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# The Suspension of Legal and Moral Norms at the EU's Mediterranean Sea Borders

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# Disclaimer

# Abstract

In recent years, the EU has seen an increase in security measures at its Mediterranean borders. A corresponding increase in migrant fatalities at sea and rhetoric concerning the threat of unsecured movements of people into the EU has contributed to the political construction of maritime migration as both an existential threat and a moral crisis. In developing an understanding of how these two concepts shape the treatment of migrants at sea, this paper addresses the question of how legal and moral norms come to be suspended in cases of maritime migration.

By identifying cases at the EU's Mediterranean borders in which legal and moral norms are suspended and analysing subsequent institutional discourse and public reaction, this paper engages with contemporary debates to situate the biopolitical control exerted over human life at the EU's maritime borders within broader processes of securitisation. This analysis identifies an incoherence in the relationship between institutional discourse and practice, which results in the perception and treatment of migrants as bare life, existing in a state of exception in which the sovereign state exerts its power to suspend the rule of law. It is argued that maritime border control, as a manifestation of biopower, directly contributes to both the insecurity of the border, and deaths at the border, that it discursively opposes.

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## About the Author

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# List of Abbreviations

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| AFM | Maritime Squadron of the Armed Forces of Malta |
| CIR | Italian Refugee Council |
| ECtHR | European Court of Human Rights |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| EU | European Union |
| EUROSUR | European Border Surveillance System |
| Frontex | European Border and Coastguard Agency |
| GAMM | Global Approach to Migration and Mobility |
| HCG | Hellenic (Greek) Coastguard |
| HRW | Human Rights Watch |
| IMO | International Maritime Organisation |
| IOM | International Organisation for Migration |
| MRCC | Maritime Rescue Coordination Centre |
| NATO | North Atlantic Treaty Organisation |
| NGO | Non-Governmental Organisation |
| PACE | Parliamentary Assembly of the Council of Europe |
| SAR | Search and Rescue |
| SOLAS | International Convention for the Safety of Life at Sea |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNHCR | United Nations High Commissioner for Refugees |

# 1 Introduction

On 26th March 2011, a group of 72 people boarded a dinghy in Tripoli and set sail for Italy. Becoming popularly known in the media as the 'left to die' boat (BBC 2012), the nine survivors of the voyage endured a fifteen-day ordeal, during which their distress calls went unanswered by nearby vessels, EU border personnel and NATO. Although they made contact with authorities via satellite phone and interacted with fishing boats, a military helicopter and a naval vessel, 63 people subsequently perished from dehydration and exposure.

Despite the media interest at the time and a resolution by the Parliamentary Assembly of the Council of Europe (PACE) which recommended that states "fill the vacuum of responsibility for SAR [Search and Rescue] zones left by a State which cannot or does not exercise its responsibility for search and rescue" (PACE Resolution 1872(2012): 13.1), an unprecedented number of tragedies continue to unfold in the Mediterranean.[1]

Such tragedies take place against a backdrop of widespread global displacement, with 2015 seeing a record 65.3 million people worldwide displaced from their homes due to persecution, conflict, violence or human rights violations (UNHCR 2015a: 3). The United Nations High Commissioner for Refugees (UNHCR) recorded that in 2014 1.6 million asylum requests were submitted to state authorities or local UNHCR offices worldwide (UNHCR 2014a: 52). 2015 saw a peak in refugee flows to the EU, and an estimated 1 million total arrivals to the EU by sea (UNHCR 2015a: 7). In 2016, despite a reduction in overall numbers attempting to cross the Mediterranean and entering Europe, the International Organisation for Migration (IOM 2017) recorded 5,143 migrant deaths in the Mediterranean, with actual deaths likely to be much higher due a high number of unreported incidents (see Laczko et al. 2016).

Responses to migration-related deaths in the Mediterranean have varied significantly between EU member states. Indeed, collective and unilateral policy responses of EU countries to this 'irregular' migration have their roots in a legal and structural framework which pre-dates the EU's current 'refugee crisis', leading to the suggestion that the 1951 Convention on the Status of Refugees, drafted in the context of the cold war, provides an unrealistic framework for the current 'crisis' (Betts and Collier 2017: 5-8). Efforts to adapt the 1951 Convention to the different needs of a constantly adapting international order have been piecemeal and ad hoc, leading Betts and Collier (2017: 5) to

[1] Including the Central Mediterranean, with crossings most commonly taking place between Libya and Italy, and in the Aegean Sea between Turkey and Greece, which is considered to be the Eastern Mediterranean.

conclude that what "began as coherent and common rules for responding to persecution have evolved into chaotic and indefensible responses to the problem of mass flight from disorder".

Despite this, a common visible trend is the increase in physical border security measures across the EU, and most noticeably at its external borders. These take the form of physical barriers at Spanish, Hungarian, and Greek borders, and heavy investment in technology and surveillance at the EU's maritime borders (see Anderson 2016: 1059). The formation of the European Border and Coastguard Agency (Frontex) in 2004 and the Global Approach to Migration and Mobility (GAMM) in 2005 have seen the deployment of rapid intervention teams to external land and maritime borders with a high incidence of 'irregular' migration (see Karamanidou 2015: 47). The European Border Surveillance System (EUROSUR), conceived in 2008 and placed into operation in 2013, has seen the initiation of an EU-wide program with a growing emphasis on surveillance and identification technologies. Less visibly, deals such as the 'EU-Turkey deal' of 2015 and 'friendship pacts' between Italy, Spain and north African states have contributed to the externalisation of EU border controls to third states (see Lemberg-Pedersen 2012).

The gradual closing of many legal migratory routes in the EU and the proliferation of external border security has led to what Andersson (2016) has termed an 'illegality industry', whereby migrants' increasing reliance on complex routes and the assistance of smugglers creates a self-sustaining industry which only grows with the advent of new border security measures and technologies. Paradoxically, as migrants' only options become increasingly dangerous routes, the tightening of maritime border security leads to an increase in migrant fatalities (see Spijkerboer 2007), thereby allowing for institutional calls for yet further increases in security. Whether such calls speak of protecting the 'vulnerable border', or protecting the 'vulnerable migrant', migratory flows are increasingly framed by an image of chaos and insecurity.

This image has shaped responses to external migration into the EU which take many forms across a number of geographical locations. Working from an understanding of the 'border' as comprised of a series of practices, the focus of this thesis is therefore on specific incidents of migration at the EU's external maritime borders, in which moral and legal norms come to be suspended through incidences of abandonments at sea, collective expulsions, and criminalisation of civilian assistance and non-state search and rescue (SAR). The continuation of such incidents in light of the EU's idealistic endorsement of individual liberty and the right to life presents a pressing contradiction. Indeed Basaran (2015: 216), suggests that "people left to die at sea demonstrate new fissures in longstanding codes of humanity, leading to the fundamental question of who falls within the scope of the norm and hence, ultimately, who belongs to humanity."

The work of Giorgio Agamben (1996; 1998) offers a unique insight into this question, through his understanding of sovereign power as that which can both allow and disallow human life. However, the processes by which certain lives come to be excluded from the norms of humanity are both multifaceted and unpredictable. The securitisation of the EU's external borders, combined with global trends of 'othering', enact a cyclical process by which external migration comes to be understood as 'threat'; a process which, as suggested by Duffield (2006: 78), allow us to identify the "sovereign boundary between inclusion and exclusion". Nonetheless, these processes exist in conjunction with a consistent humanitarian rhetoric in EU institutions which prioritises the fundamental rights of the individual. Whilst it may be tempting to assume that this is no more than a discursive veneer behind which illiberal practice continues, it is suggested here that the reality is more complex. Indeed, the interaction between liberal and security narratives offers a framework by which the unpredictable nature of illiberal practice at the EU's maritime borders can be understood better.

Thus, the fundamental question asked here is: *How do moral and legal norms come to be suspended in cases of maritime migration?*

The focus will be on addressing this question, in order to demonstrate the practical application of Agamben's concepts to 'exceptional' practices at the EU's external Mediterranean borders. In doing so, this paper aims to engage with contemporary debates concerning the utility of the concept of 'securitisation' for understanding the treatment of migrants at the EU's maritime borders by;

a) Conceptualising and demonstrating the exceptional treatment of migrants.
b) Identifying a disconnect between 'exceptional' practice by security actors and related discourse.
c) Analysing how this disconnect is translated into institutional practice.

In developing an understanding of the disconnect between EU border policy 'ideals' and 'practices', it becomes apparent that 'exceptional' incidents cannot be conceived as unavoidable or accidental. This has potential repercussions for policy makers; as noted by Spijkerboer (2007: 138), understanding unfolding maritime tragedies as foreseeable consequences of EU border policy "trigger[s] a State's positive obligation to take preventive measures to safeguard the lives of those who are put at risk".

In order to address the question of how legal and moral norms come to be suspended in cases of maritime migration, a theoretical framework is developed which engages with contemporary debates to situate the biopolitical treatment of migrants at the EU's maritime borders within broader

global processes. This is followed by an analysis of how these are expressed and interpreted at the level of the institution and the individual. Whilst our primary theoretical foundation is that of Agamben's 'state of exception', securitisation theory plays a dominant role in situating this within broader global processes.

Beginning with a conceptualisation of our understanding of the 'border' as consisting of a series of practices, we then introduce Agamben's theory of the 'state of exception', and outline its utility for understanding the biopolitical treatment of migrants. Some key criticisms of Agamben's theory are identified and subsequently addressed in our practical analysis. Contemporary debates on the applicability of securitisation theory to the subject of migration are summarised and are then utilised to demonstrate the 'absent presence' of securitisation and its utility for our purposes. Chapter Three offers an overview of 'exceptional' treatment, first summarising key legislation pertinent to the subject of maritime migration, thereby clarifying our understanding of a 'legal norm', then entering into a more subjective discussion of our understanding of 'moral norms' and their manifestation in the humanitarian rhetoric of EU institutions.

