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When the Exception Overtakes the Rule: COVID-19, Security Exemption Clauses, and International Investment Agreements
Kayla Maria Rolland

Focus Section: The Law of Search and Rescue

Remedying a Legal Black Hole: The Future of Human Rights Jurisdiction in the Mediterranean Sea
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Editorial

Dear Readers,

We are delighted to present Volume 14, No. 1. The Issue contains five articles covering important areas of international law, with the aim of stimulating discussion and academic research.

The Issue starts with an article concerning COVID-19 and international investment protection and further transitions into a special section dedicated to examining the complexities of migration control and human rights within the framework of international law. We are pleased to finally publish this focus section on "The Law of Search and Rescue" and would like to thank *Prof. Dr. Nora Markard* for bringing this collaboration to GoJIL.

The Issue begins with *Kayla Maria Rolland's* article, "When the Exception Overtakes the Rule: COVID-19, Security Exemption Clauses, and International Investment Agreements." The article provides an analysis of how the COVID-19 pandemic has reshaped the interpretation and application of security exemption clauses in international investment agreements, with a detailed case study of a bilateral investment treaty. *Rolland's* work offers a crucial perspective on the changing dynamics of global trade and investment in the face of unprecedented challenges. This is the winning submission of the GoJIL's latest Student Essay Competition on the topic of "International Law in Times of a Pandemic".

Our special section opens with "Remedying a Legal Black Hole: The Future of Human Rights Jurisdiction in the Mediterranean Sea" by *Alison Beuscher*. This article examines the decline in search and rescue efforts in the Mediterranean Sea and proposes an innovative jurisdictional approach to address the maritime human rights obligations of coastal States, drawing on case law from the Inter-American Court of Human Rights and the United Nations Human Rights Committee.

Subsequently, *Laura Goller's* "A Right to Come Within the Jurisdiction of a State under Non-Refoulement? Interpreting Article 1 of the European Convention on Human Rights in Good-faith Within the Context of Extraterritorial Migration Control" challenges traditional interpretations of non-refoulement in the context of European human rights law, focusing on the evolving practices of extraterritorial migration control.

In the fourth article, "Containing the Containment: Using Art. 16 ASR to Overcome Accountability Gaps in Delegated Migration Control", *Lina Sophie Möller* brings into focus the legal and ethical complexities that arise when States delegate migration control, using the Italian-Libyan cooperation as a case study to explore the implications for state responsibility and human rights.

The section concludes with *Sarah Isabel Pfeiffer's* article, "Nigerien Law 2015-36: How a New Narrative in the Fight Against Smugglers Affects the Right to Leave a Country,". *Pfeiffer* analyzes the impact of Niger's anti-migrant smuggling law on the fundamental right to freedom of movement. Her work offers a critical examination of the legal provisions and its implications for non-Nigerien nationals. The article is of particular interest as the military government abolished Law 2015-36 in November 2023.

In times of great political uncertainty, it is more important than ever to protect and value our legal systems. However, this also includes regularly scrutinizing the law that defines international coexistence and evaluating our past decisions in order to make even better ones in the future.

We hope you find this new Issue thought-provoking and wish you an exciting time reading the articles. We would especially like to thank the authors for their very valuable contributions.

We would also like to express our condolences to the relatives, friends and colleagues of *Prof. Dr. Dr. h.c. Dietrich Rauschning*, who passed away on 17 September 2023 at the age of 92 years. *Prof. Rauschning* influenced the Institute of International and European Law at the University of Göttingen for over fifty years and played a main part in establishing the importance of the study of International Law here. He was a member of GoJIL's Advisory Board since its foundation in 2008 and a great benefactor for the Journal's work. We mourn the loss of a bright scholar and will honor his life and memory.

The Editors

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When the Exception Overtakes the Rule: COVID-19, Security Exemption Clauses, and International Investment Agreements

Kayla Maria Rolland*

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* Kayla Maria Rolland is an articling student with the Ministry of the Attorney General, in Toronto, Canada. The views and opinions expressed in this paper are solely those of the author and should not be taken as the views of either the Attorney General of Ontario or the Government of Ontario. Research was completed as part of academic coursework from January to April 2021. Immense gratitude goes to Professor Andrea Bjorklund for her guidance while completing this paper.

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Abstract

In the trade and investment law regimes built in the post-war period, "security exemption clauses" were included within trade and investment agreements as a safety valve, permitting States to deviate from their commitments in the event that their security interests were implicated. Initially, these clauses were understood to be narrowly limited to instances of war and interstate conflict. With the rise of the national security state in the decades since, however, the concept of security interests has ballooned to encompass an ever-growing set of issues, with some fearing that the rules may become irrelevant. This has been particularly facilitated through "third generation" security exemption clauses and their inclusion of self-judging language. The COVID-19 pandemic in particular adds a new dimension to this phenomenon. As a case study analysis of the text of the Chile-Hong Kong, China SAR bilateral investment treaty (BIT) will demonstrate, it may be feasible for States to invoke security exemption clauses to justify measures taken in response to the COVID-19 pandemic in some contexts, particularly with third generation, self-judging security exemption clauses. The expanding notions of security exemption clauses have significant implications for the investor-State dispute system as a whole.

> "The expansion of the national security state has become a major cause for concern in the literature on crime, terrorism, and armed conflict, but there has been *little consideration of its effect on trade and investmen*t."[1]

A. Introduction

In the trade and investment law regimes built following World War II, "security exemption clauses" were included within trade and investment agreements as a safety valve, permitting States to deviate from their commitments in the event that their security interests were implicated. These clauses "provide States with a means to protect their most fundamental security interests even where they collide with treaty obligations".[2]

Initially, these clauses were understood to be narrowly limited to instances of war and interstate conflict. With the rise of the national security state in the decades since, however, the concept of security interests has ballooned, particularly through the increasing use of self-judging language, to encompass an ever-growing set of issues, with some fearing a "risk [of] allowing the exception to swallow the rule".[3] The COVID-19 pandemic in particular adds a new dimension to this phenomenon. With the looming possibility of a wave of investor-State disputes related to measures taken by States to address the pandemic, the potential invocation of security exemption clauses demonstrates the ever-growing boundaries of clauses.

B. Overview of Security Clauses & Evolving Interpretations

I. Overview of Security Clauses

The inclusion of security exemption clauses within international investment agreements (IIAs) is a relatively recent phenomenon. Most older IIAs do not contain security exemption clauses, but they have grown increasingly common

1 See J. Benton Heath, 'The New National Security Challenge to the Economic Order', 129 *Yale Law Journal* (2020) 4, 1020, 1029 [Heath, 'The New National Security Challenge'].

2 S. Blanco & A. Pehl, *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review* (2020), 71.

3 J. Benton Heath, 'Trade and Security Among the Ruins', 30 *Duke Journal of Comparative & International Law* (2020) 2, 223, 243-244 [Heath, 'Trade and Security'].

in more recent agreements.[4] The content and form of security exemption clauses varies. Some security exemption clauses use terms that are quite broad, providing States with significant discretion in defining a security interest. Others take a narrower approach that lists more specific conditions in which the clause may be invoked.[5] Different terms are used, including "national security, essential security interests, international peace and security, or public order".[6]

Scholars Sebastián Mantilla Blanco and Alexander Pehl identify three generations of security exemption clauses in trade and investment law, beginning with the "Security Exceptions" clause within Article XXI *General Agreement on Tariffs and Trade* (GATT) in 1947.[7] This clause has been a reference point in drafting many of the IIAs that would follow.[8]

The second generation of security exemption clauses, which spanned from the 1950's through to the mid-1990's, were heavily impacted by "trade liberalization, the promotion of foreign investment, and international dispute settlement mechanisms."[9] When security exemption clauses were included in these instruments, they were very narrow and often permitted a high degree of scrutiny. A critical development was the increasing exclusion of the self-judging language "it considers" from agreements, which had its origins within Article XXII GATT.[10]

The third generation that Blanco and Pehl have identified is considered the "antithesis of the second generation," and reached its peak during the mid-2010's.[11] These clauses sought to reserve a high degree of discretion for States. Some have gone as far as to expressly exempt the security exemption clauses from arbitral jurisdiction.[12] Increasingly, many IIAs also include specialized

4 J. Arato, K. Claussen & J. Benton Heath, 'The Perils of Pandemic Exceptionalism', 114 *American Journal of International Law* (2020) 4, 627, 630.

5 United Nations Conference on Trade and Development, 'The Protection of National Security in IIAs' (2009), available at https://unctad.org/system/files/official-document/diaeia20085_en.pdf (last visited 11 February 2024) [UNCTAD, 'The Protection'].

6 *Ibid.,* at XVIII.

7 *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 187 [GATT]; See J. Lee, 'The Coronavirus Pandemic and International Investment Arbitration – Application of "Security Exemption" Clauses in Investment Agreements', 13 *Contemporary Asia Arbitration Journal* (2020) 1, 185, 189.

8 Blanco & Pehl, *supra* note 2, 2.

9 *Ibid*.

10 *Ibid*.

11 *Ibid*.

12 *Ibid*, 3, 67.

exemptions within security exemption clauses such as to "protect public health,"[13] or to "prevent disease,"[14] although overall this remains quite rare.[15] This third generation of security exemption clauses also saw a dramatic re-introduction of self-judging language, potentially altering the predictability of the broader system by allowing States to unilaterally take measures "it considered necessary" to protect its essential security interests. By 2016, at least 134 countries were bound by such clauses.[16] As these clauses have broadened, there has been a growing sense among States that they must be included within new IIAs.[17] This resurgence of self-judging language has accelerated evolving interpretations of what may be considered measures taken for essential security interests.

As a consequence of these variations in language between agreements, the circumstances in which these clauses may be invoked varies based on the specific language of the IIA in question, and there are differences in the degree of autonomy that States are allotted in responding to perceived threats. Arbitral tribunals are often called upon to clarify the meaning of these terms and their scope.[18] A significant challenge with regard to security exemption clauses is a lack of international jurisprudence at present to assist with clarifying State obligations.[19]

States enter IIAs with the intention of inducing foreign investors with the provision of particular guarantees regarding cross-border investments.[20] Application of security exemption clauses have significant consequences, as "if the security exception applies, the investor is deprived of the IIA's protection"

13 Arato, Claussen & Heath, *supra* note 4 at 630.

14 See 'COVID-19: Public Health Emergency Measures And State Defenses In International Investment Law' (28 April 2020), Clearly Gottlieb 3, available at https://www.clearygottlieb.com/-/media/files/alert-memos-2020/public-health-emergency-measures-and-state-defenses-in-international-investment-law-pdf.pdf (last visited 11 February 2024).

15 See F. Sebastiani, 'Investor-State Disputes During the Covid-19 Pandemic: Balancing Public Health Concerns and Foreign Investors' Rights', *La Revue des Juristes de Sciences Po* (2020), fn. 4.

16 K. Sauvant *et al*., 'The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements', 188 *Columbia FDI Perspectives* (2016) 1, available at https://academiccommons.columbia.edu/doi/10.7916/D8Z60PKP (last visited 11 February 2024).

17 See UNCTAD, 'The Protection', *supra* note 5, at XVII-XVIII.

18 *Ibid.,* at XVIII-XIX, 74.

19 *Ibid.,* at 44-45.

20 See W. Moon, 'Essential Security Interests in International Investment Agreements', 15 *Journal of International Economic Law* (2012) 2, 481, 483.

and guarantees.[21] Clauses act as exceptions to a State's obligations under an IIA, freeing States from adopting measures that would otherwise be inconsistent with the agreement.[22] While most provisions apply generally to the treaty as a whole, some may apply only to specific provisions of the IIA.[23]

This essay will concentrate on security exemption clauses, however, it must be briefly noted that, even in the absence of such clauses, States may still justify measures under rules of customary international law, including force majeure, necessity, and duress.[24] It is notable that disputes regarding Argentine measures in the 1990's appeared to suggest, however, that when stand-alone security exemption clauses are included in IIAs, these must be turned to in lieu of the necessity defence.[25]

II. Evolving Notions of Security Interests

Security exception clauses within IIAs were originally conceived to address military threats and other related matters. As a consequence of this history, the requirements of security exemption clauses may be easily met in the context of events such as international or civil wars, terrorism, and armed rebellion.[26] The concept of national security has continued to evolve, however, to include health, environmental, political and economic threats.[27]

Today, government policies related to national security identify a wide range of risks and vulnerabilities unimaged in the post-war era, including climate change, domestic industrial policy, and cybercrime.[28] National security rhetoric is also increasingly emerging in global economic affairs. The challenges posed by the invocation of security exemption clauses extend beyond mere abuses – with "good faith but novel" claims as posing the most significant challenges to the system as a whole.[29]

21 C. Schreuer, 'The Protection of Investments in Armed Conflicts', in F. Baetens (ed.), *Investment Law Within International Law* (2013), 3, 17.
22 See Blanco & Pehl, *supra* note 2, 39.
23 K. Yannaca-Small, 'Essential Security Interests Under International Investment Law', in OECD (ed.), *International Investment Perspectives: Freedom of Investment in a Changing World* (2007), 93, 99.
24 See UNCTAD, 'The Protection', *supra* note 5, 34.
25 Lee, *supra* note 7, 192.
26 Schreuer, *supra* note 21, 17.
27 See UNCTAD, 'The Protection', *supra* note 5, 7.
28 See Heath, 'The New National Security Challenge', *supra* note 1, 1020; see Heath, *Trade and Security, supra* note 3, 6.
29 See Heath, 'The New National Security Challenge', *supra* note 1, 1020.

Economic crises presented the first challenge to the conventional understanding of a threat to a State's essential security interests. At the end of 2001, Argentina experienced a catastrophic financial collapse. In response to the crisis, the country adopted a series of measures to stabilize the economy.[30] Several of these measures impacted foreign investors.[31] In consequence, some of the investor-State arbitration cases that arose in the 2000's – including *CMS v. Argentina*, *LG&E v. Argentina*, and *Continental Causality v. Argentina* – helped to define the contours of the use of security exemption clauses.[32] Argentina did not deny that its measures impacted investors, rather it invoked the security exemption clauses within its various bilateral investment treaties (BITs).[33] While the outcomes of these cases varied, all established that nonmilitary threats, including an economic crisis, could implicate a State's security interests.[34]

The Argentinian cases coincided with the broader trend of expansion of the national security state. The end of the Cold War saw the national security paradigm shift from an adversarial interstate focus to a concept increasingly intertwined with human rights, law enforcement, and economic globalization.[35] The result was a proliferation in security interests.[36] The "War on Terror" in the early 2000's resulted in a shift in national security strategy, where countries sought to control the entire environment in which (often non-State) adversaries operated. As these strategies widened, so did the number of products or industries considered "security sensitive".[37] The most expansive modern security threats now consist of "actor-less" threats. These are threats where responsibility cannot be attributed to a single State.[38] These threats are more diffuse and are likely to become permanent fixtures of contemporary life rather than a temporary occurrence.[39]

One of these actor-less threats is cyber-security. The concept is vague and relates more accurately to multiple different threats requiring different

30 See W. Burke-White, 'The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System', 3 *Asian Journal of WTO & International Health Law and Policy* (2008) 1, 199, 202-203.
31 *Ibid.,* 203; UNCTAD, 'The Protection', *supra* note 5, XVI.
32 UNCTAD, 'The Protection', *supra* note 5, 8.
33 See Burke-White, *supra* note 30, 204-205.
34 See Heath, 'The New National Security Challenge', *supra* note 1, 1037-1038.
35 See Heath, 'The New National Security Challenge', *supra* note 1, 1033-1034.
36 See Heath, *Trade and Security, supra* note 3, 4.
37 Heath, 'The New National Security Challenge', *supra* note 1, 1042.
38 Heath, *Trade and Security, supra* note 3, 5-6.
39 See Heath, 'The New National Security Challenge', *supra* note 1, 1034.

policy responses.[40] The expansion of security to include cyber-security has far-reaching consequences, as any part of international commerce that has a digital component ("which is, increasingly, nearly all of it") may be captured in disputes regarding national security.[41] States have increasingly taken actions to restrict the cross-border flows of data and restrict the entry of foreign companies into sensitive sectors. Stretched to its furthest extreme, some States have begun to view the possession of large amounts of personal data by foreign firms as a security concern in itself.[42]

Climate change is another one of these actor-less threats.[43] For many, it is considered "cast as the existential threat to end all others – a security issue par excellence".[44] Climate activists have advocated for the exemption of climate measures from trade and investment obligations.[45]

Public health measures may be challenged in investor-State disputes. Outside of periods of crisis, efforts to promote public health, such as tobacco labelling laws or bans on harmful chemicals, have been challenged. Measures may also be challenged during periods of crisis.[46] In the context of COVID-19, this has raised the issue of whether the protection of public health can constitute a security interest. Some scholars have expressed that broad approaches to essential security interests capture public health emergencies, and thus security exemption clauses may be invoked as a defence.[47]

In the trade context, scholars have identified a tension between drafting provisions that are expansive enough to address evolving concerns, with the danger of providing States with a *carte blanche* that allows them to override their obligations.[48]

40 *Ibid.*, 15.
41 *Ibid.*, 5-6.
42 *Ibid.*, 15-17.
43 *Ibid.*, 1034.
44 See Heath, *Trade and Security, supra* note 3, 7.
45 See Arato, Claussen & Heath, *supra* note 4, 634.
46 See N. Bernasconi-Osterwalder, S. Brewin & N. Maina, 'Protecting Against Investor–State Claims Amidst COVID-19: A Call to Action for Governments', *International Institute for Sustainable Development* (2020), 3-4, available at https://www.iisd.org/system/files/publications/investor-state-claims-covid-19.pdf (last visited 11 February 2024).
47 See Moon, *supra* note 20, 498.
48 See Heath, *Trade and Security, supra* note 3, 18-19.

C. State Measures Taken in Response to the COVID-19 Pandemic

On March 11th, 2020, the World Health Organization (WHO) declared COVID-19 a pandemic after exponential global spread led to cases within 114 countries.[49] Some of the most widely invoked measures were very restrictive for businesses, including lockdowns, border closures, suspension of production, import and export restrictions, and nationalization of healthcare and other social services.[50] Many of these measures were adopted hastily with little regard for a State's obligations under trade and investment agreements.[51] The economic consequences of these measures have been immense.[52] The COVID-19 pandemic has also seen increased domestic screening of foreign investment on national security grounds.[53]

Investor-State disputes often follow economic, financial, or other crises.[54] In consequence, lawyers internationally have predicted a wave of investor-State disputes to follow the pandemic.[55] Some have gone as far as to call the risk "unprecedented."[56] Claims could be raised by investors on the basis of fair and equitable treatment (FET), full protection and security (FPS), national treatment (NT), or indirect expropriation.[57] Concerns have been raised regarding the burden these claims could pose to States seeking to rebuild their economies following the crisis.[58] Pointing to the Argentine crisis, many fear "unpredictable and largely contradictory [...] awards possibly reaching hundreds of millions –

49 See K. Sullivan, 'A Brief History of COVID, 1 Year In', *Everyday Health* (2021), available at https://www.everydayhealth.com/coronavirus/a-brief-history-of-covid-one-year-in/ (last visited 11 February 2024).

50 See Arato, Claussen & Heath, *supra* note 4, 628; J. Paffey & K. Campbell, 'Investor-State Disputes Arising From COVID-19: Balancing Public Health and Corporate Wealth', *Lexology* (2020), available at https://www.lexology.com/library/detail.aspx?g=89234581-29f2-4284-97e5-47a98010b3ca (last visited 11 February 2024).

51 See Lee, *supra* note 7, 186.

52 See Bernasconi-Osterwalder, Brewin & Maina, *supra* note 46, 2.

53 See UNCTAD, 'The Protection', *supra* note 5, 7.

54 See Bernasconi-Osterwalder, Brewin & Maina, *supra* note 46, 3-4.

55 See Corporate Europe Observatory, 'Cashing in on the Pandemic: How Lawyers are Preparing to Sue States Over COVID-19 Response Measures' (2020), available at https://corporateeurope.org/en/2020/05/cashing-pandemic-how-lawyers-are-preparing-sue-states-over-covid-19-response-measures (last visited 11 February 2024).

56 Bernasconi-Osterwalder, Brewin & Maina, *supra* note 46, 1.

57 See Arato, Claussen & Heath, *supra* note 50.

58 See 'Cashing in on the Pandemic', *supra* note 55.

or even billions – of dollars while cases based on similar facts lead to decisions finding no treaty breach at all."[59]

Measures must each be analyzed on an individual basis and within their specific context and relevant IIA.[60] Various stakeholders have speculated, however, about the kinds of State measures that could result in possible investor-State disputes. Due to the importance of handwashing, several South American countries suspended water service disconnections to households who had outstanding payments. While these measures were praised by the WHO, this negatively impacted foreign-owned utility companies. As Spain buckled under the weight of COVID-19 hospitalizations, multiple private hospitals refused to admit COVID-19 patients. In response, Spain's Ministry of Health took temporary control over private hospitals, potentially giving rise to claims of expropriation. Israel has granted compulsory licences to drug manufacturers, allowing manufacturers other than the patent holder to produce and distribute medicines and vaccines for COVID-19. These compulsory licences could trigger claims of expropriation. With the global economy significantly impacted by COVID-19, efforts taken by States to prevent or address a financial crisis could also face legal action.[61]

D. Security Clauses as a Defence – Chile-Hong Kong, China SAR BIT (2016) Case Study

I. Introduction to the Case Study

This case study will address the hypothetical of an investor-State dispute arising between investors and a State by looking at the text of the Chile-Hong Kong, China SAR BIT (2016).[62] As no actual disputes are known at present, this analysis will remain extremely broad and imprecise. Nevertheless, a set of general facts and a specific security exemption clause provides an opportunity for analysis that helps to elucidate some of the tensions that relate to security exemption clauses in investor-State disputes.

This case study poses a good opportunity for a hypothetical analysis as the Chile-Hong Kong, China SAR BIT is an excellent example of a recent IIA

59 Bernasconi-Osterwalder, Brewin & Maina, *supra* note 46, 1.
60 See Lee, *supra* note 7, 200.
61 See 'Cashing in on the Pandemic', *supra* note 55.
62 *Chile-Hong Kong, China SAR Investment Agreement*, signed 18 November 2016, entered into force July 14 2019, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5413/download (last visited 11 February 2024).

with a "third generation" security exemptions clause. The specific language of the clause provides some unique opportunities for discussion, particularly as it implies that it is self-judging.

