
Maritime Legal Black Holes: Migration and Rightlessness in International Law

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Abstract

This article explores the trope of the 'legal black hole' to reveal questions of legal theory arising from contemporary migrant drownings. The theme was popularized during what was then called the 'war on terror', but its trajectory is longer and more complex. Its material history, as well as its intellectual history within legal scholarship, suggest three distinct 'legacies' of legal black holes: the counterterrorism legacy; the migrant-detention legacy; and the legacy of the maritime legal black hole. The tripartite division provides a conceptual typology of instances where persons are rendered rightless. While the two former types are characterized by de facto rightlessness due to a violation of international law, the latter exposes a seldom acknowledged, yet crucial, characteristic of international law; the age-old doctrine on the division of responsibilities between states and individuals at land and at sea is now creating the conditions in which some people are rendered de jure rightless. Moreover, the typology sheds light on the specifically legal reasons for the seeming failure to end mass drowning of migrants and refugees in the Mediterranean Sea. Tracing the ways in which people become de jure rightless is ultimately suggested as a broader research agenda for scholars of international law.

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The position of such individuals destitute of nationality may be compared to vessels on the Open Sea not sailing under any flag of a state, which likewise do not enjoy any protection whatever.

–Lassa Oppenheim, 1905

1 Introduction

In the context of an increasingly protracted ‘migration crisis’, scholars have advanced interpretations of international law aiming to reduce migrant drownings at sea while upholding a legal right to asylum.¹ This article does not question the need to progressively develop international law in ways that may help realize an underlying protective purpose. It suggests, however, that the challenge may be greater than acknowledged. Analysing circumstances in the central Mediterranean, I argue that the seeming failure to prevent widespread drownings does not simply stem from a political or moral failure. It may be true that the rise of anti-immigration sentiments in Europe has had a chilling influence on duties of rescue at sea.² Yet another often ignored reason for the failure to prevent deaths at sea is ingrained in the very structure of international law. A policy fully compliant with international law can tolerate large-scale migrant deaths at sea. To explain this, the article seeks to develop the notion of a ‘maritime legal black hole’.

A fascinating, yet seldom acknowledged, characteristic of international law is how it can generate spaces in which humans are rendered rightless.³ At issue is not *de facto* rightlessness (arguably a familiar phenomenon in large parts of the world).⁴ More surprisingly, the article identifies *de jure* rightlessness: people outside the context of war or criminal punishment, whose deaths are the direct result of human decisions but are not, legally, a violation of their rights (as a matter of *lex lata*).⁵ These people are rendered rightless by the way international law distributes responsibility among its subjects, particularly states and individuals. As will become clear, in some strange way, the conditions that render certain migrants rightless are the very conditions that make it possible to have legal rights to begin with.

¹ Among many, see Goodwin-Gill, ‘The Mediterranean Papers: Athens, Naples, and Istanbul’, 28 *International Journal of Refugee Law (IJRL)* (2016) 276; Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’, 27 *European Journal of International Law (EJIL)* (2016) 591.

² See, e.g., Basaran, ‘The Saved and the Drowned: Governing Indifference in the Name of Security’, 46 *Security Dialogue* (2015) 205; C. Heller and L. Pezzani, ‘Blaming the Rescuers’, available at <https://blamingtherescuers.org>.

³ Compare Spijkerboer, ‘Wasted Lives: Borders and the Right to Life of People Crossing Them’, 86 *Nordic Journal of International Law* (2017) 1. On the notion of rightlessness, see A. Gündoğdu, *Rightlessness in an Age of Rights* (2015).

⁴ See, e.g., Z. Bauman, *Wasted Lives: Modernity and Its Outcasts* (2003).

⁵ Compare with Achiume, ‘Beyond Prejudice: Structural Xenophobic Discrimination against Refugees’, 45 *Georgetown Journal of International Law* (2013) 323, and with Giorgio Agamben’s much-discussed *homo sacer*, ‘the person whom anyone could kill with impunity’. G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998), at 72.

The label of a 'legal black hole' is not mine. Its choice reflects an attempt to contextualize migrant drownings within a larger literature. The article looks back at the history of other spaces of claimed rightlessness, sometimes referred to as 'legal black holes', to theorize what is unique about present migrant drownings. Rather than providing answers on how to solve widespread drownings in the Mediterranean, it is intended as a preliminary proposal on how to ask the relevant questions. Shedding light on legal black holes – maritime and other – is suggested as a research agenda for scholars working in diverse subfields of international law.

Section 2 provides historical background on the phenomena that have come to be known as legal black holes; the metaphor has been popularized in discussions about post 9/11 detention at Guantánamo Bay, but it has a longer trajectory. Section 3 introduces the notion of maritime legal black holes through a case study from recent Mediterranean history. Section 4 suggests a tripartite typology of legal black holes, each kind of legal black hole standing for its own 'legacy' of rightlessness. I call these categories the counterterrorism legacy, the migrant-detention legacy, and, finally, the legacy of maritime legal black holes.⁶ While, in the two former legacies, rightlessness occurs because of violations of international law, the latter legacy exposes rightlessness as an epiphenomenon of international law. Section 5 offers the study of legal black holes as a research agenda for international legal scholarship. Section 6 briefly concludes.

2 Towards a Genealogy of Legal Black Holes

Talking about a 'black hole' in a legal context (rather than in physics) is a metaphor. At first blush, the metaphor refers to an absence of law – not from seemingly 'lawless' experiences such as art making or lovemaking – but, rather, from where law is most badly needed. The legal metaphor of a black hole has a history that predates the notion of a 'black hole' in astronomy. This history sheds light on what is unique about the maritime legal black holes in which migrants and refugees now find their deaths.⁷ The earliest relevant invocation of a black hole is the 'black hole of Calcutta'. This label refers to a concrete, physical space: the prison where 123 British soldiers suffocated in 1756 after being imprisoned by Bengali forces. Partha Chatterjee traces the importance of this precedent in his book *The Black Hole of Empire* (2012).⁸ The title points not only to the physical dimension of the prison but also to the legal foundations of

⁶ In this typological approach, and other important aspects, the article takes its cue from F. Johns, *Non-Legality in International Law: Unruly Law* (2013). For another useful typology of how certain policies are perceived as exceptional, see K. Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (2016).

⁷ As Amnesty International described it, this is 'failing strategy that has led to ever more dangerous crossings and a threefold increase in the death-rate from 0.89% in the second half of 2015 to 2.7% in 2017'. Amnesty International, *Central Mediterranean: Death Toll Soars as EU Turns Its Back on Refugees and Migrants*, available at www.amnesty.org/en/latest/news/2017/07/central-mediterranean-death-toll-soars-as-eu-turns-its-back-on-refugees-and-migrants/?utm_source=twitter&utm_medium=article&utm_term=&utm_campaign=social.

⁸ P. Chatterjee, *The Black Hole of Empire: History of a Global Practice of Power* (2012).

imperialism. As will become clear in the discussion of Guantánamo after 9/11, one legal technique from this long period remains central to a typology of contemporary legal black holes: ‘The most reliable definition of an imperial practice remains that of the privilege to declare the exception to the norm.’⁹

The metaphor of the black hole did not steadily develop over centuries. As Chatterjee emphasizes, the early invocations of the black hole were for a long time basically forgotten. The term ‘legal black hole’ appeared much later. It had been casually used in the common law since the 1980s to reference instances in which law offered a right with no remedy.¹⁰ The phrase, however, did not have any essential connotation related to rightlessness or cross-border movement (which are central to the inquiry below). Talk of a ‘legal black hole’ obtained its contemporary salience only after 9/11. At this point, the debate focused on counterterrorism detention at Guantánamo Bay.¹¹ To better understand the contemporary uses of the term, including the three distinct legacies this article identifies, one must first understand the origins of detention at Guantánamo. Long before Guantánamo Bay came to house detainees from the so-called ‘war on terror’, it was used for migrants and asylum seekers.

In 1991, a military coup overthrew Haiti’s first democratically elected president Jean-Bertrand Aristide. Aristide’s ouster intensified an already-existing outpouring of Haitian refugees travelling by sea to reach Florida’s shores. President George H.W. Bush responded by directing the US coast guard to intercept Haitians on the high seas and send them to Guantánamo, where their asylum applications would be processed. These ‘shelters’ or ‘safe havens’ were in fact detention centres surrounded by barbed wire.¹² Offshore processing led to a significant decrease in refugee recognition rates, leading critics to argue that it was essentially intended to facilitate *refoulement*: the return of individuals who suffer a ‘well-founded fear’ of persecution (contrary to the 1951 Refugee Convention and its 1967 Protocol).¹³ This criticism grew in response to the May 1992 publication of Executive Order 12,807, in which Bush authorized the US coast guard to return fleeing Haitians directly to their country. The policy was famously upheld by the Supreme Court of the United States.¹⁴

Only after 9/11 was the label of a ‘legal black hole’ popularized. An early characterization of Guantánamo Bay as a legal black hole appears in the language of a British court of appeal in a case called *Abbasi*.¹⁵ In late 2002, the Court considered the case

⁹ *Ibid.*, at 337. On the continuum between imperialism and ‘counter-terrorism’, see also Moyn, ‘Drones and Imagination: A Response to Paul Kahn’, 24 *EJIL* (2013) 227.