Chapter Four presents examples which are demonstrative of the contradictions inherent in EU border practice. Examples of collective expulsions, abandonments at sea and the criminalisation of non-state SAR are presented, along with examples of the reutterance of seemingly contradictory legal and moral norms by EU institutions. Subsequently, security institutions themselves are brought into our analysis in order to better understand how these contradictions manifest at an operational level.

The focus of this analysis is on the contradictions inherent in institutions which utilise global security 'threats' to justify increased security practices, whilst explicitly endorsing seemingly contradictory legal and moral norms. It is suggested that broad processes of 'othering' and global securitisation contribute to creating the necessary conditions for migrants to be identified and treated as bare life, existing in a state of exception in which the sovereign state exerts its power to suspend the rule of law. By utilising a biopolitical framework, we can understand the paradox by which migrants come to be perceived as both a 'security risk' and 'in need of saving'; "not simply in terms of the difference between 'rhetoric/reality', but as conjoined elements within the same governmental technique" (Vaughan-Williams 2015: 34). Thus, the human suffering and loss of life on 'securitised' borders cannot be understood as purely accidental, or due to external criminal networks outside of the EU's control, but rather as inseparable from EU border policy.

The terminology used in this paper follows that of the IOM (2016a), which defines a 'migrant' as "any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the

movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is." Whilst this definition is endorsed here, the focus throughout this analysis is on people attempting to cross the external maritime borders of the EU without going through an official administrative process. Whilst a large number of migrants in the examples given aims to seek asylum in the EU, exact numbers of asylum seekers, 'economic' migrants and other travellers are impossible to determine due to the unknown number of those who never reach their destination country, or whose applications are never examined by an official body.[2] This is indicative of one paradox of the incidents identified below, as all migrants are targeted equally by repressive border controls, with no chance at the point of interception to delineate between asylum seekers, economic migrants and other groups.

# 2 The State of Exception and Securitisation of the EU's Maritime Borders

The 21st century has seen what has been described as a "physical reassertion" and an "ideological redefinition" of border controls and functions (Andreas 2000: 2). Increasingly, border studies literature has moved away from an understanding of the border as a geographically defined, objective entity towards critical border studies which seek to challenge the metaphorical association of borders with territorial 'walls' and 'limits' (Vaughan-Williams 2015: 6). State borders are increasingly understood as extending beyond the territorial limits of the state (Andreas 2000; Bigo 2007; Casas-Cortes et al. 2016; Lemberg-Pederson 2012), even as ever greater significance is placed on physical border controls, walls and fences (Rosière and Jones 2012; Vallet and David 2012). Parker and Vaughan-Williams (2009: 583) note that borders are "increasingly ephemeral and/or impalpable: electronic, non-visible, and located in zones that defy a straightforwardly territorial logic", and suggest that we should therefore begin thinking of borders as a series of practices (Parker and Vaughan-Williams 2009: 586), a concept which ties in with an increasing understanding of the mobile nature of state borders (see Szary and Giraut 2015).

Whilst for the purposes of this analysis the focus is on the 'external Mediterranean borders' of the EU, this phrase is descriptive only in that it allows us to isolate and effectively understand specific

[2] 97% of recorded arrivals at sea in 2015 came from the world's top 10 refugee-producing countries (UNHCR 2015). In the same year, 75% of asylum applications in the EU came from people who had arrived by sea. Thus it can be assumed that a large number of migrants intercepted at the EU's maritime borders intend to seek asylum in the EU.

maritime incidents and their relationship with the border, and does not necessarily signify a territorially unambiguous understanding of the maritime border in the traditional sense of a 'line drawn on a map'. Whilst the physical occurrence of a maritime incident may be in the vicinity of the geographical border, the actual causes of the incident are a result of border practice; that is, the complex interactions between individual agency, official policy, border control / surveillance, smuggler networks and bilateral interactions between states - all of which serve to create and reinforce the concept of the border. Thus, for the purpose of this analysis, the border is conceptualised as a series of practices, a move which Parker and Vaughan-Williams (2009: 586) note "entails a more political, sociological, and actor-oriented outlook on how divisions between entities appear, or are produced and sustained" and "brings a sense of the dynamism of borders and bordering practices, for both are increasingly mobile."

In applying this approach to a study of the EU border-regime, Bialasiewicz (2012: 861) outlines the unique tactics employed in the externalisation of the EU's borders, which entail a suspension of the presumed norms and standards of the EU, legitimised through "bi-lateral agreements declaredly aimed at combating readily recognisable 'evils' such as criminal networks and international terrorism". Bialasiewicz' analysis touches on two important aspects of the workings of EU border control which will be developed here; that of the suspension of assumed norms, and that of the association of migration with the encroachment of a threatening 'other'.

To understand how these aspects of EU border control interact with human life at the EU's Mediterranean Sea borders, it is useful to incorporate a discussion of biopolitics. The concept of biopolitics is understood here in the Foucauldian sense, as that which emerges when those with political power seek to exert control over their citizens at the level of biological life itself (Foucault 1998: 142). Maritime borders, as spaces in which complex interactions between sovereignty and human life occur, therefore lend themselves to biopolitical analyses (see Vaughan-Williams 2011; Casas-Cortes et al. 2016; Bialasiewicz 2012). Foucault's understanding of biopolitics stems from tracing the changing nature of power in the West from classical times to the modern day. In Foucault's words; "the ancient right to take life or let live was replaced by a power to foster life or disallow it to the point of death" (Foucault 1998: 138, emphasis in original). Foucault goes on to expand his understanding of the biopolitical application of power to incorporate a historical recognition that power "would no longer be dealing simply with legal subjects over whom the ultimate dominion was death, but with living beings, and the mastery it would be able to exercise over them would have to be applied at the level of life itself" (Foucault 1998: 142-3).

It is the concept of the 'disallowing' of life which is taken up and developed by Giorgio Agamben in his attempt to reconcile Foucault's understanding of biopolitical power with what he perceives as Foucault's unexplained "zone of indistinction"; the 'strangely unclear' point at which "techniques of individualisation and totalizing procedures converge" (Agamben 1998: 6). To demonstrate this convergence, Agamben develops a theory of the workings of sovereign power through the 'state of exception'. Taking Carl Schmitt's definition of sovereignty, "[S]overeign is he who decides on the state of exception" (Schmitt 1985:4, quoted in Agamben 1998: 11), Agamben develops the concept of a state of exception to demonstrate that;

> *if the law employs the exception – that is the suspension of law itself – as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law.* (Agamben 2005: 1)

In other words, 'bare' life, or the living being, becomes legally encompassed in the state of exception through the very suspension, or 'ban', of the law.

Within this state of exception, or 'sovereign ban', bare life can be understood as "life that constitutes the first content of sovereign power… that may be killed but not sacrificed" (Agamben 1998: 83). To demonstrate the practical application of this concept, Minca (2006) applies Agamben's theory to the death of Jean Charles de Menezes in London in 2005. Menezes, who was wrongly identified as a terrorism suspect, was shot dead by counter terrorism police due to what Minca describes as the 'regime of exception' created by emergency counter-terrorism measures. These measures transformed Menezes, in that specific moment, into bare life, thereby "granting the police agents absolute sovereign power over him: the right, that is, to define, within the instant, the confine between a life worth living and a life that does not deserve to live" (Minca 2006: 387). This example demonstrates the utility of Agamben's concepts in terms of conceptualising state action towards those who are perceived, in a particular moment, as falling outside of the 'normal' rule of law – any life that is "presupposed and abandoned by the law in the state of exception" (Agamben 1996: 112).

This is especially useful in understanding the phenomenon of migration, given the increasing diffusion of state borders outlined above. Just as Foucault (1998: 139-140) recognised biopolitics as the "administration of bodies and the calculated management of life", so the migrant or refugee does not necessarily enter a state of exception through her physical locality, but rather through her bodily exposure to biopolitical controls by state powers. Indeed, building on Hannah Arendt's seminal essay 'We Refugees' (Arendt 1943), Agamben posits the refugee as representative of 'naked' or bare life.

The refugee, he suggests, represents a 'disquieting' element in the order of the nation-state, "primarily because, by breaking the identity between the human and the citizen and that between nativity and nationality, it brings the originary fiction of sovereignty to crisis" (Agamben 1996:20.1). The danger posed by the state of exception, according to Agamben, is that the indefinite use of exceptional measures could eventually cause them to become the rule (Agamben 1996: 137).

Agamben's concepts, in situating bare life within a state of exception, lend themselves to the study of borders as "biopolitical spaces where surveillance intensifies and migrant lives are held hostage" (Topak 2014: 816), and a number of commentators have drawn upon his work to gain a greater understanding of migratory flows and border zones (see Diken 2004; Bigo 2007; Lemberg-Pedersen 2012; Mountz 2010; Rajaram and Grundy-Warr 2004; Saltar 2004; Vaughan-Williams 2011).

Nonetheless, Salter (2006), whilst endorsing Agamben's work to describe the border as a potentially 'permanent' state of exception, suggests that: "Agamben's account fails to understand the particular state of exception at the state border and the decision to include/exclude; it lacks a capacity for agency" (Salter 2006: 169). This has been noted elsewhere; for example Abbott (2012: 29) asks if an application of Agamben's understanding of bare life to certain groups runs the danger of "collapsing the particularities of the testimonies of survivors into a monolithic narrative of an encounter with nuda vita", whilst McNevin (2013:185) suggests that Agamben relies on an overly reductive theory of power, and that the status of refugees as 'politically active people' disqualifies them from the conditions of abandonment necessary for bare life.

