Preface on navigable and unregulable space(s)

While a president of the United States trumpeted his plans to build a wall against immigration from Mexico, Europe faced another type of wall, made of water. The Mediterranean Sea marks the borderline between Europe and Africa. It is used as a passage from one continent to another by those wishing to flee their homeland due to war and civil war, famine, economic deprivation, an unsafe environment or, alternatively, ambition and entrepreneurial zest, coupled with a willingness to accept high risk high gain. Like the wall against Mexican immigration, the Mediterranean Sea is also used as a fence to stop those wishing to make the passage, criminalising not merely those attempting the crossing but also those who come to their rescue. In Madjidian's chapter in this volume on the civil rescue fleet in the Mediterranean we read that '[i]n the aftermath of the Arab uprisings, migration across the Mediterranean has increased. The International Organisation on Migration ("IOM") estimates that since the beginning of 2014, at least 20,000 migrants have died trying to reach European shores'.[1]

In his penetrating work on the figure of the migrant,[2] Thomas Nail invites the reader to inverse their usual default position, asking to no longer see migration as the exception to the rule, acknowledging that for most of human history we have been nomads. We may foresee 'returning' to an era where sedentary life is what needs an explanation, rather than migration. Indeed, climate change and geopolitical disruptions may uproot comfortable assumptions about mutually exclusive sovereign states that respect the principle of non-intervention with the intent of being left in peace themselves. Nail's salient work reminds me of Jean-Marie Guehenno's 1993 prophetic *The end of democracy*,[3] where Guehenno foresaw the implications of a global elite that finds easy passage across the world while (their) transnational companies engage in tax shopping, thus endangering the loyalty as well as the income that enables states to function and protect their (and other) citizens. Nail's work proposes a radical reconfiguration of our common sense, reminding us that if land were to become an *unregulable passage*, *navigable* only for those with greater military force or economic power, most of us would be in a bad place. Taking note that, at the global level, this radical inversion of the narrative on statehood, migration and belonging may have been the default all along, with so many people being subject to myriad forces that push them from one place to another – including the economic forces that drive urbanisation, the politics of authoritarian regimes or the perverse incentives that invite human trafficking.

Simultaneously, the global information and communication infrastructure (which is now largely dependent on *mobile* devices) has created a new kind of spatiality that does not consist of mutually exclusive territories but instead situates individuals, corporations and states in myriad overlapping contexts despite them remaining in the same location. Think of working from home, a coffeeshop or from a hospital bed; discussing family matters online from one's office or while commuting; running a team during one's holiday via remote video conferencing; paying via one's mobile phone or transferring crypto currencies to obtain a non fungable token (NFT). More to the point, think of a person or a corporation staying or being established in one state while working in another, doing business across borders, hacking into computing systems on another continent, spreading deep fakes to disrupt elections within another state or conducting cyberattacks against critical infrastructure of another state without declaring war – all situations where the effects of actions taken in one jurisdiction have major repercussions in another. This new spatiality, coined cyberspace, has provoked a comparison with the waters between continents. Like the high seas,

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[1] Taken from the website of International Migration Organisation (IMO) Missing Migrants Project, https://missingmigrants.iom.int.

[2] Thomas Nail, *The Figure of the Migrant* (Stanford University Press 2015).

[3] Jean-Marie Guéhenno, *La Fin de la démocratie* (Flammarion 1993).

cyberspace seems to be a passage between more solid spaces, allowing people to escape, meet or trade. And like the high seas cyberspace has been framed as an *unregulable* space that provides freedom from state interference.

The high seas have preserved some of their claimed unregulability, even if based on global treaties rather than natural properties. Cyberspace has, on the contrary, become a densely regulated space, consisting of portals, platforms, service providers and a set of walled gardens whose 'jurisdiction' regulates by way of a convoluted mixture of technical protocols, optimisation machines that nudge their users into preferred behaviours and a tight net of Terms of Service, consent buttons and default settings. Concurrently, states have imposed extraterritorial jurisdiction to face the implications of cyberspace-induced deterritorialization, grasping for ways to fight cybercrime, including cybersecurity attacks, child abuse, identity fraud and soon to be expected unlawful remote control over cyberphysical infrastructure in the case of the internet of things. The claimed unregulability of cyberspace has paradoxically resulted in an excess of competing technical and legal regulation, pushing sovereignty out of the boundaries that shaped both its absolutist tendencies and the 'practical and effective' protections offered by a rule of law that depends on territorial jurisdiction.[4]