Like most countries, the measures adopted by Chile to date in response to COVID-19 have had negative impacts on both local and foreign companies. The country's energy sector, which benefits from significant foreign investment, for example, has seen delays in the construction of new projects as a result of curfews, border closures, and lockdowns.[63]

As with many modern IIAs, the Chile-Hong Kong, China SAR BIT (2016) contains a security exemption clause in Article 18(6). Relevant sections of the clause are reproduced below. Emphasis added is mine:

> "6. This Agreement does not:
> ... (b) prevent a Party from taking an action that *it considers* necessary to protect its essential security interests:
> ....(iii) *taken in time* of war or *other emergency in international relations*"

II. Analysis: Who Determines the Situation?

Early in the COVID-19 pandemic, scholar Jaemin Lee provided a helpful framework for assessing the feasibility of the use of security exemption clauses as a defence to measures taken in response to the virus. Surveying the texts of many IIAs, Lee identified several common threads that are relevant in determining whether a security exemption clause may be invoked as a defence. These include the questions of: Who determines the situation? Were measures taken in the time of an emergency? Do measures relate to essential security interests?[64]

The question of whether security exemption clauses are "self-judging" is considered a significant debate in treaty interpretation in investor-State disputes. Lee offers one approach. In their analysis, Lee turns to the recent World Trade Organization decision of *Russia – Measures Concerning Traffic in Transit* that addressed Article XXI GATT in the trade context for guidance on the interpretation of security exemption clauses in IIAs, asserting that this approach

63 See C. Salas & M. Valderrama, 'Energy Arbitration in Latin America: Potential State Defences in Future Covid-19-Related Cases', *Global Arbitration Review* (13 October 2020), available at https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/energy-arbitration-in-latin-america-potential-state-defences-in-future-covid-19-related-cases#footnote-076 (last visited 11 February 2024).

64 See Lee, *supra* note 7, 192-199.

is relevant as the wording in the security exemption clauses of many IIAs is very similar to Article XXI GATT. In the trade context, the decision set out that security determinations are "a decision that can and should first be made by an invoking State." The panel also concluded, however, that an adjudicative body with proper jurisdiction can review "whether the invocation satisfies the requirements set forth in the security exceptions provision".[65] Essentially, the panel determined that, in the context of trade, a State's determination is not entirely self-judging as it remains a justiciable issue, though, the panel concluded that a high degree of deference should be given to the invoking State's conclusions on the existence of a national security concern, the absence of which could be "a 'mere excuse to circumvent' an applicable treaty".[66]

Other sources have expressed far greater hesitancy in identifying broad trends regarding whether security exemption clauses are self-judging.[67] Blanco and Pehl in particular take opposition to Lee's approach and caution against blindly transplanting the approaches taken towards Article XXI GATT in the trade context to security exemption clauses in IIAs. They assert that, given the diversity among security exemption clauses, it is impossible to define a universal interpretation of whether or not a security exemption clause is self-judging.[68] In particular, no published decision has yet been required to interpret a provision that mirrors the language of "it considers" from Article XXI GATT, as most disputes have centered around second generation security exemption clauses.[69] Likewise, in the event that the clause is not self-judging, it is impossible to identify a universal standard of review.[70]

The Chile-Hong Kong, China SAR BIT provides a unique opportunity for analysis as the clause explicitly includes the language of "it considers" not yet approached by a published decision. This language may be contrasted with the language of Article XI of the Argentina-U.S. BIT of 1991, that was at issue in the Argentine cases and does not contain similar language:

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or

65 *Ibid.*, 193-194.
66 *Ibid.*, 194.
67 See UNCTAD, 'The Protection', *supra* note 5, XIX.
68 See Blano & Pehl, *supra* note 2, 1-2.
69 *Ibid.*, 40-41.
70 *Ibid.*, 1-2.

> restoration of international peace or security, or the Protection of its own essential security interests."[71]

In the Argentine cases, all tribunals rejected the self-judging nature of the clause in the U.S-Argentina BIT based on treaty wording and the interpretation by parties at the time of signing.[72] As scholar Tarcisio Gazzini asserts in an analysis of Article XI in relation to the Article 31(1) of the *Vienna Convention on the Law of Treaties* (VCLT), "the use of the expression 'measures necessary' and not 'measures the host State considers as necessary,' as in the case of similar provisions in other treaties, clearly militates against the self-judging argument".[73]

Arbitral tribunals have placed significant emphasis on the exact wording used in an applicable treaty and have typically indicated that a self-judging provision must be express. The absence of the language "it considers" or "considers necessary" has often been viewed by arbitral tribunals as a clear sign that the clause is not self-judging.[74] The Chile-Hong Kong, China SAR BIT is representative of third generation security exemption clauses. As it includes the express language of "it considers", it may be presumed to be self-judging.

The self-judging nature of clauses is considered unusual in investment law, as international tribunals have long asserted their authority in reviewing the decision-making processes of national bodies within State parties.[75] As the Chile-Hong Kong, China SAR BIT contains express language designating it a self-judging clause, in principle, an arbitral tribunal is barred from judicial review of the measure at stake.[76] In responding to the COVID-19 crisis, Chile would be permitted substantial deference to identify the measures it considers necessary to respond to a threat to its security.

Some have highlighted, however, that "the self-judging nature of a national security exception in IIAs does not provide a complete shield from judicial scrutiny."[77] States must still carry out their obligations in good faith, as a consequence of the general obligation under article 26 of the Vienna Convention

71 *Ibid.,* 40-41.
72 See UNCTAD, 'The Protection', *supra* note 5, 49-50.
73 T. Gazzini, 'Interpretation Of (Allegedly) Self-Judging Clauses In Bilateral Investment Treaties', in M. Fitzmaurice, O. Elias & P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010), 239, 245; *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT].
74 See Blano & Pehl, *supra* note 2, 42-44.
75 See Heath, 'The New National Security Challenge', *supra* note 1, 1025.
76 See UNCTAD, 'The Protection', *supra* note 5, 39.
77 *Ibid.,* 40.

on the Law of Treaties. In the context of security exemption clauses, this good faith requirement is perceived to require States to engage in honest and fair dealing and have a rational basis for the assertion of an exception. Although it may be practically difficult to establish a violation on this basis, evidence such as contradictory behavior by a State could be advanced by investors to argue that measures were not taken in good faith.[78] The ultimate question is "whether a reasonable person in the State's position could have concluded that there was a threat to national security sufficient to justify the measures taken".[79] This allows arbitral tribunals to distinguish between security concerns and disguised protectionism.[80] Measures are also generally understood to be required to meet overarching requirements of non-arbitrariness and non-discrimination.[81] Further, States must act in accordance with all other of their international obligations.[82]

In conclusion, significant latitude would be provided to Chile in terms of determining the measures it considers necessary to respond to a threat to its security as a consequence of the self-judging language within its security exemption clause, provided it acts in good faith.

III. Were Measures "Taken in the Time of [...] Other Emergency in International Relations"?

1. "In the Time of... "

"Taken in the time" necessitates a temporal requirement that measures be taken during the period of an active threat to a State's security interests.[83] As Lee highlights, this question is often approached objectively, looking at specific dates that the threat occurred.[84] In regard to the Chilean case study, measures taken while the pandemic is clearly underway are likely to satisfy this test, as evidence abounds regarding the threat posed by COVID-19 during this period.

This analysis will grow more difficult during the pandemic recovery period, however, as the question of the severity of the threat grows more nuanced. States'

78 *Ibid.*, 39-41.
79 *Ibid.*, 40.
80 *Ibid.,* 39-41.
81 See Arato, Claussen & Heath, *supra* note 4, 631.
82 See UNCTAD, 'The Protection', *supra* note 5, 89.
83 See Lee, *supra* note 7, 196.
84 *Ibid*.

exposure to possible claims is likely to increase as the crisis persists.[85] As countries enter a recovery period, claims that measures are disguised protectionism and have been taken in bad faith may be easier to advance, even in light of the self-judging nature of these clauses. This is particularly salient as COVID-19 is predicted to remain a threat for years to come, albeit hopefully growing less severe over time as immunity grows.[86] As the recovery phase extends and COVID-19 poses a less significant threat to public health, it will likely grow more difficult for States to assert that measures are taken in response to the threat of the virus.[87]

Further, arbitral tribunals addressing similar facts could even reach different determinations regarding whether the severity of the threat of COVID-19 continues to constitute a sufficient threat. While the Argentine cases all agreed that an economic crisis could constitute an emergency of international relations, they diverged on the level of severity required. *CMS*, *Enron*, and *Sempra* held that only an economic crisis imperilling a State's existence would be of a sufficient scale to meet the requirements of the security exemption clause. In contrast, *LG&E* and *Continental Causality* looked at the relevant economic, political, and social conditions and found that they, in the aggregate, satisfied the security exemptions clause.[88] This generates a degree of inconsistency and a lack of predictability that has led to legitimacy criticism by States that will be addressed further below.

The South Centre, an intergovernmental organization of developing countries, published a parallel analysis of the potential invocation of the Article 73 security exemption clause in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement and argued for a more expansive approach to the temporal requirement that would encompass "an extended period of continuing requirement for medicines and vaccines to prevent re-emergence once the virus has been brought under control".[89] As the global economy aims to recover from

85 See Arato, Claussen & Heath, *supra* note 4, 633.

86 M. Greshko, 'COVID-19 Will Likely Be With Us Forever. Here's how we'll Live With it' (22 January 2021), National Geographic, available at https://www.nationalgeographic.com/science/article/covid-19-will-likely-be-with-us-forever-heres-how-well-live-with-it (last visited 11 February 2024).

87 F. Abbott, 'The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic', *South Centre*, Working Paper No. 116 (2020) 9, available at https://www.southcentre.int/wp-content/uploads/2020/08/RP-116.pdf (last visited 11 February 2024).

88 See UNCTAD, 'The Protection', *supra* note 5, 9-10.

89 Abbott, *supra* note 87, 9.

the devastating impacts of the COVID-19 pandemic, though, there would likely be significant resistance to these calls, particularly from investors.

2. "...or Other Emergency in International Relations"

The language within Article 18(6) also requires that measures be "taken in time of war or other emergency in international relations". In determining the existence of an emergency in international relations, the panel in the *Russia* case looked at the reaction of the international community.[90] Similarly, in the analysis by the South Centre, declarations by the WHO were suggested as objective evidence of the existence of an emergency in international relations.[91] In a hypothetical dispute, Chile could easily advance evidence of an emergency in international relations, pointing to extensive evidence as documented by numerous international bodies like the WHO.

To summarize, measures taken by Chile during the period in which the threat of COVID-19 is indisputable would likely satisfy the requirement that they be taken in the time of an emergency of international relations. Measures taken by the State at a later recovery period may be more difficult to defend, however, if there is greater diversity of opinion regarding the threat of the virus at that time.

IV. Do Measures Relate to Essential Security Interests?

The final question in this analysis is whether measures relate to an "essential security interest". Lee asserts that this "means interests relating to the core function of a State such as protection of its territory or its people".[92]

There is general agreement that the protection of the health of the country's population falls within "essential security interests" in IIAs. In a policy document on "The Protection of National Security in IIAs," the United Nations Conference on Trade and Development concluded that, "while the safety of the nation and its people is clearly at the core of the provision, one could reasonably argue that threats to the health of the population or the environment are covered too."[93] The South Centre is also in agreement with this approach, arguing that, "It is difficult to foresee [...] deciding that protecting the national population

90 See Lee, *supra* note 7, 196.
91 See Abbott, *supra* note 87, 7.
92 See Lee, *supra* note 7, 198.
93 UNCTAD, 'The Protection', *supra* note 5, 7.

from a pandemic is not within the essential security interests of the State."[94] Beyond mere questions of the protection of public health, the COVID-19 pandemic could also raise other essential security interests for States that could bolster its claims.[95] These may include, for example, economic concerns and an escalation of hostilities that could further a State's argument that its essential security interests have been implicated.

As measures taken by Chile would be to protect the national population from the pandemic, an aim generally considered to be part of a State's essential security interests, this part of the test is likewise satisfied in the context of Chile.

To conclude, in a hypothetical investor-State dispute between Hong Kong investors and Chile, it appears that the security exemption clause within the Chile-Hong Kong, China SAR BIT could be successfully raised by Chile. This clause is representative of the new era of third-generation security exemption clauses, which are often self-judging and provide States with a high degree of deference, absent bad faith. Measures taken during the period where COVID-19 remains an indisputable threat would likely be easy to justify, given the expansive amount of evidence regarding the existence of an emergency of international relations. Measures taken in the recovery period may be more difficult to justify if there is greater debate regarding the threat posed by the virus. Finally, the protection of public health is easily captured by the term of essential security interests.

It is worth reiterating that the feasibility of the application of security exemption clauses to measures taken in response to the COVID-19 pandemic must be assessed on a case-by-case basis, based on the specific context and language of relevant IIAs. This hypothetical and its conclusions are reflective of *one* context and *one* IIA. Second generation clauses and any clauses that are not self-judging will face higher barriers to success. However, this case study offers two important conclusions. First, there is a possibility of success for the application of security exemption clauses to measures taken in response to the COVID-19 pandemic in some contexts. Second, it demonstrates how second-generation security exemptions clauses, especially those that are self-judging, assist with expanding the boundaries of what may be considered a security interest.

94 Abbott, *supra* note 87, 10.
95 *Ibid.*, 6.

E. Implications for the Broader Investor-State Dispute Settlement System

In a recent article, scholars Julian Arato, Kathleen Claussen, and J. Benton Heath assert, that "the [COVID-19] pandemic reveals the structural weakness of the exceptions-oriented paradigm of justification in international economic law."[96] While security exemption clauses provide States with latitude to determine their own responses to perceived threats and demonstrate flexibility in the system, they also threaten to expand so far that they begin to distort and undermine the regime.[97] This has the potential for significant impacts felt by investors who rely on the guarantees that States can now circumvent. In short, *if everything becomes an exception, the rules simply become meaningless*. Arato, Claussen, and Heath assert that the pandemic will accelerate a growing trend towards "exceptionalism" in international economic law. Where deviations from primary rules are permitted through "exceptions", it is inevitable that exceptions will proliferate.[98]

The unpredictability concerns raised by the trend towards exceptionalism are related to broader concerns relating to the consistency and predictability of decisions by arbitral tribunals in investor-State dispute settlement, including divergent approaches to substantive standards.[99] The Argentine cases in particular raise questions for States about how arbitral tribunals may approach security exemption clauses under similar sets of facts, but reach divergent conclusions. The exceptions paradigm also generates questions about the system's ability to respond to crisis – a reliance on exceptions entrenches the idea that current obligations are insufficiently flexible and unduly tether a State's ability to respond to an emergency like a pandemic.[100] This relates to broader sovereignty criticisms of investor-State dispute settlement.[101]

Particularly as the interpretation of a security threat expands, these issues pose challenges to the perceived legitimacy of the investor-State dispute regime.

96 See Arato, Claussen & Heath, *supra* note 4, 627.
97 *Ibid.,* 631.
98 *Ibid.,* 628.
99 United Nations Conference on Trade and Development, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' (2018) 3 (on file with the author) [UNCTAD, 'Possible Reform'].
100 See Arato, Claussen & Heath, *supra* note 4, 631.
101 A. Bjorklund, 'The Legitimacy of the International Centre for Settlement of Investment Disputes', in N. Grossman *et al.* (eds), *Legitimacy and International Courts* (2018), 234, 269-270.

The COVID-19 pandemic occurred at a moment of increasing resistance to global political and economic legitimacy.[102] These measures also risk further criticism and uncertainty in areas where some believe investment law is in most need of reform, such as industrial policy, digital data, and health and environmental issues.[103] In light of these growing questions of legitimacy, some indicate the result could be to view the solution as a wholesale abandonment of the system.[104]

F. Conclusion

The evolving concept of security interests in international investment law risks turning security exemption clauses, initially designed as safety valves permitting some degree of State discretion, into a far more powerful provision with significant allowances for State discretion, permitting States to act contrary to their treaty obligations.

While initially understood to be narrowly limited to instances of war and interstate conflict, the concept of security interests has ballooned, particularly through the increasing use of self-judging language, to encompass an ever-growing set of issues. With the looming possibility of a wave of investor-State disputes related to measures taken by States to address the pandemic, the potential invocation of security exemption clauses in regard to public health measures demonstrates the ever-growing boundaries of these rules. As the Chile-Hong Kong, China SAR BIT case study demonstrates, there are opportunities for State success with this strategy, particularly in regard to more recent third-generation security exemption clauses.

These issues pose long-term challenges to the regime of investor-State dispute settlement. If every rule is subject to an exception, the rules ultimately risk losing all meaning.

102 See Arato, Claussen & Heath, *supra* note 4, 627.
103 See Heath, *Trade and Security, supra* note 3, 26-27.
104 See Arato, Claussen & Heath, *supra* note 4, 634.

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Remedying a Legal Black Hole: The Future of Human Rights Jurisdiction in the Mediterranean Sea

Alison Beuscher*

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Abstract

The coastal States of the Mediterranean Sea tend toward a steady decrease in their search and rescue capacities. When a migrant boat sends out a distress signal, many ships in its vicinity either ignore it, merely observe the ship, or even move away from it. Rather than allowing people in distress onto rescue boats, the coastal States control the activity from a distance via, for example, mere distress calls. This lack of action occurs despite their legal obligation to protect under the law of the sea. Due to a maritime legal black hole, those stranded are effectively rendered rightless. This article examines whether a new jurisdictional approach may serve as a remedy and explores an intermediate design. It will assess this jurisdictional approach based on progressive Inter-American Court of Human Rights and Human Rights Committee cases while bearing in mind potential advantages and drawbacks.

A. Introduction

The protection of human rights should be at the heart of any fair migration policy. This is especially apparent in the Mediterranean, where thousands of people have died since 2014.[1] The current approach by the Member States of the European Union has failed to prevent this unnecessary loss of lives.[2] While this is partly due to moral and political concerns, part of the issue is a maritime legal black hole.[3] This black hole becomes visible in the juxtaposition of the law of the sea and human rights law:

On the one hand, coastal States must provide an "adequate and effective" search and rescue service according to the law of the sea.[4] However, the law of the sea does not permit the establishment of actionable rights for individuals[5] as there is no scholarly consensus on whether a right to be rescued exists thereunder[6] or whether the legal framework merely allocates competencies[7]. Further, the

1 United Nations Refugee Agency, 'Mediterranean Situation, Operational Data Portal – Refugee Situations' (2021), available at http://data2.unhcr.org/en/situations/mediterranean (last visited 11 February 2024).

2 Council of Europe Commissioner for Human Rights, 'Lives Saved. Rights Protected. Bridging the Protection Gap for Refugees and Migrants in the Mediterranean' (2019), 7-9, 49-50, available at https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87 (last visited 11 February 2024) ['Lives Saved. Rights Protected.'].

3 I. Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law', 29 *European Journal of International Law* (2018) 2, 347, 357 [Mann, 'Maritime Legal Black Holes']; Human Rights Committee, Individual Opinion of Committee Member Hélène Tigroudja (Concurring), *A.S., D.I., O.I. and G.D. v. Italy*, Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017 Annex VII, 28 April 2021, para. 1 [*A.S. v. Italy,* Concurring Opinion Tigroudja].

4 *United Nations Convention on the Law of the Sea*, 10 December 1982, Art. 98, 1833 UNTS 397 [UNCLOS]; *International Convention for the Safety of Life at Sea*, 1 November 1974, Chapter V, Regulation 15, 1184 UNTS 2 [SOLAS Convention]; *International Convention on Maritime Search and Rescue*, 27 April 1979, Chapter 2, Article 2.1.1, 1405 UNTS 97 [SAR Convention].

5 E. Papastavridis, 'Is There a Right to Be Rescued at Sea? A Skeptical View', 4 *Questions of International Law, Zoom-in* (2014), 17, 22-24 [Papastavridis, 'Right to be Rescued at Sea']; V. P. Tzevelekos & E. K. Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?', 86 *Nordic Journal of International Law* (2017) 4, 427, 437.

6 *Ibid*., 437; Papastavridis, 'Right to be Rescued at Sea', *supra* note 5, 20-24.

7 S. Trevisanut, 'Is There a Right to Be Rescued at Sea? A Constructive View', 4 *Questions of International Law, Zoom-in* (2014), 3, 7 [Trevisanut, 'A Constructive View']; Papastavridis, 'Right to be Rescued at Sea', *supra* note 5, 20-21, 23; Tzevelekos & Proukaki, *supra* note 5, 437.

compulsory dispute settlement mechanism of the law of the sea does not provide redress to individual persons (except for private contractors).[8] On the other hand, human rights law contains the positive obligation to protect the right to life[9] from which an actionable right to be rescued could arise.[10] However, human rights law is currently understood to give rise to extraterritorial obligations only in so far as the State exercises some physical control over migrant boats.[11] Consequently, if a State fails to comply with its obligation to rescue a migrant according to the law of the sea, it simultaneously does not exercise sufficient control over that vessel to trigger human rights law.

States are increasingly exploiting this gap of accountability by externalizing migration controls,[12] decreasing rescue capacities as well as reducing the geographical area covered by those rescue services on the high seas.[13] By not allowing migrants to board rescue boats, those migrants may not fall within the purview of the *European Convention of Human Rights* (ECHR).[14] Countries sever any jurisdictional link in an attempt to avoid the responsibilities that would otherwise arise.[15] Thus, one can reasonably describe people on migrant boats as rightless.[16] It is thus legitimate to suggest that the idea that "the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights […] protected by the Convention"[17] applies in instances such as the one at hand.

8 Art. 187, Art. 20 of Annex VI, UNCLOS.

9 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 2, 213 UNTS 222 [ECHR]; *LCB v. the United Kingdom*, ECtHR Application No. 23413/94, Judgment of 9 June 1998, para. 36; *Osman v. the United Kingdom*, ECtHR Application No. 23452/94, Judgment of 28 October 1998, para. 115 [*Osman Case*].

10 *Ibid.,* para. 115; Papastavridis, 'Right to be Rescued at Sea', *supra* note 5, 24-25.

11 See section B.

12 V. Moreno-Lax & M. Giuffré, 'The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Migratory Flows', in S. S. Juss (ed.), *Research Handbook on International Refugee Law* (2021), 82, 85.

13 'Lives Saved. Rights Protected.', *supra* note 2, 15.

14 *Ibid*., 49-50.

15 Moreno-Lax & Giuffré, *supra* note 12, 85.

16 Mann, 'Maritime Legal Black Holes', *supra* note 3, 357.

17 *Hirsi Jamaa and Others v. Italy*, ECtHR Application No. 27765/09, Judgment on 23 February 2012, para. 179 [*Hirsi Case*] (emphasis omitted); referring to: *Medvedyev and Others v. France*, ECtHR Application No. 3394/03, Judgment of 29 March 2010, para. 81 [*Medvedyev Case*].

