

THE EXERCISE OF STATE POWER OVER MIGRANTS AT SEA THROUGH TECHNOLOGIES OF REMOTE CONTROL: RECONCEPTUALIZING HUMAN RIGHTS JURISDICTION

APHRODITE PAPACHRISTODOULOU 

*Irish Centre for Human Rights, School of Law, University of
Galway, Galway, Republic of Ireland*

Email: aphrodite.papachristodoulou@universityofgalway.ie

Abstract The employment of cutting-edge technology in the European Union's external border management is transforming the way that States acquire control over seaborne migrants and deconstructing traditional conceptions of border and territory. This article sheds light on a new generation of human rights violations on the high seas, where people's rights become contingent on their geographical location which is increasingly traceable by monitoring bodies. Amidst the burgeoning phenomena of abandonment at sea and contemporary forms of migrant push-backs, this article contends that human rights jurisdiction ought to be reconceptualized in functional terms to capture new modalities of State power, that if and when exercised, can amount to effective control, triggering a State's human rights obligations.

Keywords: human rights, external border management, jurisdiction, remote control, technology, migration by sea, duty to rescue, European Court of Human Rights.

I. INTRODUCTION

Contemporary manifestations of State power and technological developments in external border management are increasingly being witnessed in relation to the phenomenon of irregular migration by sea in the Mediterranean.¹ By utilizing strategies like maritime drone surveillance to monitor people on the move, States can focus on detection and interception of migrant vessels while abstaining from search and rescue (SAR) activities.² In this way, European

¹ On 'remote control' policies, see scholarship by DS FitzGerald, 'Remote Control of Migration: Theorizing Territoriality, Shared Coercion, and Deterrence' (2020) 46(1) *JEthnic&MigrStud* 4.

² Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E Tendayi Achiume, 'Racial and Xenophobic Discrimination and the Use of Digital Technologies in Border and Immigration Enforcement' (17 December 2021) UN Doc A/HRC/48/76, 6; P Molnar and L McGregor, 'Digital Border Governance: A Human Rights-Based

States, acting alone or through European Union (EU) coordination, appear to have found alternative ways to divest themselves from the humanitarian imperative of saving lives at sea, creating a vacuum in human rights protection.³ This article will illustrate the increasing integration into migration processes of technologies that transform the way in which the EU, its Member States and third countries manage borders and mobility, and examine the potential harms that such strategies pose to migrants at sea.⁴

Under the international law of the sea, the duty to render assistance at sea is not only a well-established moral but also legal norm under customary international law, now codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS),⁵ and strengthened by the 1974 International Convention for the Safety of Life at Sea (SOLAS)⁶ and the 1979 International Convention on Maritime Search and Rescue (SAR Convention).⁷ The duty is of critical importance for preserving the safety of life when in danger of being lost at sea and also for safeguarding the right to life under international human rights law.⁸ In complying with this duty, States should refrain from returning migrants to a place where their life or

Approach' (Office of the United Nations High Commissioner for Human Rights [OHCHR], 18 September 2023) 13 <<https://www.ohchr.org/sites/default/files/2023-09/Digital-Border-Governance-A-Human-Rights-Based-Approach.pdf>>.

³ The vacuum of human rights protection has been specifically referred to in the jurisprudence of the European Court of Human Rights (ECtHR). See, for instance, *Cyprus v Turkey* App No 25781/94 (ECtHR, 10 May 2001) para 78; *Banković and others v Belgium and others* App No 52207/99 (ECtHR, 12 December 2001) (*Banković*) paras 80, 67; *Al-Skeini v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011) (*Al-Skeini*) para 142.

⁴ See, eg, the opinion of T Gammeltoft-Hansen and JC Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53(2) *ColumJTransnatlL* 235, 256; I Kalpouzos, 'International Criminal Law and the Violence against Migrants' (2020) 21(3) *GermLJ* 571. In this article, the term 'migrants' is used as employed in the International Organization for Migration (IOM) definition as there is no universally accepted definition at the international level. The IOM provides that the term migrant is '[a]n umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.' IOM, 'International Migration Law No 34, Glossary on Migration' (2019) <https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf>.

⁵ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS), art 98.

⁶ International Convention for the Safety of Life at Sea, 1974, as amended (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278, Ch V of the Annex, in particular Regulation 33.

⁷ International Convention on Maritime Search and Rescue, 1979, with annexes (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR Convention) Ch 2.1.1 of the Annex.

⁸ IMO, 'Focus on IMO: SOLAS: The International Convention for the Safety of Life at Sea, 1974' (October 1998) 21 <<https://www.dn.imo.org/localresources/en/OurWork/Safety/Documents/SOLAS98final.pdf>>.

liberty could be at risk.⁹ Accordingly, the prohibition of *refoulement* under international refugee and human rights law ties into the disembarkation of persons to a ‘place of safety’ in order for a rescue operation to be marked as completed.¹⁰ However, it is crucial to recognize that the duty to rescue was not intended to act as a policy response to the challenges posed by mass migration movements.¹¹ As a result of the lack of a coherent policy and in compliance with the duty, distress situations have become regularized in the Mediterranean where thousands of migrants perish each year.

The year 2023 witnessed unprecedented numbers of migrant tragedies, marked by shipwrecks off Italy (eg off the coast of Crotona province near Cutro) and Greece (eg the Pylos shipwreck) underscoring the ramifications of the extraterritorial practices of the EU and its Member States.¹² Despite the use of border surveillance in external border management improving the conveyance of critical information and alerting the relevant coastal States about the strong likelihood of life in danger of being lost at sea, SAR responses have not seen a corresponding increase, raising questions about the failure to initiate (timely) rescue missions.¹³

Beyond inactivity in the face of migrant drownings, States have towed migrants outside SAR regions and abandoned them at sea,¹⁴ or have pushed or pulled migrant boats back to their country of origin.¹⁵ The latter practice

⁹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention) art 33; Charter of Fundamental Rights of the European Union [2010] OJ C83/389 (EU Charter) art 19; European Convention on Human Rights and Fundamental Freedoms [1950] CETS 5 (ECHR) art 3. The interpretation of the term ‘place of safety’ has been developed through the debates on disembarkation and received much scholarly attention, see, inter alia, V Moreno-Lax, D Ghezelbash and N Klein, ‘Between Life, Security and Rights: Framing the Interdiction of “Boat Migrants” in the Central Mediterranean and Australia’ (2019) 32(4) LJIL 715; KS O’Brien, ‘Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem’ (2019) 3(2) GoJIL 715.

¹⁰ See also K Wouters and M Den Heijer, ‘The *Marine I* Case: A Comment’ (2010) 22(1) IJRL 1, 6.

¹¹ See also A Campàs Velasco, ‘Vulnerability and Marginalisation at Sea: Maritime Search and Rescue, and the Meaning of “Place of Safety”’ (2022) 18(1) IntJLC 85.

¹² A Papachristodoulou, ‘Halfway Through 2023: A Year of Unparalleled, Avoidable Migrant Tragedies at Sea’ (*EJIL:Talk!*, 21 June 2023) <<https://www.ejiltalk.org/author/aphroditepapachristodoulou/>>.

¹³ *ibid*; for analysis of a non-rescue incident in 2023, see discussion by A Papachristodoulou, ‘The Crotona Migrant Shipwreck: A Cat-and-Mouse Blame Game and the Role of Technologies at External Borders’ (*EJIL:Talk!*, 12 April 2023) <<https://www.ejiltalk.org/the-crotona-migrant-shipwreck-a-cat-and-mouse-blame-game-and-the-role-of-technologies-at-external-borders/>>.

¹⁴ *Safi and others v Greece* App No 5418/15 (ECtHR, 7 July 2022) (*Safi*); *G.R.J. v Greece and A.E. v Greece* App Nos 15067/21 and 15783/21 (pending). The latter pending cases are an example of migrants being forced onto a raft and abandoned at sea by the Greek coastguard officers.

¹⁵ Push-back practices include the forced return of migrants, including applicants for international protection, to the country from where they attempted to cross or crossed an international border without allowing them to apply for asylum or submit an appeal, which may lead to a violation of the principle of *non-refoulement*. See European Commission, Migration and Home Affairs, ‘Glossary’ <https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/push-back_en#:~:text=Various%20measures%20taken%20by%20states,or%20denied%20of%20any%20individual>. Pull-back

manifests a metamorphosis of what were direct push-backs, as evidenced in the *Hirsi Jamaa and others v Italy (Hirsi)*¹⁶ where intervention involved transferring the migrants onto a State navy vessel and delivering them back to their country of origin, into aerial *refoulement*,¹⁷ facilitated by the use of surveillance technology. Coastal State authorities increasingly rely on information gathered from aerial assets, such as unmanned aerial vehicles (UAVs, commonly known as drones), to identify the location of a migrant boat; this information is then shared with third-country authorities in order to facilitate their intervention (or, interception) and, ultimately, to deflect boats from reaching the European State's territory.

In this way, European States are no longer at the forefront of migrant interceptions and push-backs, since third countries have undertaken those tasks. This tactic of outsourcing responsibility¹⁸ has become prevalent as it allows States to avoid direct physical contact with migrant boats and the associated obligation to rescue together with disembarkation duties that would bring the individuals concerned under the State's *de facto* and *de jure* jurisdiction. It is imperative to highlight at this stage that border controls (and distress incidents) most often happen within the international space of the high seas, which is not subject to the sovereignty or jurisdiction of any State.¹⁹ Nonetheless, the freedom of the high seas does not render this area a space 'devoid of regulation',²⁰ and human rights must still be respected and realized, though many violations do go unnoticed.²¹ For this reason, the limited response facilitated by European States to blatant violations of fundamental rights has raised uncertainties on the applicability of human rights at sea in practice.²²

practices include departure prevention by third States, see N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27(3) EJIL 591.

¹⁶ *Hirsi Jamaa and others v Italy* App No 27765/09 (ECtHR, 23 February 2012) (*Hirsi*).

¹⁷ The characterization 'aerial *refoulement*' means the utilization of aerial assets to assist in performing interdictions by non-EU actors. See, eg, N Magugliani et al, 'Submission to the UN Special Rapporteur on the Human Rights of Migrants' Report on Pushback Practices and Their Impact on the Human Rights of Migrants' <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/Joint_ICHR_NUIG_GLAN_Submission.pdf>.

¹⁸ D Guilfoyle, 'Transnational Crime and the Rule of Law at Sea: Responses to Maritime Migration and Piracy Compared' in V Moreno-Lax and E Papastavridis (eds), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights*, International Refugee Law Series, vol 7 (Brill Nijhoff 2016) 174.

¹⁹ Instead, ships navigating in the high seas are subject to the exclusive sovereign power of the flag State and should seek to ensure compliance with the relevant rules of rescue. The high seas are regulated by UNCLOS (n 5) Part VII. For a thorough analysis on the freedom of the high seas, see, inter alia, Y Tanaka, *The International Law of the Sea* (CUP 2015); H Grotius, *Mare Liberum* (Liberty Fund 2004); TE Aalberts and T Gammeltoft-Hansen, 'Sovereignty at Sea: The Law and Politics of Saving Lives in *Mare Liberum*' (2014) 17 JIntlRel&Dev 439, 440.

²⁰ Aalberts and Gammeltoft-Hansen *ibid* 440.

