



Counter-hegemonic uses of law in struggles for freedom of movement in the Central Mediterranean

OÑATI SOCIO-LEGAL SERIES VOLUME 14, ISSUE 4 (2024), 1126–1147: INSTITUCIONALIZACIÓN, IRRUPCIÓN Y EL ARRAIGO EN LAS INNOVACIONES DEMOCRÁTICAS

DOI LINK: [HTTPS://DOI.ORG/10.35295/OSLS.IISL.1921](https://doi.org/10.35295/OSLS.IISL.1921)

RECEIVED 10 NOVEMBER 2023, ACCEPTED 28 MAY 2024, VERSION OF RECORD PUBLISHED 30 JULY 2024

KIRI OLIVIA SANTER 

LUCIA GENNARI

Abstract

Law constitutes the architecture of the governance of global mobility. It regulates the irreducible impulse to move, binding people to territories through the institution of citizenship and limiting the possibilities of crossing international borders. Law can also be mobilised to secure the rights of people on the move. In the Mediterranean various actors interact across a densely entangled legal landscape involving the Law of the sea, fundamental rights and asylum, and public law rules granting control and repressive powers to states for border protection and crime prevention. This article asks if – and under which conditions – law can take on counter-hegemonic qualities in the struggles for freedom of movement. It argues that legal interventions that support migrants on the move can be counter-hegemonic if they combine different approaches regarding the legal responsibility of states and when they support migratory claims to enter European territory without focusing only on the issue of international protection.

Key words

Search and Rescue; migration; Central Mediterranean; hegemony; legal interventions; postcolonial justice

Resumen

El derecho constituye la arquitectura de la gobernanza de la movilidad mundial. Regula el impulso irreductible de desplazarse, vinculando a las personas a los territorios mediante la institución de la ciudadanía y limitando las posibilidades de cruzar las fronteras internacionales. El derecho también puede movilizarse para garantizar los derechos de las personas en movimiento. En el Mediterráneo, diversos agentes interactúan en un panorama jurídico densamente enmarañado en el que intervienen el derecho del mar, los derechos fundamentales y el asilo, y las normas de derecho público que otorgan poderes de control y represión a los Estados para la protección de las fronteras y la prevención de la delincuencia. Este artículo se pregunta si -y en qué

condiciones- el derecho puede adoptar cualidades contrahegemónicas en las luchas por la libertad de circulación. Sostiene que las intervenciones jurídicas que apoyan a los migrantes en movimiento pueden ser contrahegemónicas si combinan distintos enfoques sobre la responsabilidad jurídica de los Estados y cuando apoyan las demandas migratorias para entrar en territorio europeo sin centrarse únicamente en la cuestión de la protección internacional.

Palabras clave

Búsqueda y Rescate; migración; Mediterráneo Central; hegemonía; intervenciones legales; justicia poscolonial

Table of contents

1. Introduction	1129
2. Law, hegemony and migration	1132
3. Beyond protection? Postcolonial perspectives on migration and counter-hegemonic globalisation	1134
4. The Mediterranean as a (legal) battleground	1136
5. Counter-hegemonic legal interventions	1138
6. Concluding remarks	1142
References	1143
Case law	1147

1. Introduction

This article revolves around “civil” rescue and migration in the Central Mediterranean in the context of research, activism and legal work. In this context, it asks the question: can—and under which conditions— law take on counter-hegemonic qualities in the struggles for freedom of movement? This is a pressing question because within Search and Rescue activities the legitimacy of rescuers’ actions is often put into question by states that privilege a deterrent approach to migration. However, there is also a broader significance to ask the question of law’s hegemonic qualities in the context of migration given the centrality of states’ right to exclude political outsiders which lies at the core of sovereign self-determination in the current Westphalian order (Achieme 2019, p. 1515). The starting assumption of this text is that law constitutes the architecture of the governance of global mobility. It aims to regulate the irreducible impulse to move, binding people to territories through the institution of citizenship and limiting the possibilities of crossing international borders based on racial and economic criteria. Migration management policies have contributed to the construction of what is referred to as “global apartheid” (Sharma 2020, p. 28), characterised by regimes of racial and economic discrimination and by differential access regimes to “rights, entitlements and life achievements” (*ibid.*). Analytically, we can outline various levels to describe how this differential access takes place: there is first of all a birth lottery, through which citizenship is attributed which, in turn, defines opportunities and entitlements in an unequal way across the globe, due to the way mobility privileges are racially stratified. Then, the few restrictions that can limit states’ rights to exclude non-nationals codified in refugee law and international human rights regime are themselves often severely limited: on the one hand, international protection has been considerably reduced in recent years due to the dominance of the deterrence paradigm, but also international refugee law itself has been criticised for participating in further stratification of the division of access to rights, by reinforcing an (often arbitrary) divide between “legitimate” asylum seekers and “illegitimate” so-called “economic migrants”.

Law can however be seen to play an ambiguous role within this system. On the one hand, the liberal state has—to a certain extent¹—the monopoly on the creation of law, or at least the exclusivity on the legitimate use of coercive means to enforce it. On the other hand, law is traversed by a “double bind” (Morris 2007, p. 367). According to Jacques Derrida (1992), law cannot be equated with justice. Indeed, in many cases law participates in the hindering or reduction of justice. At the same time, it is an instrument or means through which to try to approach justice (Morris 2007, p. 367). Following a Critical Legal Studies tradition, the (liberal) legal order is inherently indeterminate; there is no determinate legal “answer” that can cover all situations of conflict (Trubek 1984, 577) which in turn, cancels out a liberal theory of justice that would have that justice derives from the impartial application of rules within the legal order (Kennedy 1973, p. 351). Relatedly, post-structuralist thought has long denaturalised the Kantian legal tradition whose conception of democratic legitimacy rests on the unity of state and law. The Derridean view of law sees law as a groundless act of force (Derrida 1992), rather than a democratic edifice of rules that serve a transcendental justice.

¹ To some extent, since the creation of laws outside the state is an increasing feature of the globalized world, since the 1980s (see Dann and Eckert 2020).

These few introductory remarks serve to reframe once more the questions around which our article revolves: given how law is central to sovereign rule, and that at the heart of law lies the question of violence, is it possible to imagine strategic uses of law that can participate in the emancipation of migrants, subjects for whom the social contract with the state has been severed or has never existed? Can legal interventions that support migratory struggles ultimately challenge the current Westphalian world order based on the primary and exclusive right of states to exercise territorial sovereignty, i.e., on the power to control entry and inclusion in their territory? Or do they merely reinforce the legitimacy of certain doctrines of legal exclusion by using the “master’s tools”? (Lorde 1984).

It is surely difficult to answer these questions with a clear “yes” or “no”. However, we think that it is possible to think through situations of legal conflict and legal practices that, under specific conditions might further counter-hegemonic struggles “from below” (Santos 2020). To offer some reflections going in this direction, we take the Mediterranean Sea and migration at sea as a starting point from which to reflect on the role of law in struggles for freedom of movement. This is a particularly interesting space to focus on when thinking through the possibilities for counter-hegemonic legal interventions precisely because it is so contested. It is a space in which various actors — migrants, NGO rescuers and state/policing forces— with conflicting objectives interact and it is traversed by legal frameworks that have different logics and objects of governance. In this sense, it can be considered as a transnational plural legal space (Zumbansen 2010).