This article will specifically address the question of whether a State exercises jurisdiction over a vessel within the meaning of Article 1 of the ECHR if that State is only remotely involved in the rescue operation. This question is relevant in the hypothetical scenario of a coastal State receiving a distress call but failing to dispatch a vessel that could come into physical contact with the distressed vessel. A person could possibly invoke a violation of the right to life before the European Court of Human Rights (ECtHR). In that case, this article may provide an impulse in favor of a more expansive interpretation of jurisdiction.

This article will therefore provide some context through an outline of the ECtHR's current interpretation of jurisdiction (B.). After establishing that the Court refers to judgments of other international and regional tribunals, the article will examine current jurisdictional developments in recent decisions of the Inter-American Court of Human Rights (IACtHR) and the United Nations Human Rights Committee (HRC) (C.). It will assess whether the Court should, from a legal point of view, consider these current developments when determining whether a State exercises jurisdiction over a migrant and whether the law of the sea needs to be read into the ECtHR scope of jurisdiction to address this dichotomy of maritime and human rights law (D.). Based on the advantages and drawbacks that those cases entailed, the text will construe a new jurisdictional link (E.). Finally, the article will discuss whether the ECtHR should apply a broader, more rights-protective interpretation of jurisdiction considering political repercussions (F.).

B. Current Interpretation of Jurisdiction by the European Court of Human Rights

According to the current interpretation of Article 1 of the ECHR, jurisdiction is a necessary precondition for a State to incur responsibility for any conduct that may be attributed to it (that allegedly violates the right to life). The *travaux préparatoires* of the Convention merely indicate that the term *jurisdiction* is more expansive than *territory*.[18] Even so, the Court has dealt extensively with

18 Council of Europe, *Collected Edition of the 'Travaux Preparatoires' of the European Convention on Human Rights*, *Volume III: Committee of Experts* (1976), 260; *Banković and Others v. Belgium and Others*, ECtHR Application No. 52207/99, Judgment of 12 December 2001, para. 19 [*Banković Case*]; K. Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (2012), 95.

the meaning of jurisdiction.[19] Since the *travaux préparatoires* are supplementary means of interpretation,[20] the ECtHR case law is relevant.[21]

Principally, the ECtHR interprets jurisdiction as primarily territorial.[22] Coastal States still exercise sovereignty over the territorial sea, which is regarded as that State's territory.[23] However, the Mediterranean is also divided into functional search and rescue zones (SAR Zone(s)) that provide a division of labor in which States have certain obligations.[24] Consequently, one can make a strong argument that vessels entering these zones do not *ipso facto* fall under coastal States' jurisdiction since States do not have sovereignty over those zones.[25]

However, apart from the premise of primarily territorial jurisdiction, the ECtHR has recognized several exceptions in which a State exercises jurisdiction extraterritorially. These exceptions require a special justification that the Court determined in consideration of the particular facts.[26] Generally, the ECtHR requires there to have been an exercise of effective control. While some interpret

19 *Ibid*., 93-94.

20 *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 32, 1155 UNTS 331 [VCLT].

21 *Banković Case*, *supra* note 18, para. 19, 63, 65.

22 *Soering v. the United Kingdom*, ECtHR Application No. 14038/88, Judgment of 7 July 1989, para. 86 [*Soering Case*]; *Banković Case*, *supra* note 18, paras 59, 61, 67; *Ilaşcu and Others v. Moldova and Russia*, ECtHR Application No. 48787/99, Judgment on 8 July 2004, 69, para. 312 [*Ilaşcu Case*]; *Al-Skeini and Others v. the United Kingdom*, ECtHR Application No. 55721/07, Judgment 7 July 2011, para. 131 [*Al-Skeini Case*]; *Catan and Others v. Moldova and Russia*, ECtHR Application No. 43370/04, 8252/05 and 18454/06, Judgment of 19 October 2012, para. 104 [*Catan Case*].

23 Art. 2 UNCLOS.

24 Papastavridis, 'Right to be Rescued at Sea', *supra* note 5, 27-28; Human Rights Committee, Joint Opinion of Committee Members Yuval Shany, Christof Heyns and Photini Pazartzis (Dissenting), *A.S., D.I., O.I. and G.D. v. Italy*, Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017 Annex I, 28 April 2021, para. 6 [*A.S. v. Italy,* Dissenting Opinion Shany, Heyns, Pazartzis].

25 Papastavridis, 'Right to be Rescued at Sea', *supra* note 5, 27-28; *A.S. v. Italy,* Dissenting Opinion Shany, Heyns, Pazartzis, *supra* note 24, para. 6.

26 *Banković Case*, *supra* note 18, para. 61; *Al-Skeini Case*, *supra* note 22, para. 132; *Catan Case*, *supra* note 22, para. 105; Council of Europe, 'Guide on Article 1 of the European Convention on Human Rights' (2021), para. 13, available at https://www.echr.coe.int/documents/guide_art_1_eng.pdf (last visited 11 February 2024); critical on this: V. Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control–On Public Powers, S.S. and Others v. Italy, and the "Operational Model"', 21 *German Law Journal* (2020) 3, 385, 399 [Moreno-Lax, 'Architecture of Functional Jurisdiction'].

the case law to require both *de facto* and *de jure* control cumulatively,[27] others believe that each category suffices individually.[28] The presumption of *de jure* control can extend onboard a ship through flag jurisdiction.[29] In other circumstances, generally, a certain level of physical control such as arrest or detention is required.[30] The Court also necessitates this *de facto* control as a precondition for jurisdiction on the high seas. The Court had affirmed this precondition in cases where a ship took persons in distress on board,[31] collided with a migrant boat on the high seas,[32] or in cases when it forcibly rerouted[33] or intercepted a ship.[34] Thus, the Court requires that some physical control over the person in question exists to establish jurisdiction under Article 1 of the ECHR outside a State's territory[35] ergo on the high seas.

In summary, past cases of the ECtHR narrowly define the jurisdictional concept. To possibly protect migrants who do not come into physical contact with a rescue vessel, the following will now explore other adjudication practices.

27 S. P. Bodini, 'Fighting Maritime Piracy Under the European Convention on Human Rights', 22 *European Journal of International Law* (2011) 3, 829, 847.

28 V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law* (2017), 321-322 [Moreno-Lax, *Accessing Asylum in Europe*].

29 Art. 87 and 92 (1) UNCLOS; *Banković Case*, *supra* note 18, paras 59-61, 73; *Medvedyev Case*, *supra* note 17, para. 65; *Hirsi Case*, *supra* note 17, para. 77; *Bakanova v. Lithuania*, ECtHR Application No. 11167/12, Judgment of 31 August 2016. 63; Moreno-Lax, *Accessing Asylum in Europe*, *supra* note 28, 322.

30 *Öcalan v. Turkey*, ECtHR Application No. 46221/99, Judgment of 12 May 2005, para. 91 [*Öcalan Case*]; *Al-Saadoon and Mufdhi v. the United Kingdom*, ECtHR Application No. 61498/08, Judgment of 2 March 2010, para. 140.

31 *Hirsi Case*, *supra* note 17, paras 81-82.

32 *Xhavara and Others v. Italy and Albania*, ECtHR Application No. 39473/98, Judgment of 11 January 2001; M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011), 162 [Milanovic, *Extraterritorial Application*].

33 *Medvedyev Case*, *supra* note 17, para. 67.

34 *Rigopoulos v. Spain*, ECtHR Application No. 37388/97, Judgment of 12 January 1999; *Women On Waves and Others v. Portugal*, ECtHR Application No. 31276/05, Judgment of 3 May 2009, para. 23; E. Papastavridis, 'European Court of Human Rights *Medvedyev et al. v. France* (Grand Chamber, Application No. 3394/03) Judgment of 29 March 2010', 59 *The International & Comparative Law Quarterly* (2010) 3, 867, 870-871 [Papastavridis, '*Medvedyev et al.* v. France'].

35 *Al-Skeini Case*, *supra* note 22, para. 136.

C. Other International Bodies: A Different Point of View

The Convention must be interpreted in light of present-day conditions as the ECtHR has made the Convention a living instrument with its dynamic and evolving interpretation.[36] In the past, the ECtHR referenced customary law and provisions of international law.[37] For example, for agents on ships flying the flag of a State, the Court has recognized that customary international law and treaty provisions had defined the extraterritorial exercise of jurisdiction of the relevant State.[38] The ECtHR has also referred to judgments of other international and regional bodies while interpreting and evolving the provisions of its Convention.[39] Notably, it has also referred to the IACtHR[40] and the HRC.[41]

Considering that the Court uses external sources of law, the progressive IACtHR Environment and Human Rights Advisory Opinion (C. I.) and the views adopted by the HRC in *A.S. v. Malta* and *A.S. v. Italy* (C. II.) may influence the future interpretation of jurisdiction under the ECHR.

36 *Tyrer v. the United Kingdom*, ECtHR Application No. 5856/72, Judgment of 25 April 1978, para. 31; *Loizidou v. Turkey*, ECHR Application No. 15318/89, Judgment of 23 February 1995, para. 71; *Soering Case*, *supra* note 22, para. 102; *Selmouni v. France*, ECHR 1999-V 149, Judgment of 28 July 1999, para. 101 [*Selmouni Case*]; *Hirsi Case*, *supra* note 17, para. 175.

37 *Marckx v. Belgium*, ECtHR Application No. 6833/74, Judgment of 13 June 1979, para. 41; *Selmouni Case*, *supra* note 36, para. 97; *Al-Adsani v. the United Kingdom*, ECtHR Application No. 35763/97, Judgment of 21 November 2001, para. 26; *Makaratzis v. Greece*, ECtHR Application No. 50385/99, Judgment of 20 December 2004, para. 28; *Sommerfeld v. Germany*, ECtHR Application No. 31871/96, Judgment of 8 July 2003, paras 37-39; *Rantsev v. Cyprus and Russia*, ECtHR Application No. 25965/04, Judgment of 7 January 2010, paras 147-148 [*Rantsev Case*].

38 *Banković Case*, *supra* note 18, para. 73; *Medvedyev Case*, *supra* note 18, para. 65; *Hirsi Case*, *supra* note 17, paras 75, 77; Moreno-Lax, *Accessing Asylum in Europe*, *supra* note 28, 320-321.

39 *Cyprus v. Turkey*, ECtHR Application No. 25781/94, Judgment of 12 May 2014, paras 8, 14-15, 26-28, 49-50, 52-54; *Kononov v. Latvia*, ECtHR Application No. 36376/04, Judgment of 17 May 2010, paras 118-119.

40 *Kurt v. Turkey*, ECtHR Application No. 24276/94, Judgment of 25 May 1998, paras 64, 66-67, 101-102 [*Kurt Case*]; *Öcalan Case*, *supra* note 30, para. 166; *Zolotukhin v. Russia*, ECtHR Application No. 14939/03, Judgment of 10 February 2009, para. 40.

41 *Folgerø and Others v. Norway*, ECtHR Application No. 15472/02, Judgment of 29 June 2007, para. 45.

I. Inter-American Court of Human Rights: The Environment and Human Rights

In 2018, the IACtHR issued an Advisory Opinion concerning the obligations of State parties to the *American Convention on Human Rights* (ACHR)[42] regarding infrastructural works creating a risk of significant environmental damage to the marine environment of the Wider Caribbean Region.[43] With its interpretation, the IACtHR followed numerous United Nations treaty monitoring body recommendations. These require States to respect human rights abroad by preventing third parties from violating them in other countries if those States can influence these third parties.[44] The Advisory Opinion provides an answer to whether and under what conditions extraterritorial effects of domestic acts or omissions give rise to human rights claims.

Most importantly, the Court addressed whether it should consider that an individual, although not within the territory of a State party, may be subject to the jurisdiction of that State.[45] In answering this question, the Court considered two possible approaches. For one, it considered applying an entirely new causation-centered jurisdictional link (1.). This article will discuss whether the context of environmental obligations and the high seas legal regime are similar

42 *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123.

43 *The Environment and Human Rights*, 15 November 2017, IACtHR Advisory Opinion OC-23/17, para. 1 [*Environment and Human Rights*].

44 Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2000/4, 11 August 2000, paras 33, 35, 39, 51; Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2002/11, 20 January 2003, paras 23-24, 44(b) [*Right to Water*]; Committee on Economic, Social and Cultural Rights*, General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24, 10 August 2017, paras 26, 30-33; Committee on the Rights of the Child, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, UN Doc CRC/C/GC/16, 17 April 2013, para. 28; Human Rights Committee, *General Comment No. 36 Article 6: Right to Life*, UN Doc CCPR/C/GC/36, 3 September 2019, para. 21; A. Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR' (2018), available at: https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/ (last visited 11 February 2024).

45 *Environment and Human Rights*, *supra* note 43, para. 36.

so that the ECtHR could feasibly apply the IACtHR's line of reasoning. (2.). The Court also considered applying a functional approach to jurisdiction. Even though the Court dismissed that approach, later sections of this article will refer to a similar notion (3.).

1. A Causation-Centered Jurisdictional Link

The Advisory Opinion introduced a broader interpretation of extraterritorial jurisdiction than previously established.[46] For example, the ECtHR only vaguely recognized acts "producing effects" outside States' territories,[47] but never as a standalone basis to establish extraterritorial jurisdiction.[48] The IACtHR found that effective control over activities that caused transboundary harm sufficed rather than exercising effective control over a territory or person.[49] Thus, the Court adopted a new jurisdictional link provided that three requirements are fulfilled:

First, the State of origin must exercise effective control over the activities carried out within its territory which cause the violation of human rights outside of its territory.[50] Second, it must be in a position to prevent transboundary damage that affects the human rights of individuals outside its territory.[51] Third, there must be a causal link between the State's action or omission in its territory and the negative impact on the person's human rights outside its territory.[52]

46 Berkes, *supra* note 44, 2.

47 *Banković Case*, *supra* note 18, para. 67; *Al-Skeini Case*, *supra* note 22, para. 131; Chiragov and Others v. Armenia, ECtHR Application No. 13216/05, Judgment of 16 June 2015, para. 167.

48 Berkes, *supra* note 44, 1.

49 M. Feria-Tinta & S. Milnes, 'The Rise of Environmental Law in International Dispute Resolution: Inter-American Court of Human Rights Issues Landmark Advisory Opinion on Environment and Human Rights' (2018), 5, available at https://www.ejiltalk.org/the-rise-of-environmental-law-in-international-dispute-resolution-inter-american-court-of-human-rights-issues-landmark-advisory-opinion-on-environment-and-human-rights/ (last visited 11 February 2024).

50 *Environment and Human Rights*, *supra* note 43, paras 102, 104(h).

51 *Ibid*., para. 102.

52 *Ibid*., paras 95, 101-104(h), *inter alia* referring to: *Responsibilities and Obligations of States With Respect to Activities in the Area*, Advisory Opinion, ITLOS Reports 10, 1 February 2011, paras 181-184; Inter-American Commission on Human Rights, *Report No. 112/10 Inter-state Petition IP-02 Admissibility Franklin Guillermo Aisalla Molina (Ecuador-Colombia)*, OEA/Ser.L/V/II.140 Doc. 10, 21 October 2011, para. 99.

2. Different Contexts: Can the Strasbourg Court Apply the Inter-American Court's Reasoning?

In general, the ECtHR only extracts some findings of other decisions and decides on a case-by-case basis.[53] Still, in instances in which the ECtHR has referred to IACtHR decisions, it duly considered whether the cases had a similar factual basis and context.[54] This section will therefore examine whether the ECHR system can adopt the standards of the ACHR system. The IACtHR defined the scope of Article 1 of the ACHR by extensively referring to the ECtHR.[55] That reference shows that the foundations of jurisdiction correspond in both systems. As the establishment of the IACtHR novel jurisdictional nexus is so closely linked to transboundary environmental obligations,[56] the ECtHR could determine whether it could distinguish the law of the sea characteristically and in terms of content.

At least characteristically, both are similar: maintaining adequate and effective SAR services is a positive obligation of due diligence.[57] In the IACtHR context of environmental protection, States have to fulfill a series of obligations,[58] many of which are also based on a duty of due diligence.[59] The Court referred to the obligation of prevention in environmental law as an obligation of means, not of results, and as such similar to the positive human rights violations.[60]

However, the obligations differ content-wise. Regarding the obligations' content, in the context of the IACtHR case, environmental law contains the obligation to avoid causing transboundary harm.[61] The emphasis on a transboundary obligation is significant because pollution caused by one country can trigger a human rights problem in another country, easily crossing borders

53 As it did, for example, in *Öcalan Case*, *supra* note 30, paras 166, 183.
54 See *Kurt Case*, *supra* note 40, paras 67, 70, 84, 101; Individual Opinion of Judge Pettiti (Dissenting), *Kurt Case*, *supra* note 40, 50.
55 *Environment and Human Rights*, *supra* note 43, paras 75-81.
56 *Ibid*., paras 95-100, 104(d).
57 E. Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility', in T. Gammeltoft-Hansen & J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (2017), 161, 166 [Papastavridis, 'Rescuing Migrants at Sea'].
58 *Environment and Human Rights*, *supra* note 43, para. 125.
59 *Ibid*., paras 124.
60 *Ibid*., para. 143, referring to *inter alia* 120.
61 *Ibid*., paras 95-100, 104(f).

by, for example, air transmission.[62] According to that obligation, States must use all available means to avoid activities in their area of jurisdiction that cause significant damage to areas beyond the limits of their jurisdiction.[63] The law of the sea requires coastal States to promote the establishment, operation, and maintenance of adequate and effective search and rescue services,[64] to require ships that fly their flag to assist persons in danger,[65] and to take immediate action as soon as they receive information of an incident of distress.[66] One relevant difference may be that environmental law more explicitly refers to what action is legitimate on a State's own territory. For example, the *Stockholm Declaration* and the *Rio Declaration* state that it is a sovereign responsibility to "ensure that activities within [States'] […] control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction".[67] Further, environmental law has the potential to affect entire States, which may make it more significant.

In contrast, the due diligence requirement of the law of the sea to rescue a vessel in distress is primarily grounded on extraterritorial actions. Since the pivotal action is rescuing people on the high seas, search and rescue cases are more focused on actions that occur outside any State's territory. However, precisely when a coastal State omits sending a rescue boat and merely exercises remote control over the migrant boat, the relevant actions take place within the territory of that State. Then, the main issue is that the rescue service is not (sufficiently) operated. While the State remains the main actor in the development of transborder migration, this State-centered concept must be broadened to more

62 *Ibid*., para. 96, referring to: Human Rights Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox*, UN Doc A/HRC/22/43, 24 December 2012, paras 47-48; *Right to Water, supra* note 44, para. 31; Human Rights Council, *Analytical Study on the Relationship Between Human Rights and the Environment*, UN Doc A/HRC/19/34, 16 December 2011, paras 65, 70, 72.

63 *Environment and Human Rights*, *supra* note 43, para. 97, referring to: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, paras 101, 204; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2015, 665, paras 104, 118; *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, 665, paras 104, 118.

64 Art. 98 (2) UNCLOS.

65 Art. 98 (1) UNCLOS; Chapter 2, Article 2.1.1 SAR Convention.

66 Chapter 4, Para. 4.3. SAR Convention, Annex.

67 *Environment and Human Rights*, *supra* note 43, para. 98 (emphasis added).

suitably encompass the cross-border challenges of migration in international human rights law.[68] In this regard, the ECtHR could conceivably adopt the IACtHR causation-concentrated jurisdictional link.

3. Functional Jurisdiction

The Court had also considered establishing jurisdiction by equating the obligations imposed under environmental regimes to the obligations under the applicable human rights regime, i.e., the ACHR.[69] Accordingly, a State's conduct in the scope of the environmental regimes would be considered an exercise of the State's jurisdiction under the ACHR.[70]

More specifically, Colombia proposed that "an area of functional jurisdiction be established […], within which [States] are obliged to comply with certain obligations to protect the marine environment of the whole region".[71] The IACtHR defined functional jurisdiction as the expression used in the law of the sea to refer to the limited jurisdiction of coastal States over the activities in their maritime zones.[72] According to the Court, that jurisdiction is functional because it is exercised based on the purpose of the activity.[73]

The Court rejected the proposal that special environmental protection regimes alone extend the jurisdiction of States under the AHCR[74] based on three reasons: First, according to the Court, jurisdiction under the ACHR "does not depend on a State's conduct taking place in a specific geographical area".[75] Second, the geographical areas of the environmental protection regimes were delimited with the specific purpose of compliance with the obligations in

68 T. Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts', 29 *European Journal of International Law* (2018) 2, 581, 605.

69 *Environment and Human Rights*, *supra* note 43, paras 82, 88.

70 *Ibid*., para. 88.

71 *Ibid*., para. 85 (emphasis added).

72 *Ibid*. footnote 165; See the territorial sea, contiguous zone, the continental shelf. "For example, in an exclusive economic zone, the jurisdiction, rights and obligations attributed to both the coastal States and the other States are exercised in keeping with its 'economic' objective and taking into account the corresponding rights and obligations of the other States in the same zone."; note: the term "functional" is ascribed to a different meaning depending on the author, illustrated at: Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 26, 402.

73 *Environment and Human Rights*, *supra* note 43, fn. 165.

74 *Ibid*., para. 92.

75 *Ibid*., para. 88.

those treaties (such as to prevent pollution).[76] Although these obligations may contribute to the protection of human rights, this contribution is not equal to establishing an exercise of jurisdiction under the ACHR.[77] Third, the Court found that the environmental treaties do not extend the jurisdiction of a State beyond the borders of its territory.[78] Instead, territorial sovereignty imposes limits on the scope of the State's obligation to contribute to the global realization of human rights.[79]

Since the IACtHR did not establish jurisdiction based on Colombia's argument, this article does not propose using this case to argue that the ECtHR should apply a functional approach. However, the general idea of functional jurisdiction was taken up in *A.S. v. Malta* and *A.S. v. Italy*, which may be more convincing.

II. Human Rights Committee: *A.S. v. Malta* and *A.S. v. Italy*

That the ECtHR could apply a similar jurisdictional link within the law of the sea regime can be observed by examining the more recent HRC views. While the HRC is not a court with the power to render binding decisions, it still performs an important role in the field of human rights protection regarding the *International Convention on Civil and Political Rights* (ICCPR).[80]

In *A.S. v. Malta* and *A.S. v. Italy*, the Committee decided one incident in which a vessel carrying migrants capsized on the high seas. The difficulties of delineating human rights jurisdiction at sea, the main thesis of this article, can be illustrated by these cases (albeit under the ICCPR). The following sections will outline the facts of the incident (1.) and the approaches to interpreting jurisdiction that the Committee adopted in both cases (2. and 3.).