¹⁰ See, e.g., *J. Dykes Ltd. v. Littlewoods Mail Order Stores Ltd.*, [1982] SC 157, at 166 (HL).

¹¹ I use the term counterterrorism here without implying that everyone detained in Guantánamo was justifiably suspected of terrorism.

¹² J. Franklin, *How Did Guantanamo Become a Prison?*, available at <http://historynewsnetwork.org/article/11000>.

¹³ See, e.g., Koh, ‘Reflections on Refoulement and Haitian Centers Council’, 35 *Harvard International Law Journal (HILJ)* (1994) 1. Convention Relating to the Status of Refugees 1951, 189 UNTS 150; Protocol Relating to the Status of Refugees 1967, 606 UNTS 267.

¹⁴ *Sale v. Haitian Centers Council*, 509 US 155 (1993).

¹⁵ *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598, [2003] UKHR 76.

of a British citizen detained without a hearing at Guantánamo Bay and dismissed it. The judgment included a resounding determination that the USA had indeed violated Mr Abbasi's fundamental rights. But with the same stroke of a pen, the Court also found that this violation had no remedy: '[W]e do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a "legal black hole".'¹⁶

Lord Johan Steyn adopted the Court's phrase in a lecture held in November 2003, hosted by the British Institute of International and Comparative Law.¹⁷ The lecture by the former South African judge was simply titled *Guantánamo: The Legal Black Hole*.¹⁸ To make his argument, Lord Steyn turned to history. He traced a thread running between counterterrorism detention at the US naval base and several earlier precedents in which the procedural rights of detainees had been annulled. The lecture thus amounted to an abbreviated history of the denial of *habeas corpus* in the common law of the 20th century. By this token, the legal black hole becomes synonymous not only with a right without a remedy, but it also becomes the revocation of the most fundamental of rights without an avenue to legally challenge it. In Steyn's narrative, the idea of a legal black hole related back to a longer trajectory of exceptional national security measures, particularly during World War II and 'the troubles'.

As new revelations emerged from Guantánamo and an ever-expanding American military campaign, the trope of the legal black hole became associated not just with the lack of procedural safeguards. Substantive violations of rights also became irrevocably associated with the procedural ones: inhuman detention conditions, abusive interrogation techniques and particularly torture. A striking book revealing a type of rightlessness in these policies is *Guantánamo Diary*, published in 2015 by the former detainee Mohamedou Ould Slahi. 'What have I done?' asks Slahi in one part of his memoir, reporting the interrogator's answer: 'You tell me ... Otherwise you'll never see the light of day. *If you don't cooperate, we're going to put you in a hole and wipe your name out of our detainee database.*'¹⁹

During the Bush era, the underlying model proliferated in the form of 'black site' interrogation facilities. Contrary to his early promises, President Barack Obama did not close the facility at Guantánamo and continued to use offshore detention elsewhere. Although seemingly protected by an executive order banning torture, Obama's detainees were also denied access to the judiciary.²⁰ During this period, the European Court of Human Rights (ECtHR) cited the black hole metaphor, opining on a US interrogation facility in Poland.²¹ More recently, President Donald Trump has frequently

¹⁶ *Abbasi*, *supra* note 15, para 64.

¹⁷ Steyn, 'Guantanamo Bay: The Legal Black Hole', 53 *International and Comparative Law Quarterly* (2004) 1.

¹⁸ Like Guantánamo, the lecture too later obtained something of an iconic status. See, e.g., how Owen Fiss uses it in O. Fiss, *A War Like No Other: The Constitution in a Time of Terror* (2015), at 14–15.

¹⁹ M.O. Slahi, *Guantánamo Diary* (2015), at 220 (emphasis added).

²⁰ Executive Order 13,440, 20 July 2007.

²¹ ECtHR, *Al-Nashiri v. Poland*, Appl. no. 28761/11, Judgment of 24 July 2014; ECtHR, *Abu Zubaydah v. Poland*, Appl. no. 7511/12, Judgment of 24 July 2014.

threatened to renew torture, continues to hold detainees in Guantánamo and uses detention-by-proxy arrangements in other parts of the world. Guantánamo's black hole model migrated as a way of averting legal responsibility by conducting legally problematic interrogation beyond jurisdiction. Guantánamo has become the iconic example of a legal black hole in our own time.

Detention at Guantánamo in the counterterrorism context directly influenced migrant detention throughout this period.²² Guantánamo's migration footprint fell at the fault lines between 'developing' and 'developed' worlds.²³ A paper trail runs from Guantánamo Bay to migrant detention facilities controlled by Australia on Pacific Islands and to facilities in African countries where European member states are involved.²⁴ The purpose of placing migrants outside the territories of developed states is similar to the purpose the US government sought in the counterterrorism context. States seek to leave migrants beyond the scope of their legal duties under constitutional and/or international human rights law.

Several months after the 9/11 attacks, the Australian Parliament passed legislation giving effect to a policy of offshore detention and transfer known as the 'Pacific Solution'. The 'Pacific Solution' excised numerous islands from Australian territory, notably Christmas, Ashmore and Cartier Islands. More importantly, it introduced a policy of transfer of asylum seekers to offshore detention centres such as those on Nauru and Manus Islands in Papua New Guinea. Successive Australian Parliaments tinkered with the Pacific Solution, but one aspect remained: individuals arriving in Australia by boat are placed offshore.²⁵

To provide legal justification, Australian government lawyers relied on the USA's position regarding Guantánamo.²⁶ Although the policy has recently been strongly criticized by a Papuan court, the system still exists on the Papuan island of Manus and on Nauru.²⁷ Images of rightlessness reminiscent of Guantánamo have periodically emerged from these remote locations. In particular, conditions of indefinite detention have become so awful that they are likely amounting to torture, raising concerns about crimes against humanity.²⁸ And comparable facilities have appeared elsewhere, some of them aimed at securing European borders.

²² Dastyari, 'Refugees on Guantanamo Bay: A Blue Print for Australia's "Pacific Solution"?', 79 *Australian Quarterly* (2007) 4, at 4.

²³ Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013', *HILJ* 54 (2013) 315, at 316.

²⁴ Mann, *supra* note 23, at 334. See D. Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (2018).

²⁵ The Pacific Solution ended in 2007 but was revived in 2012 and continues under the current government.

²⁶ Refugee and Humanitarian Division, Department of Immigration and Multicultural and Indigenous Affairs, *Article 31 – Refugees Unlawfully in the Country of Refuge – An Australian Perspective* (2002), at 129.

²⁷ Supreme Court of Justice (Papua New Guinea) SCA no. 84, *Belden Norman Namah v. Hon. Rimbink Pato* (2013).

²⁸ 'Communiqué to the Office of the Prosecutor of the International Criminal Court Requesting Investigation of Australia and Corporate Contractors', *Global Legal Action Network*, 13 February 2017, at 74–83, available at www.glanlaw.org/single-post/2017/02/13/Communication-made-to-International-Criminal-Court-requesting-investigation-of-Australia-and-corporate-contractors.

The shadow of Guantánamo followed the migration detention infrastructure as it travelled around the world. To name only one other example, the Nouadhibou detention centre, which Spain established in Mauritania, was often referred to by migrants and local population as ‘little Guantánamo’ (‘El Gunatanimto’).²⁹ With the exposure of minutes from a conversation between Australian Prime Minister Malcolm Turnbull and President Trump, the offshoring of migrant detention has come full circle. ‘That is a good idea. We should do that too. You are worse than I am’, remarked Trump, who apparently, did not know the USA was pushing back boats and detaining migrants offshore at least since 1992. Within this history, counterterrorism detention and offshore migrant detention are separate categories within one typology of legal black holes.³⁰ Below I contextualize ‘maritime legal black holes’ with respect to these two categories, suggesting a tripartite typology of rightlessness. But, first, what are maritime legal black holes? The novel category introduced in this article is illustrated through a Mediterranean case study.

