SOVEREIGN AND THE SEA:
EU INTERDICTION POLICIES IN THE MEDITERRANEAN**

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DIIS Working Paper no 2008/6

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Cover Design: Carsten Schiøler

Printed in Denmark by Vesterkopi as

ISBN: 978-87-7605-254-6

Price: DKK 25.00 (VAT included)

DIIS publications can be downloaded
free of charge from www.diis.dk

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This working paper is an early version of a chapter that will be published as part of Rebecca Adler-Nissen and Thomas Gammeltoft-Hansen, eds., "*Sovereignty Games: Instrumentalising State Sovereignty in Europe and Beyond*", Palgrave, exp. publication September 2008.

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Abstract

This paper starts from the encounter between a European navy vessel and a dinghy carrying boat refugees and other desperate migrants across the Mediterranean or West African Sea towards Europe. It explores the growing trend in the EU of enacting migration control at the high seas or international waters – so-called interdiction. It is argued that these forms of extraterritorial migration control aim at reconquering the efficiency of the sovereign function to control migration, by trying to either deconstruct or shift correlate obligations vis-à-vis refugees and other persecuted persons to third States. In both instances, European States are entering into a sovereignty game, in which creative strategies are developed in order to reassert sovereign power unconstrained by national and international obligations.

Starting from an analysis of the refugee regime itself, the paper looks at the possibilities for asserting human rights extraterritorially, on the high seas, in foreign territorial waters and in relation to situations defined as search and rescue missions. On the basis of this, two inter-related dynamics emerge. The first concerns the legal debate surrounding the criteria for establishing extraterritorial jurisdiction. The so far restrictive interpretations applied provide a context for States to deconstruct protection responsibilities towards refugees by moving migration control outside their sovereign territory and into that of a foreign State. The second dynamic is what could be termed a growing commercialisation of sovereignty for the purpose of migration control. By negotiating access to foreign territorial waters or simply outsource the function of migration control to e.g. North and West African countries, European States are exploiting territorial principles of international law to shift and reduce refugee responsibilities.

Introduction

Scene: Tarifa beach in Spain on 2 September 2000; in the forefront a young couple with a picnic basket sunbathing, in the background the body of a dead migrant washed ashore after an unsuccessful attempt to cross the treacherous Strait of Gibraltar from North Africa.

When photographer Javier Balaz had his picture published in newspapers across the world, it created public outrage over the “indifference of the West”.^[1] Today, hardly a week goes by without reports of migrants dying following attempts to cross the Mediterranean or West African Sea in order to reach Europe. The humanitarian tragedy is perhaps the starkest evidence of the difficult situation EU is experiencing in relation to its southern shores.

On the one hand, it speaks of the growing pressure of immigration by destitute and desperate people willing to risk their lives in an unseaworthy dingy in the attempt to reach the Canary Islands, Malta, Spain or Italy. It is estimated that between 100,000 and 120,000 irregular migrants try to cross the Mediterranean each year (ICMPD 2004, 8). New routes are constantly established and human smuggling has grown to be one of the most lucrative forms of international crime.

On the other hand, the tragedies may also be seen as a result of the ongoing expansion of Europe’s migration control. Following the eastward expansion it has become both more difficult and less lucrative to reach the EU over land, and the bulk of African and many Asian migrants thus turn to the maritime routes. Simultaneously, advanced radar systems, deployment of NATO ships and airplanes and a number of joint Member State naval missions has made it impossible for migrants to take the easy corridors, forcing them instead to venture longer and more dangerous crossings. In what seems to be a self-sustaining dynamic, every new route prompts new control initiatives and vice versa.^[2]

The result has been a radical expansion of the Mediterranean basin and parts of the Atlantic Ocean outside West Africa as a venue for migration control. Most recently, the EU’s border agency, Frontex, has been coordinating a number of missions between Member States in response to what is often referred to as the “tides” or “waves” of migrants “flooding” the European shores (Pugh 2004, 54). The objective of these initiatives is primarily preventive: to intercept

^[1] This was the title accompanying the photograph when published in the New York Times, July 10 2001.

^[2] For an overview of the history of migration flows and control initiatives in the Mediterranean, see Lutterbeck 2006, 61ff.

migrants before they reach EU territory or territorial waters. As the sovereign ability to control migration flows at the borders is coming under pressure, the geographical locus is shifted outwards, towards the sea and towards cooperation with third States.

The refugee occupies a special position in this development. Traditionally, the refugee is the exception to the sovereign right of States to enforce migration control. Under international refugee law States in principle oblige themselves to allow entrance for any person presenting an asylum claim at their borders or within their territories, until the validity of that claim has been examined. In a time where concerns over both asylum and immigration has risen across Europe, States have been keen to come up with policy innovations to somehow rid themselves of these obligations.

Moving migration control outside the territory, to the high seas or inside foreign territorial waters, has been presented as one such innovation and raises important questions of international law. While the international human rights and refugee law is normally referred to in order to harness restrictive asylum policies within the EU, the applicability of these norms to actions performed by Member States outside the Union has been the subject of considerable debate and contention.

Taking as its starting point the tricky conceptualisation of sovereignty within international legal discourse, the present paper argues that the current opaqueness as to the geographical reach of a State's responsibilities is rooted in the inability of the present refugee regime to truly free itself of the territorial principles of the Westphalian State system. Rather the question of extraterritorial responsibility is caught in a "late sovereign order", in which questions of jurisdiction may be interpreted both territorially and universally. This interpretive breadth creates a field of contestation, in which States may rely on different sovereignty claims when acting in the extraterritorial context to reconquer their loss of sovereign control by *de facto* or *de jure* relinquishing themselves of some of the human rights obligations otherwise owed to asylum-seekers and refugees.

There is no generally accepted definition of interception. UNHCR has proposed that:

interception is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons

without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.^[3]

This includes a wide number of instances, ranging from the control performed at visa consulates to the privatisation of control by sanctioning carriers for letting undocumented migrants board their planes. This paper will confine itself to the discussion of interception at sea, which is also referred to as interdiction. In particular, the paper focuses on the Mediterranean and the sea between the West African coast and the Canary Islands as the maritime areas where the EU is currently concentrating its efforts to curb migration towards Europe.

The refugee in the late sovereign order

To understand the particular issue of the refugee in international law, it is necessary first to consider the basic structure of State sovereignty as it has developed in modern international legal discourse. Within international law, the concept of sovereignty can be described as a double-bladed sword referring to two rather distinct descriptive frames (Spiermann 1995, 124ff). On the one hand, it refers to the State as a *national* sovereign, the principle of self-containment and territorial exclusivity. In this sense international law is conceived as a residual system, concerned with establishing the principles necessary for the co-existence of States, e.g. non-intervention. The need for international law only arises when States need to settle disputes outside the realm of national law; within its territory each State holds absolute jurisdiction (Spiermann 2005, 79ff).