Here our conception of law emerges from a socio-legal perspective on transnational law: we want to try and analyse the challenge and legal “conflicts” that civil search and rescue of migrants at sea provokes in relation to its messy local manifestation. Because we adopt a critical perspective on practices or uses of law, as opposed to systematically analysing single court proceedings, our definition of what constitutes “law” is plural and transnational: in line with a law and society approach, it is interested in the “actors, norms and processes that are involved in generating, enforcing, adjudicating but also resisting law in a global context” (Zumbansen 2019, p. 917).

For what concerns the issue of rescue precisely, the legal “landscape” of the Mediterranean has been shaped by several court decisions and is regulated by various legal frameworks. When we refer to Search and Rescue in international waters and migration at sea, we first of all need to consider international Law of the sea and human rights law, as well as international laws aimed at combating cross-border crime. Then, the national law of the states where survivors or rescue ships arrive after SAR operations are over, or the domestic law of flag states of the intervening ships or airplanes is also relevant. As a consequence, case law in this field comes both from domestic and international courts and bodies, such as the European Court of Human Rights or the UN treaty bodies.

The clash over which legal framing of migration and rescue at sea should prevail, constitutes a battleground and a site of legal and political struggle. The 2012 European Court of Human Rights (ECHR) *Hirsi Jamaa and others v. Italy* ruling is particularly important in this regard and for analysing the dialectic between law and struggle surrounding the question of migration control in the Central Mediterranean. In this

ruling, the ECHR condemned Italy for transferring to a Libyan patrol boat, Eritrean citizens fleeing from Libya who had previously been rescued in international waters by an Italian military vessel.² In essence, the Court condemned the conduct of the Italian authorities for organising and carrying out the transfer of the survivors to the Libyan vessel, without taking into consideration their individual circumstances. By doing so, the Italian authorities facilitated their return to Libya, the country from which they were fleeing and where the risk of violation of their fundamental rights was obvious and known. The judgment highlighted how material support for acts of refoulement (consisting in this case in the transfer of the shipwrecked persons to the Libyan naval unit) constitutes a violation of the Convention's standards even when the facts take place extraterritorially. In this landmark case, physical contact with migrants rescued at sea was recognised as an element from which the legal responsibility of states could be derived.

In political and policy terms, the response of European countries and institutions to migration by sea has developed in recent years along three lines: the progressive retreat of European assets from migration routes and the practices of non-assistance by maritime rescue coordination centres; the delegation and strengthening of third country authorities in border control and intervention at sea; and the inhibition of civil society activities at sea through diversified practices of criminalisation of rescue (see Carrera and Cortinovis 2019). In the Central Mediterranean more specifically, European states have shifted their migration control practices in the direction of "contactless control" (Moreno-Lax and Giuffré 2017). That is, in the direction of an ever-increasing delegation to third countries of all those activities considered problematic (if not blatantly unlawful), with the aim of avoiding the responsibility that derives from the "physical contact" between migrants and state actors.

In what follows, we first outline how law's material and ideational infrastructure organises hegemonic power in terms of mobility. We then examine how the overlapping of different legal systems in the Mediterranean, combined with the challenge of migration by sea, opens up spaces for reinterpretation of existing norms and thus the possibility of imagining and claiming (new) rights. We argue that legal interventions that support migrants on the move can be counter-hegemonic if they combine different approaches regarding the legal responsibility of states and when they support migrant mobility and freedom of movement without focusing *only* on the issue of international protection. The latter is indeed a precondition to avoid reasserting the problematic division between so-called "legal and illegal" or "political and economic" migrants.

It is the combination of legal practices that support migrants' attempts to enter territories without prior authorisation and migratory movements themselves that challenge States' "right" to exclude non-nationals, that result in a counter-hegemonic challenge. If freedom of movement is a positive right included in different international conventions (see art. 12 of the International Covenant on Civil and Political Rights and art. 13 of the Universal Declaration of Human Rights) and includes the right to leave any state's territory, its counterpart and necessary element for its effective exercise, the right to enter any state's territory, is still the object of legal and practical conflicts. Our reflections are

² In violation of articles 3 (*Prohibition of torture*), 13 (*Right to an effective remedy*) and 4 prot. 4 (*Prohibition of collective expulsion of aliens*) of the European Convention on Human Rights.

based on the analysis of two concrete legal struggles involving the rescue or legal support of migrants in the Central Mediterranean that help concretise this abstract “right” to enter a state’s territory; in the first example, we show how the existing right to life and state obligation to disembark people in a place of safety, transforms the right to be rescued into the right to entry to European territory. In the second example, we see that the right to access an EU country’s territory is a core demand as a form of compensation for the damages suffered after an illegal push-back at sea.

2. Law, hegemony and migration

There are two levels of critique when analysing the ways in which law reproduces and reinforces hegemonic systems of exclusion of people on the move: the more general level, relating to the political theory of sovereignty and modern citizenship, and the more specific level, relating to the current approach to the management of the EU’s external borders, dominated by the paradigm of deterrence. We begin with the first level, the critique of law as a factor in the production of violence and exclusion for the people on the move. Citizenship – as a form of legal membership – shapes and establishes legal hierarchies within communities, clearly defining who belongs to and who is excluded from the state.³ More generally, Derrida (1992, p. 6) defines law in relation to the state as an “authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable”. The fact that he relates law to force does not mean that law is “in the service of force” or vice versa; rather, he emphasises that law has a “founding, justifying and preserving” (Buonamano 1998, p. 170) force. There is a structural relationship between the exclusion of non-citizens, sovereignty, and the construction of the liberal legal system. However, force in this context is not simply about legal exclusion; legal exclusion is intimately linked to force, because people on the move from the “Global South” are often excluded *by force* too. They are forced onto unsafe paths by the restrictive visa regime and the suppression of asylum in embassies and are thus routinely confronted with state-sanctioned force. Law’s connection to violence is obviously mediated by the state, which is not so widely examined in Gramsci’s considerations on hegemony (Buckel and Fischer-Lescano 2009, p. 443). Buckel and Fischer-Lescano’s (*ibid.*) discussion on how to apply Gramscian analysis to the apparatus of law however convincingly shows how the *Weltanschauung*—a particular way of thinking and living—of hegemony, comes to be inscribed in law. For what concerns migration, this *Weltanschauung* and the organisation of citizenship across the world, is codified in the doctrine of the contemporary form of state sovereignty at the heart of which lies the national right to exclude foreigners and non-citizens (Achieme 2019, p. 1515). There are, however, restrictions to this prerogative of the state. The 1951 Geneva Refugee Convention, and more generally the notion of

³ Of course, citizenship also has relevance beyond the strictly legal level: as Ayelet Shachar and Ran Hirschl (2007) compare it to the kind of inheritance one secures when inheriting property at birth. It acts as a multiplier of opportunities, for instance.

asylum⁴, offer the possibility of extending the rights of non-citizens to “territorial admission and political inclusion” (*ibid.*).