3 What Is a Maritime Legal Black Hole?

When Libya collapsed after a Western coalition intervened back in 2011, its search-and-rescue (SAR) zone became ungoverned.³¹ No other state took on Libya’s responsibilities in its SAR zone. Moreover, the private rescue duties of individual seafarers could not provide safety for the migrants that Libya’s fall had sprung. The result was an uptick in the rate of drownings in the Mediterranean space between Italy and Libya. One particularly tragic event occurred on 3 October 2013, when 360 migrants reportedly drowned off the coast of Lampedusa.³² The way in which the European and international response unfolded is indicative of the larger questions at issue.³³

Starting in October 2013, the Italian government launched *Mare Nostrum*. The unprecedented rescue operation deployed beyond Italy’s SAR zone was mandated to save migrant lives outside Italy’s territorial waters. But *Mare Nostrum* provided no

²⁹ Amnesty International European Institutions Office, *Mauritania: Under Pressure from the EU, Migrants Face Illegal Arrest and Collective Expulsion*, 2 July 2017, available at www.amnesty.eu/en/news/press-releases/eu/asylum-and-migration/mauritania-under-pressure-from-the-eu-migrants-face-illegal-arrest-and-collective-expulsion-0366/.

³⁰ These different precedents are made possible by a basic feature of international human rights law. Art. 1 of the International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, provides that: ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant’ (emphasis added).

³¹ The International Convention on Maritime Search and Rescue (SAR Convention) 1979, 1405 UNTS 97, Art. III(1)(c) defines search-and-rescue (SAR) zones: ‘Parties shall, as they are able to do so individually or in cooperation with other States and, as appropriate, with the Organization, participate in the development of search and rescue services to ensure that assistance is rendered to any person in distress at sea.’

³² ‘Italy Boat Sinking: Hundreds Feared Dead off Lampedusa’, *BBC News* (3 October 2013), available at www.bbc.com/news/world-europe-24380247.

³³ A. Orford, *CLSGC Annual Lecture 2016: ‘Mare Nostrum: International Law, Spatial Order, and the Mediterranean’* (2016), available at www.youtube.com/watch?v=rzgjWNQmlpU.

easy solution. Whether ‘pushed’ to sea by the increasingly violent conditions in Libya or ‘pulled’ by the hope of being saved, the operation saw a continued swell in migrant departures as well as continued deaths at sea. A narrative emerged among some European policymakers: rescue operations reflected a danger for the migrants. By creating incentives for embarkation, it encouraged people to travel to their own deaths.³⁴

This reasoning solidified into a change in policy when Mare Nostrum was terminated. On 1 November 2014, the more limited Operation Triton replaced it. Unlike Mare Nostrum, which was steered by the Italians, Triton was facilitated by the European Union’s (EU) border enforcement agency, Frontex. Now Italy was defined as a ‘host state’ for the operation, which meant that Italy would retain legal responsibility for an operation in which border guards from multiple EU member states would participate.³⁵ Unlike Mare Nostrum, Triton did not ordinarily patrol waters beyond Italy’s SAR zone. Any rescue operation beyond Italy’s SAR zone would have to be individually approved.³⁶ Importantly, while Triton’s operational guidelines required vessels to fulfil their search-and-rescue obligation, Triton did not have a rescue mandate. Rather, it was mandated ‘to control irregular migration flows towards the territory of the European Union and to tackle border crime’.³⁷ Triton has since been succeeded by Operation Sophia, which is also facilitated by Frontex and similarly not designed for rescue but, instead, for ‘border management’.³⁸

High-ranking Frontex officials knew well before the transition to Triton that numerous deaths were imminent without the safety blanket of Mare Nostrum.³⁹ They informed actors within the European Commission of this likely result, yet the warning was not heeded. The realization of the likely consequences quickly became public. A day before Triton began, *The Guardian* noted ‘expert’ warnings that the end of Mare Nostrum ‘put thousands at risk’.⁴⁰ In their report titled ‘Death by Rescue’, Charles Heller and Lorenzo Pezzani documented the events that followed.⁴¹ As they have shown, the rate of migrant deaths increased immediately when Mare Nostrum ended.

The most dramatic part of the report addresses the so-called ‘black week’ in April 2015: more than 1,200 adults and children drowned in the maritime space between Libya and Sicily. With no systematic rescue mission in place, and, indeed, no such

³⁴ Compare A. Houston, *Report of the Expert Panel on Asylum Seekers*, 14 August 2012, available at <http://apo.org.au/node/30608>.

³⁵ *European Commission, Frontex Joint Operation ‘Triton’ – Concerted Efforts for Managing Migrator Flows in the Central Mediterranean*, available at http://europa.eu/rapid/press-release_MEMO-14-609_en.htm.

³⁶ Letter by Klaus Rösler, Frontex Director of Operations Division, 25 November 2014 (on file with the author).

³⁷ *Ibid.*

³⁸ Human Rights Watch, *EU: Intolerable Inaction Costs Lives at Sea*, 15 April 2015, available at www.hrw.org/news/2015/04/15/eu-intolerable-inaction-costs-lives-sea.

³⁹ C. Heller and L. Pezzani, ‘Death by Rescue’ (2016), available at <https://deathbyrescue.org/report/narrative/>.

⁴⁰ L. Davies and A. Neslen, *Italy: End of Ongoing Sea Rescue Mission ‘Puts Thousands at Risk’*, *The Guardian* (31 October 2014), available at www.theguardian.com/world/2014/oct/31/italy-sea-mission-thousands-risk.

⁴¹ Heller and Pezzani, *supra* note 39.

activity in Libya's SAR zone, the Italian authorities relied upon private seafarers. But these were untrained and ill equipped. As the report describes, private vessels initiated rescue operations on the high seas but tragically ended up contributing to the loss of life. The carnage had to be an utterly foreseeable result for several key figures, chiefly EU Commissioner Cecilia Malmström. Continuing Mare Nostrum or initiating a similar operation with a mandate to initiate rescue would almost certainly have prevented at least some of these deaths. As one journalist said a few years later, while in a volunteer rescue boat in the same region: '*L'idée, c'est d'abord de les empêcher de se noyer parce que nous sommes dans un trou noir géographique – et je dirais politique – où dans cette région-là, il n'y a pas de bateaux.*'⁴²

But how does this case become part of a larger genealogy of 'legal black holes'? To answer, one must ask: what law, if any, were these people protected by? What law, if any, was violated when the decision was made to ignore their imminent deaths? Even with the knowledge that Triton's limited mandate would spell the death of numerous innocent people, it seems to me that neither Italy nor the EU had a positive legal duty to continue Mare Nostrum (strictly as a matter of *lex lata*). Outside their territorial jurisdiction, coastal states are, in certain circumstances, bound to provide 'adequate and effective' SAR service. This rule is found in the United Nations Convention on the Law of the Sea,⁴³ the Safety of Life at Sea Convention⁴⁴ and the Search and Rescue Convention.⁴⁵ Rescue must be provided 'regardless of the nationality or status' of the person in distress' or the circumstances in which that person is found.'⁴⁶

Perhaps the intent of these treaties was to create a system to rescue all vessels in distress. Regardless of this intent, the system does not realize such a purpose. To start, launching Mare Nostrum was not the fulfilment of a legal duty. It was a discretionary response to the increasing perils that developed in the relevant maritime space.⁴⁷ When Triton began, the dynamic at sea changed. As 'Death by Rescue' explains, at this stage, Italy tried to help private actors fulfil their roles as saviours and, indeed, used them as the 'privatized' arms of its own aborted rescue initiative. But the disaster that unfolded does not point to a human rights violation by any of the European actors involved. Libya, the state these people embarked from, had a *de jure* duty to rescue migrants in its SAR zone, but, at this post-intervention stage, there was no state to speak of, as a matter of international law.⁴⁸

⁴² A. Lattier, 'Migrants en Méditerranée: la Solution, Aller Sur Zone et Empêcher Les Noyades', *Radio France International*, 6 March 2016, available at www.rfi.fr/emission/20160306-migration-mediterranee-jean-paul-mari-empêcher-noyades.

⁴³ Convention on the Law of the Sea 1982, 1833 UNTS 3 (UNCLOS), Art. 98 (emphasis added).

⁴⁴ International Convention for the Safety of Life at Sea (SOLAS) 1974, 1184 UNTS 18961, Regulation 15.

⁴⁵ SAR Convention, *supra* note 31, Art. 2.1.1.

⁴⁶ *Ibid.*, Art. 2.1.10.

⁴⁷ In Hohfeldian terms, launching Mare Nostrum was a privilege, not a duty. The 'jural correlative' of a privilege is of course 'no-right', and, indeed, the migrants in the relevant maritime space did not have a right to enjoy the assistance of Mare Nostrum. See Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23(1) *Yale Law Journal (YLJ)* (1913) 16.

⁴⁸ Particularly, the ongoing question is whether the internationally recognized government enjoys effective control. See, e.g., D. Akande, 'Recognition of Libyan National Transitional Council as Government

To be sure, human rights duties are understood to include extraterritorial obligations.⁴⁹ Thus, it is not because the drowned migrants were outside of state territory that they were rendered rightless. Back in February 2012, the ECtHR extended human rights duties to migrants intercepted on the high seas. In *Hirsi v. Italy*, the Court found that, by pushing back a migrant vessel that left Libya, Italy had violated its obligations under the European Convention on Human Rights (ECHR).⁵⁰ Several other ECtHR judgments buttress the same principle. *Hirsi* includes an important discussion of jurisdiction. Only because the migrant boat had come under the control of Italian agents were the duties under the ECHR triggered.⁵¹ This control, the Court explains, can be established either *de facto* (for example, by the presence of Italian coast guard officials) or *de jure* (for example, by reference to an Italian flag on the intercepting boat). In any case, for extraterritorial jurisdiction to kick in, a state or its representatives must first gain control over the individual migrant.