The basic principle of national sovereignty and independence can be illustrated by the following passage by the Permanent Court of International Justice from the 1927 *SS Lotus* Case:

The rules of law binding upon States ... emanate from their own free will ... Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by international law upon a State is

^[3] UNHCR (2000). Interception of Asylum-Seekers and Refugee: The International Framework and Recommendations for a Comprehensive Approach. *UN Doc. EC/50/SC/CRP.17*. 9 June 2000, p 10.

that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.^[4]

While the second sentence is often cited as a general presumption for the sovereign freedom of States against international law, the last sentence is perhaps equally important to understand how the principle of sovereign independence is vested within a Westphalian framework. In principle, sovereign power is to be exercised within a “sovereign nation cage”, horizontally covering the territory and the territorial sea and vertically extending from the “Von Kármán line” 50,550 miles above sea level down to the sub-soil of national territory ending at the centre of the earth (Palan 2003, 97). However, outside the realm of these sovereign cages, such as when disputes arise on the high seas, the international law of co-existence becomes accordingly vague (Spiermann 2005, 88).

On the other hand, the State has been conceived as an *international* sovereign, retaining the power to enter into binding agreements with other sovereign States. This is the field of treaty law that has grown substantially over the last half century. Sovereignty in this sense is not based on territorial principles or perpetuating authority, but rather on the sovereign capacity of States to commit themselves within an international law of cooperation and thereby submit themselves as legal subjects under international law (Spiermann 2005, 92ff). On the face of it this may appear to infringe on the conceptualisation of the State as a national sovereign; human rights treaties impose a range of obligations for the sovereign State within its territory, not just vis-à-vis aliens, but also towards its own citizens. However, it conversely establishes an extension of other States’ sovereign sphere to the extent that their legal interests may transgress territorial borders on a range of new issues (Werner 2004).

This extension has been articulated by Judge Huber in the 1928 Las Palmas case:

Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their rights to integrity and inviolability in

^[4] *The Case of the S.S. “Lotus”*. Judgement of 7 September 1927. Permanent Court of International Justice. PCIJ Series A - No. 10, p. 14.

peace and war, together with the rights which each State may claim for its nationals in foreign territory.^[5]

Through the development of the international human rights regime, this obligation towards aliens of other States could be said to have developed to include all persons, regardless of nationality. Further, while the above remark refers to customary norms of inter-State relations, the principle is of no less relevance under treaty law or obligations *erga omnes* (Werner 2004).^[6]

How an issue is framed within this double structure is crucial, as the different conceptualisations of State sovereignty will point to different legal norms taking precedence. This in turn creates a field in which different notions of sovereignty have been relied upon to advance different arguments. While some scholars have emphasized the notion of international sovereignty as a mere appendix to the primacy of national sovereignty, others have argued that the present era is one in which the international law of cooperation is becoming increasingly dominant (Friedmann 1964, 88).

In the following, I shall suggest that while both conceptualisations are of continued relevance and must be seen as necessary complements in the functioning of international law, it is remarkable how the proliferation of treaty and human rights law cannot escape the territorial foundations flowing from the conceptualisation of sovereignty within a Westphalian frame of territorial exclusivity. Borrowing a vocabulary developed by Neil Walker, the present configuration of sovereignty claims in respect to refugees may be described within the framework of *late sovereignty*.

According to Neil Walker, the conceptual duality of the term sovereignty sketched out above is key to understand its present value in articulating and framing existing power relations in the transitional stage between a Westphalian and a post-Westphalian order (Walker 2003, 19ff). In the former order claims to authority are made strictly within a statist structure, whereas in the latter sovereign power is increasingly asserted along *functional* boundaries cross-cutting the territorial division of the Westphalian map. (*ibid.*, 22). The latter may be observed not only in the emergence of functionally limited polities, such as the EU, co-existing within the same territorial space as its constituent national sovereign Member States, but also in the growing emergence of

^[5] *Case of the Island of Palmas*. Judgement of 4 April 1928. Permanent Court of International Justice. R.I.I.A. Vol II.

^[6] *Case concerning the Barcelona Traction, Light and Power Company, Ltd.* Judgement of 5 February 1970 (Second Phase). International Court of Justice. ICJ Reports 1970.

cooperative legal frameworks between EU or Member States and third countries effectively extending sovereign functions beyond EU borders.

Yet, despite these functional assertions of power, the Westphalian order is not rejected in favour of a new framework for sovereignty, rather the territorial or national conceptualisation of sovereignty is adapted to understand the new order (*ibid.*, 19). This means, first, that the international law of cooperation continues to draw in large parts on the basic principles of national sovereignty in its justification and implementation. Secondly, and related, the growing cooperation effectively extending sovereign power beyond the territory has not been matched unequivocally by a similar deterritorialisation of correlate sovereign responsibilities. Instead a discursive field is opened in which questions of jurisdiction and State responsibility seems to oscillate between these two poles – the territorial and the universal (Werner 2004). In other words, in the establishment of functional polities such as the EU and in assertion of State power beyond the territory, sovereignty becomes an interpretive frame that may be used to legitimise both. In the late sovereign order of globalisation and increased international governance on the one hand, and enduring Westphalian norms of territorial exclusivity on the other, concrete interpretations within the sovereignty frame become increasingly contested.

THE REFUGEE IN INTERNATIONAL LAW

In the case of the refugee these traits are evident both in the constitution of the refugee within international law and in the current policies of extraterritorialisation pursued by European States. As one scholar notes:

The refugee in international law occupies a legal space characterized, on the one hand, by the principle of State sovereignty and related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law ... and from treaty. (Goodwin-Gill 1996, v)

As part and parcel of the broader human rights regime, most scholars would probably argue that international refugee law belongs to the international law of cooperation. Refugees are the exception to States' legitimate pursuit of migration control, and treaty law, such as the 1951 Refugee Convention, entails an obligation for State parties to extend a number of rights and benefits to all individuals falling within the definition.

Yet, the link to principles of State sovereignty and territorial supremacy in the codification of this area of law are indeed striking. Despite the appearance of universality, this regime is in the true

sense of the word *inter-national*. Refugee protection is not guaranteed in a global homogenous space, but materialises as a patchwork of commitments undertaken by individual States, tied together by multilateral treaty agreements (Palan 2003, 87).