Let's therefor return briefly to Grotius' famous *Mare Liberum*,[5] about the freedom of the high seas. Grotius wrote it as an assignment of the Republic of the United Netherlands and the United East India Company, whose interests had to be protected against claims by the Spanish and the Portuguese over a passage that happened to be crucial to Dutch trade. His treatise won out over John Selden's *Mare Clausum* that argued the opposite,[6] claiming that the high seas, just like land, can be occupied, divided and treated like private or public property. *Mare Liberum* was not a naïve idealistic praise for freedom from sovereignty. Rather on the contrary, the ingenuity of Grotius work resides in arguing for the need to secure both sovereign independence from higher authority (internal and external sovereignty) and the interdependence of sovereign states (supposedly bringing peace and general well-being). The latter required both unhindered access to the high seas, framed as a passage between states involved in trade relationships, while also justifying sovereign defence against those endangering such trade (notably pirates). This justification was even claimed to justify *bellum justum privatum* (a just private war) or *coophandel met force* (trade supported by the private force of arms), based on Grotius' detailed exposition of what natural law allows and requires both states and private enterprise in the passage between lands.

Grotius' work has withstood the test of time because of the complex and intricate argumentation he put forward, allowing sovereign states to have their cake (independence from higher authority) and eat it too (interdependence as to their mutual economic relationships). His argument for a 'natural law of the seas' is often compared to John Perry Barlow's *Cyberspace Manifesto* on internet freedom. Compared to Grotius' seminal work, this Manifesto, which declared that states had no business on the internet, was an idealistic and dangerously naïve celebration of freedom as a space without constraints. Whereas a person sailing the high seas is not also on land, a person navigating

'cyberspace' will always also navigate 'real' space. Our embodied nature is rooted in a body that is always physically located at one place, even though our mind has been capable of traveling time and space even before we started writing. In that sense our embodiment has never stopped us from inhabiting various spaces simultaneously, due to the particular affordances of human language. For instance, when speaking with others about elsewhere, past and future, or when reading about whatever is not present in the here and now, we develop a timespace that is distinct from our embodied self. The Manifesto's exceptionalism, proclaiming a realm where governments have no authority was mistaken on two accounts. First, because governments have found many ways to exercise various types of control over what goes on in 'cyberspace' whenever it interferes with their interests, often resulting in an excess of governmental interference. Second, because to the extent that government authority has indeed been lacking, it did not deliver freedom but a new type of servitude, developed and controlled by large technology companies that configure our choice architecture in a hybrid online-offline world.

This salient volume addresses the challenges posed by both *a lack* and *an excess* of sovereign power, both in the high seas and in cyberspace. More specifically it details the legal and a-legal position of migrants, most notably those traversing the Mediterranean Sea to seek refuge from political and economic hardship. The work highlights migrants' crossings in the unregulable spaces of Mediterranean waters and global cyberspaces, demonstrating in salient detail the competing jurisdictions that rule either spaces, consisting of a diversity of legislators, courts, justice authorities and police (EU, member states, Turkey, Libia) and EU agencies such as the European Police Agency (Europol), the European Border and Coast Guard Agency (Frontex), deploying systems such as the European Travel Information and Authorisation System (Etias), the European fingerprint database Eurodac, the Schengen Information System (SIS), the European Border Surveillance system (EUROSUR), which use myriad technologies to monitor, trace and track migration, from various types of biometrics (iris scanning, fingerprints), online surveillance (location and traffic data, social media postings, online behavioural data) to questionable techniques based on machine learning (to decide on reliability of refugee narratives).[7] The recently proposed EU AI Act should contribute to much needed quality control as well as to proper assessment of risks to fundamental rights.[8]

We urgently need legal, political and technological reconfigurations of cyberspace to reinvent and sustain it as a safe space. We need to explore and develop the idea and the practice of an international rule of law,[9] to make sure that individuals can *navigate* the mobile, dynamic and polymorphous spatiality that 'makes' cyberspace. At the same time, we must ensure that the high seas become *regulable* from the perspective of human rights. Neither cyberspace(s) nor the Mediterranean Sea should be free from the constraints that protects the vulnerable from the powerful. We must work to make these spaces navigable and regulable in ways that support and enable individual human agency, while ensuring that those in power treat those under their jurisdiction with equal concern and respect. Liberty without equality is *un*freedom; equality without liberty is empire (even if empire could harness unfreedom too).

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[7] Eleonore Fournier-Tombs, 'The United Nations Needs to Start Regulating the "Wild West" of Artificial Intelligence' (*The Conversation*), 31 May 2021 <http://theconversation.com/the-united-nations-needs-to-start-regulating-the-wild-west-of-artificial-intelligence-161257> accessed 5 September 2021.

[8] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts, 21.4.2021 COM(2021) 206 final. See notably Annex III under point 7.

[9] Jeremy Waldron, 'The Rule of International Law' (2006) 30 Harvard Journal of Law & Public Policy 15-30.