However, incidents outlined below concerning specific border practices of abandonment and collective expulsions highlight that whilst asylum seekers may be aware of their political position and intend to access asylum procedures of the destination country, they are frequently exposed to indiscriminate border practices and hence are denied access to the asylum procedure. Thus criticisms such as those above, and that outlined by Garelli and Tazzioli (2013: 1017) who suggest that Agamben's understanding of bare life is irrelevant in the case of migrants utilising their "full awareness of being 'governed subjects'" in order to request asylum and despite the desire to request asylum, are worth bearing in mind but do not preclude the utility of Agamben's concepts when applied to specific cases.

With this in mind, it must be noted that the focus here is not to indiscriminately label victims of maritime border incidents as inherently a-political nor as powerless examples of the irreducible, natural state of biopolitical life. Rather, it is to demonstrate the perception and treatment of vulnerable

peoples as such, and how such perceptions feed into and are themselves reinforced by institutional narrative and practice.

Indeed, as argued by Vaughan-Williams (2015: 47), Agamben's concepts provide useful insight into 'thanatopolitical' dimensions (understood as the utilisation of death to achieve political ends) within contemporary bordering practices. Although Vaughan-Williams warns against directly equating modern human rights abuses and spaces of detention in EU borderlands with Agamben's understanding of the Nazi *lager*,[3] he nonetheless suggests that Agamben's concept of 'biopolitical abandonment' offers unique insight into the EU's border crisis. Without such diagnostics, he argues, "some of the worst examples of thanatopolitics may… appear merely as tragic accidents, where the 'reality' of EU border security has simply failed to live up to the neo-liberal humanitarian rhetoric, rather than as a more intrinsic feature of biopolitics" (Vaughan-Williams 2015: 47).

In order to utilise Agamben's understanding of bare life and the state of exception to understand such incidents as more than simply 'tragic accidents', the practical applicability of his biopolitical approach must therefore be established. Butler (2004: 68) suggests that Agamben's concepts are overly general, and "do not yet tell us how this power functions differentially, to target and manage certain populations, to derealise the humanity of subjects." Astor (2009: 9-10) takes up this criticism in order to suggests that "this shortcoming results, in part, from Agamben's overemphasis on political and legal exclusion, and his neglect of the important role of social processes and practices in determining which populations become marked as excluded and targeted by discriminatory policies, and when this tends to occur."

Thus, the focus here is on establishing the mechanisms by which Agamben's state of exception comes to be a reality for certain people at the EU's maritime borders. The two areas of indistinction identified by Butler and Astor: how certain populations become to be treated as 'bare life', and how this distinction works to 'derealise the humanity of subjects', will therefore be analysed with the aim of understanding how they allow 'exceptional' treatment: in this context, the suspension of moral and legal norms at sea.

An understanding of broad processes concerning the securitisation of migration reveals to some extent how supposedly 'useful' life comes to be separated from supposedly 'useless', or 'bare' life, in terms of the latter's relationship to "to the security of free society" (Duffield 2006: 78). However, the process of 'securitising' migration is multifaceted and forms only part of a larger interplay of factors leading to the suspension of moral and legal norms at sea. As described by Buzan et al. (1998:

[3] With its connotations of work camps and death camps.

30), securitisation occurs when a concept or policy is expressed as a security concern, thereby increasing its political priority. In this manner, the political category of security is socially constructed, as opposed to objectively. In the words of Wæver (1995: 55); "security is not of interest as a sign that refers to something more real; the utterance itself is the act". In the context of migration, securitisation can therefore be understood as the process by which the movement of people is socially constructed as 'threat', in order to achieve political ends.

The theory of securitisation as understood by proponents of the Copenhagen School such as Buzan and Waever has, however, been criticised as overly narrow in terms of context, with a disproportionate emphasis on the speech acts of political figures (McDonald 2008). Nonetheless, it has led the way for a broader understanding of the influence of security rhetoric. Balzacq (2005) develops a practical approach to securitisation, which moves the emphasis beyond a narrow analysis of political speech acts and towards a "pragmatic model of security" (Balzacq 2005: 176) which necessitates the incorporation of intended audience, political agency of the speaker, and the broader social context. This allows for the securitisation of migration, whilst identifiable in speech acts and media representations, to be situated within its wider political and social context, and to incorporate elements of both praxis and practice (Balzacq 2010: 22).

The development of securitisation theory and its broad application to migration in the EU (see Lazaridis and Wadia 2015), has led to interesting debates concerning the theory's applicability to migration. Indeed, the perception and portrayal of external migration and of the migrant as a security 'threat' are multifaceted, and concern not only the securitisation of the border itself, but security rhetoric surrounding global criminal networks and smuggling enterprises. As noted by Buzan and Waever (2003: 462), even at the most local level, securitisation has its roots in broader global processes, and migration has increasingly come to be depicted as a global security threat (Bigo 2001).

Huysmans (2006: 61) has defined the securitisation of migration as "a circular logic of defining and modulating hostile factors for the purpose of countering them politically and administratively", thereby transforming those "who are often subjects in and partly products of a society into dangerous objects or factors." This approach sees the securitisation of migration not just in terms of political rhetoric and speech acts, but as inextricably linked to the 'administration' of policies. Outlining this process, Bigo (2002) demonstrates how migration comes to be securitised not only through political speech acts, but also through an administrative practice; "by the habitus of the security professionals and their new interests not only in the foreigner but in the 'immigrant.'" This contributes, he suggests, to an increasing 'structural unease', "framed by neoliberal discourses in which freedom is always associated at its limits with danger and (in) security", in which securitisation is "used as a mode of

governmentality by diverse institutions… so as to affirm their role as providers of protection and security (Bigo 2002: 65).

Indeed Bigo (2005) goes on to suggest that the security narrative concerning migration into the EU opposes cultures and civilisations against each other whose values are perceived to be antagonistic, and that;

> *it claims at the same time that globalisation and unequal distribution of wealth in the world push the poor to immigrate towards the prosperous countries and to remain there. It considers that this presence ruins the national homogenity, splits up the nation and puts the security of the state in danger. It thus sees immigration as a simultaneous attack on the security of society, because it affects coherence of national identity, and on State security, because it favours terrorism, drug trafficking, urban riots, and delinquency.* (Bigo 2005: 69-70)

The security studies approach to migration, therefore, can be seen to have developed beyond a narrow focus on speech acts, to encompass less explicitly articulated aspects of 'structural unease', administrative practice and national identity.

When looking at EU border practice, this approach allows a certain flexibility given the complexity of quantifying the relationship between diverse national / EU wide processes, and external border policy, which itself is formed by international law, EU law, and national law. Indeed, security narratives are problematic to objectively identify and isolate, with the risk that a focus on doing so will "pre-dispose the interpreter to use a security lens" (Huysmans 2006: 126).

This is demonstrated by Berry et al. (2015: 8), who in their comprehensive discourse analysis of press reporting on migration across 1500 news articles and 21 papers in Italy, France, the UK, Spain and Sweden, found that the occurrence of refugees and migrants being "discussed as threats to national security" ranged from 2.3% in articles on migration in Swedish papers, to 10.1% in Italian papers. Whilst such a finding is important in understanding a public perception of migration as posing an existential threat, it is interesting to note that within the same sample, the occurrence of humanitarian themes in articles on migration ranged from 32.5% in Spanish reporting, to 50.6% in Italian reporting. Furthermore, the researchers note that; "[M]ultiple, mixed and even seemingly contradictory frameworks of understanding may appear within a single news narrative… Certain frames may, when combined or linked with others, reinforce or otherwise subvert and transform familiar meanings" (Berry et al. 2015: 16). Thus, the depiction of migratory flows as uncontrolled

and ‘insecure’ will have a very different meaning when presented in a humanitarian framework, to when presented as a threat to national security.

Alongside the interconnected narratives identified in discourse-focused studies such as this, it is also important to note that the rhetoric of institutions dedicated to security may not conform to assumed trends. Indeed Neal (2009), in his analysis of the EU border agency Frontex, demonstrates that “the documents, political processes and rationales relating to the construction and remit of Frontex do not use overt securitizing language and do not follow the classic logic of securitization” (Neal 2009: 334). It could be argued that the very existence of Frontex, with its mandate of providing “management of operational cooperation at the external borders of the member states of the European Union” in order to ensure “a uniform and high level of control and surveillance” (Council of the EU 2004), feeds into the cycle of increasingly securitised borders (see Karamanidou 2015: 46). However, a linear connection of ‘securitising trends’ between discourse and institutional policy making should not be assumed.

Thus, whilst Balzacq’s (2010: 173) suggestion that the effective use of security as a concept “must be aligned with an external context - independent from the use of language” certainly allows for a broader conception of factors that contribute to securitisation, it also relies on an assumed link between the areas of discourse and institutional outcome. Boswell (2007: 590) has criticised this assumption, suggesting that security studies’ “concepts of ‘traversal’ between policy areas, convergence of agendas, or the ‘security continuum’, gloss over the distinctive dynamics of different parts of the political system and simplify the relationship between them”. Securitisation, Boswell states, falls short of adequately explaining EU approaches to migration, as despite the opening of the field to include both discourse and practice, the tendency is to assume “a rather simple one-way flow between politics (which legitimizes securitization through public discourse) and policy practice (which is then empowered to introduce security practices)” (Boswell 2007: 606). These two areas, she notes, operate according to distinct dynamics which preclude a meaningful ‘continuum’ of securitisation which runs logically from one to the other.