This concerns first the mechanism of responsibility assignment. At the core of the refugee regime is the obligation not to send back, or *refouler*, a refugee to a place in which he or she risks persecution.^[7] This obligation kicks in when an asylum-seeker or a refugee is present within the territory or jurisdiction of the State in question. While in principle this obliges the State to undertake a refugee status determination process, as soon as an asylum claim is launched within its territory or at its borders, the Refugee Convention contains no explicit mention of how and where the asylum procedures should be carried out (Fitzpatrick 1996, 229ff; Goodwin-Gill 1996, 178; Barnes 2004).^[8]

Secondly, beyond the *non-refoulement* prohibition, rights under the 1951 Refugee Convention are not granted *en bloc* but rather according to a principle of territorial approximation, meaning that more rights are acquired as the refugee obtains a higher “level of attachment” to the host State. This incremental approach reflects a concern of the drafters not to extend the full scope of rights in situations where refugees may arrive spontaneously in large numbers (Hathaway 2005, 157). Thus, in particular the social and economic rights may only be claimed, when a refugee is “lawfully staying” or “durably resident” within the territory of the host State. Conversely, a refugee outside the territory of a State, but within its jurisdiction is only entitled to a very basic set of rights centred on the *non-refoulement* obligation.^[9]

Lastly, the rights flowing from international refugee instruments are crucially dependent on individual States for their implementation. Unlike inter-State conflicts under the law of co-existence,

^[7] The *non-refoulement* principle is set out in a number of international human rights instruments, most notably in art. 33 of the 1951 Refugee Convention, art. 3 of the Convention Against Torture and art. 3 of the European Convention on Human Rights (ECHR).

^[8] Since refugee status is declaratory, not constitutive, the *non-refoulement* principle must be applied presumptively to asylum-seekers before refugeehood is established. See further UNHCR (2007). Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Geneva. 26 January 2007, par. 8.

^[9] The most pertinent rights under the 1951 Refugee Convention that are specifically granted without reference to being present or staying at the territory include Article 33 (*non-refoulement*), Article 16 (access to courts) and Article 3 (non-discrimination). Of somewhat lesser importance, Articles 13 (property), 22 (education) and 20 (rationing) also apply extraterritorially (Hathaway 2005, 160ff).

obligations under refugee and human rights treaties are as a rule owed towards a collective of State parties and do not therefore necessarily invoke the direct interest of other States. This has left the Refugee Convention with no international courts and no effective enforcement mechanisms (Goodwin-Gill 1996, 218). Thus, the mechanisms to ensure the implementation of refugee rights are left to intergovernmental organisations, such as the UNHCR, that are highly dependent on financial and political support from the very States they are supposed to supervise, and often, more importantly, the national courts of each State, which, depending on the respective constitutional traditions, may be able to exert a smaller or larger influence and to varying degrees draw on international instruments in national adjudication.

Together these traits paint a rather chequered picture of a refugee rights regime that, despite the language of universality, is still firmly vested within the Westphalian structures of national sovereignty. The above may also account for the recent surge to *externalise* or *extraterritorialise* both the regulation of migration control and the provision of refugee protection. In a world where States' ability to control flows of people across their borders is already challenged, moving migration control outside the borders is perceived as a strategy to prevent triggering refugee responsibilities and/or shift them to third States.

EXTRATERRITORIAL JURISDICTION AND THE COMMERCIALISATION OF SOVEREIGNTY

In the late sovereign order, this quest for extraterritorialisation brings forth two aspects of the way that the interplay between different conceptualisations of sovereignty structures State responses to refugees - one being the legal debate over extraterritorial jurisdiction and the other the political dynamic of commercialisation of sovereignty.

The first concerns State jurisdiction as the sphere in which a State may legitimately exercise its sovereign functions. The overall point of departure within human rights and refugee law is that States are bound by human rights in relation to all persons within their jurisdiction (Kessing

2007).^[10] The question is how jurisdiction is established when moving outside the “sovereign nation cage”. Within international law extraterritorial jurisdiction has been conceived of in two ways – as a property flowing from a State’s effective control over a defined *territory*, or as a relationship between a State’s exercise of authority or control over an *individual*. The first clearly derives from the principle of national sovereignty, extending jurisdiction to all geographical areas where a State exercises *de facto* sovereign control, such as in the case of e.g. military occupation.^[11] The second is primarily reflected in more recent case law dealing with cases where State agents act inside another State, whether unlawfully or following agreement between those States, and seems to reflect an expansive interpretation not to “allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.”^[12]

It is important to underline, however, that in both these conceptualisations, *extraterritorial* jurisdiction is conceived of as *extraordinary*.^[13] Despite the proliferation of extraterritorial State functions in a globalised world, the territorial jurisdictional competence remains the point of departure in international law. In practice international courts have thus applied rather high tests in order to establish extraterritorial jurisdiction for the purpose of human rights responsibilities. In the *Bankovic* case, involving the NATO air bombings of a radio station in Serbia during the Kosovo conflict, the European Court of Human Rights held that a sufficient degree of effective

^[10] Jurisdiction as the *ratione loci* of international human rights treaties is spelled out in a number of instruments, see in particular art. 1 of the European Convention on Human Rights, art 2(1) in the International Covenant on Civil and Political Rights (ICCPR) and in art 2(1) in the Convention Against Torture. Similarly, it has been convincingly argued that the core principles of refugee law, such as the *non-refoulement* principle enshrined in art. 33 of the 1951 Refugee Convention, is similarly applicable in all cases where a refugee falls under a State’s jurisdiction (Hathaway 2005, 339; Lauterpacht and Bethlehem 2003, 110; Goodwin-Gill 1996, 141f). It should be noted that a number of human rights instruments, e.g. the Genocide Convention, contains no territorial restrictions but puts an obligation upon States to prevent and punish genocide everywhere (Coomans and Kamminga 2004, 2). Similarly, some rights may be reserved for persons strictly within the territory of a State or having a particular relationship to the State. As noted above this is the case for the more substantial rights flowing from the Refugee Convention.

^[11] E.g. *Cyprus v. Turkey* (Appl. No. 25781/94). Judgement of 10 May 2001. European Court of Human Rights.