Under the law of the sea, if a boat is deemed to be in distress, a duty of rescue can arise without previously establishing the control required for jurisdiction under international human rights law.⁵² In such cases, rescue puts migrants in the control of the saving state (or on a private vessel registered under a state's flag) and, thus, within that state's human rights jurisdiction. Rescued migrants will also have a right of *non-refoulement*. If they seek asylum, they will not be deportable to where they will suffer persecution or inhuman treatment, and the state will be obliged to process their asylum requests. This point of encounter is crucial in understanding international law more generally.⁵³

But one cannot stop there. Scholars must also think of the spaces in which no such contact is made and in which rights cannot be invoked.⁵⁴ We must consider the doctrinal infrastructure that makes or breaks opportunities to initiate such contact, and

of Libya', *EJIL: Talk!* (23 July 2011), available at www.ejiltalk.org/recognition-of-libyan-national-transitional-council-as-government-of-libya/. R. Hall, 'Libya Now Has Three Governments, None of Which Can Actually Govern', *Public Radio International*, 31 March 2016, available at www.pri.org/stories/2016-03-31/libya-now-has-three-governments-none-which-can-actually-govern.

⁴⁹ M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011). The USA is nearly alone in believing otherwise. Bureau of Public Affairs Department of State, Office of Electronic Information, Department of State, *Opening Statement by Matthew Waxman on the Report Concerning the International Covenant on Civil and Political Rights (ICCPR)*, 17 July 2006, available at <https://2001-2009.state.gov/g/drl/rls/70392.htm>.

⁵⁰ ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012.

⁵¹ See illuminating discussions in Wilde, 'The Unintended Consequences of Expanding Migrant Rights Protections', 111 *AJIL Unbound* (2017) 487; Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To', 25 *Leiden Journal of International Law* (2012) 857.

⁵² Under UNCLOS, *supra* note 43, Art. 98, states shall require masters of ship to render assistance when they are 'informed' of a need of such assistance.

⁵³ Besson, *supra* note 51, arguing that 'jurisdiction qua normative relationship between subjects and authorities actually captures the core of what human rights are about qua normative relationships between right-holders and institutions as duty-bearers'. I. Mann, *Humanity at Sea* (2016), at 211–226.

⁵⁴ C. Thomas, *Encounters and Their Consequences: A Review of Itamar Mann's 'Humanity at Sea'*, *EJIL: Talk!* (3 August 2017), available at www.ejiltalk.org/encounters-and-their-consequences-a-review-of-itamar-manns-humanity-at-sea/.

that structures the opportunities migrants have, or do not have, to present human rights claims. The migrants that the 'Death by Rescue' report tells us about are beyond Italy's SAR zone. Since Italy is the host state that other European forces participating in Operation Triton are formally assisting, these are the migrants that have not clearly come within the jurisdiction of any European actor. Therefore, they do not enjoy the protection granted by the human rights obligations of European states – territorial or extraterritorial. As Samantha Besson has explained, '[w]ithout jurisdiction, there are no human rights applicable and hence no duties, and there can be no acts or omissions that would violate those duties that can be attributed to a state and a fortiori no potential responsibility of the state for violating those duties later on'.⁵⁵ At the same time, these migrants are losing their lives due to jurisdictional rules and, therefore, can reasonably be described as rightless.

When *Hirsi* came out, human rights advocates celebrated the judgment as historic, presumably not only because law was applied but also because of a perceived moral and political triumph. For the Court to step so boldly beyond territorial jurisdiction was thought of as an advancement towards universal justice. But when a court defines the limits of human rights jurisdiction – even relatively expansive ones such as those articulated in *Hirsi* – it may invite states to ignore violence beyond their jurisdiction.⁵⁶ This is precisely the kind of violence that appeared during the 'black week'. Such violence can in principle be observed within the SAR zone of a state that does not enjoy effective control and, therefore, is not really a state. It can also be observed on the high seas beyond the SAR zones of all states. Violence beyond the jurisdiction of any authority is what a maritime legal black hole is about.

To be sure, serious attempts have been made to mount a legal argument according to which there is no 'legal black hole'.⁵⁷ In fact, states do have a positive legal duty to either conduct rescue operations outside of their SAR zones or to prevent migrants from finding themselves in dangerous waters to begin with. I am not against 'filling the gap'. I just believe that the gap is deep and structural. Generalizing from this case study, the recent events of the so-called 'migration crisis' suggest that some migrants are not protected by international human rights law. These are migrants who are beyond every state's jurisdiction (whether on the high seas or, as is often the case, in the SAR zone of another disintegrated state) – migrants whose loss of life is not due to a *de facto* violation of an existing *de jure* duty. They have fallen into a maritime legal black hole. But maritime legal black holes are qualitatively different from the two other kinds of legal black holes described above.

⁵⁵ Besson, *supra* note 51, at 867.

⁵⁶ Wilde, *supra* note 51.

⁵⁷ Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea', 23 *IJRL* (2011) 174.

4 A Typology of Legal Black Holes

Compare the three types of legal black holes: one that appeared in the national security context ('the counterterrorism legacy'); another that emerged in the context of extraterritorial migrant detention ('the migration detention legacy') and, finally, maritime legal black holes. Each of these encapsulates different implicit theoretical assumptions.

A *The Counterterrorism Legacy: Violation as Plan*

Lord Steyn, at his time, described the black hole as resulting from emergency measures. As he explained, such measures posed a threat to the rule of law by their very nature: '[I]t is a recurring theme in history that in times of war, armed conflict, or perceived national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis.'⁵⁸ In this lecture, the trope of the legal black hole plays the role that the 'state of exception' plays in the work of Nazi jurist Carl Schmitt.⁵⁹ Although Steyn does not invoke Schmitt by name, the underlying theory is unmistakable. The sovereign declares the state of exception at the face of a perceived emergency. The rule of law can be suspended and replaced by executive fiat. Politics is revealed as an existential distinction between friend and enemy. In the post 9/11 period, Steyn is far from being alone in returning – implicitly or explicitly – to Schmitt. The study of Schmitt indeed became a preoccupation of sorts in academic centres in the American northeast, where scholars tried to make sense of what George W. Bush was up to.⁶⁰

Steyn's lecture advanced a defence of liberal democracy, which must limit and cabin the use of the exception within constitutional and human rights principles. Other commentators, notably Bruce Ackerman, advanced their own versions of a fundamentally similar view.⁶¹ For numerous observers in the following years, 'the legal black hole' became synonymous with a particular understanding of rightlessness, which embodied the always-lurking danger of an exception that goes beyond its own necessity and becomes normalized; the danger that liberal democracies may fail to limit an omnipotent executive. Such a failure, it was thought, led to the human rights violations of the Bush era – specifically, the torture and inhumane treatment of detainees. Remember that in this context the US government argued that detainees at Guantánamo Bay were literally rightless; they did not have protected status under the Geneva Conventions and their protocols or under customary international humanitarian law.⁶² International human rights treaties did not apply to them, as they

⁵⁸ Steyn, *supra* note 17, at 1.

⁵⁹ C. Schmitt, *The Concept of the Political* (1996).

⁶⁰ See, e.g., P.W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (2012). It has since resurfaced with the rise of 'populism'. See J.-W. Müller, *What Is Populism?* (2016).

⁶¹ See, e.g., Ackerman, 'The Emergency Constitution', 113 *YLJ* (2004) 1029.

⁶² Geneva Conventions 1949, 1125 UNTS 3; Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 6 August 1977, 1125 UNTS 3; Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 6 August 1977, 1125 UNTS 609.

were ostensibly located outside of US jurisdiction. And the US Constitution also did not grant them rights extraterritorially.

For Steyn and an entire group of liberal commentators, the legal black hole was not only about pointing out a right without an enforceable remedy, but it was also about making a case for changing the USA's policies at Guantánamo Bay and ensuring the detainees had their rights. It was precisely the conviction that rightlessness should be eradicated. As Ackerman explains, because the possibility of a 'downward spiral' of exceptional encroachment upon rights, doctrinal innovation was needed.⁶³ Underlying this view is the premise that rightlessness can violate the deep-seated values ingrained in law even when the sovereign (the US government) claims that it is legal. Rightlessness, in other words, can and should be addressed through law.