1. Facts of *A.S. v. Malta* and *A.S. v. Italy*

On 11 October 2013, a ship carrying over 400 migrants was shot at by a boat flying a Berber flag, thereby threatening to sink it on the high seas of

76 *Ibid*.
77 *Ibid*.
78 *Ibid*. paras 89-90.
79 *Ibid*. para. 90, referring to *Banković Case*, *supra* note 18, para. 60.
80 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR]; M. N. Shaw, *International Law*, 8th ed. (2017), 238-244.

the Mediterranean outside the national borders of both Italy and Malta.[81] It then transited through and exited the Libyan search and rescue zone.[82] Italy and Malta activated rescue operations and were in continuous contact with the distressed vessel via telephone.[83] Italy received the first two distress calls in the morning,[84] the Italian rescue center informed the Maltese rescue center in the early afternoon,[85] and after that, the distressed vessel also called the Maltese rescue center.[86] Malta then sent a navigational text message urging all ships in the vicinity, including the Italian rescue boat "ITS Libra", to proceed toward the vessel's position[87] and formally accepted Italy's request to coordinate the rescue of the vessel.[88] The boat carrying the migrants capsized in the late afternoon within the Maltese SAR Zone, a zone in which Italy has, in the past, often been the only State willing and able to carry out rescue operations.[89] A Maltese military vessel arrived at the scene in the early evening and rescued 147 persons.[90] The ITS Libra, from which Malta requested help three times, saved 56 persons.[91] Approximately 200 people drowned.[92]

2. *A.S. v. Malta:* A Causation-Centered Jurisdictional Link

A.S., D.I., O.I., and G.D. filed a complaint against the State of Malta regarding the violation of the right to life of their relatives who were passengers on the vessel.[93] The HRC determined that Malta had exercised jurisdiction[94] although it had found that the complainants had failed to pursue domestic

81 Human Rights Committee, *A.S., D.I., O.I. and G.D. v. Italy*, Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017, 28 April 2021, paras 2.4, 7.7 [*A.S. v. Italy*]; Human Rights Committee, *A.S., D.I., O.I. and G.D. v. Malta*, Communication No. 3043/2017, UN Doc CCPR/C/128/D/3043/2017, 28 April 2021, paras 1.1, 2.1, 2.7 [*A.S. v. Malta*].
82 *Ibid*., para. 4.5.
83 *Ibid*., paras 2.1-2.3, 2.7.
84 *A.S. v. Italy*, *supra* note 81, paras 4.3, 5.2; *A.S. v. Malta*, *supra* note 81, paras 2.1-2.2.
85 *A.S. v. Italy*, *supra* note 81, para. 4.3; *A.S. v. Malta*, *supra* note 81, para. 4.5.
86 *Ibid*., para. 3.1.
87 *Ibid*., para. 4.5.
88 *A.S. v. Italy*, *supra* note 81, para. 4.3; *A.S. v. Malta*, *supra* note 81, para. 4.5.
89 *A.S. v. Italy*, *supra* note 81, para. 4.3; *A.S. v. Malta*, *supra* note 81, paras 2.7, 4.6.
90 *Ibid*., para. 4.6.
91 *Ibid*.
92 *A.S. v. Italy*, *supra* note 81, para. 1.1; *A.S. v. Malta*, *supra* note 81, para. 1.1.
93 *Ibid*., paras 1.1-1.2.
94 *Ibid*., paras 6.1-6.7.

remedies and thus rendered the case inadmissible,[95] precluding the Committee from deciding it on the merits.

The Committee concluded that Malta had exercised jurisdiction based on three facts: first, the State party was responsible for the SAR Zone in which the shipwreck occurred. Second, the State party was in continuous contact with the vessel in distress, and third, the State party activated rescue procedures.[96] The HRC found that Malta had exercised control over the persons in distress, emphasizing the obligations a State party carries under the law of the sea,[97] and the direct and reasonably foreseeable causal relationship between the State's parties' actions, or lack thereof, and the operation's outcome.[98]

3. *A.S. v. Italy*: A Special Relationship of Dependency Jurisdiction

In *A.S. v. Italy*, the Committee also considered whether the alleged victims were within Italy's effective control to establish jurisdiction, even though the shipwreck occurred outside the State's territory, outside its SAR Zone, and none of the alleged violations happened on board a boat flying the Italian flag.[99] The HRC found that the individuals on the vessel in distress were subject to Italian jurisdiction because they were "*directly affected* by the decisions taken by the Italian authorities in a manner that was *reasonably foreseeable* in light of [Italy's] *relevant legal obligations* […]".[100] The Court argued that Italy directly affected the individuals because a "special relationship of dependency" had been established between Italy and the vessel in distress comprised of factual elements and legal obligations.[101]

Three factual elements constituted part of the special relationship of dependency.[102] The initial contact (the two distress calls in the morning) constituted the first factual element.[103] In one of those calls, Italian authorities reassured the persons on board the vessel that they would be rescued.[104] The second element was the proximity of the boat in distress (17 nautical miles) to the

95 *Ibid*., paras 6.8-7.
96 *Ibid*., para. 6.3.
97 Chapter 2, para. 2.1.9. SAR Convention, Annex; Chapter V, Regulation 33, SOLAS Convention; formal acceptance of the rescue operation.
98 *A.S. v. Malta*, *supra* note 81, para. 6.7.
99 *A.S. v. Italy*, *supra* note 81, paras 7.7-7.8.
100 *Ibid*., para. 7.8 (emphasis added).
101 *Ibid*.
102 *Ibid*., para. 7.8.
103 *Ibid*., para. 7.7.
104 *Ibid*.

ITS Libra.[105] The third element was the ongoing involvement of the Italian rescue center in the rescue operation.[106] Despite Malta's acceptance of responsibility for the rescue operation verbally and in writing, the Italian authorities remained involved.[107] Between 1:00 p.m. and 5:00 p.m., consultations took place between the Italian air force and navy on whether to assist the rescue operation by dispatching the ITS Libra. The Maltese authorities requested such dispatch on more than one occasion.[108] After being informed that the vessel had capsized, the Italian rescue center confirmed that it dispatched the ITS Libra towards the ship in distress. It arrived at the scene at 6:00 p.m. and assumed an on-site coordination role at 6:30 p.m.[109]

Italy's legal obligations under the law of the sea, which constituted a special relationship of dependency, included a duty to respond reasonably to calls of distress under regulations of the SOLAS Convention, in particular Chapter V, Regulation 33, and a duty to cooperate with other States appropriately undertaking rescue operations according to the SAR Convention, particularly its Chapter 5.6.[110]

4. Conclusion

Although the HRC established the jurisdictional nexus almost verbatim in the two cases,[111] its nature may be classified differently in each case. Milanovic argues the jurisdictional nexus used in *A.S. v. Malta* may not be wholly functional,[112] while the link used in *A.S. v. Italy* may be.[113] In *A.S. v. Malta*, he finds it unclear whether the Committee would have considered the complainants subject to Malta's jurisdiction solely because they were located in Malta's SAR Zone.[114] Possibly the Committee did not consider the SAR

105 *Ibid*., paras 4.6, 7.7.
106 *Ibid*., para. 7.7.
107 *Ibid*.
108 *Ibid*.
109 *Ibid*.
110 *Ibid.,* 7.8.
111 *Ibid*., paras 7.5-7.5; *A.S. v. Malta*, *supra* note 81, paras 6.5-6.6.
112 M. Milanovic, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations' (2021), 3, available at https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/ (last visited 11 February 2024) [Milanovic, 'Extraterritorial Human Rights Obligations'].
113 *Ibid*., 5.
114 *Ibid*., 3.

zone element sufficient, that is, not sufficient that Malta had the capacity to act in fact, but only found jurisdiction on the basis that Malta had also failed to respond to the distress call and coordinate the rescue.[115] However, in *A.S. v. Italy*, he argues that the jurisdictional nexus is functional because it is rooted, at its core, in Italy's capacity to help the vessel in distress.[116] Trevisanut also contends the use of a functional jurisdictional link.[117] In her view, the HRC did so by determining that States exercising functional powers,[118] specifically prescriptive and enforcement powers to regulate and organize search and rescue services in SAR Zones, constitutes effective control.[119] Although Trevisanut admits that SAR Zones may contain a geographic element, she argues that the HRC did not ultimately establish jurisdiction based on the activity or territory but because the State voluntarily committed to engaging in the specific activity.[120]

Although the HRC left open the manner in which it precisely determined jurisdiction, the approaches of other scholars may shed some light on possible standards it could have applied to construe a more coherent and easily applicable interpretation of jurisdiction. Giuffré argues, in the context of *A.S. v. Italy*, that effective control should be determined based on, inter alia, whether a State executes a policy plan, for example, within a (non)rescue framework.[121] In her view, the HRC could define more clearly that jurisdiction exists whenever *a State manifests its power* externally through prescriptive, executive, or adjudicative authority.[122] Hereby Guiffré draws on Moreno-Lax' idea that jurisdiction exists whenever the State exercises government functions.[123] Although Moreno-Lax developed her concept of jurisdiction in the context of close cooperation between Italy and Libya regarding migration, her general conclusions also apply in these circumstances. Moreno-Lax believes extending the threshold criterion

115 *Ibid*.
116 *Ibid*., 5.
117 S. Trevisanut, 'The Recognition of a Right to Be Rescued at Sea' (2021), at minutes 5-6, 25-27, available at https://podcasts.ox.ac.uk/recognition-right-be-rescued-sea (last visited 11 February 2024).
118 *Ibid*., at minutes 3-5.
119 *Ibid*., at minutes 25-26.
120 *Ibid*., at minutes 25-27.
121 M. Giuffré, 'A Functional-Impact Model of Jurisdiction: Extraterritoriality Before of the European Court of Human Rights', 82 *Questions of International Law, Zoom-in* (2021), 53, 76-77 [Giuffré, Functional-Impact Model of Jurisdiction]; Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 26, 397, 403-404.
122 Giuffré, 'Functional-Impact Model of Jurisdiction', *supra* note 121, 76-77.
123 Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 26, 402-403; referencing: M. Gavouneli, *Functional Jurisdiction in the Law of the Sea* (2007).

to include contextual information could ensure less arbitrary results,[124] as *de facto* elements such as physical force are often inseparable from *de jure* elements.[125] Consequently, Moreno-Lax believes that "effective control" is established whenever State action determines the substantial course of events, regardless of the use of physical force or whether those events occur in proximity to the State action.[126] Moreno-Lax argues that maritime law obligations contribute to the existence of jurisdiction,[127] pointing to cases where the larger scope or the entire operation was relevant.[128]

D. Potential Drawbacks of the Cases' Jurisdictional Links

While a broad functional jurisdictional link, similar to the above-mentioned ones, may appear to be a leap forward in favor of protecting human rights where they are often neglected, it may still be subject to objections. Even if such a comprehensive interpretation of jurisdiction was motivated by the best intentions, it could, in the long term, do more harm than good.[129]

This article examines whether the ECtHR could feasibly construct an argument from the ideas of the IACtHR and the HRC supporting that States remotely involved in a rescue operation exercise jurisdiction. Therefore, the following section will not criticize the proposal by Guiffré and Moreno-Lax (in II. 4.) to assume a jurisdictional nexus whenever a State exercises its power. In the context of this article's purpose, counterarguments will only address the ideas derived from the IACtHR and HRC cases. Specifically, this section will examine the objection that the new interpretation automatically equates jurisdiction to substantive obligations under the law of the sea (D. I.), and delve into whether requirements such as a "special relationship" or "causation" must be more closely defined (D. II.).

I. The Conflation of Jurisdiction With Substantive Obligations

Both the IACtHR and the HRC broadened their respective interpretations of jurisdiction by applying them within the context of relevant obligations. Legal scholars and HRC members argue in separate opinions that lives at sea must be

124 Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 26, 414.
125 *Ibid*., 404, 414.
126 *Ibid*., 403.
127 *Ibid*., 406-408.
128 *Ibid*., 403-404.
129 Milanovic, 'Extraterritorial Human Rights Obligations', *supra* note 112, 8.

respected by following the State's international obligation to rescue at sea.[130] Accordingly, "power and control" concepts must be construed considering the specific circumstances.[131] This method of interpretation is supported by the rule that a court or body may take into account sources of international law such as conventions when interpreting the term jurisdiction so far as those sources have been consented to by the parties of the proceedings under Article 31 (3) VCLT.[132] Further, as human rights are not self-contained, they should be implemented in harmony with the law of the sea and duly integrated into the broader system of international law.[133] Consequently, the ECtHR could read law of the sea obligations – such as that coastal States should operate adequate and effective search and rescue services and require ships flying its flag to render assistance to persons in danger[134] – into the term jurisdiction, provided the coastal State in question is a party to the SAR Convention.[135]

However, this could give rise to the objection that the new nexus effectively conflates jurisdiction with the obligation to prevent human rights violations.[136] A State's decision not to protect human rights cannot trigger an obligation to protect human rights; the latter must logically precede the former.[137] The notion of jurisdiction, which activates an entitlement of individuals to human rights *vis-*

130 Human Rights Committee, Individual Opinion of Committee Member Vasilka Sancin (Concurring), *A.S., D.I., O.I. and G.D. v. Italy*, Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017 Annex VI, 28 April 2021, para. 2.

131 Human Rights Committee, Individual Opinion of Committee Member Gentian Zyberi (Concurring), *A.S., D.I., O.I. and G.D. v. Italy*, Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017 Annex IV, 28 April 2021, para. 3 [*A.S. v. Italy,* Concurring Opinion Zyberi].

132 Human Rights Committee, Individual Opinion of Committee Member David H. Moore (Dissenting), *A.S., D.I., O.I. and G.D. v. Italy*, Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017 Annex III, 28 April 2021, para. 2 [*A.S. v. Italy,* Dissenting Opinion Moore].

133 Tzevelekos & Proukaki, *supra* note 5, 439; 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', 21 *German Law Journal* (2020) 3, 417, 419-421, 426-435 [Papastavridis, 'ECHR and Migration at Sea'].

134 Art. 98 UNCLOS; Chapter 2, para. 2.1.1, SAR Convention.

135 *A.S. v. Italy*, Dissenting Opinion Moore, *supra* note 132, para. 2.

136 This has also been argued, in part, by the Italian Government in the *Hirsi Case*, *supra* note 17, para. 65; *A.S. v. Italy*, Concurring Opinion Tigroudja, *supra* note 3, para. 1.

137 Human Rights Committee, Individual Opinion of Committee Member Andreas Zimmermann (Dissenting), *A.S., D.I., O.I. and G.D. v. Malta*, Communication No. 3043/2017, UN Doc CCPR/C/128/D/3043/2017 Annex I, 28 April 2021, para. 5 [*A.S. v. Malta,* Dissenting Opinion Zimmermann, Annex I].

à-vis a State party, is not tantamount to the concept of jurisdiction to prescribe under the law of the sea, which is about a State's obligation to regulate certain situations through its domestic law.[138] Simply put, according to this objection, the violation of an obligation under the applicable rules of the law of the sea is not a constitutive element of jurisdiction.[139] A conflation of the two terms could render the extraterritorial threshold criterion obsolete.[140]

A purely functional approach may entail the issue that a coastal State's duty is grounded in its ability to act.[141] Regarding positive obligations, it poses a difficult question of whether a State should act if it has that ability.[142] A board interpretation of positive obligations bears the danger that jurisdiction could be regarded as the mere capability to respect human rights. One may argue that, when a violation occurs, there had been the capability to respect human rights and hence jurisdiction.[143] Others object to this line of reasoning because situations in which States have the potential to place individuals under their effective control and situations involving the actual exercise of effective control may no longer be distinguished.[144] However, only the actual exercise thereof

138 *Ibid*., 6-7.

139 Human Rights Committee, Individual Opinion of Committee Member Andreas Zimmermann (Dissenting), *A.S., D.I., O.I. and G.D. v. Italy*, Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017 Annex II, 28 April 2021, para. 2 [*A.S. v. Italy,* Dissenting Opinion Zimmermann, Annex II].

140 G. Vega-Barbosa & L. Aboagye, 'Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights' (2018), 5, available at https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/ (last visited 11 February 2024); Altwicker, *supra* note 68, 590.

141 Milanovic, 'Extraterritorial Human Rights Obligations', *supra* note 112, 6.

142 *Ibid*.

143 Individual Opinion of Judge Bonello (Concurring), *Al-Skeini Case*, *supra* note 22, paras 10-12 [*Al-Skeini Case*, Concurring Opinion Bonello]; Shany seems sympathetic to this idea, albeit only on the condition that two restraining notions are also implemented: Y. Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law', 7 *The Law & Ethics of Human Rights* (2013) 1, 47, 65-71.

144 *A.S. v. Italy*, Dissenting Opinion Shany, Heyns, Pazartzis, *supra* note 24, para. 2; S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', 25 *Leiden Journal of International Law* (2012) 4, 857, 868.

establishes jurisdiction.[145] A distinction between actual effective control and the mere ability to exercise it becomes meaningless.[146]

From a more abstract and dogmatic point of view, these two parts of the objection criticize that such a jurisdictional link approximates the "cause-and-effect" doctrine, which the ECtHR tried to avoid in *Banković*.[147] Even though subsequent ECtHR jurisprudence broadened the narrow reading of jurisdiction in *Banković*, it upheld the threshold requirement in succeeding judgments.[148] As a result, it would not be correct to interpret the SAR Zone as forming part of the State's territory or an area upon which that State exercises extraterritorial jurisdiction.[149] An intermediate solution could consolidate these opposing views and resolve the issue. One can make a strong argument that the proposed jurisdictional approach does not remove the threshold criterion if not "anyone adversely affected by an act imputable to a Contracting State, wherever in the world"[150] would be brought within the Court's jurisdiction. On the contrary, the ECtHR could still maintain the essential requirement of jurisdiction, which is a concrete normative relationship between the duty-bearing State and the rights-holding individual.[151] That relationship would have to be sufficiently individualized,[152] meaning the effect of the action or omission of the State would have to be concentrated on an identifiable individual.[153] Under the presumption that there has to be a causal or special relationship, the threshold criterion would not be obsolete altogether.

145 *A.S. v. Italy*, Dissenting Opinion Shany, Heyns, Pazartzis, *supra* note 24, para. 2; Besson, *supra* note 144, 868.

146 Milanovic, 'Extraterritorial Human Rights Obligations', *supra* note 112, 6.

147 *Banković Case*, *supra* note 18, para. 75; Costa, *supra* note 18, 140-141; A. Boyle, 'Human Rights and the Environment: Where Next?', 23 *European Journal of International Law* (2012) 3, 613, 638.

148 *Cyprus v. Turkey*, ECHR 2001-IV 1, Judgment of 10 May 2001, para. 78; *Issa v. Turkey (Merits)*, ECtHR Application No. 31821/96, Judgment of 30 March 2005, para. 74; *Öcalan Case*, *supra* note 30, para. 91; *Ilaşcu Case*, *supra* note 22, paras 310-319, 376-394; *Al-Skeini Case*, *supra* note 22, paras 130-142.

149 *A.S. v. Malta*, *supra* note 81, para. 4.3; Human Rights Committee, Joint Opinion of Committee Members Arif Bulkan, Duncan Laki Muhumuza and Gentian Zyberi (Dissenting), *A.S., D.I., O.I. and G.D. v. Malta*, Communication No. 3043/2017, UN Doc CCPR/C/128/D/3043/2017 Annex II, 28 April 2021, para. 3.

150 *Banković Case*, *supra* note 18, para. 75.

151 Besson, *supra* note 144, 860, 863, 866; Altwicker, *supra* note 68, 590.

152 *Ibid*., 590-591.

153 *Ibid*., 590.

Furthermore, in the broader scope of an ECtHR decision, several other criteria must necessarily be fulfilled.[154] For example, the State must be aware of the existing human rights risk and have the required means to be in a position to offer protection.[155] Moreover, it must take all necessary measures and make the best efforts within the means available, even if the particular result is ultimately not attained.[156] While these criteria do not have to be fulfilled to establish jurisdiction, they would have to be established later to assess the positive obligation derived from the right to life.[157] With these further requirements, even a lowered threshold criterion would not result in States having to comply with illusory standards of the ECHR.

II. Ambiguous Requirements

The section above established that further requirements may prevent the threshold criterion from being obsolete altogether. These requirements would have to be established comprehensively. However, the IACtHR only specified a "possible" significant harm,[158] a link of causality,[159] and "plausible" risk factors.[160] This leads to the second objection regarding the proximity required to establish the causal link.[161] Such an oversimplification is problematic because extraterritorial consequences of a State's omissions can be complex. To compensate for this shortcoming, one may turn to the interpretation of the causal link identified by other monitoring bodies. The HRC requires a "direct

154 Scheinin even argues that "jurisdiction" only raises questions on requirements that are already addressed in the context of "attribution" and is therefore entirely unnecessary, in: M. Scheinin, 'Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights', in M. Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2012), 212, 214, 215.

155 *Osman Case*, *supra* note 9, para. 116.

156 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, 221, para. 430; *Responsibilities and Obligations of States With Respect to Activities in the Area*, Advisory Opinion, ITLOS Reports 10, 1 February 2011, para. 110; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Reports 4, 2 April 2015, para. 129; *A.S. v. Italy*, Concurring Opinion Zyberi, *supra* note 131, para. 3.

157 Tzevelekos & Proukaki, *supra* note 5, 461.

158 *Environment and Human Rights*, *supra* note 43, para. 189.

159 *Ibid*., paras 101, 103.

160 *Ibid*., para. 180.