^[12] *Issa and Others v. Turkey* (appl. No. 31821/96). Judgement of 16 November 2004. European Court of Human Rights, par. 71

^[13] This has been expressed in e.g. *Bankovic*, arguing that “from the standpoint of public international law, the jurisdictional competence of a State was primarily territorial” and that extraterritorial jurisdictions “were, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States”. *Bankovic and Others v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and the UK* (Appl. No. 5207/99). Judgement of 12 December 2001. European Court of Human Rights, par 71.

control over Serbian territory had not been asserted.^[14] Similarly, establishing personal jurisdiction has generally been limited to cases involving full control over an individual, such as in the case of abduction or detention, rather than in relation to particular functions of State sovereignty, such as preventing onwards passage for an asylum-seeker.^[15]

The notion of extraterritorial jurisdiction has thus been interpreted very differently among States and seems to create a disparity where, under a strict reading, States can avoid incurring legal responsibilities for acts committed extraterritorially in situations where neither territorial nor personal jurisdiction can be established. This has led some authors to argue that the kind of interception operations we see in the Mediterranean, the extraterritorial detention of combatants or the outsourcing of otherwise domestic sovereign functions take place in a “legal vacuum” or “legal black hole” (Wilde 2005, 15f). While these terms may be ill-chosen, as these actions are more often than not governed by elaborate cooperative legal arrangements between States, it may be more correct to argue that the interpretive breadth in establishing jurisdiction extraterritorially or assigning responsibilities in cases involving competing jurisdictions easily defers human rights obligations to the basic *modus operandi* of territorial responsibility assignment.

A second feature of the late sovereign order is the growing “commercialisation of sovereignty” as a political strategy in the late sovereign order. This term has originally been derived to describe the emergence of tax havens and offshore economies. According to Ronen Palan commercialisation of sovereignty or “jurisdiction shopping” within this field emerges as a result of the inability of international law to bridge the gulf between national sovereignty and the internationalisation of trade and capital (Palan 2002, 164). In other words, the dual conceptualisation of sovereignty creates the structural conditions for States to try to attract international capital by exploiting existing differences between national sovereign regulations or intentionally relaxing regulation in particular areas of their territory (Palan 2003, 157ff).

With regards to refugees and migration control this commercialisation is possible exactly because of the territorial principles of the refugee regime in regards to the distribution of responsibilities and the standards of protection owed. Thus, examples of such bartering of sovereign authority

^[14] *Banković*, *ibid.*

^[15] *López Burgos v. Uruguay*. Judgement of 6 June 1979. Human Rights Committee. UN Doc. A/36/40. *Issa and Others v. Turkey*, *ibid.*. *Öcalan v. Turkey (Appl. no. 46221/99)*. Judgement of 12 March 2003. European Court of Human Rights. But see *Xhavara and fifteen v. Italy and Albania (Appl. No. 39473/98)*. Judgement of 11 January 2001. European Court of Human Rights.

are numerous in the attempt to relocate refugee protection or asylum processing to less-developed countries where fewer and less costly rights are owed, both in Europe and elsewhere.^[16] In the context of migration control, a similar trend of “jurisdiction shopping” emerges as EU’s neighbours and developing countries, either for economic benefit or under threats of sanctions, provide a legal platform in the form of their land and sea geography, thereby enabling EU States to operate migration control while simultaneously shifting the primary responsibility for refugees to those countries within whose territorial jurisdiction control is operated.

Both the varying interpretations of extraterritorial jurisdiction and the commercialisation of sovereignty effectively constitute sovereignty games, in which States, or in this case the EU, may seek to horizontally dislocate responsibilities owed under international law and thereby reassert their sovereign power in areas of regulation that are otherwise marred by legal constraints flowing from either national liberal traditions or international human rights. In this sense changing the playing field for exercising sovereign power away from the national territory becomes a strategy for States in the late sovereign order to avoid obligations owed, *de facto* or *de jure*. As a result, the refugee is left to the unmitigated power of the sovereign executive when exercising migration control; or, to use the terminology of Giorgio Agamben, the migrant encountered on the high seas is effectively reduced to an “illegal body” to be controlled, to “naked life” (Agamben 1998, 100f; Noll 2003).

EU interdiction policies

In the following, it will be sought illustrated how these sovereignty games operate in the context of the recent interdiction policies developed by the EU and Member States. The first two sections will discuss extraterritorial jurisdiction claims for interdiction taking place on the high seas and within the territorial waters of a foreign State, respectively. The third will focus on the interplay of different international legal regimes, specifically how jurisdiction claims and asylum responsibilities are shifted by redefining operations from “migration control” to “search and rescue at sea”.

^[16] See in particular the Australian “Pacific Solution” and in Europe, though never realised, the UK plans for a New Vision for Refugees (Pugh 2004; Kneebone 2006; Gammeltoft-Hansen 2007).

INTERDICTION ON THE HIGH SEAS

Moving migration control to the high seas is not a new phenomenon. With the rise of boat refugees in the 1970s and 1980s high sea interdiction practices quickly became the favoured response of coastal States concerned with mass influx. Outside Europe the more famous examples include the United States' interception of Haitians and Cubans from the early 1980s up until today and more recently the Australian "Pacific Solution", which was developed following the "Tampa" incident in 2001.^[17] Similarly, in Southern Europe interdiction schemes on the high seas have been operated by Italy, France, Greece and Spain in the Adriatic Sea, the Mediterranean and around the Canary Islands (Lutterbeck 2006).

Under the Frontex auspices, the EU has also been looking to expand interdiction operations. Of the operational missions already carried out two involve interdiction outside territorial waters. One was the Nautilus Operation taking place in October 2006, during which the high sea was patrolled to prevent migration from Libya reaching Malta, Sicily or Lampedusa. While this mission was originally conceived to incorporate Libya, thus allowing for EU vessels to patrol within Libyan territorial waters, it was nonetheless hailed as a success claiming to completely prevent migrants from arriving in Malta during the time of operation.^[18] The second operation was the HERA II set to curb the migration flow towards the Canary Islands. Involving planes, helicopters and navy ships, this operation intercepted 14,572 persons on the high seas and Spanish territorial sea and 3,887 in the territorial waters of Senegal, Mauritania and Cape Verde during its five months operation from August 2006.^[19] This mission has been succeeded by HERA III set to run interdictions in the same area.

To which extent are States undertaking such interdiction operations on the high seas bound by international law not to return those intercepted claiming asylum or fearing torture or other inhumane treatment? So far courts and governments have varied greatly in their interpretation of the jurisdictional implications in such situations. Both the Australian and US interdiction policies have been based on an exclusively territorial understanding of jurisdiction and thus the *non-*

^[17] See note 46 below.

^[18] Notably, no references were made as to whether the vessels presumably intercepted and in particular if any asylum-seekers were turned back towards North Africa or allowed disembarkation in other EU States. Agence Europe, 1 November 2006.