In a 2005 article and, more recently, in an important book, Fleur Johns responded to this body of commentary with an alternative suggestion.⁶⁴ Rather than an instance of sovereign political decision that would have to be reined in by law, Johns explained, Guantánamo's 'legal black hole' was constructed by law and saturated with law. Far from the Schmittian account of a state of exception, Guantánamo became possible only due to 'the annihilation of the exception'. Calling attention to the meticulous legal ordering of the detention centre, Johns demonstrates that this environment left no room for political decision among its actors. It was not a space for the boundless freedom associated with the Schmittian sovereign. A more accurate account of the experience of US personnel at Guantánamo Bay was one of rule following. The material she uses to provide evidence of this claim is instructive. Note how she interprets a press briefing by US Secretary of the Navy Gordon England on 23 June 2004:

[T]he experience of decision-making reported by figures such as Secretary England seems, to a significant degree, to be one of disavowing prerogative power. In England's account, it is as though his job were more a matter of implementation than decision ... it is suggestive of efforts to construct a series of normatively airtight spaces in which the prospect of agonising over an impossible decision may be delimited and, wherever possible, avoided. As such, the jurisdiction created at Guantánamo Bay is constituted, in Schmittian terms, in the liberal register of the norm (indeed, an overdetermined version thereof).⁶⁵

These observations lead Johns to conclude that 'the plight of the Guantánamo Bay detainees is less an outcome of law's suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities'. The detention camps, she says, 'are spaces where law and liberal proceduralism speak and operate *in excess*'.⁶⁶ Remember that for Schmitt the state of exception is a moment of heightened discretion. The latter view is also reflected in the words of liberals such as Steyn, Ackerman and others – all of whom argue in some way for counterbalancing such executive discretion. Johns,

⁶³ Ackerman, *supra* note 61.

⁶⁴ Johns, 'Guantánamo Bay and the Annihilation of the Exception', 16 *EJIL* (2005) 613; Johns, *supra* note 6.

⁶⁵ Johns, *supra* note 6, at 94.

⁶⁶ *Ibid.*, at 92.

on the other hand, thinks Guantánamo realizes Grant Gilmore's famous vision of an inferno: '[I]n hell there will be nothing but law, and due process will be meticulously observed.'⁶⁷

The annihilation of political discretion is, for Johns, what made the defilement of detainees at Guantánamo Bay possible. This occurred through a kind of transformation of the personalities of agents at Guantánamo Bay. Working in this detention centre had altered the personal composition of employees. Such transformation ended up subsuming any sense of subjectivity or autonomy under the need to implement law and regulation: '[T]he legal regime of Guantánamo Bay is dedicated to producing experiences of having *no option, no doubt and no responsibility*.'⁶⁸ The analysis here recalls Hannah Arendt's classical work on Adolph Eichmann.⁶⁹ Steyn's and Johns' accounts may seem like they could not be further apart. They would therefore have to constitute two separate categories in a typology of legal black holes. One is of the sovereign exception (Steyn and his colleagues) and the other is about the annihilation of the exception (Johns). From the present perspective, however, they share an important tacit affinity.

The law that Johns focuses on was generated by the executive branch. She gives particular attention to the legal construction of the facility at Guantánamo Bay prior to the US Supreme Court rulings of June 2004.⁷⁰ The latter rulings, which were much commented upon, brought about a series of adjustments to detention at Guantánamo, imposing on the facility certain constitutional requirements.⁷¹ But going back to the formative period before the US Supreme Court weighed in, it was possible for the president to realize the vision of a Schmittian exception, while imposing 'airtight' bureaucratic requirements on individual agents of the executive branch. The 2001 military order issued by the US Department of Defense, which initiated wartime detention at Guantánamo Bay, was based on the national emergency proclamation of 14 September 2001.⁷² It thus corresponds to Steyn's concerns. This does not mean that Johns is wrong in her argument that personnel at Guantánamo Bay experienced a legalization of personal decision-making. These two conceptions – both within the counterterrorism legacy – are ultimately flip sides of the same coin.

Importantly for the present purposes, both accounts of Guantánamo Bay's legal black hole rely, either explicitly (Steyn) or implicitly (Johns), on some notion of sovereign intentionality. Within this subcategory, the legal black hole is in some ways generated according to a plan. Below it will become clear that this planned aspect

⁶⁷ G. Gilmore, *The Ages of American Law* (Storrs Lectures edn, 1979), at 110.

⁶⁸ Johns, *supra* note 6, at 74.

⁶⁹ Arendt's Eichmann did not think of the fuhrer as a Schmittian sovereign declaring an exceptional condition but, rather, as the source of rules that were simply to be followed. H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (2006).

⁷⁰ *Rasul v. Bush*, 542 US 466 (2004); *Hamdi v. Rumsfeld*, 542 US 507 (2004).

⁷¹ Johns, *supra* note 6, at 71.

⁷² 'George W. Bush: Proclamation 7463 – Declaration of National Emergency by Reason of Certain Terrorist Attacks', *American Presidency Project*, 14 September 2001, available at www.presidency.ucsb.edu/ws/?pid=61760.

makes it possible for us to criticize the black holes of the counterterrorism legacy from a legal perspective as violations of international law. This will not be similarly possible with maritime legal black holes. For Steyn and a whole genre of attempts to cabin the state of exception within the rule of law, the sovereign is imagined – following Schmitt – as a potentially omnipotent subject. Its position of dominance allows the sovereign to identify and manipulate the emergency condition and devour the rule of law. The sovereign can control political power and intentionally determines how to wield it, unfettered by *legal strictures*. It is because of these potentially violent ‘dragon-filled’ characteristics of sovereignty that democratic constituencies supporting the rule of law must be so adamant about delimiting the exception.⁷³ But the subversion of law through emergency measures in some way reflects the pursuit of a plan. And it can still be convincingly understood precisely as that – a subversion of law.

Johns’ intervention suggests a rather different kind of intentionality. This is the intentionality of the multiple operatives that work to support a legal system from behind the scenes. Imagine that government lawyers in the executive branch are doing their work to create opportunities for their clients. Rather than identifying an existential threat, what this requires is nimble legal–administrative weaving. The detention facility at Guantánamo Bay is an example of such design.⁷⁴ It was created, according to this view, not by ‘the sovereign’ but, rather, by a multitude of effective executive branch bureaucrats. These lawyers are no different from colleagues in the private sector searching for a safe tax haven. The legal skill of those responsible for the regime at Guantánamo was deep enough not only to identify the benefit of offshore detention but also, as Johns tells us, to know how to design the place so as to terminate any unwanted discretion.

The important point, however, is that whether a legal black hole results from sovereign decision or from juristic craftsmanship, it is still premeditated. Relatedly, the claim that what happens in the legal black hole is a violation of law remains available. Hence, a significant part of the opposition to rightlessness in Guantánamo – both in the USA and outside of the country – was articulated through appeals to law.⁷⁵ These ultimately helped enforce some limited rights for detainees at Guantánamo Bay. Remember that, in this context, the US government initially made the literal claim that detainees at Guantánamo Bay were rightless. Yet the doctrinal defences that the US government put forth at various stages remained contested and were not generally accepted outside the USA, and some were subsequently disavowed. Such possibility of contestation within the bounds of law will also be demonstrable in the migration detention legacy (though in a somewhat muted way). It will be nearly absent in the context of maritime legal black holes. At question is a continuum between the most

⁷³ Johns, *supra* note 6, at 77.

⁷⁴ For an expanded account to the deployment of legal expertise, see D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (2016).

⁷⁵ As documented and exemplified by David Cole. See D. Cole, *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law* (2016).

exceptional forms of rightlessness (the counterterrorism legacy) and the most structural ones (the legacy of maritime legal black holes). The migration detention legacy serves as a kind of intermediate.

B The Migration Detention Legacy: Violation as Byproduct

Both Steyn and Johns downplay Guantánamo's history as a migrant detention centre. But this history should be central to a typology of contemporary rightlessness. In the context of this second legacy, the degradation of humans was first made possible in the 1990s, when offshore detention in Guantánamo became an instrument of *refoulement*. When someone is sent to where they may suffer persecution or absolutely prohibited treatment, violating preemptory norms of international law, their rights are annulled. In the context of Australian offshore detention on Pacific islands, another aspect of rightlessness was revealed: the indefinite holding of people in detention in conditions that sometimes amounted to torture or inhuman or degrading treatment and possibly constituted crimes against humanity.⁷⁶

Like the rightlessness exposed in the counterterrorism legacy, these instances of rightlessness can also be framed as violations of international law. But there are several important differences between the legacies. Most importantly, in the migration detention legacy, rather than being based on an intentional plan, violations appear to occur 'merely' as a byproduct of systemic aspects of international law and politics; the determination that the world is divided into separate states (in a context of radical inequality in the distribution of wealth). These conditions made it possible for the offshoring and privatizing of migration detention to present itself as legally permissible, as it generally still is within the Australian domestic legal system. A characteristic explanation was given by Australia's then minister Amanda Vanstone: '[W]e can't make rules in relation to facilities in other countries. ... Nauru is another country.'⁷⁷ A similar position was taken by the Australian courts.⁷⁸

To be fair, Johns does mention Guantánamo's history as a facility for asylum seekers and migrants. Yet her narrative follows Steyn's and others' in that migration detention is at best secondary to the counterterrorism context. This is particularly remarkable since she explains that, rather than understanding Guantánamo as being outside of normal legality, we must think of it as continuous with criminal incarceration.⁷⁹ Why not take a better look at it as continuous with administrative detention in the migration context? I believe the migration detention legacy is relatively absent from both

⁷⁶ See, e.g., 'Communiqué to the Office of the Prosecutor', *supra* note 28; R. Hamilton, 'Australia's Refugee Policy Is a Crime against Humanity', *Foreign Policy* (23 February 2017), available at <http://foreignpolicy.com/2017/02/23/australias-refugee-policy-may-be-officially-a-crime-against-humanity/>.