If not from the radical perspective that these exceptions don’t inherently challenge the state’s right to exclude or are simply arbitrary in terms of political ethics (Kukathas 2016), their effectiveness has still been criticised on more pragmatic grounds; from a legal perspective, international refugee law for its insufficiency to cover climate change-related displacement for example (see McAdam 2021, p. 836). Some critical perspectives on governmentality emphasise how it creates an artificial distinction between “political” and “economic” migrants, excluding many from protection and access to territory (El-Enany 2008) despite the fact that the reasons for displacement may be political and/or economic (Atak and Crépeau 2021). Many people, therefore, do not fall under the strict 1951 definition, particularly when they are fleeing for reasons other than persecutions based on race, religion, nationality or membership of a “social group”. They may also be excluded because of not having yet crossed an international border.⁵

Law provides states with the ideational and material infrastructure to stabilise and enforce ideas of “legitimate” membership in the political community, and at the same time can constitute a “veil” that obscures hegemonic relations between states and people within society. For instance, through the power of universalisation and standardisation (Buckel and Fischer-Lescano 2009, p. 447) states affirm the universality of human rights while at the same time constructing systems in which access to justice is unequal and is limited by power relations. This is particularly true with regards to people on the move: as Hannah Arendt (1951) pointed out, a condition of rightlessness occurs when people detach themselves from a political community. The entire critique of liberal rights does not need to be rehearsed here but the limits of law’s emancipatory potential have been pointed out from Marx to Critical Legal Studies (Kennedy 2002). Individual (human) rights have been criticised for having become an integral part of modern ideology (Douzinas 2000), and of the doctrine of liberal, enlightened democratic states (that continue to propagate violence, sometimes in the name of human rights). They are seen as individualising and depoliticising. Here however, we are not developing a philosophy of law or developing a systematic critique of (liberal) rights, but we rather want to think about the significance of legal practices, that to a certain extent translate the social claim of access to territory, into the language of rights.

⁴ Asylum and refugee status are not the same thing, although they are related. The latter refers to the content of protection as defined in the 1951 Refugee Convention. In this sense, the notion of asylum is broader and predates the UN regime on human rights and international protection that developed after World War II. Costello *et al.* argue that the progressive replacement of the term “asylum” with “international protection” in regional jurisdictions such as the EU, is a way of limiting the meaning of asylum to “refugees within the meaning of the Refugee Convention” (see Gil-Bazo and Guild 2021, p. 870).

⁵ Other criticisms of law’s participation in exclusion have focused on the institutionalization of law as practice, but since this section is focused on theorising how law constructs mobility privileges and insider/outside status. We can then consider how institutional agents apply the hegemonic ideas of insider/outside through their work within the legal apparatus. For instance, some theorists have described the “culture of lack of credibility” (Affolter 2022) in asylum administrations, which leads to the questionable rejection of many applications. Another current of criticism looks at the depoliticizing force of humanitarian reason, which has turned asylum seekers into sufferers rather than rights-bearers (Fassin 2005). Thus, legal and administrative systems for implementing protection measures for would-be refugees are considered to reproduce - by their nature and through their functioning - violence and exclusion.

Law—to which rights also belong, even though with an ambiguous status—cannot be reduced to its properties of domination. There is in it a paradox, well indicated by Derrida's conception of law as inhabited by a double bind (Morris 2007): the promise of justice it conveys which exists alongside its material, everyday and procedural functioning. Some authors have claimed that rights can also take on a distinctly political character when they are claimed and asserted, pointing out that minorities or other subalterns may not have a lot of tools at their disposal to assert their claims. Then, they can become an instrument that challenges that order, for example to include subjects that were not originally included in what Rancière (2010) calls the regime of the visible; the regime that determines the distribution of rules in a community, that establish who belongs, the "frame within which we see something as given" (Rancière 2004, p. 304). In this understanding of rights, subjects that have been excluded from a sphere of the social and political, can claim their right to appear in the regime of the sensible by rupturing the order on the basis of their irreducible freedom and equality (McLoughlin 2016, p. 315).⁶

The gap between law as power and law as meaning (Cover 1983) leaves an interstice, a space that can be occupied by progressive claims. Seyla Benhabib and Nishin Nathwani (2021, p. 131) invoke a space of "jurisgenerative politics", calling for the appropriation of law or its language to expand the protection and agency of those who lack them. For them, law's non-fixity or otherwise formulated, the fact that law does not have a "monopoly on the spectrum of its own possible meanings in the social world" (*ibid.*, 131–132) means that with every reinterpretation or seizing of the law in political struggles, there is a possibility to shine light on the situation in which they are applied. We concede that, following a more Gramscian perspective, effective or new regime of rights cannot be the apotheosis of emancipation for people on the move. Indeed, the emancipatory promise of rights will necessarily be limited if they do not address the accumulation needs of the capitalist state (Santos 2020, 525). Therefore, our argument is not completely focused on the need to codify new rights even though we see rights as a possible means to advance the struggles of migrants. The challenge that migratory movements pose to territorial sovereignty combined with legal practices that support people on the move to access territories of the global North, has counter-hegemonic potential. These legal interventions can lead to a concretisation of a right to enter European territory.

3. Beyond protection? Postcolonial perspectives on migration and counter-hegemonic globalisation

The notion of the generative politics of law or jurisgenerative politics needs to be explored in more detail. From our perspective, the idea of combining law with political struggle does not in itself presuppose emancipatory potential. In fact, Benhabib and Nathwani also argue that jurisgenerative politics offers no guarantees since "law" can also limit such emancipatory possibilities. However, as already pointed out, our claim is that for what concerns struggles in migration, the use of law can only take on counter-hegemonic qualities if it used to undermine the state's unquestioned right to exclude political strangers. Because this right is precisely a foundational aspect of the international world order, counter-hegemonic usages of law ultimately are difficult to

⁶Rancière (2004) calls this rupture of the sensible "dissensus".

carry out in practice. They necessarily involve alliance building and, in our case, the active recognition that migratory movements foreground social change and need to be accompanied by the multiplication of levels of political intervention and approaches to accountability.

To substantiate our argument, we build on Tendayi Achiume's (2019) postcolonial critique of the post-colonial world order, in which she questions the sovereign's right to exclude non-citizens. She follows the fundamental work of TWAIL⁷ scholars, who see international law as key in maintaining a relationship of subordination between First and Third World peoples.⁸ International law was not only born out of the encounter between coloniser and colonised (Anghie 2004), but it also crystallised the asymmetrical power relations during the transition from the former to the present neo-colonial empire. Achiume reminds that Third and First World peoples are bound by a common history, in which they were co-constituted in a relationship of inequality that still exists today (Amighetti and Nuti 2016). For Achiume (2019, p. 1515) the category of "refugee" exemplifies the exceptionality of the political foreigner, i.e. the rare exceptions offered by international law to admit non-citizens into national territory. Therefore, (unauthorised) economic migration from the Third to the First World is counter-hegemonic because it undermines this right and claims a legitimate share of the wealth historically accumulated by the global North through the exploitation of the South. Gurminder Bhambra (2015) recognises the similar pre-existent relations of refugees and migrants to the states they wish to enter:

If belonging to the history of the nation is what traditionally confers membership rights upon individuals (as most forms of citizenship demonstrate), it's incumbent upon us to recognise the histories that would see refugees as already having claims upon the states they wish to enter.