^[19] Frontex. (2006). "Longest Frontex coordinated operation – HERA, the Canary Islands." News Releases, 19 December 2006 retrieved 16 March, 2007, from <http://frontex.europa.eu>.

refoulement obligation. Testing the US interdiction and subsequent return of Haitians in *Sale v. Haitian Centers Council*^[20], the US Supreme Court supported this interpretation arguing that:

a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 [of the 1951 Refugee Convention, setting out the *non-refoulement* principle] cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.^[21]

A similar interpretation may have inspired Australia when, following the Tampa incident, the 2001 Migration Amendment Act excised parts of both Australian sea and land territory, most notably Christmas Island and the Ashmore Reef, from the "asylum zone" (Pugh 2004, 60). Likewise, for asylum purposes US sovereign territory only extends to the high water mark and not government vessels or offshore bases, such as e.g. that on Guantanamo (*ibid.*). Both cases can be seen as a radicalisation of the strictly territorial understanding of jurisdiction, arguing that States are even at liberty to withdraw their territorial jurisdiction, so that even though an asylum-seeker is *de facto* present within the territory or territorial sea, she is not recognised as *de jure* present.

However, both the Sale verdict and the Australian excision practices have been widely criticised. International lawyers and human rights organisations have argued that the *Sale* case builds on an erroneous and incomplete reading of both the Refugee Convention and extraterritorial jurisdictional principles and represents a "policy decision" that did not alter the US' international obligations.^[22]

Perhaps more important, the US and Australian interpretations have not gained much currency in Europe, where in particular the European Court of Human Rights has taken a more expansive reading of extraterritorial jurisdiction in situations such as those involving interdiction in international waters. In *Xhavara*, the Court thus held that Italy was exercising jurisdiction within the meaning of the European Convention on Human Rights, when a boat with immigrants sunk following collision with an Italian navy vessel trying to board it under an agreement between the

^[20] 113 United States Supreme Court 2549 (1993).

^[21] *Ibid.* at 2565.

^[22] See in particular the dissenting opinion by Justice Blackmun, the *amicus curiae* and the external comments reprinted in *International Journal of Refugee Law*. 6 (1). (1994), 69-109. Further Hathaway 2005, 336ff and Goodwin-Gill 1996, 143ff.

two countries.^[23] Secondly, the European Court of Human Rights has rejected the ability of States to excise parts of their territory for migration purposes. In *Amuur v. France*, aliens held within French airport transit zones were found to be within French jurisdiction and territory for all purposes of the Convention, despite any French legislation to differentiate regulation of these zones from the rest of their territory.^[24] In line with this interpretation it is worth noting that migrants intercepted by European ships on the high seas under the HERA mission according to the authorities all are taken to the Canary Islands, where they have the possibility to launch an asylum application.

To the extent that European interdiction policies on the high seas constitute a sovereignty game, it is thus more likely a question of reasserting State power *de facto* than *de jure*. As noted above, the international refugee and human rights regimes are intimately dependent on national institutions – courts, appeal mechanisms, NGOs and press – in order to ensure that individuals are actually able to access international rights. The reach of these institutions seldom extends beyond the physical territory of the State and even more unlikely to uninhabited geographical areas such as the high seas. Both UNHCR and Amnesty International have raised concerns that asylum-seekers may not be able to exercise basic rights or formalise asylum claims when interdicted at sea or held at closed island detention centres such as those in Lampedusa and the Canary Islands; the very remoteness of these places is an impediment for national and international rights organisations to access asylum-seekers and monitor State actions (Gil-Bazo 2006, 579).^[25]

This has been a particular concern when interdiction policies leave the State unchecked in receiving asylum claims, which raises concerns that authorities may downplay the number of asylum-seekers in mixed migration flows. From 1981 to 1990, the period before declaring that *non-refoulement* only applied on the territory, the US interdicted and returned more than 21,000 Haitians. Yet, despite the grave human rights situation in Haiti during this period, the Coast Guard found only 6 claims strong enough to warrant a full asylum procedure (Legomsky 2006, 679). On the Canary Islands authorities have been keen to emphasize that the vast majority of those intercepted were “illegal immigrants”. Despite the increase in migration pressure over the last years, both the total number of asylum claims launched and the recognition rates have gone down,

^[23] The case was, however, declared inadmissible on grounds of non-exhaustion of national remedies. *Xhavara*, *ibid*.

^[24] *Amuur v. France*. Judgement of 25 June 1996. European Court of Human Rights. Reports 1996-III, No. 11.

^[25] See e.g. UNHCR Press Release. “UNHCR deeply concerned over Lampedusa deportations”. 18 March 2005; Amnesty International. (2005). “Spain: The Southern Border”. EUR 41/008/2005; and Human Rights Watch. “The Other Face of the Canary Islands: Rights Violations Against Migrants and Asylum Seekers”. February 2002.

which has led Amnesty International to suggest that asylum claims are deliberately overheard and discouraged.^[26] Whether this is true or not, it does suggest that moving migration from the land to the sea entails a possibility for States to carry out control further away from the eyes of those institutions that normally constitute the checks and balances in the exercise of executive power.

INTERDICTION IN FOREIGN TERRITORIAL WATERS

A particular aspect of European interdiction policies as developed in the Frontex context has been increased cooperation with North and West African States and consequently the expansion of geographical scope from the high seas into the territorial waters and land territory of third States. As will be argued below, within the theoretical framework set out above, this could be seen as a more advanced strategy for interdicting States to relieve themselves of international human rights responsibilities when conducting migration control. Rather than argue for the strict territorial application of e.g. the *non-refoulement* principle, which has proved untenable in the European context, the territorial jurisdiction of another State may be invoked to shift the primary responsibility for any protection-seekers to that State.

As part of the HERA II mission bilateral arrangements were made that allowed the Spanish, Finnish, Italian and Portuguese ships and airplanes to patrol and intercept vessels bound for the Canary Islands, not just on the high seas but also inside Cape Verde, Senegalese and Mauritanian territorial sea, contiguous zone or air space.^[27] Thus, any vessel intercepted within this 24-mile zone of these States is turned back, either to its port of departure or to a port within the territorial waters in which interdiction occurred. During the four months of operation 3,665 persons were intercepted within these zones and returned. Cooperation with the Senegalese authorities further extended to bringing Senegalese immigration officers on board European ships, and Frontex argued that these officers were formally in charge of rejecting migrants' passage to international waters. The operation was hailed by Frontex as a great success and cooperation with West and North African States is expected to be extended for the continuation, HERA III, which

^[26] Amnesty International. (2005). "Spain: The Southern Border". EUR 41/008/2005.