⁷⁷ Dastyari, 'Refugees on Guantanamo Bay: A Blue Print for Australia's "Pacific Solution"?', 79(1) *Australian Quarterly* (2007) 7.

⁷⁸ See, e.g., *Ruddock v. Vadarlis*, [2001] FCA 1329 (Federal Court of Australia).

⁷⁹ See also S. Ackerman, 'Guantánamo Torturer Led Brutal Chicago Regime of Shackling and Confession', *The Guardian* (18 February 2015), available at www.theguardian.com/us-news/2015/feb/18/guantanamo-torture-chicago-police-brutality.

sets of analyses because migrant detention is perceived somehow as less newsworthy than the counterterrorism legacy. This might have to do with migrant detention being seemingly 'less controversial'. Outside of relatively limited advocate circles, border enforcement measures enjoy popular political support in most developed countries. But the determination that migration detention becomes secondary is also due to reasons ingrained in the structure of international law as based on sovereignty. Migration detention, whether solely for deportation purposes or also for 'deterrence', can thus be perceived as necessary to maintain sovereignty.⁸⁰ As Cathryn Costello explains, migration detention has become a banal fact and is perceived as an 'increasingly routine, often automatic' result of border control.⁸¹

Imaginations of sovereignty help maintain the assumption that unauthorized border crossing, even for seeking asylum, is a quasi-criminal act. Of course, this is not the view within the professionalized field of refugee law. Outside of this field, the view remains tenable. Rather than being related to exceptional circumstances, this view is truly embedded into 'normal' international legal orders. As such, taking a close look at migration detention radicalizes and pushes forward Johns' penetrating observations on how certain legal environments trivialize the degradation of humans. It completely fits Johns' theory and takes it to yet another front. Migration detention is an important corollary of counterterrorism detention in what is ultimately one genealogy of rightlessness.

Migration detention seemingly does not carry the 'added weight' that comes with a national security emergency or with questions of guilt and punishment. It does not, in that way, involve the deeds of enemies bent upon 'our' destruction or of 'bad actors' who seek to harm society. Because citizenship ties everyone to a specific state, it is supposedly only expected that unauthorized migrants will find themselves in a kind of legal limbo. Migrant detention is – at least ostensibly – not about a distinction between 'friend' and 'enemy' (whether politically or legally constructed). It is about preserving an even more basic aspect of the modern state, wholly embraced by mainstream liberal legalism: the distinction between citizens and non-citizens.⁸²

When the legal black hole is imagined as a response to a spectacular danger – the 9/11 attacks were nothing if not a spectacle – it becomes possible to turn a blind eye to a far more banal legal black hole: the one that migrants fall into.⁸³ When the sovereign is attacked, it acts steadfastly to ensure its security and suspends the law. As Johns tells us, such suspension is itself made possible only thanks to an oversaturation of legality. But what if the law is regularly bent to deter 'mixed flows' of unwanted

⁸⁰ Gammeltoft-Hansen and Tan, 'Beyond the Deterrence Paradigm in Global Refugee Policy', 39 *Suffolk Transnational Law Review* (2016) 637.

⁸¹ Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law', 19 *Indiana Journal of Global Legal Studies* (2012) 257, at 258.

⁸² International human rights law accepts this premise and has therefore recently been labeled 'part of the status quo' on migration. See Mégret, 'Transnational Mobility, the International Law of Aliens, and the Origins of Global Migration Law', 111 *AJIL Unbound* (2017) 13, at 13.

⁸³ On 'banality' in this context, see Kalpouzos and Mann, 'Banal Crimes against Humanity: The Case of Asylum Seekers in Greece', 16 *Melbourne Journal of International Law* (2015) 1.

people seeking asylum or simply opportunities to alleviate abject poverty? The result is that migrant detention facilities can be left almost unnoticed within a genealogy of legal black holes.

Within the migration detention legacy, the label ‘legal black hole’ is seldom used. One exception is Ralph Wilde, who did interrelate this second legacy of rightlessness with the counterterrorism legacy in one of his early articles.⁸⁴ Wilde observes the way in which the threat of terrorism was harnessed to proliferate the detention of migrants and asylum seekers globally. This was made possible due to a strategic use of law, both national and international, to skirt jurisdiction over migrants and asylum seekers held in custody. Wilde reads the counterterrorism legacy and the migration detention legacy together, giving each considerable weight – two parts of one transnational history of legal black holes.⁸⁵ This article is consonant with his spirit. As demonstrated above, the exception and its annihilation reflect two aspects of one dynamic, as do the two related ‘legacies’.

Like extraterritorial detention in the counterterrorism legacy, however, the violations of law in the migration detention legacy can be identified and, indeed, have been heavily critiqued. In other words, the normalization or naturalization of abuses in migrant detention is never absolute and never totalized. Certain forms of violence towards migrants in detention have very often been conceived of as rights abuses. United Nations monitors as well as non-governmental organizations have repeatedly and compellingly argued that in many instances offshoring initiatives in the migration context have generated violations of international law.⁸⁶

This remains true if these rights abuses are not usually prevented and are implicitly accepted by powerful actors as normal. In other words, in offshored migrant detention centres, we often have a *de facto* rightlessness (but not *de jure* rightlessness). Consequently, just like in the counterterrorism legacy, a fundamental way of countering rightlessness is invoking international law and calling for its enforcement. Even if rightlessness is in both cases legally constructed, a basic gesture is still available: identify the subjects responsible for the abuse – states, corporations and individuals – and call for their legal accountability. Maritime legal black holes will provide material for a more radical critique of international law, responding to *de jure* rightlessness.

C The Legacy of Maritime Legal Black Holes: Killing by Omission

Is it true that international law does not recognize many of those who have drowned in the Mediterranean since the 2011 Libya intervention as bearers of rights? Surely, one might insist that they will always remain bearers of rights as members of humanity, a familiar argument from the tradition of natural law. As one commentator put it, ‘no human being is without protection under international law ... in every circumstance,

⁸⁴ Wilde, ‘Legal Black Hole: Extraterritorial State Action and International Treaty Law on Civil and Political Rights’, 26 *Michigan Journal of International Law* (2004) 739.

⁸⁵ *Ibid.*, at 740–741.

⁸⁶ For a compilation of the sources, see ‘Communiqué to the Office of the Prosecutor’, *supra* note 28.

every human being has some forms of protection under human rights law'.⁸⁷ But they are rightless inasmuch as every right is defined by having a corresponding duty.⁸⁸

Perhaps the most fundamental of all rights is the right to life. Under Article 6 of the International Covenant on Civil and Political Rights, '[e]very human being has the inherent right to life'.⁸⁹ Under Article 2 of the EU Charter of Fundamental Rights, '[e]veryone has a right to life', and under Article 2 of the ECHR, '[e]veryone's right to life shall be protected by law'.⁹⁰ Whether its authors intended it that way or not, the urgency of the 'Death by Rescue' report stems from demonstrating that this right can be bifurcated from a corresponding duty. People are consequently knowingly left to die *en masse*. This plight must be strictly distinguished from a misfortunate event that cannot be ascribed to human decisions. Perhaps some natural disasters are such events (though that too is contested).⁹¹ The events that have unfolded in the Mediterranean since the 2011 intervention in Libya are far from simply being such unfortunate events. Rather, they can be described as a form of killing by omission (which remains unregulated by law).⁹² Rather than holding the perpetrators legally accountable, law itself must be held morally and politically accountable for this kind of extra-jurisdictional killing.

The maritime legal black holes in which thousands now find their deaths are different in their nature from the black holes of the counterterrorism and the migration detention legacies. Rather than exposing a subject with its own will who acts illegally (whether as a result of a plan or merely a 'byproduct' of background structures and norms), these deaths are consequences of an international legal architecture founded upon sovereignty and human rights. They stem from the way sovereignty and human rights mutually construct jurisdiction, posit jurisdictional limitations and delineate areas where no such jurisdiction exists. We have inherited the twin concepts of sovereignty and human rights based on centuries-long traditions. These principles, however, are not natural. No matter how far removed from the present, they are results of choices. Like other choices, they too have losers. When people lose their lives due to these choices and lack a claim that their rights have been violated, a different black hole is revealed.