In response to Boswell’s analysis, Squire (2015: 26) posits that the securitisation of migration in the EU is best understood as an ‘absent presence’. Migration management, she suggests, is “indicative of the absent presence of a form of securitisation that is difficult to directly evidence, but that nevertheless haunts contemporary migration and border control” (Squire 2015: 32). This approach allows for a broader critical perspective which takes into account the potential for audiences to already have accepted the securitisation of migration from a background of growing global inequality and ‘othering’ (Squire 2015: 28). In this manner, migration does not necessarily need to be

specifically articulated as a security threat in order for it to be perceived, and treated, as such. As demonstrated below, maritime incidents in which moral and legal norms are suspended often occur within institutional and political discourses with a strong *humanitarian* rhetoric. Squire's concept of the 'absent presence' of securitisation is therefore posited as a useful tool by which we can recognise that broader trends of discursive securitisation remain present.

This understanding of the 'absent presence' of securitising trends within migration, however, necessitates a deeper understanding of how global processes influence EU understanding of external migration as 'threat'. Duffield (2006: 72) traces global security trends back to decolonisation, suggesting the emergence of a 'planetary order' in which "public infrastructures and social cohesion of free society are best protected by containing international migration". The EU, understood here as a "liberal entity characterised by the rule of law, democracy, freedom and security" (Karamanidou 2015: 40), is thus both institutionally and idealistically framed. The well documented rise of far-right populist politics in the EU, notably in Greece and the UK (Lazaridis and Konsta 2015), Italy (Toscano 2015), and Scandinavia (Lazaridis and Tsagkroni 2015), is characterised by protectionist rhetoric against the perceived threat globalisation poses to EU (and national) culture and identity (Toscano 2015).

Global security, however, is not confined to far-right political rhetoric. Indeed, it can be related to Edward Said's concept of 'orientalism,', or as seeing the 'West' as "rational, developed, humane, superior, and the Orient, which is aberrant, underdeveloped, inferior (Said 1978: 301). In the case of migration, therefore; "state governance and national belonging are reaffirmed and put beyond question in the identification of the asylum seeker as a 'threatening' or 'culpable' subject, thus precariously reconstructing a territorial political community in the face of its dislocation" (Squire 2009: 42). Thus, the presence of securitisation suggested by Squire (2015) may be absent from explicit speech acts, whilst being inexplicitly present in a long history of rhetorically positing the 'free society' of the EU against the threatening, unsecured 'other'.

Insofar as this 'unsecured other' is representative of a threat, EU border policy can be understood as that which aims to secure an idealised construction of 'valid life' against that of 'invalid life'. Thus, as noted by Duffield (2004: 7), "biopolitics is intrinsically connected with the security of populations, including global ones". Situating this within its broader global narrative, Duffield conceptualises Agamben's state of exception as indicative of a "conditional sovereignty", which can "either promote life through technologies of sustainable development and human security, or it can allow death when these security technologies break down and mass society comes under threat from unsecured global circulation" (Duffield 2006: 78). Therefore, global security rhetoric has

ramifications not only in terms of the physical border but also the biopolitical understanding of what it means to be a citizen, or to be 'outside' of this political category, reduced to the bare form of life and capable, therefore, of being conceived as a threat to the security of 'free society', itself a discursive manifestation of sovereign power.

As noted by Agamben and Encke (2001: 1), "[B]ecause they require constant reference to a state of exception, measures of security work towards a growing depoliticization of society." On a global level, therefore, security measures enacted in border zones or externalised to neighbouring states in turn contribute to the situating of migrants within a state of exception. Drawing on these themes, Duffield (2006: 78) suggests that, in a modern 'planetary order', we can understand Agamben's state of exception as taking the form of "a covert transborder network of detention and rendition centres, interconnected by air transport, and hidden within the folds of strategically allied authoritarian states." By her very existence in this complex network, the 'irregular' migrant is representative not just of a localised and identifiable threat to the integrity of the state border, but of a broader, intransient threat posed by the uncontrolled global movement of peoples. In this manner, the pregnant woman or young child fleeing war become just one more manifestation of the greater threat; the nameless terrorist, powerful criminal network or uncontrolled movement of insecure life.

To summarise, these broad processes are relevant not just in their framing of migration as threat, but in their framing of the 'other' as illegitimate, and thereby applicable to our investigation of the biopolitical treatment of migrants at the EU's maritime borders. The broad processes of securitisation identified above play a key part in understanding how certain people come to be treated by authorities and civilians as 'bare life' existing within a state of exception, thereby offering a theoretical framework from which to analyse incidents of the suspension of legal and moral norms in cases of maritime migration.

## 2.1 Methodology

As noted by Walters (2011:146) "[T]o focus only on new developments in surveillance and control risks a rather linear and developmentalist narrative about borders". Similarly, and taking into account the extensive focus in academic literature on the securitisation of migration, it is suggested here that a valuable lesson can be learned by identifying 'rhetoric' which contradicts 'reality'; not just that which supports it. Therefore, with a recognition of broad, global process of securitisation and increases in physical security measures at maritime borders identified above, the focus of analysis

will be on legislation, policy and discourse which appears to run counter to the exceptional practices identified.

Thus, in order to ascertain how legal and moral norms come to be suspended in cases of maritime migration, we will begin with a brief overview of what is meant, in a practical sense, by 'moral and legal norms'. As legal norms grow out of a broad base of legislation covering EU law, international law and national law, a complete overview is beyond the scope of this analysis. Therefore, legislation is specifically selected on the basis of its expressed use by institutions devoted to border security, in order to establish the normative terrain upon which they are based. Subsequently, a number of examples will be given in order to demonstrate this suspension at work at the EU's maritime borders. In order to develop Squire's (2015) concept of the 'absent presence' of securitisation, we will explore how the migrant continues to be perceived as representative of an insecure 'other', despite the liberal emphasis on the value of all human life.

The incidents described span from 2004-2014. As only a minority of cases are taken to a court of law, and incidents at sea are often shielded from public view, the depiction of these incidents often depends on eyewitness and survivor testimony, generally gathered by non-governmental organisations (NGOs) such as Amnesty International, Human Rights Watch (HRW) and the UNHCR. Reports by these NGOs often provoke a reaction from EU institutions or spokespeople, and where possible these reactions have been included.

The aim here is not to present a detailed overview of political reaction across the EU to the exceptional treatment of migrants at sea. Indeed, the nature of the examples given is such that responsibility for / knowledge of them is often denied by political figures and by border/ maritime agents. Thus, the examples given were specifically selected in order to demonstrate;

1) the 'exceptional' nature, in an Agambian sense, of treatment of migrants and
2) the seemingly contradictory endorsement of humanitarian norms in public discourse.

Included are examples of collective expulsions at sea, abandonments at sea and the criminalisation of non-state actor SAR. The examples were selected through extensive searches of media sources (on and offline) for maritime migration incidents covering the period from 2004-2014. Individual cases were then selected if they fulfilled the following categories:

1) Credible and sufficient witness testimony was available confirming the incident occurred.
2) The incident was subsequently acknowledged in the public domain by organisational press release or public statement by an NGO, politician, security agency or EU/UN/ NATO spokesperson/ institution.

To ascertain the nature of discourse surrounding these exceptional measures, each section is followed by a brief summary of available discursive reactions, namely taken from public statements released by spokespeople for institutions such as the European Parliament and European Commission.

Having identified how humanitarian rhetoric of NGOs and subsequent reactions by EU spokespeople co-exist with the illiberal practice of suspending moral and legal norms, we will then discuss how the internal workings of border institutions with a security mandate can act to filter and reinterpret legal and moral norms, to the extent that adherence to them becomes unpredictable.

# 3 Moral and Legal Norms

In order to address the question of how legal and moral norms come to be suspended in cases of maritime migration, we must first establish exactly *what* is meant, in practical terms, by 'norms'. This chapter will therefore outline our contextual understanding of legal and moral norms, and the extent to which they interact. As an Agambian approach conceptualises the state of exception as a 'sovereign ban', the approach here is to outline legal and moral norms which are assumed to apply to those who are *not* subject to such an exclusion, with the understanding that the suspension of these norms constitutes 'exceptional' treatment. Against the background of an observed increase in security practice at the EU's Mediterranean borders, this chapter will subsequently examine the humanitarian rhetoric of EU institutions, which consistently emphasis the 'fundamental rights' of migrants.

As noted above, people making 'irregular' migratory journeys across the Mediterranean do so for a number of reasons, meaning these movements of people are best understood as 'mixed flows'. Exact numbers of asylum seekers, economic migrants and other travellers are impossible to accurately determine, due to the unknown numbers of migrants' individual claims that are never examined by an official body. However, UNHCR (2015b) statistics show that 97% of recorded arrivals by sea to the EU in 2015 came from the world's top 10 refugee-producing countries. Alongside this, in the same year 75% of asylum applications in the EU came from people who had arrived via sea (Cosgrave et al. 2016). Thus, norms and legislation regarding the rights of refugees/ asylum seekers are relevant in most, if not all, of the cases outlined below.

On top of this, as noted by Andersson (2016: 1061), 'irregular' migratory journeys in the Mediterranean currently tend to occur in custom made, flimsy plastic dinghies with no experienced captain present. By the very nature of the journey attempted and mode of transport, all passengers are likely to be inherently vulnerable due to a combination of overcrowding, exposure to the elements, unseaworthy boats and a lack of/ inadequate safety equipment. Legal obligations regarding the duty

of rescue to those at peril on the sea are laid out in numerous national and international codifications. With this in mind, some of the most relevant points are also laid out below, with a recognition that this summary is by no means exhaustive.

## 3.1 Legal Norms

The 1951 Convention on the Status of Refugees (hereafter 1951 Convention), currently signed by 145 countries and by the UNHCR, defines a refugee as someone who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" is outside of their country of origin and unable or unwilling to return to it. The 1951 Convention outlines countries' responsibilities to afford refugees the right to legal assistance (Article 16.1) and prohibits states from penalising refugees who "enter or are present in their territory without authorization" (Article 31.1). It states that the expulsion of a refugee "shall be only in pursuance of a decision reached in accordance with due process of law" (Article 32.2), in which case "[t]he Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country" (Article 31.2). Notably for this analysis, it goes on to state that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (Article 32.1).