^[27] The territorial waters may extend 12 nautical miles (22 km) from the low water mark or internal waters. This belt is regarded as the sovereign territory of a State, except that foreign ships are allowed innocent passage. Control over an additional contiguous zone extending up to 24 nautical miles may further be claimed by a States 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). While this zone for other purposes are considered high seas, it reflects a functional extension of territorial sovereignty for the above purposes.

was initiated in January this year. Similarly, arrangements with Libya have been sought as part of the Nautilus operation in the Eastern Mediterranean in order to be able to operate inside its territorial waters. While so far this has not materialised, negotiations are ongoing.^[28]

So, from the viewpoint of international law what does it matter that interdiction is carried out inside foreign waters rather than on the high seas? The most obvious consequence would be to exclude all asylum-seekers fleeing directly from their country of origin to invoke the 1951 Refugee Convention. Art. 1 of this Convention clearly stipulates that the *ratione personae* only extends to individuals “outside the country of his nationality” and an asylum-seeker would thus have to exit the territorial sea in order to benefit from e.g. the *non-refoulement* principle enshrined in art. 33. While this is obviously of concern, it should be noted that e.g. the prohibition against *refoulement* to torture or other inhumane treatment enshrined in art. 3 of the ECHR does not have this limitation.

Secondly, and of primary concern to the present paper, it may be asked whether asserting extra-territorial jurisdiction is effected by moving interdiction from the high sea to the territorial sea of a third State. On first look, one could make an argument answering in the negative. Flowing from the international law of cooperation the International Law Commission has argued that “[i]nternational life provides abundant examples of activities carried on in the territory of a State by agents of another State ... [t]here is nothing abnormal in this”.^[29] Following this reasoning, one should be able to assert a principle similar to that of State actions carried out on the high seas, namely that since the basic function of human rights is to regulate the exercise of public power, it should not matter where this power is exercised (Lawson 2004, 86).

Some case law seems to support this interpretation, both under the ICCPR and the ECHR. In *López Burgos*,^[30] the Human Rights Committee held that the arrest and subsequent mistreatment of Mr. Burgos by Uruguayan Security Forces in Argentina *did* bring him within Uruguayan jurisdiction. Similarly, in the context of the European Court of Human Rights *Öcalan*^[31], involving the arrest and forcible return of PKK leader Öcalan in Kenya, did establish Turkish jurisdiction in respect to the applicant.

^[28] ISN Security Watch, 7 January 2007. See further <http://frontex.europa.eu>.

^[29] International Law Commission (1975). *Yearbook of the ILC*. Vol. II, p. 83.

^[30] *López Burgos*, *ibid.*

^[31] *Öcalan*, *ibid.*

In these cases the reasoning built on the premise that the defending States had effective personal control of the applicants and that it would be “unconscionable ... to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate within its own territory.”^[32] On first look this appears to support a rather expansive interpretation of a State’s extraterritorial jurisdiction in cases involving not territorial control but a personal or more incidental link between the acting State and an individual.

Other case law does, however, emphasize a rather high test for the level of control that a State needs to assert vis-à-vis an individual in order to establish extraterritorial jurisdiction in the personal understanding. To several lawyers, the Grand Chamber ruling of the European Court of Human Rights in *Banković*^[33] came as a surprise. Many had expected that the NATO smart bombs killing the relatives of the applicants would be enough to establish such a level of control (Coomans and Kamminga 2004; Loucaides 2006). Yet, the Court emphasized the extraordinary character of extraterritorial personal jurisdiction arguing that:

Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification of each case.^[34]

The Court found that in the present case such justification was not met in establishing a personal relationship and then went on to conclude that since the actions had occurred outside the “legal space” of the Convention (Serbia (FRY) was not a party of the ECHR at the time) and effective control of the territory was not established, the acting States could not be made responsible under the Convention.^[35]

As regards actions taking place on the territory of a State not party to the Convention, the Court thus seems to make a distinction between the extraterritorial responsibilities of States in cases where “full control” is exercised over an individual, such as in the case of arrest of physical detention and State actions that merely result in violations of human rights on foreign soil or territorial waters, even when these violations are so important that they infringe the right of life (Art. 2).

^[32] *López Burgos*, *ibid.* par. 12.3. See the similar reasoning in *Issa* cited above.

^[33] *Banković*, *ibid.*

^[34] *Ibid.* par. 43.

^[35] *Ibid.*

Under such a reading it becomes harder to establish jurisdiction when a State is operating interdiction inside foreign territorial waters. Does turning back a ship entail effective control in the personal sense? The argument could be made in cases where EU ships physically board ships or detain those on board, but it is more doubtful whether merely denying onwards passage or escorting vessels back is sufficient to meet the test of extraterritorial personal jurisdiction.

Failing this, interdiction in foreign waters moves back to the question of who exercises effective control over the territory in question. Although case law does support the possibility of shared extraterritorial jurisdiction,^[36] this has normally required a high degree of structural and military involvement over a defined geographical space.^[37] While one could presumably argue that under the traditional international legal doctrine a ship exercising government functions on the high seas or foreign territorial sea is to be considered “floating territory” (Ross 1961, 172), the presence of Senegalese immigration officers on board Frontex ships is clearly a move to underline that not only is this Senegalese jurisdiction, but the actual denial of onwards passage is also conducted by Senegalese authorities.^[38]

Without going into arguments *pro et contra ad infinitum*, it should be clear that the case for asserting EU Member State responsibility when operating interdiction in foreign territorial waters is at best substantially weaker than when operating on the high seas. From the case law above, one may venture the following interpretation: Where on the high seas and in situations where responsibility could not meaningfully be attributed to the State on whose territory actions are committed (such as following unlawful extraterritorial arrests) both the European Court of Human Rights and the Human Rights Committee have been keen to avoid “human rights vacuums” as to the geographical applicability of the relevant instruments. Yet, when acting within foreign territory under agreement or with the direct involvement of another State, it becomes much more alluring to fall back on the principle of territorial jurisdiction.

^[36] See in particular *Ilascu and Others v. Moldova and Russia* (Appl. No. 48787/99). Judgement of 8 July 2004. European Court of Human Rights.

^[37] Ibid. For the premises of effective extraterritorial jurisdiction in the territorial sense, see further *Loizidou v. Turkey* (Merits). Judgement of 18 December 1996. European Court of Human Rights. Reports 1996-VI and *Cyprus v. Turkey*, *ibid.*

^[38] Whether this is a legitimate argument could again be contested; as long as ships are captained by EU officials these could be claimed to hold effective authority.

This return to the basic Westphalian order of responsibility-sharing may inadvertently support a growing commercialisation of sovereignty, as States exploit jurisdiction shopping by negotiating arrangements to perform migration control inside other States' sovereign land or sea territory.