161 Berkes, *supra* note 44, 2-4.

and reasonably foreseeable impact on the right to life of individuals outside their territory"[162] and the ECtHR a "direct and immediate cause",[163] "sufficiently proximate repercussions",[164] and a "real and immediate risk".[165]

Nevertheless, even applying other case law to supplement the requirements of "causation" or a "special relationship," these categories still prove difficult in their application to a case. For example, some argue that a distress call creates a relationship between a State which receives it and the person who sends it because the survival of the caller depends on the actions of the recipient State, creating a "long distance *de facto* control".[166] Others require the State to make an explicit promise to rescue the migrants beyond the general SOLAS or SAR Convention obligations or require that a vessel had capsized because a State vessel hit it.[167] These conditions are based on the presumption that, while the coastal State may have the power to save the persons in distress (as any other State with ships close enough to help them feasibly would), migrants are not dependent on the coastal State.[168] According to a different view, jurisdiction is not merely established through distress calls and another State requesting assistance, especially when the vessel in distress is located in another State's SAR Zone.[169] It is instead established when a ship arrives at the scene.[170] The term "at the scene" is quite broad and could encompass any interpretation from being a hailing distance away to being at such a distance that the rescue vessel can effectively still save the drowning people, which would again entail a functional approach to jurisdiction.[171] This analogy demonstrates that a "special relationship" approach would require the ECtHR to draw an arbitrary line to avoid a politically or practically infeasible outcome.[172]

162 Human Rights Committee, *General Comment No. 36 Article 6: Right to Life*, UN Doc CCPR/C/GC/36, 3 September 2019, para. 22.
163 *Andreou v. Turkey (Admissibility)*, ECtHR Application No. 45653/99, Judgment of 3 June 2008, 11.
164 *Ilaşcu Case*, *supra* note 22, para. 317.
165 *Rantsev Case*, *supra* note 37, para. 215.
166 Trevisanut, 'A Constructive View', *supra* note 7, 12-13.
167 Milanovic, 'Extraterritorial Human Rights Obligations', *supra* note 112, 6.
168 *Ibid*.
169 *A.S. v. Italy,* Dissenting Opinion Shany, Heyns, Pazartzis, *supra* note 24, para. 5.
170 *A.S. v. Italy,* Dissenting Opinion Shany, Heyns, Pazartzis, *supra* note 24, para. 4.
171 Milanovic, 'Extraterritorial Human Rights Obligations', *supra* note 112, 7.
172 *Ibid*.

E. Construing a Jurisdictional Link

This article will finally construe an intermediate jurisdictional approach. According to this approach, the Court could find that a State exercised jurisdiction over a vessel in distress if it fulfilled the following requirements:

1. The coastal State exercised effective control over acts and omissions within its rescue center;
2. The State is obliged to act under the law of the sea; and
3. The State is factually involved in the rescue mission.

Having considered new approaches by the IACtHR and the HRC, I conceive that the law of the sea can be read into Article 1 of the ECHR. The Court could adopt the IACtHR territorial reference point. It could consider that a coastal State exercised human rights jurisdiction over a vessel in distress if the State exercised effective control over the acts within its territory, i.e., its Maritime Rescue Coordination Center. However, bearing in mind the potential drawbacks of an overly broad interpretation, the author is also of the opinion that there must be some limiting requirements when establishing jurisdiction. The State must be both obliged to act under the law of the sea and factually involved in the rescue mission. Those two requirements would not have to be fulfilled to an equal degree but rather in the sense of a sliding scale, which would have to be decided on a case-by-case basis. The more significant the obligations under the law of the sea are, the less significant the factual requirements for the distress situation have to be. For example, if a vessel in distress was within a coastal State's SAR Zone, the coastal State would already exercise jurisdiction, even if there was only a causal relationship. If the vessel in distress was not within a coastal State's SAR Zone, the State would have to assume power over the case or a "special relationship of dependency" that goes further than the mere causation that would be required. This way, jurisdiction could be established even if the State merely remotely controlled the vessel in distress.

F. Applying the Jurisdictional Link

Legal tools are available that could partially close the above-mentioned black hole. The Court is aware of this fact, as Judge Bonello's plea for a "return to the drawing board"[173] on jurisdiction shows. This section discusses whether

173 *Al-Skeini Case*, Concurring Opinion Bonello, *supra* note 143, para. 8.

the ECtHR *should* apply a broader, more rights-protective interpretation of jurisdiction. Whether the Court should adopt such a broad interpretation depends on how extensively one prioritizes universal human rights claims over their constraint by national borders as delineators of State obligations.[174]

First, one could argue that the Court should not adopt a broader jurisdictional link. Instead, it should maintain its current interpretation because Member States could take countermeasures if it adopted an interpretation of jurisdiction that deviated too far from the current one.[175] As the most severe countermeasure, Member States could opt out of the ECHR, as discussed by the Conservative Party in the United Kingdom in the context of Brexit.[176] But even if States react less overtly, they could still further outsource their border policies.[177] The violations could continue occurring and result in significant areas where States perform policy and executive functions beyond the Court's reach.[178] Italy, for example, outsources some of its border policies to Libya.[179] On a global level, Australia similarly outsourced its border policies to Malaysia after the Australian High Court found that the country's offshore processing framework was illegal.[180] These practices could result in a bifurcation that strengthens the executive and weakens the judiciary, diminishing the latter's authority.[181]

On a smaller scale, a decision could, as a side effect, clarify conditions and provide guidelines on how to push border policies beyond the jurisdiction of the courts.[182] For example, after the *Hirsi Case* established the exercise of

174 Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 26, 386; I. Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013', 54 *Harvard International Law Journal* (2013) 2, 315, 349 [Mann, 'Dialectic of Transnationalism'].

175 Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 26, 415-416.

176 *Ibid*; R. Merrick, 'Theresa May to Consider Axeing Human Rights Act After Brexit, Minister Reveals', The Independent (18 January 2019), available at https://www.independent.co.uk/news/uk/politics/ theresa-may-human-rights-act-repeal-brexit-echr-commons-parliament-conservatives-a8734886.html (last visited 11 February 2024); especially considering that immigration was the most important issue for voters in the EU referendum, Ipsos, 'Immigration is now the Top Issue for Voters in the EU Referendum' (2016), available at https://www.ipsos.com/en-uk/immigration-now-top-issue-voters-eu-referendum (last visited 11 February 2024).

177 Mann, 'Dialectic of Transnationalism', *supra* note 174, 378.

178 *Ibid*., 365, 369-373, 378.

179 *Ibid*., 334-335; for example via the 2008 Treaty of Friendship, described in Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 26, 390-391.

180 Mann, 'Dialectic of Transnationalism', *supra* note 174, 357-359, 369-372.

181 *Ibid*., 317, 364-373.

182 *Ibid*., 318, 369.

jurisdiction with the exertion of physical control, States may have felt invited to exercise "long-distance de facto control" to avoid physical contact with the distressed vessel.[183] If the Court followed a broad jurisdictional nexus such as the one I suggested, States could avoid coming into close contact with boats in distress to evade the perception of a "special relationship of dependency" and thus avoid responsibility.[184]

Second, having established possible repercussions if the Court maintains its current interpretation of jurisdiction, I will discuss considerations in favor of adopting a rights-protecting interpretation. As Judge Albuquerque writes in his concurring opinion in the *Hirsi Case*:

> "Refugees attempting to escape Africa do not claim a right of admission to Europe. They demand only that Europe, the cradle of human rights idealism and the birthplace of the rule of law, cease closing its doors to people in despair who have fled from arbitrariness and brutality. That is a very modest plea, vindicated by the European Convention on Human Rights. 'We should not close our ears to it.'"[185]

Against this backdrop, one might be more willing to take the risk and optimistically hope that more progressive rulings by the Court in an iterative process could create fewer cases of neglect on the high seas. If the Court were to clarify that allowing people to die in the Mediterranean despite obligations under the law of the sea violated the ECHR, it could shed light on the issue and encourage the EU to support coastal States more effectively,[186] for example, by establishing more monitoring systems within FRONTEX.

Third and finally, one may ask to what extent it is likely that the Court will adopt a rights-protective interpretation of jurisdiction. As a tentative speculation, the Court might do so if it believes that States will respond to its rulings in good faith, i.e., not outsource their border policies and not turn their backs on the Court. For this to happen, the political climate in the States must be receptive to a more rights-friendly interpretation. The law of the sea intends to protect people's lives when they are in distress. It remains uncertain whether adopting

183 *Ibid*., 366, 369.
184 *A.S. v. Italy,* Dissenting Opinion Zimmermann, Annex II, *supra* note 139, para. 4.
185 Concurring Opinion of Judge Pinto de Albuquerque, *Hirsi Case*, *supra* note 17, 79.
186 See human rights violations noted by Mann, *Dialectic of Transnationalism*, *supra* note 174, 368.

the herein-proposed jurisdictional nexus will provoke States to circumvent it or whether the nexus poses an opportunity to improve the situation in the Mediterranean. Holding States accountable for significant failures without placing impossible burdens could be one of the many steps necessary to resolve a small problem in the grand scheme of the migration crisis.

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A Right to Come Within State Jurisdiction Under Non-Refoulement? Interpreting Article 1 of the European Convention on Human Rights in Good Faith Within the Context of Extraterritorial Migration Control

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Abstract

Externalizing borders for the purpose of shifting and avoiding responsibilities under human rights law is not a new phenomenon in the context of migration control. In the Mediterranean, European States have increasingly sought new measures of extraterritorial migration control to avoid being held responsible under cornerstones of international refugee law such as *non-refoulement*. In the precedent *Hirsi Jamaa and Others v. Italy*, the European Court of Human Rights (ECtHR) established that the exercise of effective control over persons on the high seas amounts to the exercise of jurisdiction within the meaning of Art. 1 of the *European Convention on Human Rights* (ECHR). As a result, European States began to find new ways of controlling their borders. The focus on physically controlled 'push-backs' shifted to administratively controlled 'pull-backs'. Cooperation with third States by equipping and training their coast guards has become a way for European States to avoid any direct contact with migrants, thereby avoiding triggering jurisdiction as defined by the current case law of the ECtHR. This paper focuses, first, on how ECtHR jurisprudence responds to new forms of extraterritorial migration control and, second, on how this concept of jurisdiction relates to the obligation of States to fulfill their international obligations in good faith. How can the object and purpose of an obligation be undermined if that obligation does not apply in the first place? While the realization of Hannah Arendt's concept of 'the right to have rights' seems to depend in practice on the geographical location of the individual, this paper addresses the question of whether there might be a right to come within the jurisdiction of a State, in the sense of gaining access to a legal system, applying a good faith reading to *non-refoulement*.

A. Introduction

In his concurring opinion in the *Hirsi Jamaa and Others v. Italy* case,[1] Judge Pinto de Albuquerque referred to Hannah Arendt's concept of "the right to have rights"[2] and found that Europe's position on this was the crucial issue before the Court.[3] In most cases of migration control, problems emerge when people wish to enter the territory of a destination State but are not yet under the sovereign power of that State.[4] How are the rights of those who are about to come under that power protected?[5] It is a pressing issue that asylum seekers face in which they are not only denied territorial entry and but are also access to a legal system.[6] In order to maintain control over their borders in the age of globalization, States have adapted an increasingly complex system of migration control that, in effect, externalizes and multiplies borders.[7] Today, migrants are not only intercepted at the geographical border of their destination country, but sometimes earlier or even before they start their journey.[8]

The shifting of borders is not unproblematic, as they traditionally determine the legal sphere of a State and set the applicable legal framework.[9] A person's location largely determines what rights he or she actually has.[10] In the context of migration control, territorial location essentially defines whether individuals are effectively protected by one of the cornerstones of human rights law – *non-refoulement*.[11] Contracting States are prohibited from returning

1 *Hirsi Jamaa and Others v. Italy*, ECtHR Application No. 27765/09, Judgment of 28 February 2012 [*Hirsi*].
2 H. Arendt, *The Origins of Totalitarianism* (1973), 296-297.
3 Concurring Opinion of Judge Pinto de Albuquerque, *Hirsi*, *supra* note 1, para. 59.
4 A. L. Hirsch & N. Bell, 'The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime', 18 *Human Rights Review* (2017) 4, 417, 421-422.
5 *Ibid.*
6 T. Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control', 20 *European Journal of Migration and Law* (2018) 4, 452, 464.
7 M. Den Heijer, 'Europe Beyond Its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', in B. Ryan & V. Mitsilegas (eds), *Extraterritorial Immigration Control* (2010), 169, 169 [Den Heijer, 'Europe Beyond Its Borders'].
8 E. Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and Its Member States', in Ryan & Mitsilegas, *supra* note 7, 199, 199.
9 Den Heijer, 'Europe Beyond Its Borders', *supra* note 7, 170.
10 *Ibid.*
11 *Soering v. United Kingdom*, ECtHR Application No. 14038/88, Judgment of 7 July 1989, para. 88 [*Soering*]; UNHCR, *Interception of Asylum-Seekers and Refugees: The International*

persons to places where there are "substantial grounds […] for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3"[12] of the *European Convention on Human Rights* (ECHR).[13] Against this background, the territorial scope of this obligation is of particular interest for the question of "the right to have rights". As stated in Art. 1 ECHR and further elaborated by the European Court of Human Rights (ECtHR) in its jurisprudence, the Convention applies extraterritorially to cases within the Party's jurisdiction.[14] The notion of jurisdiction has thereby triggered fierce controversies in international law scholarship.[15] "The right to have rights" can therefore not be discussed without examining jurisdiction in the human rights context.[16]

The central question of this work is to the extent to which the concept of jurisdiction, as applied by the ECtHR, captures the migration control measures of European States. Does jurisprudence follow the progressive development of externalizing borders and the outsourcing of responsibility? To what extent has the evolution of the jurisdictional threshold led to new generations of *non-entrée* policies in the context of migration by sea outside the global migration

Framework and Recommendations for a Comprehensive Approach, UN Doc EC/50/SC/CRP.17, 9 June 2000, para. 21; G. S. Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organizations', 9 *The University of Technology Sydney Law Review* (2007), 26, 27 [Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection'].

12 *Hirsi*, *supra* note 1, para. 114; similar wording in *Soering*, *supra* note 11, para. 91.

13 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 1, 213 UNTS 222 (amended by the provision of Protocol No. 14 (CETS No. 194)) [ECHR].

14 *Banković and Others v. Belgium and Others*, ECtHR Application No. 52207/99, Decision as to the Admissibility of 12 December 2001, para. 54 [*Banković*]; *Drozd and Janousek v. France and Spain*, ECtHR Application No. 12747/87, Judgment of 26 June 1992, para. 91 [*Drozd and Janousek*]; V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2017), 272 [Moreno-Lax, *Accessing Asylum in Europe*].

15 E. Papastavridis, 'Rescuing Migrants at Sea: The Responsibility of States Under International Law', in T. Gammeltoft-Hansen & J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalization* (2016), 161, 184-185 [Papastavridis, 'Rescuing Migrants at Sea']; V. Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model"', 21 *German Law Journal* (2020) 3, 385, 386 [Moreno-Lax, 'Architecture of Functional Jurisdiction'].

16 S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To', 25 *Leiden Journal of International Law* (2012) 4, 857, 867.

infrastructure in the Mediterranean region? Are the State practices under scrutiny consistent with a good faith reading of *non-refoulement*, in the sense of maximizing its object and purpose?

After an initial presentation of the factors relevant to answer these questions, namely the good faith standard, the jurisdictional mechanism, and the factual context of irregular migration movements in the Mediterranean (B.), there follows an examination of pertinent measures of extraterritorial migration control measures against the background of a good faith interpretation (C.), leading finally to a summary of the interplay between the ECtHR's understanding of jurisdiction, the development of migration control measures, and their compatibility with a good-faith approach (D.). A good faith interpretation not only of *non-refoulement* but also of jurisdiction in the sense of Art. 1 ECHR could potentially lead to "the right to have rights" in the sense of a right to come within a State's jurisdiction and have access to effective asylum procedures.

B. The Jurisdictional "Right to Have Rights"

To explore the questions raised previously, this first chapter will clarify the jurisdictional problems that will be developed later by identifying the standard applied, which is the good faith rule of treaty interpretation (I.), the relevant mechanism of jurisdiction under Art. 1 ECHR, which as an abstract concept is open and reliant on treaty interpretation and therefore to be measured against the standard of good faith (II.), and finally a first outline of the relevant factual circumstances of State conduct in the matter of irregular migration movements in the Mediterranean (III.), which will be subject to the detailed analysis in Part C.

I. Standard of Good Faith

International treaties, like all other abstractly formulated norms, depend on interpretation, especially by the competent judiciary. Codified in Art. 26 of the *Vienna Convention on the Law of Treaties* (VCLT),[17] good faith is the baseline of treaty interpretation.[18]

The principle of *pacta sunt servanda*, which is based on good faith, demands that States actually bring about the effects that they have intentionally

17 *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 26, 115 UNTS 331 [VCLT].

18 M. Kotzur, 'Good Faith (Bona Fide)', in *Max Planck Encyclopedia of Public International Law* (2009), para. 19.

declared.[19] Good faith itself requires States to refrain from conduct that would frustrate the object and purpose of the norm, thereby limiting the discretion of States in fulfilling their treaty obligations.[20] In the context of *non-refoulement* under the ECHR, the object and purpose can be described as ensuring that a person is not extradited or returned, directly or indirectly, to a place where he or she faces "…a real risk of being subjected to torture or to inhuman or degrading treatment or punishment".[21] Some international law scholars share the view that intentionally preventing people from accessing a place where they are protected from *refoulement* may defeat the object and purpose.[22] When claims for protection are ignored and suppressed, the ultimate result is that individuals have no choice but to face the root causes of flight, which may be torture and inhuman treatment. The crucial point, however, is that the extraterritorial dimension of *non-refoulement* under the ECHR cannot be interpreted without assessing jurisdiction.[23] How can the object and purpose of an obligation be undermined if that obligation does not apply in the first place?

This leads to another question of whether good faith extends to Art. 1 of the ECHR. It is generally accepted that good faith is not in itself a legal source of obligations where none would otherwise exist but rather a secondary means to interpret the extent of an existing obligation.[24] Good faith would not have "life

19 M. Virally, 'Review Essay: Good Faith in Public International Law', 77 *The American Journal of International Law* (1983) 1, 130, 132.

20 ILC Reports of the Commission to the General Assembly, *Yearbook of the International Law Commission* (1966), Vol. II, 211, para. 4; M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 367.

21 *Soering*, *supra* note 11, para. 91; see also *Saadi v. Italy*, ECtHR Application No. 37201/06, Judgment of 28 February 2008, para. 125; *Ahmed v. Austria*, ECtHR Application No. 25964/94, Judgment of 17 December 1996, para. 40.

22 M. Giuffré & V. Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows', in S. Juss (ed.), *Research Handbook on International Refugee Law* (2019), 26; G. S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', 23 *International Journal of Refugee Law* (2011) 3, 443, 445 [Goodwin-Gill, 'The Right to Seek Asylum']; N. Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', 27 *European Journal International Law* (2016) 3, 591, 616.

23 *Soering*, *supra* note 11, para. 86.

24 *Land and Maritime Boundary Between Cameroon and Nigeria*, Preliminary Objections, ICJ Reports 1998, 275, para. 39; *Nuclear Tests Case (Australia v. France)*, ICJ Reports 1974, 253, para. 46; *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras),* Jurisdiction and Admissibility, ICJ Reports 1988, 69, para. 94; G. Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law', 4 *Italian Law Journal* (2018) 2, 489, 521.

and energy of its own"[25] and does not go beyond what the parties have agreed upon. However, it seems difficult to identify what the parties have actually agreed and to draw a clear line between an existing and a new obligation.[26]

The ECtHR has repeatedly held that the Convention must be interpreted in good faith in its entirety and referred to the principle of effectiveness in this regard.[27] In the words of Hersch Lauterpacht, the principle of effectiveness does not mean giving maximum effectiveness to the creation of a legal obligation, but rather creating a maximally effective instrument "consistent with the intention – the common intention – of the parties".[28] Thus, the current implementation of a treaty must ensure that the treaty remains effective rather than ineffective.[29] If there are several possible interpretations, the one that gives the maximally appropriate effects to the object and purpose of the treaty must be preferred under good faith.[30] Therefore, good faith ensures the performance of the treaty,[31] which is essentially determined by jurisdiction.[32] This suggests that, in the present context, Art. 1 must be interpreted in such a way as to give maximum effect to the object and purpose of *non-refoulement*.[33] This understanding also takes into account the outstanding status of *non-refoulement* as part of customary international or, as sometimes even suggested, as part of *jus cogens*.[34] Thus,

25 *Regina v. Immigration Officer at Prague Airport and Another ex Parte European Roma Rights Centre and Others*, House of Lords 2004 UKHL 55, para. 58.

26 R. K. Gardiner, *Treaty Interpretation*, 2nd ed. (2017), 168.

27 *Hirsi*, *supra* note 1, para. 179; *Mamatkulov and Askarov v. Turkey*, ECtHR Application Nos 46827/99, 46951/99, Judgment of 4 February 2005, para. 123; A. Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' 20 *European Journal Migration Law* (2018) 4, 396, 420.

28 H. Lauterpacht, *The Development of International Law by the International Court* (1982), 229.

29 T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (2011), 12-13, 96-97 [Gammeltoft-Hansen, *Access to Asylum*].

30 *Ibid*., 97; ILC, *supra* note 20, 219, para. 6.

31 J. C. Hathaway, *The Rights of Refugees Under International Law*, 2nd ed. (2021), 62.

32 ECHR, *supra* note 13, Art. 1.

33 U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 224; similar strategy applied in *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v. Belgium (Merits)*, ECtHR Application Nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 31, Judgment of 23 July 1968, paras 3-4.

34 Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection', *supra* note 11, 27; Goodwin-Gill, 'The Right to Seek Asylum', *supra* note 22, 444; E. Lauterpacht & D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in E. Feller, V. Türk & F. Nicholson (eds), *Refugee Protection in*

considering the object and purpose of jurisdiction in the context of human rights law, Art. 1 of the ECHR triggers the applicability of an instrument designed to protect human rights.[35]

II. The Basic Models of Jurisdiction

Jurisdiction, as the key concept for the applicability of rights and obligations under the ECHR, is therefore the relevant mechanism for determining whether or not a State's behavior is consistent with the object and purpose of the agreed Convention.

In its key decision in *Banković*,[36] the Court held that the exercise of jurisdiction is primarily territorial in nature and that extraterritorial exercise of jurisdiction can only be assumed in exceptional cases.[37] With respect to the territorial dimension of jurisdiction, the Court has held in *ND and NT*[38] that States may not unilaterally exclude territory from their territorial jurisdiction, so this concept of jurisdiction is clearly established.[39]

However, whether there are exceptional circumstances giving rise to extraterritorial jurisdiction must be examined on a case-by-case basis.[40] In *Al-Skeini*,[41] the Grand Chamber clarified that States exercise jurisdiction not only when they have a legal title to act extraterritorially (for example, by consent or the invitation of the territorial State),[42] but also in cases of factual control.[43] Therefore, there are two alternative grounds for assuming extraterritorial

International Law: UNHCR's Global Consultations on International Protection (2003), 89, 96.

35 *Soering*, *supra* note 11, para. 87; Ciliberto, *supra* note 24, 520.

36 *Banković*, *supra* note 14.

37 *Banković*, *supra* note 14, para. 71; *Güzelyurtlu and Others v. Cyprus and Turkey*, ECtHR Application No. 36925/07, Judgment of 29 January 2019, para. 178 [*Güzelyurtlu*]; M. Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8 *Human Rights Law Review* (2008) 3, 411, 419 [Milanovic, 'From Compromise to Principle'].