²¹ I Urbina, 'Lawless Ocean: The Link Between Human Rights Abuses and Overfishing' (Yale Environment 360, 20 November 2019) <<https://e360.yale.edu/features/lawless-ocean-the-link-between-human-rights-abuses-and-overfishing>>.

²² 'Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute: EU Migration Policies in the Central Mediterranean and Libya

On land, ever more compellingly, sophisticated and enforceable norms safeguard human life, but protection of that same human life and its associated rights at sea remains a jurisdictional and juridical grey area.²³ The European Court of Human Rights (ECtHR or the Court) has interpreted the concept of jurisdiction along different and sometimes contradictory lines, leading to legal uncertainty and factual mistakes as to when a State's human rights obligations are triggered beyond its national territory. In the ECtHR's established case law on extraterritoriality, jurisdiction beyond a State's *terra firma* is contingent upon 'exceptional' circumstances, where the acts of the State party, performed outside its territory or producing effects there, constitute an extraterritorial exercise of jurisdiction within the meaning of Article 1 of the European Convention on Human Rights (ECHR).²⁴ What remains unclear is how jurisdiction can accommodate cases in the context of maritime migration, where 'effective' control over an individual's rights does not happen spatially or personally. Instead, State power is exerted through technologies of remote control to prevent (ultimately) access to territory (eg during a border surveillance operation at sea). An enquiry into the theory that encompasses these types of situations is therefore necessary to address securitization practices that impact human rights protection at sea negatively.²⁵ Challenging questions will be raised concerning the relationship between human rights and border technologies, thus providing a research agenda for scholars, practitioners and judges alike to build upon.

The structure of this article is as follows. Section II presents the gradual technologization of border control by examining extraterritorial State practices together with the evolving European policy approach in the Mediterranean region. The analysis shows that the transformation of European border controls has resulted in border violence and the preclusion of entry. Against this contextual background, Section III addresses the normative gap in the extraterritorial reach of international human rights by delving into the meaning of jurisdiction and analysing relevant jurisprudence on extraterritoriality. Section IV reconceptualizes jurisdiction in functional terms and sets the stage for a discussion on the ability of technologies to act as knowledge generators that could trigger the jurisdictional link between a

(2014–2019)' (Communication to the International Criminal Court) <<https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>>.

²³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 109, 112; see also *Hirsi* (n 16) para 178. See also key legal analysis on extraterritoriality by M Milanovic, *Extraterritorial Applications of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

²⁴ See, for instance, *Ilaşcu v Moldova and Russia (Ilaşcu)* App No 48787/99 (ECtHR, 8 July 2004) para 314; *Banković* (n 3) para 67; *Al-Skeini* (n 3) para 133.

²⁵ Securitization has been defined as 'the process whereby actors with sufficient authority identify existential threats to the State, society, or other particular object, and seek to implement extraordinary measures in response to the putative threat', D Ghezelbash et al, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) 67(2) ICLQ 330.

duty-bearing State and the potential right-holding individual. The conceptualization of jurisdiction posited herein does not consider direct physical contact with the concerned individuals as a *conditio sine qua non* for the application of human rights law.²⁶ On the contrary, it proposes a paradigm that addresses instances of State power that, if and when exercised, can constitute effective control, triggering a State's human rights obligations.

II. MOBILITY AND THE TECHNOLOGIZATION OF BORDERS

By definition, migration is a source of human mobility that is best described as a geographical phenomenon conceptualized by the movement of people across State borders and spaces.²⁷ In Europe, third-country nationals who do not have the appropriate visa documents to secure legal entry are often forced to seek unauthorized access via dangerous migration routes—the most well known being the sea. Migration policies to control or set entry requirements in a State or group of States, like the EU, equally have a geographical dimension.²⁸ The EU per se does not carry out border controls, but these are undertaken by European States individually or coordinated by the EU's Border and Coast Guard Agency (Frontex), usually in the form of joint naval operations or under bilateral cooperation agreements between States (eg the Italy–Libya Memorandum of Understanding²⁹).

Thermal imaging cameras, night-vision goggles, ground sensors, aerial video surveillance, maritime simulations, UAVs and even experimental robotic technology are some of the technologies employed to monitor and control movement before people reach Europe's physical borders.³⁰ Whilst scholars

²⁶ For similar legal argumentation embracing a functional approach to jurisdiction, see, in particular, V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *S.S. and others v Italy*, and the "Operational Model"' (2020) 21(3) *GermLJ* 385, 388.

²⁷ J Könönen, 'Legal Geographies of Irregular Migration: An Outlook on Immigration Detention' (2020) 26(5) *PopulationSpace&Place* e2340, 5.

²⁸ Every State has a sovereign right to exercise control over who is allowed to enter, transit and remain in its territory. See Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

²⁹ 'Memorandum of Understanding on Cooperation in the Fields of Development, the Fight Against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders Between the State of Libya and the Italian Republic' (EU *Migration Law Blog*, 2 February 2017) <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>; N Keady-Tabbal and I Mann, 'Weaponizing Rescue: Law and the Materiality of Migration Management in the Aegean' (2023) 36(1) *LJIL* 78.

³⁰ V Kapogianni, 'The Reverberations of the Rise of Fencing Border Regimes: Pushbacks, Detention and Surveillance Technologies' (*International Law Blog*, 21 November 2022) <<https://internationallaw.blog/2022/11/21/the-reverberations-of-the-rise-of-fencing-border-regimes-pushbacks-detention-and-surveillance-technologies/>>. Other artificial intelligence (AI) technologies deployed at external borders include integrated analysis of various data streams including automatic identification systems, coastal and vessel-mounted sensors, and contextual

like Mattelart have rightly pointed out that the use of surveillance shifts control ‘from visible to invisible’, and that it is this invisibility that engenders the efficiency and uniqueness of such technologies of control,³¹ it is argued here, and by others,³² that the use of such surveillance results in an invisible phenomenon—migration by sea—becoming visible, or, ‘knowable’ and hence ‘governable’. It is against this background that sophisticated technologies play an instrumental role within border management as they generate spatial knowledge and, therefore, afford significant power to State authorities to control remotely the passage and entry of irregular migrants.³³ This is important to comprehend at the outset, as the increased visibility of migration routes and the timely knowledge of potential distress situations affords States the opportunity to affect an outcome or course of events. Such exercise of power is capable not only of triggering positive obligations to render assistance at sea under the law of the sea framework but also extraterritorial human rights obligations, as will be argued in Section IV.

A. ‘Smart Borders’ versus Lives at Sea

Underpinned by the aim of building ‘smart borders’ to tackle migration, the EU established, inter alia, the European Border Surveillance System (EUROSUR) in 2013, a programme operated by Frontex that uses big data technologies (including satellite imagery and ship recording services) ‘to predict, control and monitor traffic across European Union borders’ and ultimately to block the passage of migrants.³⁴ Notably, one of the aims of EUROSUR was to ‘contribute to ensuring the protection and saving the lives of migrants’.³⁵ Although the number of migrant crossings has fallen significantly since 2016

information concerning the weather, commercial activities, environmental conditions, military exercises and maritime incidents. See also Frontex, ‘Artificial Intelligence-Based Capabilities for the European Border and Coast Guard: Final Report’ (17 March 2021) <https://frontex.europa.eu/assets/Publications/Research/Frontex_AI_Research_Study_2020_final_report.pdf>.

³¹ P Bonditti, D Bigo and F Gros, *Foucault and the Modern International Silences and Legacies for the Study of World Politics* (1st edn, Palgrave Macmillan 2017) 290.

³² C Robinson, ‘Making Migration Knowable and Governable: Benchmarking Practices as Technologies of Global Migration Governance’ (2018) 12(4) *IntlPolSociol* 418; see also S Kalm, ‘Liberalizing Movements? The Political Rationality of Global Migration Management’ in M Geiger and A Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan 2010).

³³ Notwithstanding, the ECtHR has highlighted that State parties are required to make ‘available genuine and effective access to means of legal entry’, including to submit an asylum application, see *N.D. and N.T. v Spain* App Nos 8675/15 and 8697/15 (ECtHR, 3 October 2017) para 209. See also C Binder, ‘How the EU Politicises Research and Development in Border Security’ (King’s College London, 21 June 2022) <<https://www.kcl.ac.uk/how-the-eu-politicises-research-and-development-in-border-security>>. This ‘policing at a distance’ theory has been developed by Bigo and Guild, see D Bigo and E Guild, ‘Policing at a Distance: Schengen Visa Policies’ in D Bigo and E Guild, *Controlling Frontiers* (1st edn, Routledge 2005).

³⁴ Regulation (EU) 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir) [2013] OJ L295/11.

³⁵ *ibid.*, art 1.

as a result of the EU's securitized approach to border governance—which the EU heralds—this decrease has been accompanied by a dramatic increase in the mortality rates in the Mediterranean, which is particularly unsettling given that the area is heavily surveilled.³⁶ The International Organization for Migration (IOM) recorded more than 3,041 missing migrants in the Mediterranean region in 2023 compared to 2,411 in 2022. This translates to an 11 per cent increase in mortality rates in 2023, while in 2022 there was an 18 per cent increase from 2021.³⁷

These migrant drownings have been described in the literature as 'border deaths' as it is apparent that they result from border violence and are the consequence of structural and political conditions rather than the result of individual acts.³⁸ When States become aware of persons in distress by virtue of data transmitted from surveillance technologies, such as thermal images indicating an emergency, the international law of the sea mandates immediate assistance to those in danger of being lost at sea. However, as Goodwin-Gill notes, quoting the International Tribunal for the Law of the Sea (ITLOS), this obligation is 'not a counsel of perfection ... but rather "an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result"'.³⁹ Put simply, in legal terms, it is an obligation of conduct and not of result.

It could legitimately be expected that increased situational awareness of sea migration routes would enhance SAR responses by providing early warnings of distress and sustained vigilance over the danger to life at sea. However, the spiralling loss of life at sea along with the abuse of migrants' human rights when being unlawfully intercepted and returned to their countries of origin have exposed the systematic obstruction of this humanitarian duty,

³⁶ See eg United Nations High Commissioner for Refugees (UNHCR), 'UNHCR Data Visualisation on Mediterranean Crossings Charts Rising Death Toll and Tragedy at Sea' (2022) <<https://www.unhcr.org/news/briefing-notes/mediterranean-sea-arrivals-decline-and-death-rates-rise-unhcr-calls>>.

³⁷ These figures were generated by the author on the basis of data taken from the IOM's Missing Migrant Project, which collects the most comprehensive figures on the region. See Missing Migrants Project, 'Deaths During Migration Recorded Since 2014, by Region of Incident' <<https://missingmigrants.iom.int/data>>. The data were analysed using descriptive statistics to determine mortality rates, comparing the annual number of attempted crossings with the actual number of deaths/missing persons.

³⁸ T Spijkerboer, 'Moving Migrants, States, and Rights: Human Rights and Border Deaths' (2013) 7(2) L&EthicsHumRts 213. For further analysis on border deaths, see P Cuttitta and T Last (eds), *Border Deaths: Causes, Dynamics and Consequences of Migration-related Mortality* (Amsterdam University Press 2020). See also M Albahari, *Crimes of Peace: Mediterranean Migrations at the World's Deadliest Border* (University of Pennsylvania Press 2015) 21, where Albahari argues 'Thousands of deaths in the Mediterranean, over two decades, are not misfortunate accidents, inevitable fatalities, acts of God or of nature. They are crimes of peace.'