Unauthorised economic migration challenges the fact that the "vehicles" of self-determination remain mostly with(in) First World states (Achiume 2019, p. 1549). Hence, the priority given by migration to freedom of movement over the prerogative of borders has the potential to reconfigure national orders and challenge Europe's policy of exclusion. The ultimate goal of enabling relations of co-sovereignty between First and Third world people can serve as a guiding principle for interventions that support struggles for movement across borders. The struggle against the sovereign's right to exclude non-citizens, in a post-colonial perspective, engenders a kind of friction that upsets the status quo and extends towards a horizon of justice that remains "yet to come" (Derrida 1992, p. 27). Keeping this horizon in mind can help to critically assess legal strategies that will further entrench (or not) the racialised order of European modernity. Following from this idea, it thereby becomes obvious that legal practitioners or activists that support these struggles cannot limit themselves to advocating for protection. Firstly, because focusing only on legal protection discourses and regimes reproduces colonial fantasies of the "white man's burden" (Danewid 2017). They reinforce the idea that

⁷Third World Approaches to International Law.

⁸We follow Achiume who defines the Third World as the territories and peoples that Europeans colonised mainly between the mid-18th and 20th centuries. Stressing the continuing relevance of colonialism and imperialism, postcolonial scholars propose the "Third World" as a counter-hegemonic category, see (Rajagopal 1998). We use this term to highlight the ongoing relations of oppression and resistance to it, between the First and Third Worlds.

Europe is benevolently “hosting” uninvited migrants, failing to recognize the continuities between the so-called migration “crises” and Europe’s “continuous encounter with the world it has created through more than five hundred years of empire, colonial conquest and slavery” (*ibid.*, p. 1680). This notion reaffirms the idea that certain individuals deserve to be exceptionally admitted to the territory of a state of which they are not citizens or in which they have no right to reside. Secondly, because this notion of “protection” can easily be co-opted by states in an attempt to shirk their responsibilities.⁹

Of course, there is a balance to be struck; we are not advocating throwing out the baby with the bathwater. References to international refugee law or international protection may play a central role at specific times or in specific litigation strategies. The principle of non-refoulement is particularly important as it states that people cannot be forcibly returned across a national border to a place where their rights and dignity are at risk. But as Boaventura de Sousa Santos (2005, p. 443) notes: “it is one thing to use a hegemonic instrument in a given political struggle. It is another thing to use it in a hegemonic fashion”. In struggles for freedom of movement, this means emphasising the conflictual nature of the dynamic between states in the global North and people on the move, rather than emphasising their need for protection. States continually seek to reterritorialize those they consider out of place; whilst those who cross borders clash with this state logic.

The Central Mediterranean is characterised by the crossing of those who in most cases aim to reach the European space for reasons varying from family ties to the search for a better life, to the flight from persecution and not necessarily to obtain an abstract protection status. Therefore, we would like to emphasise that legal interventions that primarily aim at facilitating access to the European territory are not only possible within the existing legal framework as we shall see in what follows, but also support the claims of migrants for a right of entry (regardless of their legal status). This has a transformative potential for the European political community at large.

4. The Mediterranean as a (legal) battleground

Before diving into the situations and cases in which we detect counter-hegemonic uses of law, we now turn to the Central Mediterranean’s legal architecture. Indeed, it is important to understand that from a legal perspective, the Mediterranean is an area affected by multiple legal regimes and systems, especially for what concerns search and rescue. Therefore, our argument is not completely focused on the need to codify new rights even though we see rights as a possible means to advance the struggles of migrants. The challenge that migratory movements pose to territorial sovereignty combined with legal practices that support people on the move to access territories of the global North, has counter-hegemonic potential. These legal interventions can lead to a concretisation of a right to enter European territory.

When we speak of rescue at sea, we refer to events that take place mainly on the “high seas”, i.e. in international waters. This might give the false impression of a less “regulated” space than land or territorial waters. International waters, which lie at a distance of 12 or 24 miles from the coast, are in fact areas that are not subject to state

⁹ In the Central Mediterranean, for example, “regional landing platforms” in third countries have been proposed by the EU Council as a “solution” to the migration “crisis”.

sovereignty. Nevertheless, treaties and conventions grant states obligations and faculties that can or must be exercised outside their territory. This is the case with conventions on the protection of life at sea (e.g. the SAR Convention and the SOLAS Convention) or on human rights (such as the European Convention on Human Rights or the Geneva Convention). States, however, are permitted to exercise police control and detention powers even in international waters, in specific circumstances.¹⁰ In the cases we are interested in, the domestic law of the port States or those whose flag the vessels or aircraft involved in Search and Rescue (SAR) activities fly is also very often relevant. The same applies to European Union law, which is called into question both in terms of control and protection of the fundamental rights of rescuers and helpers.

We can therefore say that in the Mediterranean, migration and rescue at sea are traversed by a plurality of legal systems: the international, the European and the internal legal systems of the coastal states or of the flag states of ships and aircraft that move through or over the sea. It is also affected by rules regulating several different matters: the law of the sea, the law of navigation, fundamental rights and asylum, immigration rules, and public law rules granting control and repressive powers to states in the context of protecting their borders and preventing border crime. It is therefore not a lawless space, which escapes the control or responsibility of states, but on the contrary a legally “dense” place in which different actors bearing different obligations and rights, move and interact with each other, each having their own political and legal claims.

The coexistence of these different systems and regimes of norms often determines conditions through which it is possible to intervene. Various mechanisms and instruments of domestic or international safeguards can be activated with the aim of establishing the prevalence of one or the other. Through the interpretation of existing norms or the claiming of new formulations, it is thus possible to illuminate spaces that open up the imagination and the production of new rights.

Contradictions around interpretations of these overlapping frameworks mainly emerge from the friction between states’ need for control, the progressive “closure” of maritime border and the demands of migrants exercising their (internationally codified¹¹) right to leave the state they are in. A conflict also becomes clear when those migrating by sea claim the (basic) right to life. Ultimately, the right to life necessarily includes the right to be rescued, to disembark in a safe place and, the right to enter the European space to seek protection or to be saved from danger.

Moreover, on the side of people carrying out rescues, there are also different possible legal interpretations between rescues performed on the basis of solidarity and those said to simply fulfill a duty of assistance at sea.¹²

The most important tension that has become particularly evident in some of the situations we will try to describe in more detail in the next section involves a tension relating to legal interpretation: the law of the sea, which includes both the obligation of

¹⁰ See for example EU regulation n. 656/2014 which regulates the powers and obligations of Frontex vessels also on the high seas.

¹¹ Art. 12 International Covenant on Civil and Political Rights 1966.