Recent legal precedent in which the 1951 Convention has been referenced can be found in the 2012 case of Hirsi Jamaa v Italy, which was taken to the European Court of Human Rights (ECtHR). The Court ruled in favour of 24 applicants, who formed part of a group of 230 migrants who were intercepted 35 nautical miles south of Lampedusa, transferred onto Italian military ships and handed over to Libyan authorities in Tripoli without any attempts made to ascertain if they were in need of international protection. After being handed over to the Libyan authorities, two of these passengers subsequently died from unknown causes. In its judgement, the ECtHR reiterated states' responsibilities to abide by the rule of non-refoulement as per Article 32.1 of the 1951 Convention (ECtHR 2012). The Court also ruled that there had been a violation of the prohibition of torture and of "collective expulsion of aliens" as stated, respectively, by Article 3 and Protocol 4 Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In reaching its judgement, the Court made reference to resolution 1821 (2011) of the PACE, which concludes with these words:

> *Finally and above all, the Assembly reminds member states that they have both a moral and legal obligation to save persons in distress at sea without the slightest delay, and unequivocally reiterates the interpretation given by the Office of the United Nations High Commissioner for Refugees (UNHCR), which states that the principle of* non-refoulement *is equally applicable on the high seas. The high seas are not an area where states are exempt from their legal obligations, including those emerging from international human rights law and international refugee law*. (PACE Resolution 1821 (2011))

Irregular migration across the Mediterranean is, by its very nature, a perilous venture. As noted by Betts and Collier (2017: 55), refugees worldwide are often faced with three "dismal" options: "encampment, urban destitution, or perilous journeys." Thus, many of those who embark on a journey across the Mediterranean have exhausted other options, and in their attempts to avoid detection risk poor weather conditions and long, perilous routes.

As noted by Cacciaguidi-Fahy (2007: 91) the normative framework governing assistance at sea is based on a foundation of basic human rights principles; nominally the right to life and the right to dignity. The UN International Maritime Organisation (IMO) oversees much of the formal codification of maritime law. The 1974 International Convention for the Safety of Life at Sea (SOLAS), for example, requires any "master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that people are in distress", to proceed to their assistance (as long as it is safe to do so) "with all speed" (SOLAS 1974: V:33.1). Similarly, the 1979 International Convention on Maritime Search and Rescue (SAR Convention) states that, as 'soon as reasonably practical' following a rescue, "the party responsible for the search and rescue region… shall exercise primary responsibility for ensuring… that survivors assisted are disembarked from the assisting ship and delivered to a place of safety" (SAR Convention 1979: 3.1.9). Furthermore, the SAR Convention requires any master of a ship to assist those in distress at sea "regardless of the nationality or status of such a person or the circumstances in which that person is found" (SAR Convention 1979: 2.1.10). 2004 amendments to the SOLAS and SAR Conventions emphasise the responsibility of a state to find a safe place of disembarkation for any shipwrecked people, *on its own territory* (IMO 2004).[4] In the 1982 United Nations Convention on the Law of the Sea (UNCLOS), ships are required "to render assistance to any person found at sea in danger of being lost", and "to

[4] Malta has yet to sign these amendments.

proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him" (UNCLOS, Article 98:1).

## 3.2 Moral Norms

Due to their more subjective nature, moral norms can be harder to establish. However, the two legal norms identified above – that of the right to seek asylum, and that of the duty of rescue – have clear moral connotations in their emphasis on the protection of strangers. In many cases, 'moral' norms will be objectified in legislation. A moral norm, however, is understood here to be a broader expression of obligation or duty which does not rely on legislation in order to be considered the 'norm'. Indeed, Betts and Collier (2017: 41) suggest that the 1951 Convention reflects the "morally incontrovertible" idea that people "who face serious harm in their country of origin should not be forced to go back until it is safe to do so". Similarly, Basaran (2015: 209), in his analysis of examples of apparent indifference to suffering and death at sea, suggests that; "praise for Good Samaritans, along with the public outrage and condemnation displayed toward bystanders, seems to confirm the existence of a well-aligned normative compass, pointing unequivocally to saving lives." Thus, the more subjective moral norms of 'saving lives' and 'protecting from harm' are subsequently legally anchored and contextualised in a range of laws that stipulate a specific duty to rescue and, in some cases, prescribe penalties for non-rescue.

In terms of identifying moral norms that are suspended in cases of maritime migration, the view taken here follows that of moral philosopher Peter Singer who states, through analogy, that the majority of humans would feel morally obliged to assist someone in peril as long as it was safe and easy for them to do so. That; "if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it" (Singer 1972: 231). As noted by legal philosopher Arthur Ripstein (2000: 752) "It is difficult to resist the idea that there is a moral duty to rescue others in peril, where such rescues can be affected at little or no cost to oneself. The deep rationale for such a duty is shared by any outlook that has room for any idea of duty: Human life is important; when lives can be saved without sacrificing anything of moral (or other importance) they should be."

If anything, a recognition of the normative landscape of moral and legal duties to rescue further complicates incidents of abandonments and collective expulsions at sea. These 'exceptional' treatments of migrants run alongside the phenomenon of what has been described as 'collective indifference' towards specific groups who are in danger of suffering and death at sea – the result, it

has been suggested, not of individual moral failure, but rather of a global process of "securing indifference toward securitized populations" (Basaran 2015: 216). It is at this intersection between the actions of state authorities and civilian actors on the high seas, the global process of securitisation, and the normative terrain of EU 'ideals', that we encounter space for the 'state of exception', in which the moral and legal norms outlined above are routinely suspended.

Indeed, the observed increase in security practice at the EU's Mediterranean borders is mirrored by the consistent humanitarian rhetoric of EU institutions. This is perhaps best summarised by the European Commission, who in a 2011 communication to the European Parliament stated that the umbrella organisation for the EU's external migration policy, the Global Approach to Migration and Mobility (GAMM), has the duty to *protect the fundamental rights* of migrants. The communication elaborates that; "[i]n essence, migration governance is not about 'flows', 'stocks' and 'routes', it is about people. In order to be relevant, effective and sustainable, policies must be designed to respond to the aspirations and problems of the people concerned" (European Commission 2011: 6). The Commission further states that "the caricature of a so-called "Fortress Europe" is not an accurate representation of EU policy. Rather, the EU has a duty to ensure that "Europe's borders are safe and secure with appropriate legal channels for entry" (European Commission 2011: 17).

Thus, whilst the physical increase in security at the EU's maritime borders is apparent, EU institutional rhetoric is not exclusively devoted to securitising trends. As will be demonstrated below, the protection of the fundamental rights of migrants is consistently reiterated as a priority by EU institutional spokespeople and policy makers, most notably in the aftermath of maritime tragedies. The discrepancy between institutional rhetoric and recorded cases of malpractice is summarised by the UN 'Special Rapporteur on the Human Rights of Migrants', in his report following a research trip to four EU countries. He states that; "the European Union has certainly progressively developed a more rights-friendly approach with regard to migration policy… However, the Special Rapporteur did not necessarily see this reflected in measures adopted on the ground. Rather, in the context of his missions undertaken, the Special Rapporteur observed that the implementation of a rights-based approach remains largely absent" (UN 2013: 10). Institutions such as Frontex, whose founding principles are based on human rights and the protection of liberal norms, have been similarly criticised for "undermining these principles" through practice (see Karamanidou 2015:48). The following chapter will examine specific examples of incidents on the EU's Mediterranean Sea borders which demonstrate such practices.

# 4 The Suspension of Moral and Legal Norms

This chapter outlines a number of recorded cases of 'exceptional' practice at the EU's maritime borders. It is demonstrated that the suspension of norms in these incidents paradoxically takes place within a prominent public discourse which endorses those same norms. Subsequently, these incidences are set against a background of institutional interpretation of official policy. Bringing together recorded examples of the suspension of legal and moral norms with a discussion of institutional interpretation of official policy gives us some understanding of how global processes of securitisation shape and filter the working of sovereign power through the state of exception.

## 4.1 Collective expulsion

In line with the ECtHR's ruling in the Hirsi Jamaa v Italy case outlined above (Chapter Three), the term 'collective expulsion' refers to the mass expulsion of foreigners from a state, as directly prohibited by Protocol 4, Article 4 of the ECHR. Such occurrences are popularly depicted in the media as 'pushbacks'. Despite the ECtHR's ruling in the Hirsi Jamaa v Italy case outlined above, collective expulsions of migrants at sea have not ceased. Evidence of such operations is often based on witness testimony and research undertaken by NGOs and non-state actors. Indeed, NGOs such as HRW, Amnesty International and the UNHCR have collated numerous survivor and witness testimonies of life-threatening tactics utilised by authorities in returning migrants (see HRW 2009; HRW 2014). In a 2013 report, Amnesty International stated that "the alarming number of testimonies collected by Amnesty International alleging collective expulsion suggests that these practices are regularly employed by Greek border guards and coastguards" (Amnesty International 2013:9).

**CASE A**

In January 2014, the UNHCR released a press statement regarding an incident which took place earlier that same month during an apparent attempted collective expulsion between Turkey and the Greek Island of Leros. Survivors of the incident reported that their boat, carrying 28 people, had been intercepted by the Greek Coastguard (HCG), who began to tow it back in the direction of Turkey at high speed. Whilst under tow, the boat capsized leading to the deaths of 12 people (including 8 children) who had been on board (UNHCR 2014b).