³⁹ G Goodwin-Gill, 'Drowning in the Mediterranean: Time to Think and Act Regionally' (*EJIL: Talk!*, 12 April 2021) <<https://www.ejiltalk.org/drowning-in-the-mediterranean-time-to-think-and-act-regionally/>> quoting ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10, para 110 (emphasis in original).

potentially jeopardizing multiple rights, including the right to life, the prohibition of torture and the right to an effective remedy. Determining the exact number of deaths resulting from State authorities neglecting their duty to rescue is challenging, but information from various sources, including investigative journalists and academics, provides an indication of the human toll.⁴⁰ An earlier study conducted along the United States–Mexico (land) border revealed that border control policies employing new surveillance technologies doubled migrant deaths and redirected migration routes towards more perilous paths.⁴¹ An assumption was made that Europe’s ‘watery graves’ were similarly the result of the increased use of technology to facilitate interceptions and returns.⁴² The expansion of State sovereign power and amplification of the State’s discretion in interpreting legal obligations is being both facilitated and exercised through technological tools at the expense of migrants’ rights and lives. According to Mitsilegas such externalization measures create a preventive (in)justice paradigm, as the legal and policy frameworks aim to control and prevent migratory movements.⁴³

At a time of substantial EU spending on research and development for security technology,⁴⁴ the European project ‘NESTOR’⁴⁵ provides one of the most recent examples epitomizing the technologization of the border and practices of exclusion.⁴⁶ This ‘next-generation’ border surveillance system

⁴⁰ See DS FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019) 204. See also A Momigliano, ‘Italian Forces Ignored a Sinking Ship Full of Syrian Refugees and Let More Than 250 Drown, Says Leaked Audio’ (*Washington Post*, 9 May 2017) <<https://www.washingtonpost.com/news/worldviews/wp/2017/05/09/italian-forces-ignored-a-sinking-ship-full-of-syrian-refugees-and-let-more-than-250-drown-says-leaked-audio/>>.

⁴¹ P Molnar, ‘Territorial and Digital Borders and Migrant Vulnerability Under a Pandemic Crisis’ in A Triandafyllidou (ed), *Migration and Pandemics: Spaces of Solidarity and Spaces of Exception*, IMISCOE Research Series (Springer 2022) 48–50.

⁴² *ibid* 48. For a discussion on how technology has transformed the nature of the European border, see also JJ Rijpma, ‘Brave New Borders: The EU’s Use of New Technologies for the Management of Migration and Asylum’ in M Cremona (ed), *New Technologies and EU Law* (OUP 2017) 197.

⁴³ V Mitsilegas, ‘The EU External Border as a Site of Preventive (In)justice’ (2022) 28(4–6) *ELJ* 263; see also on externalization, E Xanthopoulou, ‘Mapping EU Externalisation Devices Through a Critical Eye’ (2024) 26(1) *EJML* 108.

⁴⁴ BO Martins and MG Jumbert, ‘EU Border Technologies and the Co-Production of Security “Problems” and “Solutions”’ (2022) 48(6) *JEthnic&MigrStud* 1430, 1431.

⁴⁵ NESTOR was co-funded by the European Commission under the Horizon 2020 Programme (H2020-SU-SEC-2018-2019-2020), commencing in November 2021 and ending in April 2023. Frontex, ‘NESTOR: Showcasing a New Border Surveillance System’ (22 March 2023) <<https://frontex.europa.eu/innovation/eu-research/news-and-events/nestor-showcasing-a-new-border-surveillance-system-NIV4SC>>. According to EU Regulation No 1896/2019 on the European Border and Coast Guard, art 2(13), ‘pre-frontier area’ means the geographical area beyond the EU external borders which is relevant for the management of these external borders through risk analysis and situational awareness.

⁴⁶ On exclusion, see Bigo’s ‘banopticon’ apparatus, ie using profiling technologies to target surveillance to specific groups seen as potential threats to the State—such as migrants—rather than monitoring everyone equally. In Bigo’s view, constant surveillance has become normalized in society, justified by the need for security, often leading to pre-emptive measures against individuals who are a ‘threat’ to the State, even though they have not necessarily committed any

aimed to provide pre-frontier situational awareness beyond maritime and land borders by employing mixed reality glasses, long-range electro-optical sensors, 360° cameras, three-dimensional radar, an unmanned underwater vehicle and a platform that integrated data from radio frequency analysers. The primary aim of NESTOR was the detection of irregular migration and human trafficking through strengthening the long-range surveillance capabilities of States. The lines between migration management on the one hand, and the fight against transborder crime on the other, are blurred through effectively equating migrants with criminals. This process of ‘othering’ fuels destructive attitudes and allows for stricter security measures to address the supposed ‘threat’.⁴⁷ Conceptualized in this manner, the border becomes a key instrument of migration management, with technology aggravating the practice of *refoulement* and allowing States seemingly to sidestep any associated obligation of rescue by shifting the responsibility to third countries.

B. European Practices in the Mediterranean

There has been an ever-growing technologization of border controls in the Mediterranean.⁴⁸ In 2015 as part of its response to the ‘migration crisis’, the EU instigated its Common Security and Defence Policy military operation in the Mediterranean, EUNAVFOR MED Operation Sophia (Operation Sophia).⁴⁹ This operation marked a clear operational shift in the EU as the aim of the mission was to prevent departures, disrupt smuggling networks and trafficking operations and, ultimately, ‘to better contain the growing flows of illegal migration’.⁵⁰ In 2016 the Council reinforced Operation Sophia’s mandate and added two supporting tasks: the training of the Libyan Coast Guard and Navy (LCGN), and the use of aerial, satellite and maritime assets to contribute to the enforcement of the United Nations (UN) arms

offence. Hence, they exclude the individual because of their foreign status. D Bigo, ‘Detention of Foreigners, States of Exception, and the Social Practices of Control of the Banopticon’ in PK Rajaram and C Grundy-Warr (eds), *Borderscapes: Hidden Geographies and Politics at Territory’s Edge* (1st edn, University of Minnesota Press 2007) 23; T Tomsky, ‘Citizens of Nowhere: Cosmopolitanisation and Cultures of Securitisation in Dionne Brand’s *Inventory*’ (2019) 40(5) *JIntercultStud* 564.

⁴⁷ On the migration–security nexus, see Martins and Jumbert (n 44) 1433. Bigo has also discussed the securitization of cross-border mobility, see D Bigo, ‘Security and Immigration: Toward a Critique of the Governmentality of Unease’ (2002) 27(1) *Alternatives* 63, 67.

⁴⁸ For example, Frontex has extensively employed technologies that rely upon surveillance platforms that include drones in addition to radars and satellites to gather information on migration. See Martins and Jumbert (n 44) 1431.

⁴⁹ Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED Operation Sophia).

⁵⁰ See European Council, Council Conclusions (EUCO 22/15) (26 June 2015) para 3 <<https://data.consilium.europa.eu/doc/document/ST-22-2015-INIT/en/pdf>>. See further, Ghezelbash et al (n 25) 333; V Moreno-Lax, ‘The EU Humanitarian Border and the Securitization of Human Rights: The “Rescue-Through-Interdiction/Rescue-Without-Protection” Paradigm’ (2018) 56(1) *JComMarSt* 119, 128.

embargo on the high seas off the coast of Libya.⁵¹ In 2020 EUNAVFOR MED Operation Irini (Operation Irini) superseded Operation Sophia, which had fulfilled mainly training of the LCGN and surveillance roles in the Central Mediterranean due to a lack of naval assets to conduct physical inspections.⁵² Operation Irini's mandate is focused on providing direct engagement in support of the identification and interdiction of arms transfers, representing a shift from Sophia's anti-migration focus. However, its remit retains the controversial capacity building and training of the LCGN in law enforcement tasks at sea and has an expanded scope that allows for the use of aerial surveillance within Libyan airspace.⁵³

Despite the gradual shift in immediate focus, the long-term goal behind these operational moves was to buttress Libya's capacity to stop migrants from leaving its territory — 'for pre-emptive take-backs to replace SAR, shifting the responsibility for refugee and migrant flows to Libya'.⁵⁴ The EU's external border policy is geared towards the reinforcement of third countries' capacity to guard their borders and intercept migrant boats, distracting attention from the more pressing challenges presented by irregular migration and the widening gaps in refugee and human rights protection.⁵⁵ Given the extensively documented deterioration of the human rights situation in Libya and the widely documented abuses suffered by migrants under the control of the LCGN,⁵⁶ preventing migrants from departing from Libyan territory or returning individuals to Libya can amount to complicity with arbitrary detention, torture and even violations of the right to life.⁵⁷

In addition to Operation Irini, the EU has funded other external border management initiatives, including, inter alia, Frontex's 'Joint Operation Poseidon' in the Eastern Mediterranean which carries out border surveillance

⁵¹ Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED Operation Sophia).

⁵² The Council in 2019 adopted the decision to suspend all naval vessels in the Central Mediterranean, see Council of the EU, EUNAVFOR MED Operation Sophia: mandate extended until 30 September 2019, press release 246/2019; Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED Operation Irini).
⁵³ *ibid*, para (5).
⁵⁴ Ghezl bash et al (n 25) 334.

⁵⁵ Commission Communication, The Global Approach to Migration and Mobility, COM(2011) 743 final, 15. See also L Chouliaraki and M Georgiou, 'Migration – The Crisis Imaginary' (LSE, 14 July 2023) <<https://blogs.lse.ac.uk/europpblog/2023/07/14/migration-the-crisis-imaginary/>>; Keady-Tabbal and Mann (n 29) 72; J Hathaway, *The Law of Refugee Status* (CUP 2005) 309; Markard (n 15) 591.

⁵⁶ See Human Rights Council, 'Report of the Independent Fact-Finding Mission on Libya' (20 March 2023) UN Doc A/HRC/52/83; Human Rights Watch, 'No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya' (21 January 2019) <<https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>>.

⁵⁷ See Forensic Oceanography, 'Blaming the Rescuers: Criminalising Solidarity, Re-enforcing Deterrence' (June 2017) <https://content.forensic-architecture.org/wp-content/uploads/2023/04/2017_Report_Blaming-The-Rescuers.pdf>; M Jackson, *Complicity in International Law* (OUP 2015), 152–154; On preventing entry by preventing exit, see analysis in this issue by A Macklin, 'Exit Rights, Seamless Borders and the New Carceral State' (2024) 73 ICLQ 891.

mostly along the Greek sea borders with Turkey,⁵⁸ Frontex's 'Joint Operation Indalo' in the Western Mediterranean, that carries out border surveillance and SAR primarily from North-West Africa to Spain,⁵⁹ and Frontex's 'Operation Themis' which replaced the 'Joint Operation Triton' in February 2018 and has as its primary mandate border control and surveillance supporting Italy in the Central Mediterranean region.⁶⁰ Operation Themis represents an extension of the geographic coverage of these missions, extending surveillance activities to the waters of Algeria, Tunisia, Libya and Egypt as key parts of the migration routes leading to the Mediterranean.⁶¹ These missions have one operational aspect in common: the use of air-naval assets to collect intelligence in the Mediterranean region.