¹² In this sense Itamar Mann (2020) hypothesised that the carrying out of sea rescue activities by European civil society organisations could be framed within the scope of the rights established by the European Charter of Fundamental Rights and in particular the right of association, expression and opinion.

captains to assist those in distress regardless of their legal status and that of states to coordinate or facilitate rescue operations; and which implies the duty to bring shipwrecked persons to a “safe”¹³ location to be identified through the application of rules pertaining to the law of the sea and human rights (and in particular the principle of non-refoulement). Many of the frictions we refer to emerge in moments when the “safe” place for disembarkation has to be concretely indicated and, subsequently, in the act of legally framing the entry of “irregular” migrants. The question this particular friction raises can be summarised as the following; are people who carry out rescue operations helping rescued people to reach a “safe” territory according to international law or are they facilitating irregular entry?

To summarise, the definition of the legal nature of the entry of rescued persons into the territory of European states constitutes an important battleground in the field of state criminalization practices. It is the main subject of criminal courts in Italy dealing with the issue of rescue. As will be seen in the next section, there exists the notion of a (“pure”) right to be rescued. This right is irrespective of the legal status of those in distress at sea and, according to consistent case law, it includes the right to disembarkation and therefore to enter the territory of a state that can be defined as “safe”. Asylum in this field is important but not central, since the aim is to reaffirm the universality of the right to life, regardless of the legal status of those in distress at sea. What is relevant is the intersection of the law of the sea and human rights norms; this is key for contesting the opposing norms of immigration and border defence.

We will now focus on two areas where the tension between these principles, regimes and laws has become particularly evident. The first relates to the disembarkation of people rescued from the high seas (relating to the right to enter the territory of the state in order to escape danger or seek asylum), and the second, to the criminalisation of sea rescue activities.

5. Counter-hegemonic legal interventions

In a general sense, we think it is possible to imagine a “dual” use of legal instruments and litigation in particular. Indeed, litigation can have a defensive (though not necessarily conservative) connotation, as is the case with defence in criminal trials, but it can also have an offensive dimension. In this offensive application of litigation, legal action can for example be carried out to block a certain behaviour or practice of state actors, to oppose aspects of public authorities’ behaviour and policies that are considered illegitimate, or to highlight the legal responsibilities of states. Ultimately, they can open up spaces for the affirmation of rights that are still in the making.

Litigation in border struggles is all the more necessary because migration policies, sometimes supported by national and international jurisprudence, are increasingly creating regimes of differential access to rights based on nationality and legal status. As described in the previous section, this is most visible at sea, where there is constant friction between principles and norms of rights protection and border control.

¹³ As described by the Court of Cassation itself in the *Rackete* judgment (Cass. Pen. Sez. III no. 6626/2020), in order to concretely define a so-called place of safety in the context of rescue operations at sea involving migrants, reference must be made to the rules of the international law of the sea and to those relating to the protection of fundamental rights.

One of the legal issues that we think is most interesting from the perspective of trying to use litigation in an emancipatory sense, is that of the possibility to affirm the existence (or the need for recognition) of a right to enter the European space, in order to save oneself from a situation of danger (such as shipwreck or the risk of being subjected to inhuman and degrading treatment) or to seek asylum.

To what extent does the existing legal framework allow the assertion of a right to enter European states for those in a state of danger or in need of asylum? The affirmation of such a right, which we believe is already possible on the basis of existing norms and principles (De Vittor 2023), would be an important step in the direction of the concretisation of freedom of movement and the production of new areas of law towards a possible enlargement of the (here European) political community. Focusing on legal access to the territory seems to us to be central in that regard. Indeed, externalisation policies in and around the Mediterranean are aimed precisely at discouraging departures and making travel more and more difficult and dangerous affecting not only freedom of movement, but also the possibility of exercising the right to asylum and the right to life. This is probably why the assertion of such a right encounters significant resistance and is often not recognised by domestic and international courts, even at the expense of the violation of other rights such as personal freedom or protection against inhuman and degrading treatment. Even so, the right to access European territory¹⁴ can be asserted in specific cases; we now turn to two examples of legal interventions that can be seen as attempts to use law in a counter hegemonic way, in spite of, in one case, the negative outcome in Court.

Beginning in the summer of 2018 and for about a year, the Italian Maritime Rescue Coordination Centre (MRCC Rome), at the political instigation of the then Minister of the Interior, began to delay or refuse to indicate to rescue vessels – state and private – a port where to disembark shipwrecked people rescued in international waters (Cancellaro 2020). This led to rescued persons being forced to remain on board rescue ships for many days in conditions not suitable to guarantee them the protection of their right to life and health, especially given the traumatic experience that often characterises the migration experience and the sea voyage.

On the basis of the international Law of the sea,¹⁵ ships carrying out SAR operations should be relieved as soon as possible of the responsibilities arising from the transport of shipwrecked persons through the support of coastal states. In addition, the UNCLOS, SAR and SOLAS¹⁶ conventions provide that rescue operations can only be considered to be concluded with the disembarkation of the shipwrecked persons in a “safe” location. Moreover, the obligation to rescue exists for the protection of anyone in distress at sea, regardless of nationality or legal status. Therefore, we can say that the obligation of states to coordinate or collaborate in rescue operations that take place in the SAR area under their jurisdiction (but often also outside) corresponds to the right of anyone, regardless of nationality or legal status, to be assisted and rescued (Trevisanut 2014). It is in this

¹⁴ In the case of SAR operations, entry into Europe coincides with disembarkation (in Italy or Malta) in what can be defined, as opposed to the Tunisian or Libyan coasts, as a “safe” place.

¹⁵ Paragraph 3.1.9 SAR Convention.

¹⁶ See paragraph 2.1.10 and 3.1.9 of the SAR Convention, and more generally on the obligation to rescue at sea art. 98 UNCLOS, reg. 33 cap. 1.2. 98 UNCLOS, reg. 33 cap. V Convenzione SOLAS.

spirit that the right to enter European territory can be asserted by rescued people, and their supporters, when the former are being denied disembarkation in a safe place.

In January 2019, the NGO rescue vessel *Sea-Watch 3* became stranded outside Italian ports after the above-mentioned practice ordered by the Italian Ministry of Interior to delay disembarkation was put in place. In two separate episodes, some of the rescued people onboard approached the ECHR with an urgent appeal (request for interim measures) and asked the court to order Italy to allow them to disembark or at least to secure their situation. The appeal also highlighted the presence of unaccompanied minors onboard the ship. The Court did not order the shipwrecked persons to be disembarked (which would have involved their entry into Italian territory) but only that the authorities ensure that their basic needs (food, water, basic medical assistance) be met and that, in the case of minors, guardians be appointed (Il Fatto Quotidiano 2019). The day after the decision, the Italian authorities nevertheless allowed the disembarkation and all the rescued persons entered the port of Catania, after a 10-day long standoff. As such, the Court's protection in this case stopped at the right to life (food, water, basic medical care), without recognizing that, from the intersection of the law of the sea and human rights, the obligation for European coastal states arises to guarantee disembarkation in their ports to migrants rescued in the Mediterranean and with it their entry onto European territory.