Despite denial by the Greek Coastguard (who claimed they had been towing the vessel towards the small Greek islet of Farmakonisi), the Council of Europe Commissioner for Human Rights Nils

Muizniek issued a statement condemning the incident as appearing "to be a case of a failed collective expulsion" (Independent 2014). Muizniek continued by reiterating the Greek government's previous pledge to "put an end to the illegal practice of collective expulsions and effectively investigate all such cases" and urging them to implement this pledge. A statement by Amnesty International regarding the incident points to the "blatant disregard for human life shown by the Greek coastguard during push-back operations carried out in the Aegean Sea" (Amnesty international 2014).

**CASE B**

Collective expulsions have also been recorded concerning the return of migrants from Italy to Libya. Notable for this analysis is an incident in 2004, in which 1153 migrants arrived by boat to the Italian island of Lampedusa, only to be returned to Libya (with no knowledge of their destination) a few hours later. It was later found that the 'registration' of all 1153 involved their names being recorded as 'Mohamed Ali', and their nationality as 'Palestinian' (Amnesty International 2005). In his analysis of the incident, Kitagawa (2011:2010) makes use of Agamben's state of exception to suggest that the migrants "were reduced to a mass without names, voices, and individuality, and were unconditionally deported; in Agamben's terms, rendered as bare life and abandoned into a zone of indistinction between citizen and noncitizen, the human and non-human".

The European Parliament's 2005 "Resolution on Lampedusa", drafted in reaction to several such mass expulsions from Italy to Libya in 2004 and 2005, states that "the collective expulsions of migrants by Italy to Libya … constitute a violation of the principle of 'non refoulement' and that the Italian authorities have failed to meet their international obligations by not ensuring that the lives of the people expelled by them are not threatened in their countries of origin". The resolution states that the European Parliament is "deeply concerned about the fate of the hundreds of asylum seekers returned to Libya, since that country is not a signatory to the Geneva Refugee Convention, has no functioning asylum system, offers no effective guarantee of refugee rights and practices arbitrary arrest, detention and expulsion", whilst raising concerns over the "treatment and deplorable living conditions of people held in camps in Libya" and the "massive repatriations of foreigners from Libya to their countries of origin in conditions guaranteeing neither their dignity nor their survival" (European Parliament, 2005).

**CASE C**

Despite strongly worded concerns voiced by the European Parliament shortly after the 2004-5 mass expulsions of migrants (see above) reports by NGOs such as the UNHCR and HRW show a

continuation of collective expulsions from Italy to Libya. In 2009, Italian authorities intercepted a vessel 30 miles from Lampedusa, carrying 82 people. These people were forcefully loaded onto a Libyan vessel, with no attempt made to ascertain their need for international protection. UNHCR reported that 6 people required hospital treatment from injuries sustained during the forcible removal from their vessel, onto the Libyan vessel (UNHCR 2009). HRW, in their investigation into the same incident, describe witness testimonies that electric-shock batons and clubs were used by the Italian authorities to force the passengers onto the Libyan boat (HRW 2009: Section VI).

Notably, UNHCR's press release relating to this incident began by praising Italy's history of rescuing those in distress at sea and "providing assistance and protection to those in need". It goes on to criticise the 'push-back' policy evident in this incident, expressing "serious concerns" that it both prevents access to asylum, and "undermines the international principle of non-refoulement" (UNHCR 2009). Thus, the migrants in question were subject to treatment in violation of Article 3 of the ECHR, prohibiting "inhuman or degrading treatment or punishment", were subject to an act of collective expulsion, and were at risk of refoulement by Libyan authorities to their country of origin.

In case A given above, the actions of the HCG cannot necessarily be said to be performative, in that the incident was subsequently denied (despite robust witness testimony). Thus, the physical actions undertaken by the HCG problematize the 'discourse/practice' cycle of securitisation – should denial and/ or concealment of such actions be successful, the discursive nature of such an incident is impaired; it cannot be 'used' to frame threat or justify further security measures. Furthermore, the Council of Europe Commissioner's (Muizniek) press release emphasises the humanitarian imperative to cease illegal actions which endanger lives. Case B offers a greater challenge to analysis due, perhaps, to its less emotive content. The indiscriminate naming of all victims as 'Mohamed Ali', in attempting to reduce the victims to a single mass, is nonetheless indicative of 'othering', which in turn can be associated with global processes of securitisation. However, the subsequent 'Resolution on Lampedusa' by the European Parliament states an overriding concern for the welfare of those who fall victim to expulsion, whilst emphasising once again the imperative to protect the human rights of migrants. Thus, in the cases outlined above, recurring trends include an institutional reluctance amongst border-authorities to acknowledge such incidents, and a strong discursive rhetoric from NGOs, the European Parliament and European Commission condemning them.

## 4.2 Abandonments at sea

Abandonments at sea are understood here as the deliberate and informed decision by maritime actors not to take action to assist those in peril on the sea. As above, evidence of many such incidents rests

on survivor and witness testimony.[5] An Amnesty International report of 2013 outlines 13 separate survivor testimonies in which people with stories of being pushed-back to Turkey in the Aegean Sea "described similar experiences of their inflatable boats being rammed or knifed, or nearly capsized while they were being towed or circled by a Greek coastguard boat, their engines disabled, their oars removed, and their occupants left in the middle of the sea on unseaworthy vessels" (Amnesty International 2013:11). Thus, cases of abandonment can also involve aspect of direct action, in terms of removing vessels' means of propulsion or making them unseaworthy.

**CASE D**

One such incident, and perhaps the most high-profile of those described here, is that of the so called 'left to die' boat of March 2011 raised in Chapter One. Originally documented by journalist Jack Shenker for the Guardian newspaper (Shenker 2011), an enquiry into the incident was subsequently ordered by the Council of Europe. In the resulting report to the PACE, Strik (2012) outlines in detail the events leading up to the tragedy. When the boat's engine cut out shortly after it disembarked from Libya, the passengers made a distress call via satellite phone, which was received by the Italian Maritime Rescue Coordination Centre in Rome (MRCC). Shortly afterwards, a French military helicopter dropped water and biscuits, but did not return. At this point, the Maltese and Italian maritime rescue centres, NATO and Frontex had been informed of the plight of the boat. By the tenth day of the voyage, at which point approximately half of the passengers had perished from dehydration, a naval vessel passed close by, its sailors taking photographs of the dinghy and its remaining occupants before leaving the area. Five days later, the dinghy came ashore once more in Libya with ten surviving passengers, one of whom died shortly after disembarkation due to a lack of medical attention. Throughout their ordeal, the survivors reported having sighted numerous other civilian/ fishing vessels, which failed to go to their assistance. GPS data shows there were an estimated 38 naval assets in the vicinity (Heller et al. 2012: 49) and a Spanish NATO vessel which had been informed of the distress call was at one point eleven miles away (Strik 2012: 2).

In a statement issued through the Guardian regarding this incident, UNHCR spokeswoman Laura Boldrini said; "the Mediterranean cannot become the wild west; those who do not rescue people at sea cannot remain unpunished" (Shenker 2011). Also through the Guardian, a NATO spokesman denied that NATO had any record of the incident, stating; "NATO units are fully aware of their responsibilities with regard to the international maritime law regarding safety of life at sea," and that

[5] See HRW (2009) Section IX 'Failure to Rescue Boats in Distress at Sea' for witness testimonies.

"NATO ships will answer all distress calls at sea and always provide help when necessary. Saving lives is a priority for any NATO ships" (Shenker 2011). Despite this, as noted by Klepp (2014: 42) the incident is unique in that it provides a well-documented example of an incident in which French, Italian and Maltese border authorities, plus NATO and Frontex personnel, contributed to the "non-rescue" of the boat.

**CASE E**

More recently, in May 2017 Italian paper *L'Espresso* released the recording of a telephone conversation from 3rd October 2013 between Dr Mohanad Jammo, a Syrian passenger on board an overloaded dinghy approximately 61 miles away from the island of Lampedusa, and the Italian authorities (L'Espresso 2017). In the recording, the distress call is repeatedly passed between Maltese and Italian officials, who recommend that it change its course for Malta, although GPS data shows that the vessel in distress was located approximately 188 miles away from Malta at the time (Gatti 2013). The Italian navy patrol ship Libra was 17 miles away from the people in distress and yet waited five hours after receiving the distress call - at which point the vessel in distress capsized - before responding. The incident led to the death of 268 people, including 60 children. The authorities involved in this incident are still being investigated by Italian prosecutors (see Gatti 2017).

In a statement regarding the incident, European Commissioner Cecilia Malmström stated in a press release that; "these images [of the 3rd October shipwreck] are still in my mind as a terrible reminder of how we must strive to keep Europe open to those who seek protection. For those escaping dictatorship and oppression, fleeing conflicts and wars, Europe is a shelter where they can find safety, or a new life far from tyranny and misery" (European Commission 2014). Italian president Giorgio Napolitano said in a statement that the EU needed to take action to stop the "succession of massacres of innocent people" (Pantaleone 2013), whilst the deputy prime minister Angelino Alfano stated; "We hope the EU realises that this is not an Italian but a European disaster." The head of the PACE, Jean-Claude Mignon, said "We must end this now. I hope that this will be the last time we see a tragedy of this kind, and I make a fervent appeal for specific, urgent action by member states to end this shame" (Davies 2013).

**CASE F**

Cases of abandonment, however, have also occurred at the hands of civilian actors. The case of the *Budafel* is one such example: in May 2007, a boat carrying 27 migrants who had departed a week earlier from Libya and were heading for Italy capsized in the vicinity of the Budafel, a Maltese fishing

vessel. The passengers of the capsized vessel were able to cling to the tuna pens being towed by the *Budafe*l and requested assistance from the fishermen. The Capitan of the *Budafel* notified the MRCC, however refused to allow the people in distress access to his ship, and they were left on the tuna pens, exposed to the elements, for three days and nights until being picked up by an Italian naval vessel. The captain of this vessel told the media that he refused to divert his ship to disembark the men "because he was afraid of losing his valuable catch of tuna" (Coppens and Somers 2010: 380). All passengers subsequently submitted asylum applications in Italy.