Technology plays a leading role in Frontex's capacity to geolocate migrants near to borders and take strategic decisions about who to alert.⁶² Rather than launching a SAR response, Frontex has principally conducted aerial sightings of distress incidents via chartered aircrafts operated by private companies through its multipurpose aerial surveillance scheme in the Central Mediterranean. These aircraft transmit video footage and other information to a situation centre in Frontex headquarters in Warsaw,⁶³ which then makes operational decisions about who to alert, communicating information to various actors, including the LCGN. In so doing, it does not attempt to ensure that pull-backs, which would result in increased harm to the lives of migrants, will not occur.⁶⁴ This is

⁵⁸ Pursuant to art 3(1) of the Frontex Regulation, the Agency may launch joint operations based on the request of a Member State that is having difficulties regarding external border control. Regulation (EU) 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex also introduced changes to the mandate of the agency, namely in terms of what concerns sea operations coordinated by Frontex. This Regulation was fully integrated and referred to in Regulation (EU) 2016/1624 and now in Regulation (EU) 2019/1896; Joint Operation Poseidon began in 2006.

⁵⁹ Launched in November 2007.

⁶⁰ Frontex, 'Frontex Launching New Operation in Central Med' (1 February 2018) <<https://www.frontex.europa.eu/media-centre/news/news-release/frontex-launching-new-operation-in-central-med-yKqSc7>>.

⁶¹ Frontex, 'Operations' <<https://www.frontex.europa.eu/what-we-do/operations/operations/>>. Tunisia also receives equipment for border surveillance under the 'Anti-Smuggling Partnership', see European Commission, 'The European Commission and Tunisia Have Expressed the Willingness to Establish a Stronger Operational Partnership on Migration, Anti-Smuggling and the Promotion of Legal Migration' (27 April 2023) <https://ec.europa.eu/commission/presscorner/detail/en/statement_23_2494>.

⁶² Geolocation refers to the exact geographical location of a person, object or event through the comparison of photographs or videos with satellite imagery. The main objective of a joint border control operation is border control (detecting, preventing and responding to irregular migration). This consists of border checks and border surveillance as per the Schengen Borders Code (n 28), art 2(10). For in-depth discussion on Frontex and accountability, see M Fink, *Frontex and Human Rights Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Meijers Research Institute and Graduate School of the Leiden Law School 2017).

⁶³ Frontex, 'Frontex Situation Centre: Multipurpose Aerial Surveillance' (2018) <<https://op.europa.eu/en/publication-detail/-/publication/b96286e0-1aa8-11e8-ac73-01aa75ed71a1>>.

⁶⁴ V Moreno-Lax et al, *The EU Approach on Migration in the Mediterranean* (European Parliament, European Parliament's Committee on Civil Liberties, Justice and Home Affairs 2021) 77.

particularly alarming given that Frontex has been repeatedly scrutinized and accused of being complicit in push-back operations by a number of EU bodies, human rights organizations and UN organs, and has faced legal action against its practices and claims that it has overstepped the limits of its powers.⁶⁵ The European Ombudsman's decision on the fundamental rights obligations of Frontex with regard to SAR in the context of its maritime surveillance activities has highlighted significant shortcomings in how Frontex handles maritime incidents and showed a failure to ensure fundamental rights monitoring in its decisions.⁶⁶

The analysis of available data has demonstrated a significant correlation between Frontex surveillance flights and the number of interceptions performed by the LCGN, pointing to the conclusion that on days when the aerial assets fly more hours over their dedicated area of operation, the LCGN tends to intercept more boats.⁶⁷ These interventions have escalated in recent years, indicating a departure from established international obligations in this space. In 2022 alone the LCGN intercepted 24,684 people at sea, whilst that year marked the highest death toll recorded since 2016, with 6,876 documented deaths.⁶⁸ It is clear that the reliance on aerial surveillance by Member States operating under Frontex jointly with the LCGN indicates a progressive abstention from SAR activities, but also an intensification of systematic remote interceptions and returns of migrants to Libya. Frontex's 'airborne complicity' has resulted in systematic *refoulement* operations that could be regarded as crimes against humanity.⁶⁹

⁶⁵ See, inter alia, Human Rights Watch, 'EU: Frontex Complicit in Abuse in Libya' (12 December 2022) <<https://www.hrw.org/news/2022/12/12/eu-frontex-complicit-abuse-libya>>; European Court of Auditors, 'Frontex's Support to External Border Management: Not Sufficiently Effective to Date' (2021) <https://www.eca.europa.eu/Lists/ECADocuments/SR21_08/SR_Frontex_EN.pdf>; OLAF European Anti-Fraud Office, Final Report <https://cdn.prod.www.spiegel.de/media/00847a5e-8604-45dc-a0fe-37d920056673/Directorate_A_redacted-2.pdf>; Front-LEX, 'For the First Time, a "Pushback" Victim Sues Frontex for Half a Million Euro' (2024) <<https://www.front-lex.eu/alaah-hamoudi>>. Case T-600/21 *WS and others v Frontex* ECLI:EU:T:2023:492 also demonstrates that Frontex is being challenged over the legality of its actions, albeit in the slightly different context of deportation.

⁶⁶ European Ombudsman, 'Decision on How the European Border and Coast Guard Agency (Frontex) Complies with its Fundamental Rights Obligations with Regard to Search and Rescue in the Context of its Maritime Surveillance Activities, in Particular the Adriana Shipwreck (OI/3/2023/MHZ)' (26 February 2024) <https://www.ombudsman.europa.eu/fr/decision/en/182665#_ftn24>.

⁶⁷ J Sunderland and L Pezzani, 'Airborne Complicity: Frontex Aerial Surveillance Enables Abuse' (Human Rights Watch, 8 December 2022) <<https://www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse>>.

⁶⁸ Data from IOM, 'Missing Migrants Project Global Data Overview, January 2022–December 2022' (21 June 2023) <<https://missingmigrants.iom.int/sites/g/files/tmzbd1601/files/publication/file/MMP%20global%20data%20briefing%202022.pdf>>.

⁶⁹ Front-LEX, 'Challenging the Complicity of Frontex's Aerial Surveillance Activities in Crimes Against Humanity' (May 2024) <<https://www.front-lex.eu/frontex-complicity-crimes-against-humanity>>.

The use of security concerns as a justification to prevent the entry of migrants has created a bulwark to accessing international protection.⁷⁰ As FitzGerald notes, States' adherence to the formal legal principle of *non-refoulement* encourages them to create policies, like the interception of migrant vessels at sea and border externalization, that, in practice, undermine the essence of the international refugee regime by increasing the risk of *refoulement*.⁷¹ Considering that more than 70 per cent of the EU's external borders are maritime, the surveillance monitoring of wider areas has created a new generation of human rights violations where an individual's rights become conditional on their geographical location. However, to date there has been no real judicial test of the idea of *refoulement* described above,⁷² or of the aerial cooperative actions of States witnessed as part of joint border operations at sea.

At this juncture, it needs be underscored that Frontex's operations at sea are, in principle, required to abide by EU law, including the Charter of Fundamental Rights of the European Union (EU Charter) and relevant international law, including the provisions of UNCLOS.⁷³ The EU Charter, in particular, pertains to all actions taken by the EU institutions, bodies and agencies as well as its Member States whenever EU law is being implemented, whether territorially or extraterritorially.⁷⁴ There is thus no jurisdictional threshold requirement for the applicability of EU human rights law, as unlike the ECHR, the EU Charter does not contain a jurisdictional clause, and it can offer more extensive protection than the ECHR under Article 52(3).⁷⁵ Therefore, both the EU institutions and its Member States are bound by the EU Charter irrespective of the potential impact of their decisions,⁷⁶ or the

⁷⁰ H Dijkstra, A Meijer and M Besters, 'The Migration Machine' in H Dijkstra and A Meijer (eds), *Migration and the New Technological Borders of Europe* (Palgrave Macmillan 2011) 3. On remote control practices restricting access to asylum protection, see, eg, FitzGerald (n 40) 216.

⁷¹ Refugee Convention (n 9) art 33, EU Charter (n 9) art 19; ECHR (n 9) art 3; FitzGerald (n 40) 43–57; for a related discussion on the *non-refoulement* principle, see R Barnes, 'Refugee Law at Sea' (2004) 53(1) ICLQ 47.

⁷² See also the most recent case of *WS and others v Frontex* (n 65) (finding that Frontex is not accountable for violations of human rights in return operations that it assisted; these are the responsibility of Member States).

⁷³ EU Regulation No 656/2014, art 9(1); see also E Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility' in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2016) 170.

⁷⁴ Border control measures fall under the scope of EU law (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2012/C 326/01) [2012] OJ C326/1, art 9), yet SAR operations are regulated by the international law of the sea framework.

⁷⁵ 'EU fundamental rights obligations simply track EU activities, whether they take place within or without territorial boundaries', V Moreno-Lax and C Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity – The Effectiveness Model' in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1659, 1662.

⁷⁶ V Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21(3) *GermLJ* 436, 448.

location of the affected individuals in question. As Ryngaert notes, when the EU exercises its powers, 'it owes human rights obligations to persons affected by such exercise of power, irrespective of the location of those persons'.⁷⁷ However, it is important to stress the challenge of providing definitive answers regarding the extraterritorial reach of the EU Charter, which remains an area surrounded by ambiguity.⁷⁸

III. JURISDICTION: A *CONDITIO SINE QUA NON* FOR SAFEGUARDING RIGHTS AT SEA

The ongoing situation in the Mediterranean accentuates the importance of clarifying extraterritorial human rights obligations during maritime crossings, as the risk to life is particularly amplified during migration by sea. The situational and structural vulnerability of migrants at sea relates not only to navigational hazards and migrant smuggling or human trafficking but extends also to exclusionary border control practices,⁷⁹ or 'non-entrée' policies,⁸⁰ applied from the moment an individual attempts to leave their country. The analysis below reflects on the notion of jurisdiction in human rights law, exploring its meaning and scope *qua* threshold criterion for safeguarding human rights. In turn, it explains its association, if any, with related yet dissimilar notions of jurisdiction in international law, before showcasing how the ECtHR has interpreted the notion of jurisdiction, both in general settings and in the maritime space. The quest for a unified understanding of extraterritorial human rights jurisdiction is an important one. Clarifying this normative issue allows for an examination of whether the use of border technologies in migration processes can serve as a trigger to jurisdiction for the application of human rights law.

A. Understanding Human Rights Jurisdiction

Apart from the positive obligations of assistance found in the international law of the sea framework, individual rights are protected under international human rights law, which States should guarantee for everyone under their jurisdiction.⁸¹ When looking at the territorial scope of the application of a treaty under international law, Article 29 of the 1969 Vienna Convention on the Law of the Treaties (VCLT) provides that 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'.⁸² As has been highlighted by the

⁷⁷ C Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' (2018) 20 *IntCLRev* 374, 380.

⁷⁸ See L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effect' (2014) 25 *EJIL* 1072, 1075. ⁷⁹ See FitzGerald (n 1) 4–22.

⁸⁰ Gammeltoft-Hansen and Hathaway (n 4) 235.

⁸¹ S Joseph and S Dipnall, 'Scope of Application' in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2017) 119.