38 *ND and NT v. Spain*, ECtHR Application Nos 8675/15, 8697/15, Judgment of 13 February 2020 [*ND and NT*].

39 *Ibid.,* para. 109.

40 *Al-Skeini and Others v. the United Kingdom*, ECtHR Application No. 55721/07, Judgment of 7 July 2011, para. 132 [*Al-Skeini*].

41 *Ibid*.

42 *Banković*, *supra* note 14, para. 71; *Al-Skeini*, *supra* note 40, para. 135.

43 *Ibid*., para. 136; Moreno-Lax, Accessing Asylum in Europe, *supra* note 14, 274.

jurisdiction: *de jure* and *de facto* control.[44] Cases of extraterritorial *de jure* control include, for example, actions involving consular and diplomatic State agents, as decided by the European Commission of Human Rights in *WM v. Denmark*.[45]

The two main models of *de facto* control are based on some degree of factual power over either territory (spatial model) or individuals (personal model).[46] In this sense, jurisdiction is a matter of fact and actual physical power, rather than a matter of legality.[47] In *Al-Saadoon*,[48] the Court also held that "total and exclusive *de facto* control"[49] gives rise to *de jure* responsibilities.

Physical control over a territory was already established as a basis for jurisdiction in the Court's jurisprudence prior to *Banković*.[50] In *Loizidou*[51] and *Cyprus*,[52] the Court referred to the criterion of "effective [territorial] control",[53] irrespective of whether this control was exercised "lawful[ly] or unlawful[ly]".[54] With respect to *de facto* control over persons, the Court in *Banković* rejected an expansive "cause-and-effect"[55] notion of the personal model, arguing that

44 *Al-Saadoon and Mufdhi v. the United Kingdom*, ECtHR Application No. 61498/08, Decision as to the Admissibility of 30 June 2009, paras 87-88 [*Al-Saadoon*]; *Hirsi*, *supra* note 1, paras 77, 80-81; I. Papanicolopulu, 'Hirsi Jamaa v. Italy. Application No. 27765/09', 107 *The American Journal of International Law* (2013) 2, 417, 420.

45 European Commission of Human Rights, *WM v. Denmark* (1992), DR 193, para. 1; see also *Hirsi*, *supra* note 1, para. 75; *Banković*, *supra* note 14, para. 73; *Medvedyev and Others v. France*, ECtHR Application No. 3394/03, Judgment of 29 March 2010, para. 65 [*Medvedyev*].

46 M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011), 119 [Milanovic, *Extraterritorial Application of Human Rights Treaties*]; Papastavridis, 'Rescuing Migrants at Sea', *supra* note 15, 25.

47 Milanovic, 'From Compromise to Principle', *supra* note 37, 423.

48 *Al-Saadoon*, *supra* note 44.

49 *Ibid*., para. 88.

50 Milanovic, 'From Compromise to Principle', *supra* note 37, 423.

51 *Loizidou v. Turkey*, ECtHR Application No. 15318/89, Judgment of 18 December 1996 [*Loizidou*].

52 *Cyprus v. Turkey*, ECtHR Application No. 25781/94, Judgment of 10 May 2001 [*Cyprus*].

53 *Loizidou*, *supra* note 51, para. 52; see also *Ilascu and Others v. Moldova and Russia*, ECtHR Application No. 48787/99, Judgment of 8 July 2004, paras 382-384 [*Ilascu*]; *Cyprus*, *supra* note 52, para. 77.

54 *Loizidou*, *supra* note 51, Judgment on the Preliminary Objections of 23 February 1995, para. 62.

55 *Banković*, *supra* note 14, para. 75.

it would devalue Art. 1 as a threshold criterion.[56] In *Issa*,[57] the Court affirmed jurisdiction in cases where a State exercises "authority or control […] – whether lawful […] or unlawful […]"[58] over persons in an area not under the control of that State.[59] In several later cases, the Court then referred to the exercise of "physical power and control"[60] over a person.[61] Regarding the question of the required degree of effective control, most of the cases before the ECtHR dealt with situations of full and exclusive physical control, such as in *Al-Saadoon*[62] by way of detention.[63] While some cases indicate that the exercise of indirect control, like direct control, can lead to jurisdiction,[64] other cases such as *MN and Others*,[65] suggest a more reluctant understanding.[66]

III. Outline of *Non-Entrée* Policies in the Context of Irregular Migration in the Mediterranean Region

Whether States comply with the object and purpose of *non-refoulement* and how Art. 1 ECHR becomes determinative in this regard is of particular importance in the factual context of irregular migration in the Mediterranean outlined in this chapter.

56 *Ibid.*; Milanovic, *Extraterritorial Application of Human Rights Treaties*, *supra* note 46, 174, 182.

57 *Issa and Others v. Turkey*, ECtHR Application No. 31821/96, Judgment of 16 November 2004 [*Issa*].

58 *Ibid.,* para. 71.

59 See also *Pad and Others v. Turkey*, ECtHR Application No. 60167/00, Decision as to the Admissibility of 28 June 2007, para. 53 [*Pad*]; *Isaak and Others v. Turkey*, ECtHR Application No. 44587/98, Decision as to the Admissibility of 28 September 2006, 21 [*Isaak*]; *Ben El Mahi and Others v. Denmark*, ECtHR Application No. 5853/06, Decision as to the Admissibility of 11 December 2006, para. 8.

60 *Al-Skeini*, *supra* note 40, para. 136.

61 See also *Al-Saadoon and Mufdhi v. The United Kingdom*, ECtHR Application No. 61498/08, Judgment of 2 March 2010, para. 88; *Medvedyev*, *supra* note 45, para. 65.

62 *Al-Saadoon*, *supra* note 44, para. 88.

63 J. C. Hathaway & T. Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence', 53 *Columbia Journal of Transnational Law* (2015) 2, 235, 263.

64 See exemplarily *Medvedyev*, *supra* note 45; *Xhavara and Others v. Albania and Italy*, ECtHR Application No. 39473/98, Decision as to the Admissibility of 1 January 2001 [*Xhavara*].

65 *MN and Others v. Belgium*, ECtHR Application No. 3599/18, Judgment of 5 March 2020, paras 119, 123 [*MN and Others*].

66 Hathaway & Gammeltoft-Hansen, *supra* note 63, 262-263.

Global mobility has always been part of human history. Today, developments in all areas of mobility, whether it be new methods of transportation or the legal facilitation of the movement of people, confront States with a situation in which it becomes increasingly difficult to maintain control over the ever-growing number of arrivals on their territory.[67] Not all migrating persons are welcome, though there is a preference for those who promise an economic advantage.[68] While borders have become looser for some in the age of globalization, they are tightened for other unwanted migrants.[69]

States have a sovereign right to prevent non-nationals from crossing their borders,[70] but they have also voluntarily agreed to limit their sovereignty by ratifying human rights treaties such as the ECHR.[71] Migration control therefore takes place in an area of tension between human rights and refugee law norms and the sovereign rights of States.[72] Nevertheless, States have a strong interest in remaining formally bound by human rights obligations.[73] Otherwise, the affluent States of the Global North could not expect the more vulnerable States, often countries of transit and origin of migrants, to comply with human rights.[74] This inconsistent attitude towards refugee law has led to a variety of *non-entrée* policies that restrict access to the global mobility system and aim to evade jurisdiction,[75] resulting in strategies characterized by the progressive externalization and multiplication of Europe's external borders.[76] As observed by the United Nations Special Rapporteur on the human rights of migrants,

67 Spijkerboer, *supra* note 6, 455-456.
68 Hathaway & Gammeltoft-Hansen, *supra* note 63, 237; Spijkerboer, *supra* note 6, 453.
69 Spijkerboer, *supra* note 6, 455.
70 *Hirsi*, *supra* note 1, para. 113; *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, ECtHR Application Nos 9214/80, 9473/81, 9474/81, Judgment of 28 May 1985, para. 67; M. N. Shaw, *International Law*, 8th ed. (2017), 361.
71 Gammeltoft-Hansen, *Access to Asylum, supra* note 29, 12-13.
72 T. Gammeltoft-Hansen, 'Extraterritorial Migration Control and the Reach of Human Rights', in V Chetail & C. Bauloz (eds), *Research Handbook on International Law and Migration* (2014), 114 [Gammeltoft-Hansen, 'Extraterritorial Migration Control']; G. S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd ed. (2007), 1.
73 Hathaway & Gammeltoft-Hansen, *supra* note 63, 282-283.
74 A. Shacknove, 'Asylum Seekers in Affluent States (Paper presented to the UNHCR conference "People of Concern", Geneva 1996)', quoted in UNHCR, *The State of the World's Refugees* (1997), 12.
75 M. J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (2004), 2; Hathaway & Gammeltoft-Hansen, *supra* note 63, 241; Spijkerboer, *supra* note 6, 454.
76 Den Heijer, 'Europe Beyond Its Borders', *supra* note 7, 169. Various terms are used to describe this phenomenon, among others extra-territorialization, external migration

the externalization of migration control can be understood as a phenomenon whereby "border control no longer takes place at the physical borders".[77] This may include measures ranging from the direct and physical interception of migrants to indirect support for third State operations.[78]

Restricting access to the global mobility infrastructure by imposing a strict system of visa requirements and thus limiting regular migration opportunities has led to the emergence of a parallel infrastructure of migration movements, in particular the irregular migration by sea in the Mediterranean region.[79] By penalizing carriers for transporting persons without the required documents, States rely on private companies to enforce their laws.[80] Limited or no opportunities for asylum seekers to apply for asylum abroad have led to a sharp increase in migrants relying on irregular channels, such as traffickers and smugglers, and are the main reason why there are situations where irregular movements are intercepted.[81]

In the context of the Mediterranean, maritime interceptions usually aim to prevent migrants from reaching the territorial waters of intercepting States, thereby blocking asylum claims without individually assessing the merits of

governance, remote migration policing, see M. Den Heijer, *Europe and Extraterritorial Asylum* (2012), 3 [Den Heijer, *Europe and Extraterritorial Asylum*].

77 Special Rapporteur on the Human Rights of Migrants, *Regional Study: Management of the External Borders of the European Union and Its Impact on the Human Rights of Migrants*, UN Doc A/HRC/23/46, 24 April 2013, para. 55; see in a similar vein Brouwer, *supra* note 8, 200; S. Trevisanut, 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea', 27 *Leiden Journal of International Law* (2014) 3, 661, 662-663.

78 B. Frelick, I. M. Kysel & J. Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants', 4 *Journal on Migration and Human Security* (2016) 4, 190, 193.

79 Spijkerboer, *supra* note 6, 461.

80 Mole & Meredith, *supra* note 49, 108-109; S. Scholten, *The Privatization of Immigration Control Through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control* (2015), 2.

81 Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions*, UN Doc A/72/335, 15 August 2017, para. 13 [*Report of the Special Rapporteur of the Human Rights Council*]; A. Brouwer & J. Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide', 21 *Refuge: Canada's Journal on Refugees* (2003) 4, 6, 8; C. Boswell, 'The "External Dimension" of EU Immigration and Asylum Policy', 79 *International Affairs* (2003) 3, 619, 619.

their protection claims.[82] Unlike situations in territorial waters[83] and contiguous zones,[84] States do not have general *de jure* jurisdiction over situations that occur on the high seas.[85] Whether States actually exercise jurisdiction when conducting interception measures on the high seas depends, among other things, on the degree of *de facto* control deemed sufficient to establish jurisdiction.[86]

C. Jurisdiction in the Context of Extraterritorial Control of Irregular Migration Movements

The purpose of this chapter is first to provide an overview of the extraterritorial migration control measures taken by European States to combat irregular migration by sea and the jurisdictional problems involved. Furthermore, the findings are measured against the standard of good faith developed above.

A first generation of *non-entrée* measures that rely on unilateral deterrence by the destination State includes, in addition to denying visa applications, intercepting persons on the move at the moment they have already become part of the irregular movement system. These are referred to as traditional or classical measures in academia, among others,[87] and are characterized by the fact that the receiving State acts geographically outside its own border (I.). Having proven problematic from various points of view, these interception measures have led to the implementation of a newer generation of *non-entrée* policies based on cooperation with third States and characterized by the absence of a factual link to the destination State (II.).

I. First Generation Measures of Extraterritorial Migration Control

First generation extraterritorial migration control measures focus mainly on geographic distance from the national territory and do not necessarily involve

82 *Report of the Special Rapporteur of the Human Rights Council*, *supra* note 81, para. 11; Brouwer & Kumin, *supra* note 81, 11; Frelick, Kysel & Podkul, *supra* note 78, 193.

83 *Convention on the Law of the Sea*, 10 December 1982, Art. 2, 1833 UNTS 3 [UNCLOS].

84 UNCLOS, Art. 33 (1); A. Klug & T. Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle to Extraterritorial Interception Measures', in B. Ryan & V. Mitsilegas (eds), *Extraterritorial Immigration Control* (2010), 69, 93.

85 *Ibid.,* 95; UNCLOS, Art. 86.

86 Klug & Howe, *supra* note 84, 96-97.

87 For terminology see for example Ciliberto, *supra* note 24, 492; Hathaway & Gammeltoft-Hansen, *supra* note 63, 243.

cooperation with third countries.[88] A strategy that focuses strictly on territorial borders has proven ineffective in combating irregular migration as fences and surveillance systems do not absolutely deter migrants from entering national territory.[89] This has led to the practice of push-backs on the high seas, where States usually exercise full physical control (1.). In addition, other practices with a lower degree of physical control raise the question of what degree of *de facto* control is considered sufficient to establish jurisdiction (2.).

1. Interception Measures Conducted with Full Physical Control

As a classic form of *non-entrée*, States attempt to deter migrants on the high seas to prevent them from entering territorial waters.[90] The term push-back was likely first used by the UN High Commissioner for Refugees (UNHCR) in a 2009 briefing note,[91] referring to operations conducted by Italy and other countries that same year.[92] In nine operations, 834 individuals were returned to Libya,[93] the return conducted directly by Italian authorities on Italian ships or through transfers by Italian authorities to the so-called Libyan Coast Guard.[94] These interceptions were carried out in accordance with bilateral agreements between Italy and Libya, including the Treaty on Friendship, Partnership, and Cooperation signed in August 2008.[95]

Aside from the outlier case of *Sale*,[96] where the United States' Supreme Court rejected the exercise of extraterritorial jurisdiction by American patrol boats on the high seas,[97] there is little support today for the view that States

88 Special Rapporteur on the Human Rights of Migrants, *supra* note 77, para. 55.
89 J. Carling, 'Migration Control and Migrant Fatalities at the Spanish-African Borders', 41 *International Migration Review* (2007) 2, 316, 340; Den Heijer, 'Europe Beyond Its Borders', *supra* note 7, 169; Gammeltoft-Hansen, 'Extraterritorial Migration Control', *supra* note 72, 113.
90 Hathaway & Gammeltoft-Hansen, *supra* note 63, 245.
91 UNHCR, 'UNHCR Interviews Asylum Seekers Pushed Back to Libya' (2009), available at https://www.unhcr.org/4a5c638b6.html (last visited 11 February 2024).
92 M. Den Heijer, 'Reflections on Refoulement and Collective Expulsion in the Hirsi Case', 25 *International Journal of Refugee Law* (2013) 2, 265, 269 [Den Heijer, 'Reflections on Refoulement'].
93 *Hirsi*, *supra* note 1, para. 101.
94 *Ibid*., para. 20.
95 Den Heijer, 'Reflections on Refoulement', *supra* note 92, 269.
96 *Chris Sale et. al. v. Haitian Centers Council et. al.*, US Supreme Court 509 US 155, Judgment of 21 June 1993.
97 *Ibid*., 173-174.

can return refugees on the high seas without exercising jurisdiction.[98] Most prominently, the Grand Chamber of the ECtHR ruled in *Hirsi*[99] that push-backs on the high seas are conducted in the exercise of jurisdiction and therefore trigger *non-refoulement* under Art. 3 ECHR.[100] The Court based its decision on two grounds of jurisdiction.[101] First, it found that Italy exercised *de jure* control because the migrants were transferred to Italian vessels.[102] Applying the flag-State-principle,[103] as confirmed in *Rigopoulus*[104] and *Banković*,[105] a State has *de jure* jurisdiction over vessels flying its flag.[106] Moreover, Italy was found to have also exercised *de facto* control over the migrants on board its vessels.[107] In this regard, the Court referred to its decision in *Medvedyev*,[108] where it found that France had exercised "full and exclusive control"[109] when French navy commandos boarded a Cambodian vessel on the high seas and arrested the crew.[110] Although the factual control exercised by Italy in *Hirsi*[111] did not amount to arrest or detention as in *Medvedyev*,[112] it did involve a strong physical presence of intercepting State forces since the migrants were physically transferred to Italian vessels and handed over to Libya by the Italian authorities.[113]

98 Hathaway & Gammeltoft-Hansen, *supra* note 63, 247-248.
99 *Hirsi*, *supra* note 1.
100 *Ibid*., paras 134-135; Hathaway & Gammeltoft-Hansen, *supra* note 63, 248.
101 *Hirsi*, *supra* note 1, paras 81-82.
102 *Ibid*., paras 11, 77.
103 UNCLOS, Art. 92.
104 *Rigopoulus v. Spain*, ECtHR Application No. 37388/97, Decision of 12 January 1999 [*Rigopoulus*].
105 *Banković*, *supra* note 14, para. 73.
106 *Hirsi*, *supra* note 1, para. 75.
107 *Ibid*., para. 81.
108 Medvedyev, *supra* note 45.
109 *Ibid*., para. 67.
110 J. Coppens, 'Interception of Migrant Boats at Sea', in V. Moreno-Lax & E. Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (2017), 199, 218-219 [Moreno-Lax & Papstavridis, *Boat Refugees*].
111 *Hirsi*, *supra* note 1.
112 *Medvedyev*, *supra* note 45, para. 98.
113 *Hirsi*, *supra* note 1, para. 11.

2. Interception Measures Conducted with Lower Degree of Physical Control

While there is little doubt about the exercise of jurisdiction in cases where migrants are brought onto the intercepting State's vessel,[114] the Court has not defined clear criteria for the degree of *de facto* control required to establish jurisdiction.[115] For example, it is not entirely clear how to deal with cases where the migrants remain on their vessels. In *Xhavara*,[116] where the migrants were not transferred to the Italian vessel, the Court relied on a prior written agreement between Italy and Albania and did not assess the issue of jurisdiction further.[117] Together with *Rigopoulus*,[118] this decision suggests that jurisdiction could be assumed in cases where control is exercised by organs of the Contracting States, such as military vessels.[119]

An open question in this context is whether any exercise of governmental authority acting on the concerned persons amounts to the exercise of jurisdiction or whether some additional exercise of effective control is required.[120] Some decisions further suggest that the limited use of force used to prevent the vessel in question from proceeding is also sufficient to establish a jurisdictional nexus.[121] In *Andreou*,[122] the Court found the Convention applicable because Turkey opened fire, even though it was in an area not controlled by Turkey.[123] In *Women on Waves*,[124] the Court declared the Convention applicable seemingly

114 D. Guilfoyle, 'Human Rights Issues and Non-Flag State Boarding Of Suspect Ships in International Waters', in C. R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), 83, 88-89; E. Papastavridis, 'European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?', in M. Fitzmaurice & P. Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights* (2013), 117, 125 [Papastavridis, 'European Convention on Human Rights'].

115 Den Heijer, 'Reflections on Refoulement', *supra* note 92, 273.

116 *Xhavara*, *supra* note 64.

117 Elaborated in *Hirsi*, *supra* note 1, para. 169; *Banković*, *supra* note 14, paras 37, 81; Gammeltoft-Hansen, *Access to Asylum, supra* note 29, 124.

118 Rigopoulus, *supra* note 104.

119 Papastavridis, 'European Convention on Human Rights', *supra* note 114, 124; Papanicolopulu, *supra* note 44, 422.

120 Den Heijer, 'Reflections on Refoulement', *supra* note 92, 273.

121 Papastavridis, 'European Convention on Human Rights', *supra* note 114, 125.

122 *Andreou v. Turkey*, ECtHR Application No. 45653/99, Judgment of 27 October 2009 [*Andreou*].

123 *Ibid*., para. 25.

124 *Women on Waves and Others v. Portugal*, ECtHR Application No. 31276/05, Judgment of 3 May 2009.

on the basis that the Portuguese warship performed tactical maneuvers aimed at stopping a vessel called *Borndiep* without boarding it, but again the Court did not explicitly address the issue of jurisdiction.[125] Therefore, it remains an open question whether effective control is exercised when a boat's course is diverted and it is escorted back to, for example, Libya.[126] However, in *MN and Others*,[127] it is clear that the Court considers that *de facto* control cannot be established by the submission of a visa application in an embassy of the destination State.[128] The Court held that the mere presence on the premises of diplomatic or consular buildings may not suffice to establish a jurisdictional link if the applicants act unilaterally and can leave at any moment.[129] The requisite degree of factual control must therefore involve some form of coercion on the part of the State to be considered strong enough by the ECtHR.

Nevertheless, some scholarly voices seem to assume that the very act of monitoring a vessel before intercepting it brings it under the jurisdiction of the Contracting State.[130] In this vein, the UN Human Rights Council's Special Rapporteur on extrajudicial, arbitrary, and summary executions noted that the European Union has established such a comprehensive surveillance system that a sufficient level of "functional control"[131] can be assumed to trigger human rights obligations.[132] Papastavridis, on the other hand, cites *Al-Skeini*,[133] where the Court held that jurisdiction does not arise solely from spatial control over, for example, vessels or buildings, but from the "exercise of physical control over the person in question",[134] and finds it highly unlikely that jurisdiction can be established on the mere basis of a surveillance system.[135]

125 *Ibid*.; Ciliberto, *supra* note 24, 518; Papastavridis, 'European Convention on Human Rights', *supra* note 114, 125.
126 Coppens, *supra* note 110, 219; Papanicolopulu, *supra* note 44, 423
127 *MN and Others*, *supra* note 65.
128 *Ibid*., para. 125.
129 *Ibid*., para. 118.
130 See S. P. Bodini, 'Fighting Maritime Piracy Under the European Convention on Human Rights', 22 *European Journal of International Law* (2011) 3, 829, 835; R. Geiß & A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011), 108.
131 Report of the Special Rapporteur of the Human Rights Council, *supra* note 81, para. 64.
132 *Ibid.*
133 *Al-Skeini*, *supra* note 40.
134 *Ibid*., para. 136.
135 Papastavridis, 'European Convention on Human Rights', *supra* note 114, 125; see also Guilfoyle, *supra* note 114, 89.