⁸⁷ Paust, 'Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions Changing the Laws of War: Do We Need a New Legal Regime after September 11', 79 *Notre Dame Law Review* (2003) 1335, at 1351.

⁸⁸ Hohfeld, *supra* note 47. See also Corbin, 'Rights and Duties', 33 *YLJ* (1923) 501, at 501 (opening his article by saying that the assertion that 'all men are created equal and are endowed by their Creator with certain inalienable rights' may be a good rallying cry but is legally inaccurate).

⁸⁹ ICCPR, *supra* note 30.

⁹⁰ Charter of Fundamental Rights of the European Union, OJ 2012 C 326/02.

⁹¹ Among many others, see P. Blaikie *et al.*, *At Risk: Natural Hazards, People's Vulnerability and Disasters* (2014), at 4: 'The crucial point of understanding why disasters happen is that it is not only natural events that cause them.'

⁹² I. Mann, 'Killing by Omission', *EJIL: Talk!* (20 April 2016), available at www.ejiltalk.org/killing-by-omission/.

Maritime legal black holes stem from international law's distribution of public and private duties among its different actors.⁹³ In common law countries, one of the first things law students learn is that law imposes no duties of rescue upon individuals *qua* individuals. The classical jurisprudence on this includes comically macabre examples. A characteristic hypothetical describes a bystander witnessing a drowning baby.⁹⁴ Law professors often use the initially astonishing absence of a duty of rescue to illustrate a basic tenet of legal positivism: the distinction between legal and moral prescription (or 'the separation thesis').⁹⁵ Of course, there are important exceptions to the general absence of a duty of rescue. The basic point nevertheless stands: law does not impose a general duty of rescue. Law does not always follow moral prescription. The absence of a duty of rescue, of course, is not uniform across the comparative law terrain. In civil law traditions, we typically find criminal and/or tort provisions penalizing certain failures to rescue. Upon scratching the surface, however, one discovers that duties of rescue in civil law countries are also not very robust.⁹⁶ They are wrinkles overlaying the fundamental presumption: individuals are not directly responsible for each other's security.

As Arthur Ripstein has argued, the absence of a duty of rescue is intimately related to the very basis of sovereignty in Western political thought – that is, to the social contract tradition.⁹⁷ By granting the responsibility for security to a public entity, law 'relieves' individuals from direct mutual responsibility, opening a space for private life. The dominant understanding of international human rights law redoubles this structure. It relies on states as both the enforcers of law and the sources of law within their jurisdictions – territorial or personal. More rarely acknowledged is the fact that travellers on the earth's oceans and seas have a legal responsibility to carry out a duty of rescue. The captain of a ship flying its flag is required 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'.⁹⁸ This is not exclusively the case in a state's territorial waters. Here, states also are still required to provide assistance to vessels in distress. It is also not exclusively true in a state's SAR zone (which may or may not be different from its territorial waters). However, the fundamental tenet of law, according to which the responsibility for security is ultimately allocated to public authority, does not hold on the high seas or in the SAR zone of a collapsed state such as Libya. Private vessels are required to respond to each

⁹³ See, e.g., Aalberts and Gammeltoft-Hansen, 'Sovereignty at Sea: The Law and Politics of Saving Lives in the *Mare Liberum*', 17 *Journal of International Relations and Development* (2014) 439.

⁹⁴ See, e.g., Franklin and Ploeger, 'Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children', 40 *Santa Clara Law Review* (1999) 991.

⁹⁵ H.L.A. Hart, *The Concept of Law* (2012), at 268.

⁹⁶ Feldbrugge, 'Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue', 14 *American Journal of Comparative Law* (1965) 630.

⁹⁷ Ripstein, 'The Division of Responsibility and the Law of Tort', 72 *Fordham Law Review* (2004) 1811.

⁹⁸ UNCLOS, *supra* note 43, Art. 98(1); SOLAS, *supra* note 44, ch. V, Regulations 10(a), 33. This entails a positive obligation of flag states to adopt domestic legislation that imposes penalties on shipmasters who ignore or fail to provide assistance (even if at times this obligation is not implemented).

other's signals of distress. In the SAR zone of a collapsed state, there is a lacuna in responsibility.

Stepping out of sovereignty and into maritime commons, the construction of relations between private and public authority transforms.⁹⁹ Law defines quite differently the ways in which persons are implicated by each other's claim upon life. A ship's flag carries significant legal consequences, seemingly anchoring the ship back to a terrestrial, state-centred, legal order: a 'floating territory'.¹⁰⁰ Yet by imposing mutual duties of security upon individuals, law is radically privatized at sea. While it is illegal for a vessel to travel the seas without a flag, engaging in such illegality cannot relieve a ship from the obligation to carry out a duty of rescue. Against the backdrop of this conceptual legal architecture, the events described in the 'Death by Rescue' report provide an invaluable insight. They reflect how this modern legal division of labour is put under pressure in the context of the contemporary 'refugee crisis'. What happens to the legal ordering of the sea when one sovereign disintegrates? This is precisely what happened to Libya after the 2011 intervention. With Libya being, until then, a close partner of Italy's in border enforcement, the result was that the maritime border was opened. That desperate populations spilled into the Mediterranean was an entirely foreseeable outcome.

Rather than being declared as states of exception, or resulting from a meticulous legal design of exceptional spaces, the background conditions constructing the maritime legal black holes normally go without saying.¹⁰¹ The duty of rescue at sea, and its limitation to vessels in the vicinity of a vessel in distress, was solidified back in the 17th century. Like Johns' black hole, maritime legal black holes are saturated by law. The law of the sea, human rights law and other sources of international law construct this black hole. But this law is not put forth to bypass other law as a matter of a plan, whether 'sovereign' or merely 'bureaucratic'. It is law that is experienced as if it had always been in place and as the condition for the existence of rights, as they have come to be understood in a Western international legal tradition, stemming from closed polities. It is for this reason that it becomes so difficult – indeed, impossible – to argue that drowning in the high seas or in the SAR zone of a state that has collapsed, in circumstances when no other actor is present, is a violation of law. The laudable efforts of some lawyers to do so too often risk mixing up *lex lata* and *lex ferenda*, choosing an aspirational analysis of law that cannot be enforced. This is not to eliminate states' agency in generating the crisis we see in the Mediterranean. Against the backdrop of a division of legal labour that allows some to drown legally, states and other actors can employ arrangements that increase or decrease the number of deaths.

⁹⁹ Aalberts and Gammeltoft-Hansen, *supra* note 93.

¹⁰⁰ See, e.g., *S.S. Lotus (Fr. v. Turk.)*, 1927 PCIJ Series A, No. 10: 'These vessels and their crews are answerable only to the law of the flag, a situation which is often described by saying, with more or less accuracy, that these vessels constitute a detached and floating portion of the national territory.'

¹⁰¹ On such unmentioned premises, see Kennedy, *supra* note 74, at 45–46

European member states and their coast guards debate energetically what rescue operations in the Mediterranean are appropriate or required. At the same time, policies that would go directly against background principles of international law seem to be ‘off the wall’ solutions that are therefore also off the table. For example, the ‘safe passage’ proposal coming from several migrant rights advocates – including Heller and Pezzani – has not been taken seriously so far, although it can probably reduce deaths at sea to nearly zero.¹⁰² But these kinds of proposals go against the principles that are held as obvious: states must be able to protect their borders. Granted, there may be some measures that are illegal in the protection of borders. (This is a point made above in the context of the migrant detention legacy). But even when it is foreseeable that failing to save beyond a state’s SAR zone will lead to thousands of deaths, the underlying premise that death can be ignored is not challenged.

Unlike certain aspects of the counterterrorism and migrant detention legacies, a study of maritime legal black holes is not a study of prohibited acts or ill wills. It is a study of the destruction of human life that is a symptom of the international legal system. Killing may truly not happen intentionally. We do not always find the indirect intentions that are revealed in the migration detention legacy, circumventing the law in order to achieve the ‘deterrence’ of migrants. Like maritime legal black holes, the migration detention legacy is also grounded in structural forces. But it also has an aspect of a plan. In maritime legal black holes, killing typically occurs while all involved actors express their dismay, their shame and, indeed, their horror, but they can avoid extending their help.

It is important to stress that none of the above is intended to dismiss the important actions of both state and private actors currently conducting voluntary rescue activities in the Mediterranean. Search for them on social media, and you will find an endless outpouring of images of people being saved. The saved are consistently a much greater number than those who have drowned.¹⁰³ It is important, however, to remember that these rescues are, essentially, charity activities. They go beyond what is required by law. They do not embody a duty corresponding to a right, which is something we do not normally have in the maritime spaces at issue.