⁸² Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, art 29.

above discussion, border control practices, interception measures and distress incidents (SAR operations) most often occur beyond the territorial sea (which is considered as part of a State's territory and extends up to twelve nautical miles) and, in particular, take place in the Exclusive Economic Zone (EEZ), which for SAR purposes, is treated as if it is the high seas.⁸³ States ordinarily do not enjoy sovereign control on the high seas and thus individuals enjoy no protection of their rights, in the absence of a normative relationship with a duty-bearing State. The VCLT does not address the application of treaties beyond the territory of a State party. In addition, the main international human rights treaties on civil and political rights, the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights and the ECHR and their Protocols, conceive State responsibility for securing the rights they contain only in terms of the State's 'jurisdiction'. For example, the ECHR provides in Article 1 that its State parties 'shall secure to everyone within their jurisdiction' the rights and freedoms provided in the Convention. It is thus necessary to establish extraterritorial human rights jurisdiction in order to apply the relevant human rights treaties for the protection of migrants at sea.

It is well established that jurisdiction in international human rights law is fundamentally different from jurisdiction as it is primarily understood in public international law.⁸⁴ Jurisdiction in international human rights law is understood as responsibility giving rise to specific human rights obligations,⁸⁵ whereas, as Milanović puts it, jurisdiction in public international law concerns a State's right to regulate its own public order;⁸⁶ hence, it is concerned with whether or not a State's activity constitutes a lawful exercise of jurisdiction.⁸⁷ Accordingly, in the international human rights domain, the exercise of power by the State does not have to be necessarily within its legal competence,⁸⁸ but needs only 'to flow, by definition, from a lawfully organized institutional and constitutional framework through which these state agents exercise some kind of normative

⁸³ The high seas freedoms remain applicable within the EEZ for SAR purposes (in so far as they are not incompatible with other provisions on the EEZ regime). Art 58(2) of UNCLOS (n 5) renders arts 88–115 of UNCLOS applicable to the EEZ.

⁸⁴ Jurisdiction under international law refers to the competence of a State to make, apply and enforce its laws. The State can exercise this competence by way of prescription, adjudication or enforcement. Jurisdiction under international law can fall into one of the following five headings: territoriality, nationality, passive personality principle, protective principle and universality principle.

⁸⁵ T Altwickler, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29(2) EJIL 581, 582.

⁸⁶ M Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8(3) HRLRev 411, 420.

⁸⁷ R Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in S Sheeran and N Rodley (eds), *Routledge Handbook of International Human Rights* (Routledge 2013) 640.

⁸⁸ A Ollino, *Due Diligence Obligations in International Law* (CUP 2022) 151; S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) LJIL 857, 867.

power with a claim to legitimacy, even if that claim might prove to be unjustified'.⁸⁹

Additionally, jurisdiction in human rights law should also be demarcated from the law on State responsibility, especially the principles surrounding attribution of conduct. In the human rights field, jurisdiction is tied to the emergence of an obligation of the State to secure (or take responsibility for) the rights of individuals.⁹⁰ Conversely, with regard to the law of State responsibility, '[a]ttribution of certain acts to a public institution and State agents, and, more generally, responsibility, only come later once the State's duties have arisen in the first place and have been violated'.⁹¹ Thus, in relation to this discussion, the focal 'responsibility' of the State is not the attribution of legal responsibility (after a breach has taken place), but the need to ensure compliance with human rights obligations beforehand.

B. The Extraterritorial Understanding of Jurisdiction: General Application

The ECtHR in its jurisprudence on extraterritoriality has so far employed two types of jurisdiction in order to determine the applicability of the ECHR outside a State's own *terra firma*: (1) jurisdiction defined spatially, the 'spatial model', also known as 'control over an area'; and (2) jurisdiction defined personally, the 'personal model', also known as 'State-agent authority or control' or 'power over an individual'. The first landmark case of the ECtHR examining the extraterritorial application of human rights treaties was *Loizidou v Turkey*, in which the Court developed the concept of spatial jurisdiction.⁹² The Court emphasized that a State's responsibility might arise 'when as a consequence of military action—whether lawful or unlawful—it exercised *effective control of an area* outside its national territory'.⁹³ However, this conception of jurisdiction cannot cover the many different ways and situations in which States might violate human rights abroad without exercising effective control over an area.

Subsequently, in interpreting jurisdiction in the *Banković* case, the ECtHR ruled that the people killed in the airstrike were not within the jurisdiction of the North Atlantic Treaty Organization (NATO) States, explaining that airstrikes over a territory do not establish control over the actual area. Disappointingly, it held that jurisdiction is primarily territorial and did not agree with the applicants' submission that 'anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the

⁸⁹ See also discussion by V Kapogianni and N Magugliani, 'When Aerial Surveillance Becomes the *Sine Que Non* for Interceptions at Sea: Mapping the EI and its Member States' Complicity in Border Violence' in P Czech et al (eds), *European Yearbook on Human Rights 2023* (Intersentia 2023) 498.

⁹⁰ Milanović (n 86) 423.

⁹¹ Besson (n 88) 869.

⁹² *Loizidou v Turkey* App No 15318/89 (ECtHR, 18 December 1996) para 62.

⁹³ *ibid.*

jurisdiction of that State', finding that the text of Article 1 did not support such an approach to jurisdiction.⁹⁴

Since then, there have been several remarkable developments attempting to alleviate the stringency of the *Banković* rule. In *Ilaşcu and others v Moldova and Russia*, the ECtHR held that jurisdiction may persist even in parts of the State's own territory that are not under its effective control.⁹⁵ The State still has a positive obligation under Article 1 of the ECHR to take all appropriate measures within its power, in accordance with international law, to secure to the applicants the rights guaranteed by the Convention, even in the absence of effective control.⁹⁶ Importantly, in the ground-breaking case of *Al-Skeini v UK*,⁹⁷ the ECtHR, by affirming the 'personal model' of jurisdiction, stressed that 'whenever the State through its agents exercises control and authority over an individual and thus jurisdiction' the State is obligated to secure that individual the rights relevant to the situation flowing from the ECHR.⁹⁸ It further noted that the decisive element is 'the exercise of physical power or control over the person in question'.⁹⁹ The reasoning highlights the conceptual ambiguities surrounding the use of 'power' and 'control' with regard to establishing jurisdiction. The ECtHR either intended to equate the 'exercise of physical power' with 'control', or it meant that power and control are alternatives in this context.¹⁰⁰ In his compelling concurring opinion, Judge Bonello argued that the failure of judicial institutions to establish a coherent and axiomatic regime of jurisdiction signifies a failure to recognize the universal status of personhood, which is the essence of human rights.¹⁰¹

More recent cases seem to be indicating a return to the infamous narrow stance in *Banković* in interpreting the notion of jurisdiction, as scholars like Milanović have noted in the context of armed conflict cases that have arisen.¹⁰² Despite debates on the extent of ECHR protection, these discussions do not easily translate to the migration context, especially at sea, where the principles are applied differently. This is because the widely acknowledged two-model approach, commonly recognized as the basis of extraterritorial jurisdiction, does not seem to apply to factual circumstances where a State exercises remote control over persons in distress at sea by way of information (and visual knowledge) acquired from technological devices used during border

⁹⁴ *Banković* (n 3) para 75; *Spijkerboer* (n 38) 225.

⁹⁵ *Ilaşcu and others v Moldova and Russia* App No 48787/99 (ECtHR, 8 July 2004) paras 312–319. ⁹⁶ *ibid*, para 331. ⁹⁷ *Al-Skeini* (n 3).

⁹⁸ *ibid*, para 137; for further discussion on the extraterritorial application of the EU Charter, see Moreno-Lax and Costello (n 75) 1657. ⁹⁹ *Al-Skeini* (n 3) para 135 (emphasis added).

¹⁰⁰ L Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020) 124. When considering the application of the personal model, the Court tends to treat the exercise of physical power as a decisive element to a finding of jurisdiction.

¹⁰¹ Concurring Opinion of Judge Giovanni Bonello in *Al-Skeini* (n 3) para 4.

¹⁰² *Georgia v Russia (No 2)* App No 38263/08 (ECtHR, 21 January 2021); see also M Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (*EJIL:Talk!*, 25 January 2021) <www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/>.

surveillance operations at sea. Neither the spatial model nor the personal model appears to fit appropriately in this context. The scope and content of pre-existing international human rights law norms are thus faced with the need for reformulation and adaptation to address effectively the intricacies of not only maritime migration but also the integration of technology in border management.¹⁰³

C. Jurisdiction in the Maritime Space

Human rights bodies, alongside law-of-the-sea specialized bodies and tribunals,¹⁰⁴ have recognized that human rights extend and apply at sea in an analogous manner to on land, as long as control is exercised by State parties' authorities.¹⁰⁵ Accordingly, there is ample scholarship on the application of human rights treaties at sea,¹⁰⁶ pointing out that the law of the sea pursues the protection of human rights indirectly.

Xhavara is the only case heard by the ECtHR thus far invoking a violation of the right to life under Article 2 of the ECHR in the context of extraterritorial migration policies, and concerned an incident which resulted in the drowning of fifty-eight migrants.¹⁰⁷ The Italian authorities had intercepted a boat carrying Albanian nationals in an attempt to prevent the migrants from entering Italy, pursuant to an existing bilateral agreement between Italy and Albania.¹⁰⁸ Importantly, the ECtHR found that the incident was, in fact, caused by the Italian military vessel in the course of carrying out the activities under their agreement with Albania and thus, based on the factual circumstances of the collision, the victims were within Italy's jurisdiction.¹⁰⁹ While the case was inadmissible because the applicants did not exhaust all

¹⁰³ On legal analysis of digital rights and the interplay with the limits of international human rights law, see Y Shany, 'Digital Rights and the Outer Limits of International Human Rights Law' (2023) 24 *GermLJ* 461, 467.

¹⁰⁴ For example, ITLOS has employed human rights in the context of a law of the sea dispute, by reiterating the concept of 'considerations of humanity' first used in the *Corfu Channel* judgment by the International Court of Justice, in the *M/V Saiga* (No 2) case concerning enforcement activities at sea. See *M/V 'Saiga' (No 2)* (*Saint Vincent and the Grenadines v Guinea*) (Judgment of 1 July 1999) [1999] ITLOS Rep 10.

¹⁰⁵ E Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention under the Law of the Sea Paradigm' (2020) 21(3) *GermLJ* 417, 424.

¹⁰⁶ See, inter alia, S Cacciaguidi-Fahy, 'The Law of the Sea and Human Rights' (2007) 9 *Panóptica* 1; BH Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1997) 36 *ColumJTransatlL* 399; T Treves, 'Human Rights and the Law of the Sea' (2010) 28(1) *BerkeleyJIntL* 1.

¹⁰⁷ *Xhavara and others v Italy and Albania* App No 39473/98 (ECtHR, 11 January 2001) (*Xhavara*).

¹⁰⁸ A Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strasbourg?' (2018) 20(4) *EJML* 396, 410.