In June 2019, in a similar case, this time involving the captain Carola Rackete who was also operating a *Sea Watch* vessel, the ECHR went further and did not order any kind of measure against the Italian government, pointing out that the ship was outside of Italian territorial waters (see Zirulia and Cancellaro 2019). These circumstances led the ECHR to doubt that it had jurisdiction in this case, implicitly denying the extraterritoriality of the protection of rights such as the right to life and not to be subjected to inhuman and degrading treatment. However, on this occasion, also in light of the fact that there were no persons in immediate danger of losing their lives, the Court did not impose any measures on the Italian government, "counting" on the fact that the Italian authorities would spontaneously provide basic assistance to the persons on board. In doing so, the Court again denied the existence of a right to enter the territory after the rescue, not only to save themselves but also to seek asylum. This is also with reference to categories of people, such as unaccompanied minors, who by law, cannot be deported.¹⁷

It is important to point out that in such cases the failure to recognise the right to enter the territory had as a direct consequence the arbitrary restriction of personal freedoms, and the violation of the right to dignity, to physical and mental health, and the right not to be subjected to inhuman and degrading treatment. These rights cannot be said to have been protected through the mere distribution of food, drink and basic medical services. Ordering the fulfilment of "basic needs" without recognising the right to entry fits into the Court's increasingly restrictive orientation towards migrants, which it is also shown repeatedly in decisions concerning land borders (see Sanfilippo 2021). Maritime border cases such as the one involving the *Sea Watch 3* show perhaps with even greater intensity the harshness of the effects of a differentiated regime of access to rights based on nationality and legal status.

¹⁷ V. Art. 19 d.lgs. 286/1998.

There are, as illustrated above with the emergency appeal to the ECHR, possibilities for experimenting with litigation at different levels that reaffirm a right to enter European territory. In the cases above, this “right” was ultimately not recognised by the ECHR. More importantly though, and for the purpose of our argument, we want to point out that such a use of law, from the perspective of people on the move and their supporters, was intended to affirm the right to enter the European territory.

The right of migrants themselves are not the only way to argue for the facilitation of accessing territory. When we consider other actors moving in the Mediterranean and their different legal positions in relation to migrants, more possibilities open up for counter-hegemonic uses of the law. For example, it is interesting to consider the position of those who carry out rescue activities in the Mediterranean. Italian criminal jurisprudence is constant in reaffirming the legitimacy of the behaviour of those who fulfil their obligation to provide assistance at sea: from search and rescue to disembarkation in Italy.¹⁸ In one of the best-known cases, which again involved the captain Carola Rackete, who was investigated for the crime of aiding and abetting irregular immigration and disobeying the order of a warship, the Italian Supreme Court recognised that her conduct, which consisted in facilitating the entry onto Italian territory of persons without the necessary documents following a SAR operation, was lawful. The decision was justified by the argument that she performed a duty (the duty of rescue at sea). This application of the justification clauses (which also includes, for example, the exercise of a right, the state of necessity and legitimate defence) enables the possibility to consider the actions of the rescuers as lawful, legitimate and even compulsory under the existing legal system.

Considering how often the legitimacy of rescuers’ actions is put into question, we see the use of litigation that establishes a correspondent right of migrants to be rescued and disembark in a safe place (read: to enter the territory of EU states) as a possible counter-hegemonic usage of law.

Following in this vein of argumentation, two decisions of the Tribunal and the Court of Appeal of Rome that directly considered the legal position of a group of people unlawfully rejected at sea and taken back to Libya in 2009 (Civil court Rome sentence N. 22917/2019 and Court of appeals Rome RG 2525/2020), are also useful. These decisions concern the case of a group of Eritrean citizens who were rescued by the Italian military ship *Orione* and then forced to be transhipped onto a Libyan patrol boat that took them back to Libya, in circumstances very similar to those of the case *Hirsi Jamaa v. Italy*. The group claimed compensation for the damage suffered due to the unlawful behaviour of the Italian authorities, before the Court of Rome. They claimed both an economic form of compensation and a “specific form”; in this case they requested the issuance of an entry visa to Italy in order to access the asylum procedures since this had been prevented from doing so because of the expulsion at sea. The Rome Court and the Court of Appeals

¹⁸ See in this case Cass. Pen. Sez. III n. 6626/2020 (*Rackete* case), p. 11 e ss “L’obbligo di prestare soccorso dettato dalla convenzione internazionale SAR di Amburgo, non si esaurisce nell’atto di sottrarre i naufraghi al pericolo di perdersi in mare, ma comporta l’obbligo accessorio e conseguente di sbarcarli in un luogo sicuro (c.d. “place of safety”)”. We translate this as follows: “The obligation to render assistance under the international Hamburg SAR Convention does not end with the act of rescuing shipwrecked persons from the danger of being lost at sea, but entails an ancillary and consequential obligation to disembark them in a place of safety”.

upheld the claims and affirmed that the conduct of the Italian authorities had materially prevented the applicants from entering Italy and from requesting asylum. Hence, they were entitled to entry for the purpose of accessing the relevant procedure.¹⁹ According to the Court, this was the only possible outcome of the case in order to uphold the application and effectiveness of asylum rules, primarily inscribed in the Constitution. According to this interpretation, the right to entry for the purpose of accessing asylum procedures, are an essential part of the concrete and effective application of the right to asylum already provided for by positive law; if entry is materially prevented by state authorities, the right to asylum remains an abstraction.

6. Concluding remarks

These examples have served to illustrate the complicated interactions between conflicting legal and regulatory regimes that characterise the legal landscape with which people on the move come into contact when crossing the Mediterranean sea border. They show how the right to enter European territory can be made effective through a combination of legal intervention, determination of people on the move, and search and rescue activities. Migrants' claim to territorial entry can be supported (and this has been confirmed in several judgments) using different sets of rules and their systematic interpretation (De Vittor 2023). Both from the point of view of maritime law, reaffirming the obligation to disembark survivors in a safe place, and from the point of view of criminal law, which has repeatedly confirmed the legitimacy of the actions of rescuers and condemned states—and recently also private individuals²⁰—for preventing disembarkation or facilitating a refoulement at sea. Finally, the Italian judiciary has also affirmed the constitutional right of non-citizens to enter Italian territory to access protection procedures.

We conclude with the idea that migrants who claim the right to enter European territory, taking to the sea and fleeing from the coasts of North Africa, are linked to citizens of the so-called “First World” by a relationship of “implication” (Rothberg 2019). “Implicated” subjects are bound together in an entangled and complicated way, by the enduring propagation of historical violence that continues to reverberate in the present through small-scale encounters and large-scale structures of inequality (*ibid.*, pp. 1–2). Since legal rights are necessarily correlated to obligations, the obligation flowing from people on the move's claim to entry into European territory is a recognition, induced by the relation of implication, that people of the First World have mutual obligations towards them.