REGIME SHIFTING: FROM INTERDICTION TO RESCUE AT SEA

Reading the press statements from Frontex or the political justifications for increased funding to patrol the Mediterranean and West African coasts one finds surprisingly few references to a stated aim of migration control.^[39] Rather, these operations primarily seem to be framed as efforts to dissuade migrants from the perilous journey towards Europe and the need to ensure rescue for those in distress at sea. There is much to say in favour of such aspirations. Many vessels embarking upon the journey have no or limited navigation aids, insufficient engines, fuel and safety equipment onboard. Overcrowded ships entail a number of sanitary and health issues and there is a substantial risk of diseases, debilitation or psychological stress spreading among those aboard during the voyage (Pugh 2004, 56).

Hardly a week goes by without dead bodies are found washing up on the shores between EU and its southern neighbours. According to ICMPD more than 10,000 persons have died trying to cross the Mediterranean from 1994 to 2004.^[40] In addition, Spanish authorities estimate that approximately 6,000 persons, mainly Senegalese, died last year alone trying to reach the Canary Islands.^[41] The growing human tragedy may in part be seen as a result of the reinforcement of migration control at EU's external borders. As the easier routes, such as the Strait of Gibraltar and the Spanish enclaves in Morocco, are reinforced, pressure moves towards less accessible and typically more dangerous routes, such as the one from West Africa to the Canary Islands.

Consequently, interest in reinforcing search and rescue cooperation between EU/Member States and North African States has been given high priority on the agenda and in the relations between relevant coastal States within the MEDA and ENP frameworks. Even in States with whom EU cooperation is scarce, such as Libya, EU missions have been launched defining a "Libyan search

^[39] See e.g. COM (2006) 733, Reinforcing the management of the European Union's Southern Maritime Borders, 30.11.2006.

^[40] ICMPD, Irregular transit migration in the Mediterranean – some facts, futures and insights, Vienna, 2004.

^[41] ISN Security Watch, 12 January 2007.

and rescue area” and establishing operational cooperation in this field.^[42] Yet, beyond a humanitarian imperative, the recent interest in rescue at sea may also be viewed as a sovereignty game for the purpose of migration control in its own right. First, performing a rescue mission at sea supersedes the otherwise established norm prohibiting an acting State to intercept and board a vessel flying the flag, and thus subject to the jurisdiction, of another State.^[43] Secondly, cooperation agreements in the context of search and rescue operations, such as the framework established with Libya, may provide a context for shifting asylum and human rights obligations to third States.

Performing rescue operations at sea is a long-established duty under international maritime law.^[44] It contains a responsibility for private, commercial and State vessels to respond to persons in distress at sea. Traditionally, the maritime rescue regime has been marred by lack of a mechanism to decide 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”, 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.

Thus, for much of the last decades the issue of rescue at sea has been playing out as a variation of the classic problem between self-interested States and international cooperation (Barnes 2004, 11). The opaqueness in the intersection between refugee and maritime law meant that the nearest coastal States (whether within territorial waters or on the high sea), flag States of the rescue vessels and States of the next port of call for merchant vessels were all arguing against having to take a responsibility themselves. The result has been a number of problematic stalemates and

^[42] Department of Information, Malta, Press Release no. 1094: “Agreed Conclusions of Seminar on ‘Saving Life at Sea and in the Desert’ held in Malta on 20th July 2005”, available from www.doi.gov.mt.

^[43] 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 19.

^[44] The issue first emerged in international instruments in 1910. Since then it has been codified in various forms in the four 1958 Conventions on the Law of the Seas, the 1982 United Nations Convention on the Law of the Sea (superseding the 1958 Conventions), the 1974 International Convention for the Safety of Life at Sea, the 1979 International Convention on Maritime Search and Rescue and the 1989 International Convention on Salvage. It is further established as a general principle of international law (Miltner 2005).

costly delays for vessels, eventually leading to a disincentive to undertake rescue obligations at all.^[45]

Only recently amendments to the 1979 Convention on Maritime Search and Rescue (SAR) and the 1974 International Convention for the Safety of Life at Sea (SOLAS) have attempted to establish mechanisms for identifying which coastal State is responsible for allowing disembarkation.^[46] Under this regime the world's oceans are divided into 13 Search and Rescue Regions (SRR). In each region the affected States are responsible for establishing coordination, which effectively has translated into drawing a map partitioning the high sea zones in which each coastal State is responsible in addition to their territorial waters. While third State or private vessels may undertake the rescue missions themselves, the State in whose zone the operation takes place holds main responsibility for ensuring that distress calls are responded to and, importantly, allow disembarkation.^[47]

While these amendments have been broadly celebrated as closing a vital gap in the search and rescue regime, one should appreciate how these amendments may also favour new interdiction strategies by altering the locus of international protection obligations. The intensified Frontex

^[45] One of the most recent examples in the European context is the "Marine 1" that broke down in international waters and was rescued by the Spanish Coast Guard. The ship was towed to Nouadhibou, the nearest port in Mauritania, but the Mauritanian government refused disembarkation on the grounds that the shipped likely originated from Guinea and should be returned there. Following negotiations, Mauritania allowed disembarkation in return for guarantees from the Spanish government that all migrants and refugees would be returned or resettled elsewhere. However, repatriation has proved equally difficult. Most of the approximately 200 passengers are believed to come from the Kashmir area but do not want to reveal their identities. Afghanistan and Pakistan have been reluctant to cooperate. Similarly, a plane with 35 migrants had to return in mid-air because Guinea-Bissau would not receive them (ECRAN Weekly Update, 9 February 2007 and 17 February 2007).

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 plans for interception and offshore asylum processing, what is now commonly referred to as the Pacific Solution. For more information on this case, see Barnes 2004, Pugh 2004 and Kneebone 2006.

^[46] The amendments to both Conventions were adopted by the International Maritime Organisation in 2004 and entered into force 1 July 2006. See MSC 78/26/Add. 1, Annex 3 and 5 respectively.

^[47] *Ibid.*

patrols and cooperation agreements with North and West African countries means that EU ships are increasingly operating inside foreign search and rescue zones, whether on the high sea or inside foreign territorial waters. Under the new disembarkation rules, the respective African States will be responsible for allowing disembarkation and therefore, presumably, provide asylum procedures or enforce return to the country of origin. This argument was made by Malta when refusing to let the Spanish trawler *La Valletta*, carrying 51 migrants, dock at Maltese ports. Malta was supported by EU Commissioner Franco Frattini, stating 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”.^[48]

The potential for jurisdiction shopping in such instances is exacerbated by the fact that none of the maritime conventions provide a solid definition of what constitutes “distress” (Pugh 2004, 58). Instead, the master of the intercepting ship has been given authority to evaluate when a vessel is in need of rescue or when a vessel is merely unseaworthy by modern standards. In the context of Frontex or other European vessels operating migration control at sea this seems to provide a system where situations may usefully be defined differently in order to divert responsibilities for asylum-seekers at different points in their journey towards Europe; if boats are intercepted inside a foreign State’s Search and Rescue zone the incentive would be to define it as a rescue operation and thereby shift any disembarkation obligation to that State. If, on the other hand, interdiction is conducted inside the European search and rescue zone there would be an interest in defining it as migration control and thereby evade any direct disembarkation responsibilities and instead deal with the issue in the context of varying interpretations of jurisdiction, as discussed above.