¹⁰⁹ *Xhavara* (n 107); S Trevisanut, 'Is There a Right To Be Rescued at Sea? A Constructive View' (Questions of International Law, Zoom In, 23 June 2014) <<http://www.qil-qdi.org/is-there-a-right-to-be-rescued-at-sea-a-constructive-view/>>.

domestic remedies,¹¹⁰ important insights can be gained from the ECtHR's reasoning in determining that there was jurisdiction. It implicitly confirmed that migration controls through the construction of bilateral agreements could give rise to the exercise of jurisdiction as they confer enforcement powers on a State.¹¹¹ Applying this reasoning of the ECtHR by analogy, it is apposite to posit that technological advancements in border activities transform the way that States exercise control over persons at sea and thus may be capable of giving rise to jurisdiction. Thus, even though territorial jurisdiction is the predominant source of jurisdiction, the development of a technological border evokes a different dynamic that is capable of altering the traditional framework of international human rights law and the rules on jurisdiction.

The ECtHR addressed the specific issue of jurisdiction at sea in *Medvedyev and others v France*¹¹² in the following way:

[A]s this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of article 1 of the Convention.¹¹³

This approach was confirmed in the renowned *Hirsi* case, when the ECtHR determined that a State exercises jurisdiction on intercepting vessels on the high seas, when migrants are 'under the continuous and exclusive *de jure* and *de facto* control' of that State.¹¹⁴ This is the most important ECtHR case to date in relation to extraterritorial human rights obligations in rescue operations as the ECtHR confirmed that jurisdiction extends across borders and applies on the high seas where a State's border control operations threaten the rights of migrants.¹¹⁵ Notably, the ECtHR has recently affirmed this ruling in a case involving similar circumstances, *M.A. and Z.R. v Cyprus*,¹¹⁶ and did not accept that the bilateral agreement between Cyprus and Lebanon of readmission ensures protection against human rights violations. The Court found Cyprus to have performed maritime push-backs in a similar manner to *Hirsi*, and reiterated that States 'cannot evade their own responsibility by relying on obligations arising out of bilateral agreements with other

¹¹⁰ E Papastavridis, 'European Convention of Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?' in M Fitzmaurice and P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications*, Queen Mary Studies in International Law (Martinus Nijhoff/Brill 2013) 128.

¹¹¹ Cacciaguidi-Fahy (n 106) 18; *Xhavara* (n 107).

¹¹² *Medvedyev and others v France* App No 3394/03 (ECtHR, 29 March 2010).

¹¹³ *ibid.*, para 67.

¹¹⁴ *Hirsi* (n 16) paras 74–75, 81.
¹¹⁵ *ibid.* The Court quoted, inter alia, in its reasoning the Parliamentary Assembly of the Council of Europe, 'The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants' (2011) Res 1821, para 8: '[t]he 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', paras 178, 180.

¹¹⁶ *M.A. and Z.R. v Cyprus (M.A. and Z.R.)* App No 39090/20 (ECtHR, 8 October 2024).

countries, in this case Lebanon'.¹¹⁷ It can be concluded that border control policies are primarily an expression of State authority and all forms of this control should result in the exercise of the State's jurisdiction.¹¹⁸ Therefore, it can be posited that technologies fall in the context of such operations, as they can allow States to abstain from direct physical contact between the authorities and individuals in distress, who they are nonetheless in a position to impact remotely through their decisions.

With the exception of these few cases, the jurisprudence of the ECtHR on migration increasingly shows its ambivalence towards extending the notion of jurisdiction beyond borders, leading to more restrictive outcomes and leaving significant gaps in human rights protection. In the face of this apparent lack of political will or consensus, it will require a bold judicial intervention to develop the normative contours of jurisdiction to safeguard the rights of individuals on the high seas.

IV. RECONCEPTUALIZING HUMAN RIGHTS JURISDICTION

A. A Functional Understanding

In the absence of a specialized refugee treaty body, or a migration court, or other supranational supervisory mechanism dealing with these matters, adjudication in this field is primarily national in conjunction with international human rights bodies. Ultimately, the responsibility for administering justice for gross human rights violations at sea that may go unnoticed or unpunished falls on human rights bodies.¹¹⁹ As a result, the ECtHR, as a court of last resort, has an instrumental role to play in condemning extraterritorial practices that violate human rights but also in guiding the EU and its Member States on migration policies and ensuring that an 'à la carte' respect for human rights is no longer entertained.¹²⁰

In addition to the ECtHR, the UN Human Rights Committee (HRC) has also dealt with an abundance of cases concerning the extraterritorial application of human rights. In general terms, the HRC has been seen to take a *pro homine*, universalistic approach to the construction of extraterritorial jurisdiction that has led to broader legal constructions, whereas the ECtHR has been seen to adopt a more sovereignty-oriented approach that has often led to more restrictive

¹¹⁷ *ibid*, para 91.

¹¹⁸ *M.A. and others v Lithuania* App No 59793/17 (ECtHR, 11 December 2018) Concurring Opinion of Judge Pinto de Albuquerque, para 5.

¹¹⁹ R Collins, "Outlaw Oceans" and "Lawless Seas"? Revisiting the High Seas as a Regulatory Space Under (and After) UNCLOS 1982' in K Siig, B Feldtmann and FMW Billing (eds), *The United Nations Convention on the Law of the Sea: A System of Regulation* (1st edn, Routledge 2023) 25–6; see also Human Rights at Sea <www.humanrightsatsea.org>.

¹²⁰ The phrase 'à la carte' respect for human rights was employed by Judge Giovanni Bonello in his Concurring Opinion in *Al-Skeini* (n 3) para 18, to criticize what he perceived as the ECtHR's inconsistent application of the ECHR. Judge Bonello voiced concerns that the Court had adopted an inconsistent approach to the ECHR's extraterritorial application, applying it differently depending on the circumstances, rather than adhering to a unified rule.

outcomes.¹²¹ In the context of migration cases, the ECtHR is frequently seen as taking a deferential attitude to States in upholding their sovereign right to control migration, resulting in significant gaps in human rights protection.¹²²

In contrast to the ECtHR's approach to extraterritoriality, the HRC has interpreted jurisdiction in functional terms and used 'impact' as a ground for applying the ICCPR when a State exercises power in extraterritorial settings over 'persons located outside any territory effectively controlled by the State, whose [rights are] nonetheless *impacted* by its military or other activities'.¹²³ To this end, if a State's act produces effects outside its territory that impact the enjoyment of the rights of the concerned individuals, it could amount to an exercise of jurisdiction.¹²⁴ The key aspect of jurisdiction, as Shany argues, is not about the actual act or omission, but 'about states having the potential (or functional capacity) to comply with or violate IHRL obligations'.¹²⁵

Consequently, having the potential to exercise effective control in a situation arguably carries the same degree of power as actual placement within a State's control. This justification finds its origins in Aristotle's distinction between the *potentiality* and *actuality* of positive obligations.¹²⁶ The former translates into power ('*dynamis*'; 'δύναμη'), while the latter translates into activity

¹²¹ The HRC as a quasi-judicial body, delivers decisions or so-called 'Views of the Committee' in dealing with individual communications under the Optional Control, which are not legally binding. The ECtHR as a judicial body issues binding judgments. Although the HRC's decisions and recommendations are not binding in nature, it is understood that States should take them into account and adhere to them in good faith. For further discussion, see OHCHR, 'Statement by Mr. Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, at the International Law Commission' (21 July 2015) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16254&LangID=E>>; M Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' (2020) 38(1) Netherlands Quarterly of Human Rights 12; see also L Slingenber, 'The Right Not to be Dominated: The Case Law of the European Court of Human Rights on Migrants' Destitution' (2019) 19(2) HRLRev 291.

¹²² See, eg, *N.D. and N.T. v Spain* (n 33); C Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016); L Raible, 'Extraterritoriality Between a Rock and Hard Place' (Questions of International Law, Zoom In, 30 June 2021) <http://www.qil-qdi.org/extraterritoriality-between-a-rock-and-hard-place/#_ftn1>; PP de Albuquerque, 'The Rights of Migrants and Refugees Under the European Convention on Human Rights: Where Are We Now?' in S Mullally and F de Londras (eds), *The Irish Yearbook of International Law*, vol 13, 2018 (Hart Publishing 2020) 5–9, 22, particularly see 8, 'in the view of the Grand Chamber, migrants can be treated worse than ordinary criminals' and 22, 'the Court [ECtHR] has turned its back on the most vulnerable and has failed to live up to its mission to protect human rights for *all* individuals'.

¹²³ HRC, 'General Comment No. 36—Article 6: Right to Life' (3 September 2019) UN Doc CCPR/C/GC/36, para 63 (emphasis added). See also N Sitaropoulos, 'States are Bound to Consider the UN Human Rights Committee's Views in Good Faith' (Oxford Human Rights Hub, 11 March 2015) <<https://ohrh.law.ox.ac.uk/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith/>>.

¹²⁴ *Lopez Burgos v Uruguay* Comm No 52/1979 (6 June 1979) UN Doc CCPR/C/13/D/52/1979(1981) para 12.3.

¹²⁵ Y Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Rights Law' (2013) 7(1) L&EthicsHumRts 47, 66.

¹²⁶ J Sachs (trans.), *Aristotle's Metaphysics* (Green Lion Press 1999).

(‘*energeia*’; ‘*ἐνέργεια*’).¹²⁷ On the one hand, potentiality is the power to affect an outcome; on the other hand, actuality is the realm of events and facts. Ontologically, therefore, the two are not to be equated but carry the same degree of power, that is, a State has the capacity (whether it acts on it or not) to impact the relevant rights of individuals in a direct and reasonably foreseeable manner by its decisions. Hence, in line with Raible’s argumentation, the power to do something is potential, and if and when it is exercised, results in control.¹²⁸

To support the functional model of jurisdiction, an analogy can be drawn from a land-rescue case, *Furdik v Slovakia*,¹²⁹ concerning the delayed rescue of a mountain climber who died whilst waiting for help to arrive.¹³⁰ The ECtHR grasped the opportunity to clarify that the obligation of States to protect the right to life under the ECHR extends to emergency services ‘where it has been *brought to the notice* of the authorities’ that the life or health of an individual is at risk.¹³¹ This reasoning could equally be extended to the case of migrants in distress at sea, as visibility or real-time monitoring generated by technology is capable of drawing the attention of the State authorities to a possible emergency, thereby inducing a situation of power.

Considering border technology in the reconceptualization of jurisdiction, it is posited that pre-frontier detection of maritime movements empowers States to control remotely how a situation of distress at sea will unfold.¹³² Whilst scholars like Jumbert have argued that surveillance does not equal actual control, it nonetheless provides States with the choice whether to exercise sovereign power at the border.¹³³ From this perspective, border technologies could be conceptualized as knowledge generators that have the ability to activate the jurisdictional nexus vis-à-vis a State’s human rights obligations to exercise *ex ante* due diligence through its conduct in managing migration. As a result, a coastal State may need to refrain from adopting measures that could disrupt migration movements—such as intensified surveillance—especially if such actions risk impeding the efficacy of rescue operations or even increasing the likeliness of distress incidents, by encouraging migrants to take more dangerous, less surveilled routes.¹³⁴ The continuing large-scale loss of life at sea should prompt States to review the applicable regulatory system, as Lisa-

¹²⁷ See also G Agamben, *Potentialities: Collected Essays in Philosophy* (Stanford University Press 1999) 177.

¹²⁸ Raible (n 100) 102–5; see also Besson (n 88) 863.

¹²⁹ *Furdik v Slovakia* App No 42994/05 (ECtHR, 2 December 2008) (*Furdik*).