¹⁹ Civil court Rome (Trib. Civ. Roma), sentence N. 22917/2019, p. 9 e ss: “[S]i ritiene che laddove le autorità di uno Stato intercettino in alto mare dei migranti sorga in capo alle stesse l’obbligo di esaminare la situazione personale di ciascuno e di non attuare il respingimento dei rifugiati verso un territorio in cui la loro vita o la loro libertà sarebbero minacciate e in cui essi rischierebbero la persecuzione, con la precisazione che la mancata richiesta di asilo non consente di ignorare che in taluni Paesi sia riscontrabile una situazione di sistematico mancato rispetto dei diritti umani”. We translate this as follows: “[I]t is considered that when the authorities of a State intercept migrants on the high seas, they are under an obligation to examine the personal situation of each individual and not to refoul the refugees to a territory where their life or freedom would be threatened and where they would risk persecution, with the clarification that the failure to apply for asylum does not make it possible to ignore the fact that in some countries there is a situation of systematic disregard for human rights”.

²⁰ See the recent decision of the Court of Naples against the captain of the ship “Asso Ventotto” for facilitating the pushback of migrants to Libya (sentence n. 16696/2022).

Our argument in favour of this reading of counter-hegemonic uses of law derives from the characterization of rights and obligations as changing over time through practice and from the claim that justice should reflect differential social and historical relations of implication. Thus, from a transformative perspective and emphasizing the primacy of politics over law, we think that the latter can be used to support transformative movements of which migrants are part. Law is then a privileged tool that has the possibility of transforming ethical and moral obligations into institutions of obligations (Eckert 2023). As such, the right to enter European territory for “Third World” citizens can be read as part of a broader horizon of post-colonial justice.

In this as in other contexts, people acting in solidarity with migrants can struggle alongside them to support them in gaining access to territory and/or their rights. It is important to note that the main force for social change remains the movement of people themselves. But since the legal hegemony of exclusion is strong and the need to ensure an egalitarian and non-differentiated system of access to rights is a goal not only for migrants but for other subjectivities too, it has been the goal of this article to think through the building of alliances that can also include the (counter-hegemonic) use of law and thus succeed in connecting the space of sea and land, for the emancipation of world society as a whole.

Ultimately, by highlighting the use of legal instruments in these struggles, we attempt to question the nation-state’s “right” to exclude non-citizens (Achieme 2019) from accessing their rights, recognizing that migrants from the Third World are necessarily connected to the political community of the global North. As such, we advocate for a reading of law and obligations of justice that mirror a social connection model (Young 2006), which sees responsibility for harm creation in a much broader (here, also historical) sense than causal attribution usually considered in law.

The reasoning we propose in this text has been influenced by our respective experiences at sea, without which our understanding of and proximity to the dynamics we address would have had a different intensity and depth. Our hope is that our reflections can help others engaged in furthering the right to free movement for all; either practically or in a theoretical sense, when thinking about how to broaden the horizon of justice in a world constrained by law and the power of nation states to enforce it.

References

- Achieme, T.E., 2019. Migration as Decolonization. *Stanford Law Review* [online], 71(6), 1509–1574. Available at: <https://ssrn.com/abstract=3330353>
- Affolter, L., 2022. Trained to Disbelieve: The Normalisation of Suspicion in a Swiss Asylum Administration Office. *Geopolitics* [online], 27(4), 1069–1092. Available at: <https://doi.org/10.1080/14650045.2021.1897577>
- Amighetti, S., and Nuti, A., 2016. A Nation’s Right to Exclude and the Colonies. *Political Theory* [online], 44(4), 541–566. Available at: <https://doi.org/10.1177/0090591715589764>
- Anghie, A., 2004. *Imperialism, Sovereignty and the Making of International Law* [online]. Cambridge University Press. Available at: <https://doi.org/10.1017/CBO9780511614262>

- Arendt, H., 1951. *The Origins of Totalitarianism*. New York: Harcourt, Brace and Company.
- Atak, I., and Crépeau, F., 2021. Refugees as Migrants. In: C. Costello, M. Foster and J. McAdam, eds., *The Oxford Handbook of International Refugee Law* [online]. Oxford University Press, 134–151. Available at: <https://doi.org/10.1093/law/9780198848639.003.0008>
- Benhabib, S., and Nathwani, N., 2021. The Ethics of International Refugee Protection. In: C. Costello, M. Foster and J. McAdam, eds., *The Oxford Handbook of International Refugee Law* [online]. Oxford University Press, 114–133. Available at: <https://doi.org/10.1093/law/9780198848639.003.0007>
- Bhambra, G.K., 2015. Europe won't resolve the "migrant crisis" until it faces its own past. *The Conversation* [online], 1 September. Available at: <https://theconversation.com/europe-wont-resolve-the-migrant-crisis-until-it-faces-its-own-past-46555>
- Buckel, S., and Fischer-Lescano, A., 2009. Gramsci Reconsidered: Hegemony in Global Law. *Leiden Journal of International Law* [online], 22(3), 437–454. Available at: <https://doi.org/10.1017/S0922156509990033>
- Buonamano, R., 1998. The Economy of Violence: Derrida on Law and Justice. *Ratio Juris* [online], 11(2), 168–179. Available at: <https://doi.org/10.1111/1467-9337.00083>
- Cancellaro, F., 2020. Dagli hotspot ai "porti chiusi": quali rimedi per la libertà "sequestrata" alla frontiera? *Diritto penale contemporaneo - Rivista trimestrale* [online], n. 3. Available at: <https://www.sistemapenale.it/it/articolo/cancellaro-hotspot-porti-chiusi-liberta-personale-rimedi>
- Carrera, S., and Cortinovis, R., 2019. Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility? *CEPS Paper in Liberty and Security in Europe* [online], 2019–10. Available at: <https://www.ceps.eu/ceps-publications/search-and-rescue-disembarkation-and-relocation-arrangements-in-the-mediterranean/>
- Cover, R.M., 1983. Foreword: Nomos and Narrative. *Harvard Law Review* [online], 97(1), 4–68. <https://doi.org/10.2307/1340787>
- Danewid, I., 2017. White innocence in the Black Mediterranean: hospitality and the erasure of history. *Third World Quarterly* [online], 38(7), 1674–1689. Available at: <https://doi.org/10.1080/01436597.2017.1331123>
- Dann, P., and Eckert, J., 2020. Norm-creation beyond the state. In: M.C. Foblets et al., eds., *The Oxford Handbook of Law and Anthropology* [online]. Oxford/New York: Oxford University Press, 808–826. Available at: <https://doi.org/10.1093/oxfordhb/9780198840534.013.47>
- De Vittor, F., 2023. *La migrazione via mare nel diritto internazionale: libertà di movimento, obblighi di soccorso e rispetto dei diritti umani delle persone migranti*. Naples: Editorial Scientifica.