The question remains, of course, whether defining a situation as a rescue mission legally supersedes any direct responsibilities vis-à-vis asylum-seekers on behalf of the acting State. This is somewhat unclear. A case could be made that the rescuing State is still exercising jurisdiction in performing the rescue mission or by virtue of taking onboard rescued persons on a State vessel. While not legally binding, the guidelines adopted by the Maritime Safety Committee of the International Maritime Organisation on the treatment of persons rescued at sea emphasizes that con-

^[48] Department of Information, Malta, Press Release no. 1094, *ibid*. It should be noted, however, that Libya refused to take on any responsibilities in this matter, and that the migrants were disembarked in Spain after being stranded off the Maltese coast for 8 days.

sideration should be given “to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened”.^[49]

In practice, however, it seems that by defining the operation within the search and rescue regime, questions regarding refugee protection are moved away from the acting State and responsibilities solely assigned according to territorial or zone divisions, as agreed among the States in the region. The Valletta case mentioned above illustrates this quite clearly. Libya is not a signatory to the 1951 Refugee Convention and has a track record of onwards expulsion of asylum-seekers and migrants returned from Europe to unsafe countries where persons risk torture or persecution.^[50] To the extent that it could be established that these persons had been under European jurisdiction, a case could be made that such chain-*refoulement* would constitute a breach of art. 3 of the European Convention of Human Rights. Yet, both the EU Commissioner and the Maltese government argue that responsibility rested solely with Libya and no considerations were seemingly made as to any protection issues.

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 perhaps, more importantly, created a substantial negative economic externality by delaying commercial vessels. Under the present regime, this is replaced by a cooperative sovereignty game in which the international legal framework in principle provides a positive obligation for a single State at any point in the Mediterranean or the Atlantic Ocean outside West Africa. The sovereignty game thus shifts from one of territorial retraction to one in which African coast States may commercialise their territorial waters and high sea rescue zones as venues, where Frontex ships can effectively intercept migrants without incurring correlate responsibilities for disembarkation, and thus asylum processing.

^[49] This language closely resembles that used in articles 1 and 33 of the 1951 Refugee Convention prohibiting *refoulement*. See Maritime Safety Committee, Guidelines on the treatment of persons rescued at sea, Resolution MSC.167(78), adopted on 20 May 2004, par. 6.17.

^[50] Notably, based on Red Crescent information the Italian journalist Fabrizio Gatti reported that more than 100 people had died following Libya’s expulsion of “illegal migrants” through the Saharan desert. A number of these had previously been deported to Libya from the Italian island detention centre Lampedusa (L’Espresso, 24 March 2005).

Conclusions

In its communication on “Reinforcing the management of the European Union’s Southern Maritime Borders” the Commission noted the lack of “clarity and predictability” as regards Member State obligations under international law and thus the need to:

... analyse the circumstances under which a State may be obliged to assume responsibility for the examination of an asylum claim as a result of the application of international refugee law, in particular when engaged in joint operations or in operations taking place within the territorial waters of another State or in the high sea.^[51]

The present paper has attempted to do exactly this. Yet, the above analysis does not paint a “clear” picture of international law in this area or establish “predictable” mechanisms for designating State responsibilities. Rather, it has tried to elucidate how different interpretations of the concept of jurisdiction and interlocking legal regimes has made the exact nature of State obligations towards asylum-seekers and refugees a field of contestation, in which the extraterritorial applicability of refugee rights is open to different interpretations, new cooperation schemes emerge and it is possible for States to frame issues within various legal regimes with rather different game rules.

The result seems to be an increased manoeuvrability for States. Whether *de facto* or *de jure*, the extraterritorialisation of migration control works to the advantage of European States when it comes to deconstructing or shifting responsibilities owed to refugees and asylum-seekers. In particular, moving regulation into foreign jurisdiction or casting operations within the international search and rescue regime seem to improve the likelihood that legal responsibilities are settled by falling back on the basic Westphalian notion of territorial jurisdiction.

This again has given rise to the increasing commercialisation of sovereignty for the purpose of migration control. The paper has confined itself to situations in which European States are directly involved in performing offshore migration control. Yet, both the practical and legal difficulties in asserting State responsibility in such instances are presumably only exacerbated when inter-State cooperation entails a complete outsourcing of migration control to third

^[51] COM (2006) 733, 30.11.2006, par. 34.

States.^[52] In sum, we may be witnessing the beginning of a new offshore human rights economy through which “protection in the region” and “cooperation with third countries” are both hides for attempts to capitalise on foreign territorial jurisdictions and lower national human rights standards to shift and reduce burdens of refugee protection away from Europe (Gammeltoft-Hansen 2007).

So far there has been a tendency among human rights lawyers and refugee advocates to reject the restrictive and territorially based interpretations of extraterritorial jurisdiction as stemming from both State practice and international case law as bad reasoning or policy-driven misinterpretations. While such misdemeanours are certainly conceivable in this field of international law, this paper has tried to point to a more structural explanation for the difficulty in exactly defining the extent of extraterritorial human rights responsibilities. Within the late sovereign order this difficulty does not amount to a systematic attempt to undermine the applicability of international human rights and refugee law, but rather points to the inherent duality in the way that sovereignty has been conceived within international legal discourse.

From the viewpoint of refugee protection this conclusion may seem disappointing. To the extent that Europe hails its human rights regime as an attempt to codify universal norms, the least we would expect would be for European States to abide by the same human rights standards when acting abroad. In this sense, the increasing trend of extraterritorialisation warrants further reconsideration of the primarily territorial framing of State jurisdiction and consequently human rights standards. Whether this will happen and the late sovereignty order thus continue to develop, time will tell; indeed one could agree with the assessment of Richard O’Boyle of the European Court of Human Rights when in relation to *Bankovic* he noted that “the law on ‘jurisdiction’ is still in its infancy” (O’Boyle 2004, 139).

^[52] For some perspectives on the scope of such outsourcing in the EU context, see Gammeltoft-Hansen 2006 and Lutterbeck 2006.

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