¹³⁰ Trevisanut (n 109).¹³¹ *Furdik* (n 129) (emphasis added).

¹³² Moreno-Lax (n 26) 385; Trevisanut (n 109).

¹³³ MG Jumbert, ‘Control or Rescue at Sea? Aims and Limits of Border Surveillance Technologies in the Mediterranean Sea’ (2018) 42(4) *Disasters* 674, 695.

¹³⁴ DF Georgoula, ‘Building Walls at Sea: An Assessment of the Legality of the Greek Floating Barrier’ (2022) 34(1) *IJRL* 54, 71; S Trevisanut, ‘The Principle of *Non-Refoulement* and the De-Territorialization of Border Control at Sea’ (2014) 27(3) *LJIL* 661.

Marie Komp suggests, ‘with an eye to the question whether it actually prevents the loss of life in practice’.¹³⁵

At a high level of generality, the complexities raised above can be disentangled by answering the following principal question: at what point in time do persons in distress at sea become subject to a State’s jurisdiction? It is submitted that the jurisdictional link is activated at the point when the notified-State has the functional capacity (power) to impact through its decisions (acts and/or omissions, including instructions to a third party) the relevant rights of the concerned individuals in a direct and reasonably foreseeable manner.¹³⁶ What makes control over the rights of individuals at sea ‘effective’ is the State’s ‘capacity to determine the material course of events’ and compliance with the duty of protection.¹³⁷ A causal link is thus created, triggering a State’s positive human rights obligations to exercise due diligence in coordinating rescue efforts, in order to stimulate conduct that is in line with the SAR system and the international human rights framework. The justification for this interpretation is clear: it is only by requiring action at a stage when it can still have effect that the right to life is adequately safeguarded. Thereafter, it is clear that both flag and coastal States are obliged to adhere to the principle of *non-refoulement* and ensure that those rescued are taken to a place that qualifies as safe.¹³⁸ This functional understanding aligns with a teleological interpretation of jurisdiction,¹³⁹ which becomes pertinent for addressing the evolving patterns in migration control and external border management.

In the below analysis, the functional understanding of jurisdiction will be incorporated into the practices most commonly seen in the Mediterranean region: (1) delayed/non-assistance; (2) push-backs by a proxy third actor; and (3) privatized *refoulement* in connection with aerial *refoulement*.

¹³⁵ LM Komp, *Border Deaths at Sea Under the Right to Life in the European Convention on Human Rights* (Routledge 2022) 157.

¹³⁶ This position builds on Shany’s formulation of a functional jurisdiction, albeit without the element of ‘significant’ potential impact. See Shany (n 125) 65. In this vein, the climate change cases are a pivotal example of the attempt to reconceptualize a functional conception of jurisdiction based on the impact of State activities. For the most recent case, see the application submitted in ‘The Portuguese Youth Case’ (particularly 6–12) which is pending before the ECtHR <<https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf>>.

¹³⁷ Moreno-Lax (n 26) 385, 414.

¹³⁸ Refugee Convention (n 9) art 33.

¹³⁹ The term ‘functional’ is understood from a capacity perspective, that is, a State’s potential to impact the human rights of individuals, if and when a State is in a position to do so. This echoes the HRC’s General Comment No 36 on the right to life of the ICCPR, which articulates a ‘functional’ approach to jurisdiction in interpreting the right to life: ‘every time that a State has the power to exercise functions that have an impact on human rights of individuals in a direct and reasonably foreseeable manner, those individuals are within the jurisdiction of the State’. HRC (n 123).

B. Practical Application of the Functional Model

1. Delayed assistance and non-assistance

The functional view espoused in this article is largely influenced by the much-discussed case of *A.S. and others v Italy*, concerning a migrant shipwreck which resulted in an estimated 200 deaths.¹⁴⁰ In this case, the Italian and Maltese authorities did not cooperate effectively in agreeing who should undertake the rescue, and, as a result, help arrived seven hours after the first launch of the distress call. The issue before the HRC was not whether the shipwreck occurred within the State party's territory, as it clearly did not, but rather whether the alleged violations of the right to life could be considered to have been within the power or effective control of the State, despite taking place outside its territory. The HRC found that Italy exercised effective control over the individuals in distress as they were 'directly affected' by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable¹⁴¹ even though they were also concurrently subject to the jurisdiction of Malta who had formally assumed primary responsibility to coordinate the rescue operation as it was within its SAR zone.¹⁴²

Consequently, the HRC effectively broadened the concept of control, since it was not required to be over the person, but rather over the enjoyment of human rights. This facilitates attribution of certain types of rights violations where the element of physical control is not present. An equally important development in this context is the ECtHR judgment in *Safi and others v Greece*, where the Court emphasized the considerable delays in rescue assistance which have become the norm in the Mediterranean. In this case rescue arrived over an hour after the boat had completely sunk. The judgment made it clear that time is of the essence in cases where drowning can be reasonably anticipated.¹⁴³ It is thus clear that the

¹⁴⁰ *A.S., D.I., O.I. and G.D. v Italy* Comm No 3042/2017 (27 January 2021) UN Doc CCPR/C/130/D/3042/2017 (*A.S. and others v Italy*).

¹⁴¹ *ibid.*, para 8.5 (emphasis added).
¹⁴² *A.S., D.I., O.I. and G.D. v Malta* Comm No 3043/2017 (27 January 2021) UN Doc CCPR/C/128/D/3043/2017, para 6.7. The mismanagement of SAR services or the failure to observe the duty to render assistance at sea adequately might attract the shared responsibility of the various actors involved. The fact that there can be multiple duty-bearers does not preclude a finding of more than one State exercising concurrent jurisdiction over the same individuals and the same situation, if their acts or omissions impact the lives of individuals in a direct and reasonably foreseeable manner. The issue of shared responsibility may arise in the event of a wrongful act given the multiplicity of actors involved, State and non-State actors, for example a third State that knowingly undertakes the pull-back of migrants at sea or provides intelligence information to their whereabouts. Each State in these situations may have shared responsibility for the overarching wrongful conduct. For similar legal argumentation on shared responsibility, see M Milanović, 'Extraterritoriality and Human Rights' in Gammeltoft-Hansen and Vedsted-Hansen (n 73) 68. On shared responsibility in the maritime context, see also S Trevisanut, 'Search and Rescue Operations at Sea' in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 432.
¹⁴³ *Safi* (n 14) para 162.

coastguard, as a *de jure* State organ,¹⁴⁴ has a pivotal role to play in exercising State power.

Such legal and factual complexities were exacerbated in the Cutro shipwreck of 26 February 2023, which provides a paradigmatic example of the kind of policy control that portrays a functional understanding of jurisdiction as described in this article. In brief, while no distress call was placed from the migrants' boat to alert the Italian authorities of their need of assistance, the use of surveillance technology by Frontex alerted the relevant authorities of a strong likelihood of a distress situation that arguably should have been marked as a SAR event.¹⁴⁵ The Italian Maritime Rescue Coordination Centre had access to the live-streaming sensors that were shared by Frontex by virtue of the boat being in its SAR region, but still did not classify the incident as an 'emergency', and thus did not launch a SAR operation.¹⁴⁶ It therefore seems that the primary cause of this human tragedy was Italy's negligent failure to launch a SAR mission within its SAR zone, resulting in fatal consequences.

The law of the sea provides that coastal States have authority over distress incidents in their SAR zone and there is an obligation of due diligence whereby they must exercise best efforts to activate the available SAR services in that geographical area and employ all adequate measures to save lives.¹⁴⁷ It appears that the creation of a technological surveillance infrastructure is capable of serving as an accountability avoidance tool, allowing coastal States an interpretative discretion as to whether a situation amounts to 'distress' that would oblige them to ensure that the necessary assistance is provided. Arguably, unduly delaying or negligently handling a rescue operation, or not responding to information indicating a distress situation from coastal States concerning vessels within their SAR zones, amounts to an exercise of human rights jurisdiction as the authorities are acting in the knowledge (actual or putative) that the lives of persons are at risk.

¹⁴⁴ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) art 4 <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

¹⁴⁵ N Nielsen, 'Crotone Shipwreck Triggers Police vs Coastguard Blame Game' (*EUObserver*, 2 March 2023) <<https://euobserver.com/migration/156776>>.

¹⁴⁶ For further discussion, see A Papachristodoulou, 'The Crotone Migrant Shipwreck: A Cat-and-Mouse Blame Game and the Role of Technologies at External Borders' (*EJIL:Talk!*, 12 April 2023) <<https://www.ejiltalk.org/the-crotone-migrant-shipwreck-a-cat-and-mouse-blame-game-and-the-role-of-technologies-at-external-borders/>>.

¹⁴⁷ SAR zones under the law of the sea framework are not understood as zones of jurisdiction. Instead, they are delimited areas of ocean space where States must ensure cooperation and coordination of SAR operations, see SAR Convention (n 7) Annex, para 2.1.1; and 'Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur' (19 July 1999) UN Doc A/CN.4/498, para 67.

2. Push-backs by a proxy third actor

In a joint third-party application submitted to the ECtHR in the pending *S.S. and others v Italy* case, it was argued, inter alia, that the jurisdictional link is activated ‘whenever a State’s authority, due to its powers under international law—and on the high seas, under the international law of the sea—issues instructions to a third actor with extraterritorial effect’.¹⁴⁸ The incident unfolded in 2017 and concerned an interception by the LCGN, acting under Italian orders, of a vessel carrying around 150 migrants which began to capsize on the high seas soon after departing from Tripoli. It should be noted that the non-governmental organization (NGO) Sea Watch 3 (SW3) also arrived at the scene and assumed on-scene coordination, as the LCGN initially objected to taking that role (and did not have the necessary equipment to carry out the rescue). Nevertheless, the Italian authorities insisted the LCGN should take charge of the rescue. The NGO rescued some individuals, some were ‘pulled-back’ by the LCGN to a camp in Libya where they reportedly faced abuse, and others, including a child, drowned amidst the unravelling of the chaotic situation.

The case is a stark representation of the countless incidents of Italy assigning rescue duties to the LCGN to try to avoid any direct physical contact that would bring the persons in distress under its jurisdiction. Reflecting on the case, Papastavridis has expressed the view that the knowledge of the distress incident alongside control over the persons in the case are decisive for the ECtHR to establish its jurisdiction.¹⁴⁹ Indeed, the State’s influence over the perpetrator was highlighted by the Court in the *Ilaşcu* case, where it concluded that Russia bore responsibility for the abuses committed by Moldovan separatists in Moldova. This conclusion was based on Russia’s ‘decisive influence’ over the separatists.¹⁵⁰ However, the Court’s reasoning in this instance is rather ambiguous as it does not clearly explain the significance of Russian influence—whether it serves as a basis for attribution of responsibility or triggers the obligation to protect.¹⁵¹ Therefore, in considering this case, the ECtHR has a real opportunity to consolidate its jurisprudence on the extraterritorial application of human rights at sea and in particular, when a State issues instructions to a third actor which have an extraterritorial effect. However, it might reject a functional understanding of extraterritorial human rights jurisdiction, given that it rejected the ‘capacity’ or ‘impact’ approach argued by the applicants in *Banković*.¹⁵² It went on to

¹⁴⁸ *S.S. and others v Italy*, Application No 21660/18, Written Submissions on Behalf of the Aire Centre (Advice on Individual Rights in Europe), The Dutch Refugee Council (DCR), The European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ), Intervening, 11 November 2019, 4 <https://www.icj.org/wp-content/uploads/2019/11/ECtHR-SS_v_Italy_final-JointTPI-ICJECREAIREDCCR-English-2019.pdf>.