3. Conclusion on the Findings of Jurisdiction Concerning First Generation Measures

In summary, applying case law of the ECtHR on interceptions on the high seas, persons brought on board the intercepting vessel come within the *de jure* and *de facto* jurisdiction of the respective flag State.[136] In cases that do not involve the physical transfer of persons, it remains decisive what degree of *de facto* control is sufficient to establish jurisdiction.

Although safe assumptions about the existence of jurisdiction cannot be made in all cases, first generation migration control measures primarily relying on geographic distance are proving increasingly problematic for States.[137] In addition to the evolving legal challenges, modern ways of human smuggling complicate the measures initially applied.[138]

This leads to the conclusion that the understanding of jurisdiction elaborated above ensures the object and purpose of *non-refoulement* if there is at least some factual link in the tradition of the ECtHR`s jurisprudence, since States are then obligated to examine the details of the case. However, according to the case law of the Court, it is permissible for States to avoid exercising *de facto* control to an extent that cannot be denied for the establishment of extraterritorial jurisdiction, such as by refraining from taking action on or refusing visa applications. This approach follows the inherently territorial understanding of jurisdiction in the way that some kind of intentional and externally perceptible connection between the State and the individual is required. The object and purpose of *non-refoulement*, though, cannot be secured by an omission on the part of the State, especially when the omission (e.g., the issuance of visa) occurs in the context of a bureaucratically established procedure by the State that allows the individual to "unilaterally" establish a *de facto* link. If the individual enters this system, which on the part of the State is not detached from its human rights obligations, it cannot be consistent with their purpose to allow States, on the one hand, to make this system very strict in order to keep certain individuals outside the legal system and, at the same time, to deny the factual effect of the system

136 UNHCR, 'Submission in the Case of Hirsi and Others v. Italy' (2010), para 4.3.2, available at https://www.unhcr.org/protection/operations/4decccc19/submission-office-united-nations-high-commissioner-refugees-case-hirsi.html (last visited 11 February 2024).

137 T. Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy: The Case of Deterrence Policies', 27 *Journal Refugee Studies* (2014) 4, 574, 584 [Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy'].

138 Hathaway & Gammeltoft-Hansen, *supra* note 63, 246.

in establishing a jurisdictional link. When the Court speaks of migrants being culpable when they do not go through the regular procedures in *ND and NT*,[139] it is only consistent to assume a *de facto* link between the State and the individual when they do so.[140] The object and purpose of *non-refoulement* therefore require a generous understanding of the degree of factual control required, taking into account the legal realities of the migration system as a whole.

II. Cooperation-Based Measures of Extraterritorial Migration Control

New forms of extraterritorial migration control rely on close cooperation between Contracting States and third States, typically States of transit or origin.[141] These States are oftentimes willing to serve as "gatekeepers" for political and economic reasons.[142] These are precisely the States that are not bound by the ECHR's comparatively effective system of human rights protection.[143]

The ultimate goal has become to sever any jurisdictional link by eliminating all physical contact between Contracting States and migrants.[144] The main focus of this cooperation-based form of migration control is no longer the geographic distance but rather on the shift of responsibility to another actor.[145] These measures of "consensual containment"[146] benefit European states in their aim to reduce the number of arrivals and controlling streams before they even occur.[147] Measures of "contactless control" range from funding detention centers in third States,[148] readmission agreements that facilitate the return of migrants,[149] and the establishment of information campaigns aiming at shifting responsibility

139 *ND and NT*, *supra* note 38.
140 *Ibid*., para. 208.
141 Markard, *supra* note 22, 610.
142 Hathaway & Gammeltoft-Hansen, *supra* note 63, 249; Markard, *supra* note 22, 593.
143 Ciliberto, *supra* note 24, 526; M. Den Heijer & J. Schechinger, 'Refoulement', in A. Nollkaemper & I. Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017), 496.
144 Giuffré & Moreno-Lax, *supra* note 22, 4.
145 T. Gammeltoft-Hansen, 'Growing Barriers: International Refugee Law', in M. Gibney & S. Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (2010), 74 [Gammeltoft-Hansen, 'Growing Barriers'].
146 Giuffré & Moreno-Lax, *supra* note 22, 15.
147 Giuffré & Moreno-Lax, *supra* note 22, 15.
148 D. Lutterbeck, 'Migrants, Weapons and Oil: Europe and Libya After the Sanctions', 14 *The Journal of North African Studies* (2009) 2, 169, 172.
149 Boswell, *supra* note 81, 619.

to the migrants themselves.[150] They may be described as "orchestrated forms of consensual and proactive containment",[151] establishing a passive deterrence paradigm among European States.[152] In the context of irregular migration across the Mediterranean, the coordination of interception measures carried out by a third State, so-called pull-backs, are particularly interesting with respect to jurisdiction (1.). Even further reducing the level of *de facto* control, the financing, equipping, and training of third States' coast guards may serve as an example (2.).

1. Coordination of Interception Measures Conducted by a Third State

The case pending before the ECtHR, *SS and Others v. Italy*,[153] can serve to illustrate the jurisdictional problems that arise in the context of remote migration control through cooperation with the local administration of a third State.[154] The application was filed by the Global Legal Action Network based on the reconstruction of events alleged to have occurred on November 6th, 2017.[155] Compared to the push-backs in *Hirsi*,[156] the underlying policy objective was the same, which was preventing migrants from reaching Italian territorial waters, even if the actors were different.[157] In *SS and Others*, it was not the Italian authorities that conducted the operation but their Libyan counterparts.[158] Although the Maritime Rescue Coordination Center (MRCC) in Rome was the first to receive the distress call of the sinking dinghy with around 150 migrants on the high seas, Italian authorities were not physically involved in the operation.[159] They communicated the situation to nearby ships, including Libya's *Ras Al Jadar*.[160] In addition, it appears that the MRCC in Rome communicated

150 Giuffré & Moreno-Lax, *supra* note 22, 14-15; C. Oeppen, '"Leaving Afghanistan! Are You Sure?" – European Efforts to Deter Potential Migrants Through Information Campaigns', 9 *Human Geography* (2016) 2, 57, 59.
151 Giuffré & Moreno-Lax, *supra* note 22, 3.
152 *Ibid.*
153 *SS and Others v. Italy (Exposé des faits)*, ECtHR Application No. 21660/18, communicated on 26 June 2019 [*SS and Others*].
154 Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 15, 387.
155 *Ibid.*
156 *Hirsi*, *supra* note 1.
157 Ciliberto, *supra* note 24, 499.
158 *SS and Others*, *supra* note 153, paras 7-8.
159 Pijnenburg, *supra* note 27, 409.
160 *SS and Others*, *supra* note 153, paras 3-4.

directly with the Libyan Coast Guard's Joint Operation Room in Tripoli, asking them to assume on-scene command.[161] So far, it is unclear how the Court will rule in this case. Did Italy exercise jurisdiction by apparently coordinating the operation, even though its own agents were not directly involved?

Indeed, in *Hirsi*,[162] the Court stated that jurisdiction can be assumed when State authorities take action and "the effect of which is to prevent non-nationals from reaching the borders of the State".[163] It has also repeatedly held that "acts of the Contracting State performed, or producing effects, outside their territories can constitute an exercise of jurisdiction".[164] The Court could therefore find that the instructions issued from Italian territory had extraterritorial effects since they led to the operation carried out by the Libyan authorities.[165] Some of the few cases that support the understanding that the extraterritorial effects of State conduct can trigger its jurisdiction involve the use of force by Turkish troops while the individuals involved were near or within a UN buffer zone.[166] These findings are, however, contrary to the Court's ruling in *Banković*,[167] where it explicitly rejected a "cause and effect"[168] understanding of jurisdiction.[169]

The crucial question in this context remains whether the Court will find sufficient causal nexus between the Italian instructions and the conduct of the Libyan authorities.[170] However, this may be more of a merits issue than a jurisdictional issue.[171] All in all, the outcome of the case remains unclear. The Court could refer to different strands of its jurisprudence to establish a

161 Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 15, 389; whether jurisdiction could be established based on the mere presence of an Italian helicopter on the scene will be left aside for the purpose of this paper. On this, see Pijnenburg, *supra* note 27, 408-413.

162 *Hirsi*, *supra* note 1.

163 *Ibid*., para. 180.

164 *Ibid*., para. 72; similarly, see *Banković*, *supra* note 14, para. 67; *Al-Skeini*, *supra* note 40, para. 131; *Drozd and Janousek*, *supra* note 14, para. 91.

165 Pijnenburg, *supra* note 27, 422.

166 *Andreou*, *supra* note 122, paras 25-26; *Solomou and Others v. Turkey*, ECtHR Application No. 36832/97, Judgment of 24 June 2008, paras 50-51; *Pad*, *supra* note 38, paras 53-55; *Isaak*, *supra* note 38, para. 21; similarly, see *Al-Skeini*, *supra* note 40, para. 133; *Drozd and Janousek*, *supra* note 14, para. 91.

167 *Banković*, *supra* note 14.

168 *Ibid*., para. 75.

169 *Ibid*., para. 75; reaffirmed in *Medvedyev*, *supra* note 45, para. 64; Milanovic, *Extraterritorial Application of Human Rights Treaties*, *supra* note 46, 187.

170 Pijnenburg, *supra* note 27, 423.

171 In *Rantsev v. Cyprus and Russia*, ECtHR Application No. 25965/04, Judgment of 10 January 2010, para. 208, the Court reserved this question of responsibility to the merits;

jurisdictional link based on the Italian instructions.[172] However, this would represent a major step beyond the limits of its inherently territorial understanding of jurisdiction and the strict understanding of the full and exclusive control requirement.[173]

2. Export of Migration Control Measures by Financing, Equipping and Training Third States

There are cases where the Contracting Party's involvement is limited to indirectly supporting third States in conducting interceptions through funding, as well as providing equipment and training.[174] In the context of the November 2017 incident, the longstanding cooperation between Italy and Libya was already acknowledged in *Hirsi*.[175] The Libyan ship that carried out the interception had been donated by Italy[176] and the Libyan crew had been trained by the EUNAVFOR MED mission.[177] In addition, Italy supports the Libyan Coast Guard by funding the maintenance of their patrol boats,[178] providing technical and logistical advice,[179] and by setting up a center for coordinating operations.[180] In 2017, Italy actively supported Libya in establishing its own Search and Rescue Region and assisted Libya in building its own MRCC.[181] Moreover, Italy funded several migrant detention centers in Libya.[182]

For the purposes of jurisdiction, one could rely on the Court's line of reasoning in *Ilascu*.[183] The Court found that the Russian Federation exercised

while in *Andreou*, *supra* note 122, para. 25, the direct causal nexus was considered sufficient to trigger jurisdiction.

172 Pijnenburg, *supra* note 27, 426.

173 *Ibid*., 411.

174 Boswell, *supra* note 81, 619; Hathaway & Gammeltoft-Hansen, *supra* note 63, 252; Markard, *supra* note 22, 612.

175 *Hirsi*, *supra* note 1, paras 13, 19-20.

176 Amnesty International, 'Libya's Dark Web of Collusion: Abuses Against Europe-Bound Refugees and Migrants' (2017), 45, available at https://www.amnesty.org/en/documents/mde19/7561/2017/en/ (last visited 11 February 2024); Pijnenburg, *supra* note 27, 413-414.

177 Amnesty International, *supra* note 176, 46.

178 *Ibid.*

179 *Ibid*.

180 *Ibid*.; Lutterbeck, *supra* note 148, 172.

181 Amnesty International, *supra* note 176, 45.

182 Lutterbeck, *supra* note 148, 172; Giuffré & Moreno-Lax, *supra* note 22, 8.

183 *Ilascu*, *supra* note 53.

extraterritorial jurisdiction due to its "decisive influence"[184] over the self-proclaimed "Moldavian Republic of Transdniestria" [185] (MRT). The local administration had survived only "by virtue of the military, economic, financial and political support given to it by the Russian Federation".[186] It follows that the duty to protect human rights abroad can also be inferred from the extent of a State's influence, even if the act in question was committed by another actor.[187]

Indirect support for maritime interceptions by third States could therefore amount to "decisive influence",[188] as they might not have been able to conduct the operation in question without European support.[189] However, there are significant differences in the geographic situation of the MRT case and the incidents at stake.[190] While Russia has been found to have effective control over the MRT,[191] the funding and supporting States clearly do not exercise effective control over the high seas or third State territory.[192] This dependency of the decisive influence criterion was also recognized by the Court when it found that the Republic of Moldova, as the official territorial State, still had a duty to comply with its positive obligations under the ECHR, even though it did not have effective control over the MRT.[193] Therefore, it seems that, in the absence of effective control, obligations to prevent violations of the Convention arise only when there is an additional factor of control.[194]

Overall, the decisive influence threshold established in the context of the MRT is quite high and, if applied to the cases outlined above, would not be met by Italy, for example, because the indirectly supporting States do not exercise effective control.

184 *Ibid*., para. 392.
185 *Ibid.*
186 *Ibid.*
187 Pijnenburg, *supra* note 27, 415.
188 *Ilascu*, *supra* note 53, para. 392.
189 Ciliberto, *supra* note 24, 527-528; Giuffré & Moreno-Lax, *supra* note 22, 23-24.
190 Ciliberto, *supra* note 24, 528.
191 *Ilascu*, *supra* note 53, para. 392.
192 Ciliberto, *supra* note 24, 528.
193 *Sandu and Others v. The Republic of Moldova and Russia*, ECtHR Application Nos 21034/05 and 7 others, Judgment of 3 December 2018, para. 34; *Ilascu*, *supra* note 53, para. 331.
194 Ciliberto, *supra* note 24, 528.

3. Conclusion on the Findings of Jurisdiction Concerning Cooperation-Based Measures

Applying the ECtHR's current jurisprudence to cases that do not involve a territorial or factual control link in the Court's original sense, it becomes clear that jurisdiction cannot be seen exclusively in terms of a factual ability of the State to access the individual if the object and purpose of *non-refoulement* is the standard. While questions of causality and foreseeability to establish liability remain particularly difficult in these cases of indirect control, the purpose of *non-refoulement* is to secure the life of those immediately threatened and so prohibits State conduct aimed at preventing consideration of the merits of the case by bypassing jurisdiction. At least in the context of pull-backs, it seems incoherent to deny the application of the Convention merely because States, aware of ECtHR jurisprudence, do not use their own State agents but those of third States, especially since the question of attribution remains to be resolved on the merits. This may be different for the latter group of cases, since the financing of third States is not, at least at first glance, directly connected with a concrete event relevant under Art. 3 ECHR. However, where the assumption of such a factual connection in the sense of decisive influence is possible, the object and purpose of *non-refoulement* require a broad understanding.

D. A Right to Effective Asylum Procedures through Jurisdiction Understood in Good Faith

Some scholars in international law seem to assume that any exercise of migration control, whether territorial or extraterritorial, entails the exercise of jurisdiction.[195] Although the Court in *Medvedyev*[196] stated that the maritime environment is not a place devoid of human rights protection,[197] current jurisprudence of the ECtHR does not follow this entirely.[198] The primarily territorial nature of jurisdiction and a comparatively strict threshold for effective control[199] make the assumption of jurisdiction in the context of extraterritorial

195 See for example Lauterpacht & Bethlehem, *supra* note 34, 111; Concurring Opinion of Judge Pinto de Albuquerque, *supra* note 3, paras 74-76; E. Willheim, 'MV Tampa: The Australian Response', 15 *International Journal of Refugee Law* (2003) 2, 159, 175.

196 Medvedyev, *supra* note 45.

197 *Ibid*., para. 81; reaffirmed in *Hirsi*, *supra* note 1, para. 178.

198 Gammeltoft-Hansen, *Access to Asylum, supra* note 29, 100.

199 See for comparison Human Rights Committee, *AS, DI, OI and GG v. Malta*, CCPR/C/128/D/3043/2017, 13 March 2020, para. 7.8.

migration control the exception rather than the rule. However, *Banković*[200] has also been strongly criticized and some scholars assume that the Court itself is moving away from this doctrine.[201] Among the most exceptional cases in terms of jurisdiction are *Ilascu*,[202] *Andreou*,[203] and *Issa*.[204] Nevertheless, there are many incidents of current State practice where it is not clear whether or not they are carried out in the exercise of jurisdiction, leading to ambiguity as to the applicability of *non-refoulement*.[205]

In this light, two findings can be made. Firstly, States are actively seeking to circumvent obligations of *non-refoulement*.[206] The measures as analyzed above do not claim to present a complete picture. Rather, they are intended to give an idea of what is described as a comprehensive paradigm of "cooperative deterrence".[207] Not only in the context of the Mediterranean, but also beyond, States jointly strive to control and prevent migration flows.[208] In doing so, States aim for the highest possible efficiency of migration control on the one hand and the elimination of any direct contact on the other.[209] This has led to increasingly indirect measures of migration control, as evidenced by the push-back versus pull-back strategies.[210] Taken together, these measures of "consensual containment"[211] dramatically worsen the ability of refugees to access effective protection against *refoulement*.[212]

This leads to the second finding about how States attempt to circumvent *non-refoulement*. The ambiguity of jurisdiction, as currently understood by the ECtHR, allows States to use this trigger mechanism to avoid human rights

200 *Banković*, *supra* note 14.
201 L. Loucaides, 'Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case', in L. Loucaides, *The European Convention on Human Rights: Collected Essays* (2007), 73-75 (with further references); V. Mantouvalou, 'Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality', 9 *International Journal on Human Rights* (2005) 2, 147, 159.
202 *Ilascu*, *supra* note 53.
203 *Andreou*, *supra* note 122.
204 *Issa*, *supra* note 57; Gammeltoft-Hansen, *Access to Asylum*, *supra* note 29, 150.
205 See parts (C.I.) and (C.II.) of this paper.
206 Pijnenburg, *supra* note 27, 407.
207 Hathaway & Gammeltoft-Hansen, *supra* note 63, 235; T. Gammeltoft-Hansen & N. F. Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy', 5 *Journal of Migration and Human Security* (2017) 1, 28, 31.
208 Hathaway & Gammeltoft-Hansen, *supra* note 63, 235.
209 *Ibid*., 284.
210 See parts (C.I.) and (C.II.) of this paper.
211 Giuffré & Moreno-Lax, *supra* note 22, 5.
212 Den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 76, 178.

obligations. In this sense, jurisdiction affords a structural incentive for States to engage in extraterritorial migration control.[213] The resulting gaps are not necessarily protection vacuums outside the law due to non-compliance.[214] Rather, the structures set by international law trigger creative legal thinking within European migration policy to find the most efficient way for ensuring that migrants do not reach territorial borders.[215] The way international law distributes responsibility through the factor of jurisdiction renders humans in certain spaces *de facto* and *de jure* without rights.[216] However, with a growing number of Court decisions in this context, the limiting structures seem to be tightening up. The first generation measures of extraterritorial migration control that, against the background of *Banković*,[217] primarily relied on the externalization aspect have been successfully challenged, at least in their most visible form of push-backs by *Hirsi*.[218] Thus, 'effective control' became decisive and has led to the development of a new generation of extraterritorial migration control measures based on cooperation and attempting to export classical migration control measures to third States.[219] The relationship between European migration policies and the ECtHR's jurisprudence on the issue of jurisdiction is crucial in this regard and resembles a cat-and-mouse game.[220] While the Court follows the newly adapted migration control measures with a few years' delay, the applied case law can also be seen as an "indirect road map"[221] for the next generation of extraterritorial migration control.[222]

Nevertheless, these findings raise serious concern as to the effective protection of those who are about to come under the jurisdiction of a State but do not reach territorial borders.[223] What value do codified rights under the ECHR have if they are not actually applied? Given that there are certainly

213 Gammeltoft-Hansen, *Access to Asylum*, *supra* note 29, 146-147.
214 *Ibid*., 149; *Al-Skeini*, *supra* note 40, para. 142; see also *Cyprus*, *supra* note 52, para 78.
215 Special Rapporteur on the Human Rights of Migrants, *supra* note 77, para. 56; Gammeltoft-Hansen, *International Refugee Law and Refugee Policy*, *supra* note 137, 586.
216 I. Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law', 29 *European Journal of International Law* (2018) 2, 347, 348.
217 *Banković*, *supra* note 14.
218 *Hirsi*, *supra* note 1; Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy', *supra* note 137, 584.
219 Boswell, *supra* note 81, 622.
220 Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy', *supra* note 137, 588.
221 *Ibid.*
222 *Ibid.*
223 Report of the Special Rapporteur of the Human Rights Council, *supra* note 81, para. 36.

numerous incidents in which extraterritorial migration control in fact results in the violation of *non-refoulement*, these policies pose significant questions about whether States actually respect their legal obligations. If taken seriously, jurisdiction must not be interpreted in such a way as to allow States to circumvent their obligations. To this extent, jurisdiction under Art. 1 ECHR cannot be considered "from the standpoint of public international law".[224] However, a broader understanding of jurisdiction in this sense does not replace the criteria of causation and foreseeability as they are still to be applied within the merits.[225] Good faith does therefore not imply obligations beyond the capacity of States but, in the context of *non-refoulement*, good faith does require that States provide access to effective asylum procedures.[226] Against this background, and in order not to deprive *non-refoulement* of its effectiveness, States must recognize "the right to have rights" in the sense of a right to access jurisdiction.

224 *Banković*, *supra* note 14, 59.

225 See exemplarily *Soering*, *supra* note 11, para 86.

226 Hathaway & Gammeltoft-Hansen, *supra* note 63, 238; M. Giuffré, 'Access to Asylum at Sea? Non-Refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations', in Moreno-Lax & Papastavridis, *Boat Refugees*, *supra* note 10, 248, 255; G. Noll, 'Seeking Asylum at Embassies: A Right to Entry Under International Law?', 17 *International Journal of Refugee Law* (2005) 3, 542, 548.

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Containing the Containment: Using Art. 16 ASR to Overcome Accountability Gaps in Delegated Migration Control

Lina Sophie Möller*

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Abstract

When the European Court of Human Rights found Italy responsible for push-backs on the high seas in *Hirsi Jamaa* based on Italy's effective control over the individuals, it simultaneously solidified the concept of jurisdiction as a prerequisite of human rights obligations and provided States with deeper knowledge on how to avoid responsibility. Since then, instead of pushing the migrants back themselves, destination States increasingly delegate the task of migration control to third States. Under the guise of "capacity building", they fund, train, and equip third States to exercise containment measures and carry out pull-backs. By way of bilateral agreements, destination States remain in control of the migration flow while avoiding any direct contact with the migrants that would trigger their human rights obligations. One example for this is the Italian-Libyan cooperation under the 2017 *Memorandum of Understanding*, which was renewed in 2020.