In response to this incident, the Italian Refugee Council (CIR), submitted a report to the PACE, stating that "The Budafel put these people's lives at risk and submitted them to inhuman and degrading treatment in violation of article 2 and 3 of the European Convention on Human Rights" (CIR 2007: 6). In reference to the Budafel incident and three other migration related SAR incidents, the report states that "immigrants coming by sea face both the difficulties involved in crossing the Mediterranean and dangers deriving from the highly differing search and rescue responses in operation in these waters… Moreover, it should be pointed out that the great majority of these people are asylum-seekers in need of international protection" (CIR 2007: 1).

Again, it would appear that public discourse regarding such situations contradicts the reality experienced - a press release by the European Commission in response to case B outlined above urged that "Shipmasters and merchant vessels should be reassured once and for all that helping migrants in distress will not lead to sanctions of any kind and that fast and safe disembarkation points will be available. It has to be clear that, provided they are acting in good faith, they would not face any negative legal consequences for providing such assistance" (European Commission 2013). Nonetheless, case F demonstrates that civilian actors can also play a role in the suspension of legal and moral norms – a key difference being that the captain of the *Budafel* was not answerable to the institutional norms of a border agency at the time. Nonetheless, as the 'Master' of a ship, he was required to both assist those in distress and to ensure they were 'delivered to a place of safety' (SAR Convention 1979: 3.1.9). As shown below in case G, civilians may have other reservations about conducting rescues at sea.

## 4.3 Criminalisation of assistance at sea

**CASE G**

One notable case of the criminalisation of civilian assistance in the Mediterranean occurred in 2004, when the Cap Anamur, on route to Iraq where it was to deliver humanitarian supplies, diverted to

rescue 37 migrants from a sinking ship between Malta and Lampedusa. Both Malta and Lampedusa subsequently denied the Cap Anamur permission to disembark the migrants, and the ship was left for 3 weeks, unable to dock. As food supplies became depleted and mental health deteriorated amongst those on board, the captain eventually issued an emergency call due to being unable to "guarantee the safety of the people on board" (Cuttitta 2014: 23) and was allowed to disembark in Sicily. Upon disembarkation, in what has been called a "sovereign gesture" (Mezzadra and Neilson 2013: 171), the crew was arrested on suspicion of 'people smuggling'. The ship's captain and first officer underwent a three-year trial before being acquitted (BBC 2009). Shortly after the incident, the European Council expressed "utmost concern about the human tragedies that take place in the Mediterranean as a result of attempts to enter the EU illegally' and called on states to 'intensify their cooperation in preventing further loss of life" (European Council 2004: 25).

In a press release at the time, the UNHCR gave a statement expressing its "strong concern over apparent disregard for accepted international and European standards and for fundamental elements of due process" (UNHCR 2004). However, the criminalisation of civilian SAR in the Mediterranean has not abated, from Sicilian fishermen who found their boats confiscated and houses searched after responding to distress calls at sea (Albahari 2006), to the arrest of Spanish lifeguards on the Greek Island of Lesbos in 2016 (Aljazeera 2016).

A CIR report of 2007, outlining examples of civilians being punished for providing assistance at sea, suggests an increasing "reluctance of fishermen to rescue people in distress at sea, frequently because of a fear of losing working days on the sea or huge amounts of money" (CIR 2007: 1). Typical of this is a case in 2007, which saw seven Tunisian fisherman prosecuted by an Italian court after rescuing forty-four migrants from the sea. The fishermen were acquitted after a four-year court process, during which their fishing boats and licences were revoked (Cuttitta 2014: 33).

Indeed, Basaran (2015) suggests that, despite the outcome of the trials having had no effect on actual rescue legislation, several such high-profile cases have led to fishermen's livelihoods being ruined by lengthy legal proceedings, meaning the legal process, despite eventual acquittal, becomes punishment in itself. He suggests that, given this; "rescue at sea became a costly operation that small fishing boats and even larger commercial vessels need to avoid, if possible, or to comply with only to a minimum degree" (Basaran 2015: 213). He points out that "increasingly legal status defines access to rescue and creates a category of people exempted from ordinary norms of humanity. Classifying people as unauthorized, irregular, illegal, and/or criminal creates suspicion, stigmatization, and feelings of distrust toward these populations" (Basaran 2015: 213).

## 4.4 An analysis of these incidents

The incidents outlined above are indicative of the "chaotic and indefensible" response that Betts and Collier (2017: 5) suggest is characteristic of EU reactions to migratory flows over the last two decades. The purpose of focussing on such incidents is not to depict all EU border control practice as morally exceptional. Indeed, the examples outlined above form a small part of a much larger picture, in which civilians, NGOs and state actors account for a large number of successful rescues at sea. Rather, these examples demonstrate that despite evidence of well-established and discursively reinforced legal and moral norms, migrants at the EU's maritime borders continue to be subject to unpredictable and often 'exceptional' treatment. The examples given demonstrate an important but often overlooked aspect of maritime migrations disasters; that of the moral outcry of EU spokespeople and institutions. Cases E and F saw the evocation by such actors of the 'shame' of the EU in 'allowing' such incidents to continue at its borders, thus positing the EU, an entity characterised by its ideals (see Chapter Two), as obliged to intervene.

As Andersson (2014: 153) writes, the "violent back-room of the border", including trauma and drama at sea, is often shielded from public view by state actors. The examples given above are representative of a small selection of cases in which survivors were able to make contact with a person or institution able to make their story public. Institutional condemnation of the incidents given above not only obscures the extent to which those same institutions are accountable for exceptional practice, but also gives security actors on the maritime borders of the EU further justification to increase security measures in the name of rescue and protection.

Gaining an understanding of *how* moral and legal norms come to be suspended in cases such as those outlined above has a clear immediate moral imperative, but also broader ramifications. Incidences of illiberal border control such as those demonstrated are liable to reproduce the very 'chaos' they purport to prevent, as restrictive and punitive measures force migrants to take ever more dangerous routes in order to avoid detection, and the smuggling enterprise is pushed further underground (Tsianos and Karakayali 2010; Spijkerboer 2007). These incidents, therefore, feed into a self-perpetuating cycle of securitisation and human rights abuses, by which increases in security, framed as 'humanitarian', only open the door to abuses such as those above. Furthermore, as noted by Basaran (2015), punitive policies against non-state actors who enact rescues run the danger of changing the normative landscape concerning the obligation to rescue those in peril on the sea. Again, by encouraging a perception of migrants at sea as "exempted from ordinary norms of humanity" (Basaran 2015: 213), punitive measures against non-state actors subsequently feed into the broader

rhetoric of global securitisation, by reinforcing the construction of 'us' and 'them'. This is perhaps best exemplified by the example of the labelling of 1153 people as 'Mohamed Ali' by Italian authorities (case B), denying them a recognition of any form of 'human' identity or agency – even a name - prior to their collective expulsion.

Therefore, despite an emphasis in academic literature on the discursive securitisation of migration, the examples outlined above suggest an incoherence in the relationship between institutional discourse and practice. As has been outlined, these exceptional incidents occur in the context of increased security measures in terms of surveillance and instruments of control, but within a liberal trend of respect for EU norms of human rights protection. These trends have been posited by Walters (2011: 153) as typical of a 'humanitarian border'; "a domain where it is especially clear that governmental practices emanate not from a given centre of official authority but in contexts of contestation and politicization."

At this stage, therefore, it is useful to look at how the legal and institutional 'norms' identified come to be filtered and applied differentially at the level of practice by security actors. Humanitarian and security narratives are inevitably filtered through institutions which are explicitly created for the purpose of security, such as Frontex, the HCG, and the AFM (the Maltese navy). At which point does the humanitarian imperative override, or itself become overridden, by the broader security agenda? Indeed, the two narratives come together in an unpredictable manner, each level of interplay contributing to the final outcome and framing whether a maritime actor interprets a boat in distress as a 'threat to the security of the border', as a 'humanitarian emergency', or as a combination of the two.

As noted by Williams (2015), the mandate of 'care' in border enforcement can also serve to increase its reach. Indeed, framing border security as a moral *obligation* gives a double urgency to its instigation; not only must 'free society' be protected from a 'flood' of insecure life, but that life itself must be 'saved' as a matter of emergency. Images depicting overcrowded boats full of desperate people evoke dual narratives – the vulnerability of human life, and the chaotic nature of that life. As noted elsewhere (Andersson 2016: 1060), these dual narratives enable a "two-faced reactive response of 'humanitarian' action and more policing." The unpredictability of this combination, as stated by Klepp (2004: 41), means that even 'regimes' as well established as that of maritime SAR are constantly "interpreted and redesigned according to a variety of political interests and power relations".

Pallister-Wilkins (2015), in her ethnographic research on Frontex and Greek border officers, offers an insight into border officials' personal interpretations of their mandate. Highlighting an

interview with a Greek police chief, she portrays an uneasy institutional interpretation of the relationship between "rescuing migrants, preventing their entry and catching the smugglers who facilitate entry" (Pallister-Wilkins 2015: 63). This differential interpretation is vital in understanding the contradictions apparent between discourse and practice. In their ethnographic approach to understanding the work of Frontex, based on 64 interviews with past and serving Frontex officers, Aas and Gunhus (2015: 4) note that the agency's internal motto is "Humanity, open communication, professionalism, trustworthiness, teamwork". Yet within the agency, they describe a patchwork of sub-cultures, leading to "pronounced distinctions within Frontex with regard to how individual officers see their role and perform their tasks" (Aas and Gundhus 2015: 7). A recurring theme, however, was a disinterest in collecting information about migrant mortality; "this was seen as difficult or impossible at all levels of the organization and was described as a task for NGOs and national authorities" (Aas and Gunhus 2015: 10). The absence of an expressed will to acknowledge fatalities correlates with Frontex's institutional understanding of 'vulnerability' as that which relates to the border, as opposed to the human; "[V]ulnerability is understood as the factors at the borders or in the EU that might increase or decrease the magnitude or likelihood of the threat" (Frontex 2012: 109). Thus, practicing officers on the 'ground' are faced with a number of competing narratives; not only their own moral standing, but an institutional mandate of border security, stated institutional ideals of humanitarianism, and the 'presence' of global processes of securitisation pitting the 'European' against the 'other'.