¹⁴⁹ Papastavridis (n 105) 435.

¹⁵⁰ *Ilaşcu* (n 24) para 392.

¹⁵¹ For a thorough discussion on abuses committed by third parties, see M Hakimi, ‘State Bystander Responsibility’ (2010) 21(2) EJIL 341.

¹⁵² *Banković* (n 3) para 75.

say that the mere capacity to interfere with the enjoyment of a right will not suffice to entail jurisdiction over the right-holder.¹⁵³ However, *Banković* was a different scenario from the present context of external border and migration management, albeit also featuring competing policy considerations.

3. Privatized refoulement in connection with aerial refoulement

The practice of interdiction and *refoulement* is also increasingly carried out by private merchant vessels acting on information obtained by States through aerial intelligence. The *Nivin* incident in 2018 is an example of such a situation, which led to the submission of an individual complaint, *SDG v Italy*, currently pending before the HRC.¹⁵⁴ In this incident, upon rescuing migrants in the Mediterranean, the commercial vessel the *Nivin* was instructed by the Italian authorities to return them to Libya. The LCGN boarded the vessel and allegedly injured a number of the rescued migrants and returned them all to detention centres.¹⁵⁵

The complaint relies on the impact model mentioned above in Section IV.A, arguing that in their dealings with the *Nivin*, the Italian authorities through their coordination with and on behalf of the LCGN had impacted the right to life of the individuals involved, in a direct and reasonably foreseeable manner. Of particular relevance is the fact that the Italian authorities acquired knowledge about the migrant boat in distress by virtue of the data transmitted by a Spanish surveillance aircraft operating as part of Operation Sophia.¹⁵⁶ Looking at the ECtHR's jurisprudence, the Court has recognized a 'reasonable knowledge' condition which provides that preventive positive obligations arise if the State's authorities knew or should have known of a real and immediate risk to the life of an identified individual from the criminal acts of a third party.¹⁵⁷

In this vein, the knowledge criterion rests on a factual assessment of the circumstances which will be triggered by a certain risk that is foreseeable for States. In the context of maritime migration and external border management,

¹⁵³ *ibid*, para 75; see also Shany (n 103) 467.

¹⁵⁴ 'Communication to the United Nations Human Rights Committee in the Case of SDG against Italy (Anonymized Version) Submitted for Consideration under the Optional Protocol to the International Covenant on Civil and Political Rights to The United Nations Human Rights Committee' (GLAN, 2019) <https://www.glanlaw.org/_files/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf>.

¹⁵⁵ For similar discussion, see JP Gauci, 'When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations' (BIICL, 2020) <https://www.biicl.org/documents/124_private_vessels_research.pdf>.

¹⁵⁶ See analysis by A Papachristodoulou, 'The Ban-Opticon of Migration: Technologies at Maritime Borders and Extraterritorial Jurisdiction' (*Border Criminologies*, 11 May 2022) <<https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2022/05/ban-opticon>>. See also GLAN, 'Privatised Migrant Abuse by Italy and Libya' <<https://www.glanlaw.org/nivincase>>.

¹⁵⁷ *Osman v the United Kingdom* App No 23452/94 (ECtHR, 28 October 1998) paras 116–117.

it can be analogously argued that the knowledge criterion will be satisfied when States receive information about a distress incident that alerts them of a probable result¹⁵⁸—the foreseeable risk to the life of migrants who are in distress—and requires immediate action.

4. Concluding remarks on the functional model

Clearly, technology has been very effective and has played a key role in preventing migrants from reaching Europe and curtailing the right to seek asylum. Recognizing the significance of this development, the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions has underlined the responsibilities of States exercising such surveillance, noting that since the:

European Union and its member States have put in place an extensive surveillance system focused on security and border patrol [and have] chosen to provide security in the Mediterranean, the States members of the European Union ... are exercising sufficient *functional control* to be subject to the one obligation inextricably linked to ocean surveillance: an adequate and effective system of rescue. This includes the implementation of the principle of *non-refoulement*, including to unsafe third countries, the protection of refugees and migrants, including against preventable and foreseeable loss of lives and support to ships operated by non-governmental organizations.¹⁵⁹

The EU and its Member States have progressively redefined their border policies in a manner that not only shows nearly complete disengagement with rescue obligations but also involves delegating SAR activities and border management to Libya, a volatile State where human rights abuses are a concern. While Libya now has its own SAR zone, numerous reports from NGOs and individuals strongly argue for a re-evaluation of the Libyan SAR zone classification until the LCGN demonstrates that it will conduct SAR operations in line with international obligations.¹⁶⁰ As noted above, rescue operations must end in a safe harbour or a ‘place of safety’, and Libya is not considered a safe place to disembark shipwrecked persons rescued at sea.¹⁶¹

¹⁵⁸ SAR Convention (n 7) regulation 2.1.9.

¹⁵⁹ UN Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, ‘Unlawful Deaths of Refugees and Migrants’ (15 August 2017) UN Doc A/72/335, para 64 (emphasis added).

¹⁶⁰ Open Letter, ‘Hundreds of NGOs and Individuals Call for Revocation of Libya’s SAR Zone’ (Migreurop, 3 July 2020) <<http://www.migreurop.org/article2997.html?lang=fr>>.

¹⁶¹ See Communication to the International Criminal Court (n 22); *Hirsi* (n 16); also an abundance of reports by international bodies including UNHCR, IOM and the UN mission in Libya providing such evidence. See, for instance, UN Support Mission in Libya, ‘“Detained and Dehumanised” Report on Human Rights Abuses against Migrants in Libya’ (13 December 2016) <https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf>; Council of Europe, ‘Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights: Application No.

In conclusion, an observation is in order: the fact that cases like the *Nivin and A.S.* are being brought before the HRC is likely to be a strategic move by lawyers amidst fear that the case will be unsuccessful in the ECtHR, which is increasingly criticized for its ‘non-friendly’ approach to migrants’ human rights.¹⁶² In this light, Dembour acknowledges that the ECtHR’s jurisprudence in the area of migration has proven to be less helpful when it comes to protecting the rights of migrants than one ‘might have hoped, given that protecting human rights is the *raison d’être* of the Court’.¹⁶³ She wonders, ‘will it always be like this? It does not have to be’.¹⁶⁴

One can think of cases (albeit only a few) where the ECtHR adopted a *pro homine* approach to migration, such as *M.S.S. v Belgium (M.S.S.)* in which the transfer of an asylum seeker from Belgium to Greece, in accordance with EU legislation, was found to violate multiple provisions of the ECHR,¹⁶⁵ in a similar manner to the *Hirsi and M.A. and Z.R.* cases in which Italy and Cyprus were condemned for their practices and cooperation agreements with third countries that exposed migrants to serious risks. Whilst recognizing the difficulties faced by vanguard States due to their geographic location at the gates of Europe, the ECtHR in *M.S.S.* made it clear that this cannot pardon States of responsibility for their serious shortcomings.¹⁶⁶ However, in a more recent case, *N.D. and N.T. v Spain*, concerning the expulsion of irregular migrants and a State’s sovereign right to manage its borders, the ECtHR failed to reflect on surveillance activities in the context of border practices that are employed without geographical or territorial limits and impact the rights of migrants negatively. Cases such as this displace the individual ‘from the heart towards the periphery of the ECHR system’.¹⁶⁷

V. CONCLUSION

It is readily apparent that under the veil of technological advancements, the extraterritorial practices of the EU and its Member States have been becoming increasingly cavalier towards international human rights law, revealing a lack of solidarity towards third-country nationals in need of protection. At the same time, while the ECtHR has been a source of hope for many, it has taken an increasingly complex stance in relation to issues on

21660/18, *S.S. and others v. Italy*’, CommDH(2019)29 (15 November 2019) <<https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-app/168098dd4d>>.

¹⁶² Raible (n 122).

¹⁶³ M-B Dembour, ‘The Migrant Case Law of the European Court of Human Rights’ in B Çali, L Bianku and I Motoc (eds), *Migration and the European Convention on Human Rights* (OUP 2021) 36. ¹⁶⁴ *ibid.*

¹⁶⁵ *M.S.S. v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011) para 251.

¹⁶⁶ Dembour (n 163) 36.

¹⁶⁷ S Carrera, ‘The Strasbourg Court Judgement *N.D. and N.T. v Spain*. A Carte Blanche to Push Backs at EU External Borders?’ (2020) Robert Schuman Centre for Advanced Studies EUI Working Paper RSCAS 2020/21, 2.

extraterritoriality that has undermined the protection landscape and empowered States to turn a blind eye to vulnerable people in need of protection. Amidst the escalating phenomena of abandonment at sea and contemporary push-back practices,¹⁶⁸ the ECtHR needs to continue adjusting the parameters of human rights jurisdiction to ensure that the ECHR remains a ‘living instrument’ that is ‘interpreted in the light of present-day conditions’.¹⁶⁹ As evident from the analysis of its jurisprudence in this article, the notion of territorial jurisdiction is no longer capable of being easily discerned.

Arguably, the label ‘technological advancements’ offers a useful lens for interpreting contemporary manifestations of State power and lends support to the argument for developing a functional model of jurisdiction. This is because technology increasingly provides the means to control remotely how a situation will unfold, often at the expense of migrants’ human rights—and lives. The words of Judge Pinto de Albuquerque in his concurring opinion in *Hirsi* highlight the present disdain for migrants and their plight: today’s Europe is no longer ‘the cradle of human rights’.¹⁷⁰ For the cradle to be re-established, the human rights framework needs to be adapted to such societal changes, including the unprecedented impacts of technological developments.

ACKNOWLEDGEMENTS

The author is deeply grateful to Professor Siobhán Mullally for her in-depth comments and suggestions, and to Dr Efthymios Papastavridis and Professor Richard Collins for their valuable comments on earlier drafts. The author has also benefitted from helpful discussions with Professor Yuval Shany. An earlier version of this article was presented at: the Visiting Scholar/Visiting Researcher Colloquium 2024 at Harvard Law School; the European Human Rights Law Conference 2023 (Cambridge University); The Protection of Vulnerable People at Sea workshop (Swansea University); and the Society of Legal Scholars Annual Conference 2022 (King’s College London). The author thanks the participants of these conferences and workshops as well as the two anonymous reviewers and editor-in-chief for their useful comments and feedback. The author is also indebted to the National University of Ireland for funding their Post-Doctoral research. As always, any errors or omissions remain the author’s own.

¹⁶⁸ VW Nick, *Europe’s Border Crisis: Biopolitical Security and Beyond* (OUP 2015) 60.

¹⁶⁹ *Hirsi* (n 16) para 174; the ‘living instrument’ doctrine which upholds this interpretative task was first articulated in *Tyler v the United Kingdom* App No 5856/72 (ECtHR, 25 April 1978) para 31.

¹⁷⁰ *Hirsi* *ibid*, Concurring Opinion of Judge Pinto de Albuquerque.