The principal differences between the two black hole legacies described above and maritime legal black holes are now readily observable. These can be summarized by two interrelated insights. First, the former categories can be characterized as violations of international law. Maritime legal black holes, in contradistinction, are unique in that they do not result from violations of international law but, rather, generate deaths that stem from the structure of international law. Second, the two former

¹⁰² Heller and Pezzani, *supra* note 39. In that respect, a policy of safe passage will directly refute the common claim according to which rescue operations incentivize dangerous trips and thus increase migrant deaths.

¹⁰³ In 2015, the Italian coast guard’s Maritime Rescue Coordination Centre saved around 150,000 people, while 3,771 deaths were registered. ‘How 150,000 People Were Saved in the Mediterranean’, *IRIN*, 7 January 2016, available at www.irinnews.org/analysis/2016/01/07/how-150000-people-were-saved-mediterranean.

categories are somehow results of intentional legal–political design by identifiable subjects who violate international law (whether overtly or more indirectly). Maritime legal black holes, on the other hand, are unintended consequences of a certain division of labour that international law defines between states and individual actors. They are results of deep-seated conceptions both of sovereignty and of human rights. As explained below, they are also made possible only by conditions of radical global inequality.

5 A Discipline of Black Holes

One might consider the above a rather special set of circumstances too particular to provide interesting insights in the general field of international legal theory. But, as I write these words, the circumstances surrounding Heller and Pezzani’s ‘black week’ are but a small-scale version of a much larger cataclysmic dynamic at play. Suffice it to cite numbers from the International Organization for Migration, according to which in 2015, 3,777 migrants died in the Mediterranean, out of above 1 million arrivals (0.3 per cent); in 2016, 5,079 migrants died out of 363,348 arrivals (1.3 per cent).¹⁰⁴ In other words, the rate of drownings has grown more than fourfold. This suggests that thousands of deaths could have been prevented. Yet thousands enjoyed no protections that would legally require them to be saved. This condition reflects extant law, even under a capacious understanding of extraterritorial human rights obligations.

Identifying maritime legal black holes suggests a specific mode of analysis in international law. This is an analysis engaging with the structure of international law, seeking to reveal the political and moral premises underlying how international law distributes duties of basic protection. Such analysis then illustrates how and why some people have been rendered *de jure* rightless by such premises. Recently, a group of scholars convened to discuss the question: ‘What is global migration law?’¹⁰⁵ My own answer would be that global migration law, among other pursuits, can develop as a field studying the ways in which migrants are being rendered rightless due to various global conditions. This mode of analysis does not aim to replace more traditional modes of international legal scholarship or argumentation. Identifying where law has been violated, as scholars have done elsewhere both in the context of counterterrorism detention and in the context of migrant detention, is just as important. The different genres of analysis are complementary modes of engagement with international law. Pointing out extreme violations of rights should go hand in hand with revealing where the very construction of rights generates rightless populations.

Concretely, in the context of the case study above, this kind of analysis may show how surveillance technologies have allowed developed countries to transform parts

¹⁰⁴ International Organization for Migration, ‘Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079’, 6 January 2017, available at www.iom.int/news/mediterranean-migrant-arrivals-top-363348-2016-deaths-sea-5079.

¹⁰⁵ See symposium opened by Ramji-Nogales and Spiro, ‘Introduction to Symposium on Framing Global Migration Law’, 111 *AJIL Unbound* (2017) 1.

of the Mediterranean into bits of functionally sovereign territory.¹⁰⁶ But because jurisdiction is still based either on territoriality or on control (such as in *Hirsi*), such functional sovereignty is bifurcated from the legal duties that would otherwise come with it. I believe this type of analysis can be employed in many different areas of international law, not only in the context of migration. For example, one can explore the related premises implicit in emerging measures aiming to resettle residents of disappearing Pacific island nations. Why are these more often advanced in managerial language rather than as restitution for an international wrong (or a remedy for a violation of rights)?¹⁰⁷ As Hilary Charlesworth offered a decade and a half ago, we could ‘examine what international law has to offer to the person who wants to pollute the environment or violate human rights’.¹⁰⁸ This suggests a research agenda and perhaps a methodology for international legal scholars: identify legal black holes and locate areas in which law renders humans rightless.

A discipline focused on legal black holes must study rightlessness within a social, economic and political context. From this perspective, one might point out that, while drownings are accepted by international law, they are not caused by international law. That migrants ‘fall’ into maritime legal black holes also results from their own decisions to travel. What are the social, economic and political contexts in which such decisions are made? Confronting maritime legal black holes, migrants may find themselves trading a legal right for a request for charity. They relinquish rights attached to corresponding duties of states that are unwilling or unable to fulfil those duties in a way perceived as minimally satisfactory by their beneficiaries. Contemporary conditions in the world make some of the world’s inhabitants believe that the charity they may or may not enjoy at sea, often times given by volunteer groups, is preferable to *de jure* rights they enjoyed where they came from.¹⁰⁹ What they get when travelling into maritime black holes is the opportunity to call stronger and richer states for help (while taking an enormous risk). With the growing sophistication of maritime border enforcement, states can often choose when they want to bear the burden of duties of rescue and when they do not. A methodology focused on the emergence of legal black holes would have to spend considerable attention on questions about what makes a right tradable for a promise of charity.

Hannah Arendt, in her magnum opus *Origins of Totalitarianism*, made an interesting observation that touches directly upon the notion of rightlessness I aimed to develop here:

¹⁰⁶ See Ben-Yehoyada, ‘“Follow Me, and I Will Make You Fishers of Men”: The Moral and Political Scales of Migration in the Central Mediterranean’, 22 *Journal of the Royal Anthropological Institute* (2016) 183, at 189 (arguing that the ‘The Mediterranean turned – quite practically – into Europe’s massive offshore guest chambers, or collective *diwan*’).

¹⁰⁷ See, e.g., López-Carr and Marter-Kenyon, ‘Human Adaptation: Manage Climate-Induced Resettlement’, 517 *Nature News* (2015) 265.

¹⁰⁸ Charlesworth, ‘International Law: A Discipline of Crisis’, 65 *Modern Law Review* (2002) 377, at 392.

¹⁰⁹ Important examples include the Migrant Offshore Aid Station, Watch the Med and Save the Children.

The best criterion by which to decide whether someone has been forced outside the pale of the law is to ask if he would benefit by committing a crime. If a small burglary is likely to improve his legal position, at least temporarily, one may be sure he has been deprived of human rights ... The same man who was in jail yesterday because of his mere presence in the world, who has no rights whatsoever and lived under the threat of deportation, or who was dispatched without sentence and without trial to some kind of internment because he had tried to work and make a living, may become almost a full-fledged citizens because of a little theft.¹¹⁰

Paraphrasing Arendt's words written during the 20th century interwar period, it can be understood that taking to the sea is the 'best criterion by which to decide whether someone has been forced outside the pale of the law'. We live in a universe in which being *de jure* rightless is sometimes preferable to having *de jure* rights that have no de facto enforcement. At the bottom line, migrants' decisions are the true measure of rightlessness. They allow us – far more than Arendt could do in her time – to observe the extent to which populations have fallen out of the pale of the law on a global scale. If one adopts an orientation towards international legal scholarship focused on identifying black holes, migration can take a central role in international legal scholarship more generally. The legal regime at sea would not 'tempt' rightless populations, if *de jure* rights were somehow de facto enforceable. Rather than meeting any positive legal standard, the latter question of de facto enforcement involves lived realities and distributional consequences. Quite simply, it rests on a demand that people perceive their de jure rights as worth having. Addressing maritime legal black holes is addressing human rights violations from the perspective of those who seek to alleviate the violation of their own human rights, even at the price of giving up rights and very possibly dying.

6 Conclusion

At the opening of *The Black Hole of Empire*, Chatterjee appeals to the astronomical metaphor of the black hole:

In the evolutionary history of stars, the black hole is a theoretical construct ... no communication could possibly take place with an inside observer, if there were one. Scientists do, of course, infer the existence of black holes from observing disks of dust or hot gas near the cores of stars, but no actual black hole has ever been observed so far.¹¹¹

Maritime legal black holes have a somewhat similar status. Migrants who experienced such black holes are either dead or far removed from positions in which they can contribute to theoretical reflection about international law. Yet by tracing the trajectory of the black hole metaphor, one can follow the ways in which their experiences should inform international legal theory. Against this backdrop, it has become apparent that maritime legal black holes are different from those that have emerged in the counter-terrorism and migration detention contexts. Today, maritime legal black holes merit

¹¹⁰ H. Arendt, *The Origins of Totalitarianism* (1951), at 286.

¹¹¹ Chatterjee, *supra* note 8, at 1.

much more sustained attention from international law scholars: not only those interested in migration but also those interested in the foundations of the discipline must try to observe them, albeit if indirectly. This is far from being ‘merely’ an academic curiosity. The relevant characteristics of international law must be understood if concerned citizens of the world are to respond more successfully to the dangers that migrants and refugees face today.