In an anonymous interview with Pro Asyl (2007: 13), an HCG officer operating in the Aegean between Greece and Turkey elaborated on his differential interpretation of migrants;

> *When we see refugees, women and children, we say: that is a family, we have to help them. But when Afghans (for example) arrive, you see that they are all young men between 14 and 17 – it seems as though it were a sort of army, moving from the east to Europe.*

In this example, the officer's perception of who he should assist appears to rest on the level of threat he perceives. Indeed, his understanding of young Afghans as 'a sort of army, moving from the east' is indicative of the perceived threat of 'unsecured' populations, whilst his reaction to women and children; 'we have to help them', appears to reflect a moral narrative.

Thus, whilst HCG officers interviewed showed acknowledgement of official 'norms', their own interpretation of the situation and personal prejudices guided their actions. The HCG commander on the Greek island of Lesbos, Apostolos Mikromastoras, went as far as to state that "They [male

migrants] are all very well trained, they swim very well! Europe has to understand that a very real danger is approaching. I believe we are dealing with an Islamic invasion" (in interview with Pro Asyl, 2007: 13). Whilst it is by no means suggested that these comments are representative of a widespread attitude within the HCG, they nonetheless demonstrate the potential for personal prejudice to affect operational conduct. Indeed, as another HCG officer stated in reference to migrants intercepted in Greek waters whilst crossing the Aegean from Turkey; "If they don't damage their boats to such an extent that they're unusable… we put them back on the boats and bring them back to the Turkish coast or to an uninhabited island. This is not official policy – of course not" (Pro Asyl 2007: 14).

These testimonies from Frontex and HCG officers offer an insight to the level of "flexibility of interpretation" inherent in organisations which appropriate a discourse of fundamental rights whilst fulfilling a security mandate (see Aas and Gundhus 2015; Neyroud and Beckley 2001). Klepp (2010) offers further insight into this in his interview with an AFM Commander. The Maltese commander describes how the authorities attempt to circumvent obligations to refugees picked up at sea, for example through the type of vessel employed. Due to a warship being considered 'sovereign territory', the authorities would attempt to transfer migrants out of international waters on small, unregistered boats upon which migrants were unable to claim asylum (Klepp 2010: 17). This leads Klepp to suggest that it is *on* the Mediterranean Sea border that the "parameters of refugee protection and the principle of *non-refoulement* are negotiated" (Klepp 2010: 18), thereby leaving room for operational practices which do not conform to the legal norms of the EU.

At this point, it is useful to return to Agamben's concept of the state of exception to understand how, through the complex intertwining of these often-conflicting narratives, migrants come to be perceived as 'bare life'. This is perhaps best exemplified in an interview with an AFM commander, who complained that;

> *UNHCR has said that Libya is not a safe place for disembarkation. So what does that mean? That anyone saved in Libyan SAR has to be disembarked in Malta as well? They are not separating the two issues! There is a safe place in terms of SAR and there is a place of safety in terms of humanitarian law. These are two different things.* (Klepp 2011: 549)

This telling comment brings us back to the concept of agency as discussed in Chapter Two. There is no recognition by the AFM Commander that the people he refers to may desire to seek asylum, or even that, as human beings, *both* humanitarian and SAR laws are applicable. Thus, whilst the treatment of the migrant as bare life may rely on the state apparatus and be a combination of the

complex interplay of politics and ideals, it is also manifest at the level of individual choice. The AFM commander is willing to fulfil what he saw as his mandate – 'saving' lives at sea – but he is not willing to go as far as to give those lives agency – they are not people, with agendas, the desire to apply for asylum, nor the right to do so. He will acknowledge his duty to deliver them to a place of safety as per his perceived mandate - SAR - but any further desires they may have are illegitimate – in an observable sense, they are included *only by being excluded*; subject to the sovereign ban. Thus, whilst maintaining a moral outlook, he simultaneously excludes those who are representative of an existential security threat.

Whilst it is acknowledged that such conclusions concerning individual choice cannot *a priori* be drawn from the highly selective excerpt given above, it nonetheless offers a conceptual foundation from which we can begin to understand the practical application of Agamben's state of exception, and how it can be utilised to shed light on the suspension of moral and legal norms in the cases above. In this way, it is not only the 'threatening' migrant who is perceived as bare life, but also the 'vulnerable';

> *[T]he 'irregular' migrant in need of saving by border security authorities is interpellated as a subject that is not only denied any political agency, but also devoid of any connectivity with wider social relations. Excepted from the historical conditions that have led to such situations of emergency, she or he is treated as a biological life.* (Little and Vaughan-Williams 2016:550)

Drawing on the work of Esposito (2011), Little and Vaughan-Williams go on to suggest that contemporary border security, in encompassing an element of humanitarianism, allows for 'irregular' migrants to be both 'protected' *and* 'banned' by border authorities; "compassionate border work operates according to an (auto) immunitary logic: the very lives that are identified as in need of protecting and saving can also become targeted by lethal apparatuses of security" (Little and Vaughan-Williams 2015:551).

# 5 Conclusion

We have taken only a small step here in addressing the underlying question of *how* legal and moral norms come to be suspended in the cases outlined above. The two areas of indistinction we identified in Agamben's theory of the state of exception: of how certain populations become to be treated as 'bare life', and how this distinction works to 'derealise the humanity of subjects', have been explored,

with the former identified as inseparable from the external context of global inequality and 'othering' which contribute to the securitisation of the migrant as both threat and as ‘bare life’. The latter has proven more complex to analyse, further complicated as it is by the moral outcry of EU institutions and spokespeople over the suffering at EU borders.

The working of sovereign power through the state of exception is subject to the complex interplay of global security processes, institutional norms and law, and operational interpretation. Thus we can avoid the reductionist conclusion that humanitarian rhetoric is no more than a divisive veneer constructed in order to present an acceptable public front behind which illiberal practice occurs (although in some cases this may be the outcome), and we can begin to understand that the treatment of migrants as bare life is not a ‘foregone conclusion’, but rather has the potential to be interrupted or diverted at any level as the expression of sovereign bio-power is filtered through legislation, institution and the individual.

The discourse of the migrant as ‘at threat’ has its origins deeply imbedded in the ideals of the EU as a liberal entity, meaning that caution must be used in applying a linear framework of securitisation to the exceptional treatment of migrants at maritime borders. Not only are attempts often made to conceal these incidents from public view (an unknown number of which succeed), but they violate legal norms and official policy, and are commonly discursively opposed by policy makers and institutional actors; the institutional norm concerning such incidents is to prioritise the importance of rescue and humanitarian assistance. Thus, whilst it is acknowledged that media rhetoric in the EU contributes to equating maritime migration with threat (Berry et al. 2015), policy makers and key institutional actors consistently prioritise the liberal rhetoric of respect for human life at the borders of the EU.

In light of this, it is suggested that securitisation of migration at the EU’s maritime borders is best approached in terms of the ‘absent presence’ conceptualised by Squire (2015), acknowledging the rhetorical threat of “unsecured global circulation” (Duffield 2006: 78), whilst problematizing the assumed dominance of this rhetoric in political and institutional discourse. This approach allows for a critical analysis of the coexistence of liberal rhetoric with illiberal practice.

EU border authorities are tasked with standing between not just one territory and another, but at a more ‘symbolic’ frontier of global inequality. Whilst this frontier acts to reproduce the uncontrolled movement of external populations as threatening to the EU’s own security, doing so is a “multidimensional process of interconnecting diverse policy issues through institutional codifications” (Huysmans 2006: 150). Given that many EU institutions are based on codifications which prioritise the protection of fundamental rights, the ‘protection’ of the EU – or at least the

upholding of its ideals – is inextricably linked to the imperative of protecting vulnerable life. Whilst it has been demonstrated that the institutional expression of humanitarian ideals is not necessarily sufficient to ensure humanitarian practice, the continuing trend of abuses on the EU's Mediterranean Sea borders cannot be fully understood without incorporating associated liberal rhetoric. Indeed, the danger of conceptualising exceptional practice as the 'inevitable fallout' of a linear process of securitisation, is that it comes to be perceived as both routine and, potentially, as unavoidable.

Thus, a change in practice at the border necessitates an understanding of incidents such as those outlined above as not only unacceptable, but, importantly, as *avoidable*. The 'left to die' boat (case D), therefore, is not understood as an example of vulnerable people being passively 'left' to die, but rather as vulnerable people being actively 'allowed' to die. Taken with our understanding of the border as that which consists of a series of practices, the practices of state and civilian actors contribute to the construction of maritime migration - that which would compromise the border - as both an existential threat and a moral crisis. It is through the complex intertwining of these two narratives that legal and moral norms come to be suspended. As Duffield (2004: 8) aptly writes, 'global governance', "as a design of bio-power… rather than responding 'out of the blue' to external threats, directly fabricates its own security environment. In distinguishing between valid and invalid global life, it creates its own 'other'… to which it then responds and tries to change." Maritime border control, as another manifestation of bio-power, can be understood in a similar manner; as that which directly contributes to both the insecurity of the border, and deaths at the border, that it discursively opposes.

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