- Derrida, J., 1992. Force of Law: The “Mystical Foundation of Authority”. In: D. Cornell, M. Rosenfeld and D. Gray Carlson, eds., *Deconstruction and the Possibility of Justice*. New York/London: Routledge.
- Douzinas, C., 2000. *The End of Human Rights: Critical Legal Thought at the Turn of the Century* [online]. Oxford: Hart. Available at: <https://doi.org/10.5040/9781509955527>
- Eckert, J., 2023. Decolonising the political: Presence, Law, and Obligation. *Anthropological Theory* [online], 23(4). Available at: <https://doi.org/10.1177/14634996231185324>
- El-Enany, N., 2008. Who is the new European refugee? *European Law Review* [online], 33(3), 313–335. Available at: <https://dx.doi.org/10.2139/ssrn.1033334>
- Fassin, D., 2005. Compassion and Repression: The Moral Economy of Immigration Policies in France. *Cultural Anthropology* [online], 20(3), 362–387. Available at: <https://doi.org/10.1525/can.2005.20.3.362>
- Gil-Bazo, M.T., and Guild, E., 2021. The Right to Asylum. In: C. Costello, M. Foster, and J. McAdam, eds. *The Oxford Handbook of International Refugee Law* [online]. Oxford University Press, 867–882. Available at: <https://doi.org/10.1093/law/9780198848639.003.0049>
- il Fatto Quotidiano, 2019. Sea Watch, la Corte europea dei Diritti dell’uomo: “Si assistenza dei migranti a bordo, no alla richiesta di sbarco”. *Il Fatto Quotidiano* [online], 29 January. Available at: <https://www.ilfattoquotidiano.it/2019/01/29/sea-watch-la-corte-europea-dei-diritti-delluomo-si-assistenza-a-bordo-no-alla-richiesta-di-sbarco/4933936/>
- Kennedy, D., 1973. Legal formality. *The journal of legal studies* [online], 2(2), 351–398. Available at: <https://doi.org/10.1086/467502>
- Kennedy, D., 2002. The critique of rights in critical legal studies. *Left legalism/left critique* [online], 178, 216–227. Available at: <https://doi.org/10.1215/9780822383871-006>
- Kukathas, C., 2016. Are Refugees Special? In: S. Fine and L. Ypi, eds., *Migration in Political Theory* [online]. Oxford University Press, 249–268. Available at: <https://doi.org/10.1093/acprof:oso/9780199676606.003.0012>
- Lorde, A., 1984. *Sister Outsider*. Toronto: The Crossing Press.
- Mann, I., 2020. The Right to Perform Rescue at Sea: Jurisprudence and Drowning. *German Law Journal* [online], 21(special issue 3), 598–619. Available at: <https://doi.org/10.1017/glj.2020.30>
- McAdam, J., 2021. Displacement in the Context of Climate Change and Disasters. In: C. Costello, M. Foster and J. McAdam, eds., *The Oxford Handbook of International Refugee Law* [online]. Oxford University Press, 832–847. Available at: <https://doi.org/10.1093/law/9780198848639.003.0047>
- McLoughlin, D., 2016. Post-Marxism and the Politics of Human Rights: Lefort, Badiou, Agamben, Rancière. *Law and Critique* [online], 27(3), 303–321. Available at: <https://doi.org/10.1007/s10978-016-9177-0>

- Moreno-Lax, V., and Giuffré, M., 2017. The Rise of Consensual Containment: From “Contactless Control” to “Contactless Responsibility” for Forced Migration Flows. In: S.S. Juss, ed., *Research Handbook on International Refugee Law*. Cheltenham/Northampton: Edward Elgar, 82–108.
- Morris, R.C., 2007. Legacies of Derrida: Anthropology. *Annual Review of Anthropology* [online], 36, 355–389. Available at: <https://doi.org/10.1146/annurev.anthro.36.081406.094357>
- Rajagopal, B., 1998. Locating the Third World in Cultural Geography. *Third World Legal Studies* [online], 15(1), 1–20. Available at: <http://scholar.valpo.edu/twls/vol15/iss1/2>
- Rancière, J., 2004. Who Is the Subject of the Rights of Man? *The South Atlantic Quarterly* [online], 103(2), 297–310. Available at: <https://doi.org/10.1215/00382876-103-2-3-297>
- Rancière, J., 2010. *Dissensus: On Politics and Aesthetics* [online]. London: Bloomsbury. Available at: <https://doi.org/10.5040/9781472547378.ch-001>
- Rothberg, M., 2019. *The Implicated Subject: Beyond Victims and Perpetrators* [online]. Stanford University Press. Available at: <https://doi.org/10.1515/9781503609600>
- Sanfilippo, A., 2021. La corte EDU adotta misure provvisorie contro Polonia e Lettonia. *IARI* [online], 5 October. <https://iari.site/2021/10/05/la-corte-edu-adotta-misure-provvisorie-contro-polonia-e-lettonia/>
- Santos, B. S., 2020. *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 3rd ed. Cambridge: Cambridge University Press. Available at: <https://doi.org/10.1017/9781316662427>.
- Santos, B.S., 2005. The counter-hegemonic use of law in the struggle for a globalization from below. *Anales de la Cátedra Francisco Suárez*, 39, 421–474.
- Shachar, A., and Hirschl, R., 2007. Citizenship as Inherited Property. *Political Theory* [online], 35(3), 253–287. Available at: <https://doi.org/10.1177/0090591707299808>
- Sharma, N., 2020. *Home Rule: National Sovereignty and the Separation of Natives and Migrants* [online]. Durham: Duke University Press. Available at: <https://doi.org/10.1515/9781478002451>
- Trevisanut, S., 2014. Is there a right to be rescued at sea? A constructive view. *Questions of International Law* [online], 1, 3–15. Available at: <https://www.qil-qdi.org/is-there-a-right-to-be-rescued-at-sea-a-constructive-view/>
- Trubek, D.M., 1984. Where the Action Is: Critical Legal Studies and Empiricism. *Stanford Law Review* [online], 36(1/2). Available at: <https://doi.org/10.2307/1228692>
- Young, I.M., 2006. Responsibility and Global Justice: A Social Connection Model. *Social Philosophy and Policy* [online], 23(01), 102. Available at: <https://doi.org/10.1017/S0265052506060043>
- Zirulia, S., and Cancellaro, F., 2019. Caso Sea Watch: cosa ha detto e cosa non ha detto la Corte di Strasburgo nella decisione sulle misure provvisorie. *Diritto Penale Contemporaneo* [online], 26 June. Available at:

<https://archiviodpc.dirittopenaleuomo.org/d/6760-cosa-ha-detto-e-cosa-non-ha-detto-la-corte-di-strasburgo-sul-caso-sea-watch>

Zumbansen, P., 2010. Transnational legal pluralism. *Transnational Legal Theory* [online], 1(2), 141–189. Available at: <https://doi.org/10.1080/20414005.2010.11424506>

Zumbansen, P., 2019. Transnational Law as Socio-Legal Theory and Critique: Prospects for “Law and Society” in a Divided World. *Buffalo Law Review* [online], 67(3), 909–960. Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol67/iss3/>

Case law

Civil court Rome /(Trib. Civ. Roma), sentence N. 22917/2019.

Court of appeals Naples, sentence n. 16696/2022 of 01.02.2023.

Court of appeals Rome (Corte d’ Appello di Roma) RG 2525/2020 January 2021.

Court of Cassation (Corte di Cassazione) sentence n. 6626 of 20.2.2020.

European Court of Human Rights, *Hirsi Jamaa and others v. Italy*, 23.02.2012 (27765/09).