Migrants intercepted by Libya are systematically detained in prisons under horrific conditions, which is in clear violation of their human rights. The present article explores ways to allocate responsibility on destination States for their involvement in those human rights violations notwithstanding the lack of jurisdiction. In particular, the article deals with the question whether the general international law of State responsibility is applicable alongside international human rights law. Responsibility for complicity, as lined out in Art. 16 of the *Articles on State Responsibility for Internationally Wrongful Acts*, is compared to the concept of due diligence obligations in international human rights law, dismissing the claim that the latter poses *lex specialis*. Subsequently, Art. 16 ASR's substantive requirements are applied to the case study in order to test the provision's capability to overcome the accountability gap.

A. Introduction

Current European migration policies seem to be motivated by the belief that migrants and refugees who are out of sight and out of control do not possess any claims of protection.[1] States are eager to *externalize* their borders, which involves the delegation of migration control to third States.[2] Destination States fund, train, and equip these third States to exercise containment measures and carry out pull-backs.[3] Legally, the minimalization of contact by the destination State serves to evade any jurisdictional link that would trigger its human rights obligations.[4] However, it seems untenable that a State could escape responsibility by "outsourcing or contracting out its obligations".[5] This work draws on the potential of Art. 16 of the International Law Commission's (ILC) *Articles on State Responsibility for Internationally Wrongful Acts* (ASR)[6] to cure this ill. Ultimately, it raises the question whether States should be held accountable for their involvement in containment measures beyond the scope of jurisdiction and, if so, whether Art. 16 ASR is a capable legal instrument to do so. In particular, it looks at the Italian contribution to selected human rights violations by Libya under the *International Covenant on Civil and Political Rights*

1 V. Moreno-Lax & M. Lemberg-Pedersen, 'Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization', 56 *Questions of International Law, Zoom-In* (2019), 5.

2 G. Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law', 4 *Italian Law Journal* (2018) 2, 489, 497; A. Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?', 20 *Human Rights Law Review* (2020) 2, 306, 323; M. Giuffré & V. Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows', in S. Juss (ed.), *Research Handbook on International Refugee Law* (2019), 84.

3 Ciliberto, *supra* note 2, 490.

4 Giuffré & Moreno-Lax, *supra* note 2, 85; J. C. Hathaway & T. Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence', 53 *Columbian Journal of Transnational Law* (2015) 2, 235, 244.

5 G. Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations', 9 *University of Technology Sydney Law Review* (2007), 26, 34.

6 *ILC Articles on the Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10, UN Doc. A/56/10, chap. IV.E.1, November 2001 [ASR].

(ICCPR)[7] as determined by the 2017 *Memorandum of Understanding* (MoU) between the two countries.[8]

First, this analysis sheds light on the role of jurisdiction when allocating responsibility for delegated migration control (A.). Next, it questions Art. 16 ASR's applicability to international human rights law (IHRL) (B.), explaining the concept of derived responsibility (I.), responsibility for disregard of due diligence in IHRL (II.), determining their overlap (III.), and then dismissing the claim that due diligence and its prerequisite of jurisdiction pose *lex specialis* to Art. 16 ASR (IV.). In a third step, the work applies Art. 16 ASR to Italy's support of Libya under the MoU (C.). It starts by presenting the cooperation's factual and legal background (I.) and identifies Libya's violation of Art. 7(1) and 10(1) ICCPR (II.). It then moves on to the substantial requirements of Art. 16 ASR (III.), namely the material element of aid and assistance, the mental element ranging from knowledge to intent, and the opposability of norms. As a conclusion, the article promotes the concept that allocating responsibility to delegating States is appropriate and desirable while also discussing courts' reluctance to do so (D.).

B. Irresponsibility of Destination States Absent Jurisdiction?

The relevance of the concept of jurisdiction stems from jurisdictional clauses such as Art. 2(1) ICCPR, which restricts the Covenant's applicability.[9] It determines that a State owes the obligations to "all individuals within its territory and subject to its jurisdiction". The Human Rights Committee (HRC) interpreted this as including all persons over whom a State exercises power or effective control, including extraterritorially.[10] The concept of extraterritorial

7 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR].

8 *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*, 2 February 2017, renewed on 2 February 2020, available at https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf (last visited 11 February 2024) [MoU].

9 D. Davitti, 'Beyond the Governance Gap: Accountability in Privatized Migration Control', 21 *German Law Journal* (2020) 3, 487, 501.

10 Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 10. [CCPR, *General Comment No. 31*].

jurisdiction is a developing field in human rights jurisprudence. While the HRC has shown willingness to explore a functional approach in the context of the right to life,[11] ultimately, some form of factual personal control remained necessary to establish jurisdiction.[12] Cooperation with third States in the form of funding, training, and equipment is appealing to destination States because it is explicitly designed to avoid such direct control.[13]

This reveals a major flaw of expanding jurisprudence on the concept of extraterritorial jurisdiction. When the European Court of Human Rights (ECtHR), for example, found Italy responsible for push-backs on the high seas in *Hirsi Jamaa* based on *de jure* and *de facto* control over the individuals,[14] it simultaneously solidified the concept of jurisdiction and provided States with deeper knowledge on how to avoid responsibility.[15] Rather than stopping human rights violations from taking place in the context of delegated migration control, explicit adjudication has enabled States to enter ostensible enforcement vacuums beyond courts' reach by aligning their cooperation along the set boundaries.[16] By this, such adjudication fosters the bifurcation of executive and judiciary, of policy and law, something Mann calls the "dialectic of transnationalism".[17] Running just below the jurisdictional threshold of human rights treaties, delegated migration control thus appears to fall within an accountability gap.[18]

11 Human Rights Commitee, *General Comment No. 36: Article 6 (The Right to Life)*, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 63; Human Rights Committee, *AS, DI, OI and GD v. Italy,* Communication No. 3042/2017, UN Doc. CCPR/C/130/D/3042/2017, 11 April 2021, para. 7.7 [*AS et al. v. Italy*]; Human Rights Committee, *Munaf v. Romania*, Communication No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006, 21 August 2009, para. 14.2.

12 Drawing on a 'special relationship of dependency', *AS et al. v. Italy, supra* note 11, para. 7.8; more generally M. den Heijer, *Europe and Extraterritorial Asylum* (2012), chap. 2 [den Heijer, *Extraterritorial Asylum*].

13 Pijnenburg, *supra* note 2, 323.

14 *Hirsi Jamaa and Others v. Italy*, ECtHR Application No. 27765/09, Judgment of 23 February 2012, paras 81-82 [*Hirsi*].

15 Pijnenburg, *supra* note 2, 310; T. Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law', 20 *European Journal of Migration and Law* (2018) 4, 373, 379. [Gammeltoft-Hansen, 'International Cooperation on Migration'].

16 I. Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013', 54 *Harvard International Law Journal* (2013) 2, 315, 372, 373.

17 *Ibid.*, 369.

18 Ciliberto, *supra* note 2, 491.

This gap could be filled by the concept of responsibility for complicity.[19] It derives responsibility from the principal's act.[20] Therefore, the jurisdictional hurdle must only be overcome to establish the wrongfulness of this principal act.[21] For the assisting State, it suffices that it knowingly rendered aid or assistance to the violation of a norm it is itself bound by.[22] Consequently, Art. 16 ASR's potential lies in the fact that it holds States accountable for facilitation, even when they did not exercise control over the principal act.[23] As such, it represents an alternative to current approaches to expanding the concept of extraterritorial jurisdiction. The argumentation proceeds on the presumption that Art. 16 ASR reflects custom.[24]

C. Abstract Applicability of Art. 16 ASR to the ICCPR

The first question that arises is whether Art. 16 ASR is at all applicable to breaches arising under the ICCPR. While the Commentary itself takes the applicability to human rights violations for granted,[25] this is not echoed in human rights adjudication. Instead, jurisprudence turns to due diligence to hold States responsible for acts connected to other States' human rights violations.[26] Both concepts will be presented before we explore their interrelation.

19 The term will be used interchangeably for aid or assistance.

20 M. Fink, 'A "Blind Spot" in the Framework of International Responsibility? Third-Party Responsibility for Human Rights Violations: The Case of Frontex', in T. Gammeltoft-Hansen & J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (2017), 277 [Fink, 'Blind Spot'].

21 *Ibid.*, 284.

22 V. Lanovoy, 'Complicity', *Max Planck Encyclopedias of International Law* (2015), para. 17 [Lanovoy, 'Complicity', *MPIL*].

23 K. Nahapetian, 'Confronting State Complicity in International Law', 7 *UCLA Journal of International Law and Foreign Affairs* (2002) 1, 99, 101.

24 Indicated by ASR Commentary, Yearbook of the International Law Commission (2001), Vol. II, Part Two, Art. 16 [7], 66 [ASR Commentary]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, para. 420 [*Bosnian Genocide*]; H. P. Aust, *Complicity and the Law of State Responsibility* (2011), chap 4.

25 ASR Commentary, *supra* note 24, Art. 16 [9].

26 B.III.1. below; M. den Heijer, 'Shared Responsibility Before The European Court of Human Rights', 60 *Netherlands International Law Review* (2013) 3, 411, 422 [den Heijer, 'Shared Responsibility'].

I. Responsibility for Complicity Under Art. 16 ASR

Art. 16 ASR reads:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State.

The provision establishes a State's responsibility for the contribution to the internationally wrongful act of another State.[27] Responsibility is *derivative* insofar as the conduct in itself may be lawful.[28] Wrongfulness only accrues after another State has committed a violation, to which the contribution was linked.[29] Then, however, contribution becomes an autonomous wrongful act of itself triggering responsibility.[30]

For delegated migration control, this means that the exerting third State retains primary responsibility; the sponsoring destination State additionally incurs responsibility for its aid or assistance.[31] The concept is driven by the idea that a State may not do by another what it cannot do by itself and thereby explicitly tackles the tactic behind indirect delegation.[32]

II. Responsibility for Disregard of Due Diligence

Responsibility for the behavior towards other States' wrongful acts can also follow from the failure to adhere to due diligence.[33] The duty to carry out due

27 J. Crawford, *State Responsibility: The General Part* (2013), 399.
28 V. Lanovoy, 'Complicity in an Internationally Wrongful Act', in A. Nollkaemper & I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014), 144 [Lanovoy, 'Complicity', *Principles of Shared Responsibility*].
29 Fink, 'Blind Spot', *supra* note 20, 277.
30 Lanovoy, 'Complicity', *MPIL*, *supra* note 22, para. 5.
31 Pijnenburg, *supra* note 2, 318.
32 A. Dastyari & A. Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy', 19 *Human Rights Law Review* (2019) 3, 435, 438.
33 A. A. D. Brown, 'To Complicity… and Beyond! Passive Assistance and Positive Obligations in International Law', 27 *Hague Yearbook of International Law* (2014), 133,

diligence entails the obligation to take all reasonably available means to prevent harm if a State knows or ought to have known of risks.[34] It is driven by the idea that, to an appropriate degree, States should carry responsibility for spheres under their control, resulting in the threefold criteria of foreseeability, capacity, and reasonableness.[35] In the human rights context, responsibility for the failure to adhere to due diligence was first imposed in the landmark decision Velásquez Rodríguez before the Inter-American Court of Human Rights (IACtHR).[36] Drawing on the obligation to *ensure* the rights of individuals within a State's jurisdiction in Art. 2(1), the HRC also recognized due diligence obligations under the ICCPR.[37] As for all human rights under the treaty, jurisdiction is indispensable for the obligation to arise.[38]

III. Overlap

In conceptual distinction from complicity, disregard of due diligence leads to *independent* responsibility,[39] arising from conduct that precedes the principal act.[40] Either way, the case constellations in which complicity and due diligence obligations are relevant significantly overlap. One prominent example is the *Bosnian Genocide* case, which dealt with Serbia's responsibility for the Srebrenica genocide.[41] Absent actual knowledge, the International Court of Justice (ICJ) could not establish complicity analogous to Art. 16 ASR.[42] It did find, however, that Serbia had breached its positive obligation to prevent the genocide.[43] For

149.

34 M. Monnheimer, *Due Diligence Obligations in International Human Rights Law* (2021), 117.

35 *Ibid.*, 267.

36 *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, IACtHR Series C, No. 4, para. 172.

37 CCPR, *General Comment No 31*, *supra* note 10, para. 8.

38 S. Kim, 'Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context', 30 *Leiden Journal of International Law* (2017) 1, 49, 67.

39 H. P. Aust & P. Feihle, 'Due Diligence in the History of the Codification of the Law of State Responsibility', in H. Krieger, A. Peters & L. Kreuzer (eds), *Due diligence in the International Legal Order* (2020), 55.

40 H. Moynihan, 'Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission's Articles on State Responsibility', 67 *International and Comparative Law Quarterly* (2018) 2, 455, 463 [Moynihan, 'Mental Element'].

41 *Bosnian Genocide*, *supra* note 24, 377-378.

42 *Ibid.,* 422-423.

43 *Ibid.,* 428-438.

this, it relied on the same factual arguments that would have been important under Art. 16 ASR, namely the political, military, and financial links between the Federal Republic of Yugoslavia and the Republika Srpska.[44] Thus, the ruling uses obligations to prevent as a functional alternative to establish responsibility for involvement in other States' wrongful acts.[45] Posing a lower threshold than Art. 16 ASR, duties of due diligence seemed to be the preferable option.[46] Den Heijer even proposes that human rights due diligence already contains the prohibition to facilitate assistance, rendering Art. 16 ASR useless under human rights law.[47]

1. Cases of Complicity in Extraordinary Rendition

The ECtHR's jurisprudence on extraordinary rendition cases seemingly approves this suggestion. Comparison is warranted because the *European Convention of Human Rights* (ECHR)[48] and the ICCPR grant similar substantive protection pending on jurisdiction.[49]

El-Masri dealt with Macedonia's participation in a terror suspect's ill-treatment, torture, and subsequent detention predominantly carried out at the hands of the Central Intelligence Agency (CIA) of the United States. In a departure from the general rules on attribution,[50] the Court held the ill-treatment at Skopje Airport to be "imputable" to Macedonia based on the "acquiescence or connivance" of the present Macedonian authorities and the fact that the actions took place within its jurisdiction.[51] Direct responsibility also resulted from the combination of positive obligations and facilitation despite

44 *Ibid.,* 422, 434; Aust, *supra* note 24, 402.
45 Aust, *supra* note 24, 403.
46 A. Liguori, Migration Law and the Externalization of Border Controls: European State Responsibility (2019), 34.
47 den Heijer, *Extraterritorial Asylum, supra* note 12, 103, 108.
48 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 [ECHR].
49 D. McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee', 65 *International and Comparative Law Quarterly* (2016) 1, 21, 42.
50 M. Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction', 27 *European Journal of International Law* (2016) 3, 817, 820.
51 *El-Masri v. the Former Yugoslav Republic of Macedonia,* ECtHR Application No. 39630/09, Judgment of 13 December 2012, para. 206 [*El-Masri*]; see also Human Rights Committee, *Mohammed Alzery v. Sweden,* Communication No. 1416/2005 UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006, para. 11.6 [*Mohammed Alzery*].

constructive knowledge.[52] The Court held on to this approach in *Al Nashiri,*[53] *Husayn,*[54] *Nasr*,[55] and *Abu Zubaydah.*[56] Although Art. 16 ASR was listed as relevant law in all cases, the Court did not assess the facilitation in terms of derived responsibility.[57] Instead, it framed questions of facilitation essentially as breaches of States' positive human rights obligations.[58]

2. Cases of Extraterritorial Complicity

However, the perception of Art. 16 ASR as expendable erodes once a case deals with aid or assistance rendered beyond jurisdictional borders. One of the rare examples is *Tugar* which concerned the illegal sale of anti-personnel mines from Italy to Iraq and their usage in human rights violations.[59] The former European Commission on Human Rights dismissed the case as inadmissible, referring to the lack of an "immediate relationship" between supply and violations. In contrast to extradition that posed an act of jurisdiction, Italy's failure to regulate the arms transfers had been "too remote to attract the Italian

52 *El-Masri*, *supra* note 51, paras 211, 239.

53 *Al Nashiri v. Poland*, ECtHR Application No. 28761/11, Judgment of 24 July 2014, paras 452, 517; *Al Nashiri v. Romania*, ECtHR Application No. 33234/12, Judgment of 31 May 2018, para. 595 [*Al Nashiri*].

54 *Husayn (Abu Zubaydah) v. Poland*, ECtHR Application No. 7511/13, Judgement of 24 July 2014, para. 512 [*Husayn*].

55 *Nasr and Ghali v. Italy*, ECtHR Application No 44883/09, Judgment of 23 Febuary 2016, para. 243 [*Nasr*].

56 *Abu Zubaydah v. Lithuania*, ECtHR Application No. 46454/11, Judgment of 31 May 2018, para. 582 [*Abu Zubaydah*].

57 *El-Masri*, *supra* note 51, para. 97; *Al Nashiri*, *supra* note 53, para. 207; *Al Nashiri v. Romania, supra* note 53, para. 210; *Husayn*, *supra* note 54, para. 201; *Nars, supra* note 55, para. 185; *Abu Zubaydah, supra* note 56, para. 232.

58 J. Crawford & A. Keene, 'The Structure of State Responsibility Under the European Convention on Human Rights', in A. van Aaken & I. Motoc (eds), *The European Convention on Human Rights and General International Law*, Vol. 1 (2018), 189; H. Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (2016), Chathamhouse Research Paper, para. 91, available at https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf (last visited 11 February 2024); A. Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?' (21 December 2012), EJIL: Talk!, available at https://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/ (last visited 11 February 2024).

59 European Commission of Human Rights, *Application No. 22869/93, Tugar v. Italy* (1995), 83-A DR 26.

responsibility". The Commission only discussed the positive obligations of Italy, which, in the absence of a link establishing jurisdiction, were not triggered. Derived responsibility under Art. 16 ASR, on the other hand, rests on the precise idea that it is possible to rely on another State's conduct being the "decisive cause"[60] when links are too remote to establish *direct* responsibility of the assisting State.[61] It provides for a mechanism that holds States responsible even for *indirect* involvement in wrongful acts if this is deemed appropriate in view of the significance of their actions.[62]

IV. Dismissal of the Lex Specialis Claim

Thus, it is crucial to establish that Art. 16 ASR complements due diligence obligations. Particularly, this article advocates the opinion that due diligence does not replace Art. 16 ASR as *lex specialis*. In the context of State responsibility, the doctrine of *lex specialis*[63] has found expression in Art. 55 ASR. Within this provision, the ASR foresee the possibility of being suspended by special secondary rules contained in specific instruments.[64] For the principle to apply, the opposing norms must deal with the same subject matter[65] and conflict with one another.[66] The Commentary defines such conflict as "actual inconsistency […] or else a discernible intention that one provision is to exclude the other".[67] Beyond instances of contradiction,[68] conflicts can thus also arise when interpretation suggests that the special rule is intended to apply autonomously.[69]

60 *Ibid*.
61 den Heijer, *Extraterritorial Asylum*, *supra* note 12, 109.
62 *Ibid.,* 111.
63 *Report of the Study Group of the International Law Commission to the Fifty-Eighth Session*, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, para. 102.
64 ASR Commentary, *supra* note 24, Art. 55 [2]; B. Simma & D. Pukolwski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', 17 *European Journal of International Law* (2006) 3, 483, 486.
65 G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points', 33 *British Yearbook of International Law* (1957), 203, 237.
66 A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis', 74 *Nordic Journal of International Law* (2005) 1, 27, 44.
67 ASR Commentary, *supra* note 24, Art. 55 [4].
68 Lindroos, *supra* note 66, 45.
69 ASR Commentary, *supra* note 24, Art. 55 [4].

The principle of *lex specialis* ranges from fully self-contained regimes that ban any recourse to general rules of international law[70] to weaker special regimes containing *lex specialis* only for singular norms.[71] IHRL constitutes the latter. Human rights bodies frequently rely on principles codified in the ASR.[72] Nevertheless, to justify individual departures from the ASR,[73] reference has been made to human rights' special character.[74] It must therefore be assessed whether the application of Art. 16 ASR is compatible with this special character.

1. Divergence From Standard Secondary Rules

Primary rules are those which establish the rights and obligations of States and define wrongful conduct.[75] Secondary rules, which the ILC intended to constrain the ASR to,[76] elaborate on the legal consequences of breaches of primary rules.[77] Operating on distinct levels, it has been argued that primary and secondary rules do not relate to the same subject matter.[78] Thus, there is some appeal to the argument that substantive due diligence obligations under IHRL as primary rules cannot, as a matter of principle, be *lex specialis* to the rules on State responsibility.[79] However, the Commentary itself recognizes that instances of derived responsibility cross the artificial border between primary

70 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, para. 86; D. M. Banaszewska, 'Lex Specialis', Max Planck Encyclopedias of International Law (2015), para. 21; Simma & Pukolwski, *supra* note 64, 493.

71 ASR Commentary, *supra* note 24, Art. 55 [5]; Banaszewska, *supra* note 70, para. 6.

72 Report of the Secretary-General, *Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies*, UN Doc. A/71/80/Add.1, 20 June 2017, counting a total of 65 references from 2001 to 2016.

73 E.g. *Mohammed Alzery*, *supra* note 51, para. 11.6.

74 *Mapiripan Massacre v. Colombia,* Judgment of 15 September 2005, IACtHR Series C, No. 134, para. 107; *Banković and Others v. Belgium and Others,* ECtHR Application No. 52207/99, Judgment of 12 December 2001, para. 57.

75 E. David, 'Primary and Secondary Rules', in J. Crawford (ed.), *The Law of International Responsibility* (2010), 27.

76 *Report of the International Law Commission on the Work of its Thirts-Second Session*, UN Doc. A/35/10 27, 5 May-25 July 1980, para. 23.

77 *Second Report on State Responsibility of Special Rapporteur Roberto Ago*, UN Doc. A/CN.4/233, 20 April 1970, para. 11.

78 A. Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System', 22 *European Journal of International Law* (2011) 4, 993, 1020.

79 Aust, *supra* note 24, 417.

and secondary rules.[80] Beyond outlining the consequences of a wrongful act, complicity expands responsibility for conduct that would otherwise be lawful to States which would otherwise not bear responsibility.[81] Therefore, it is most plausible to assume with Lanovoy and Aust that its nature lies somewhere between a primary and a secondary rule.[82] In light of this, the *lex specialis* claim cannot be generally precluded.[83] Rather, the described overlap indicates relation to the same subject matter, fulfilling the first criteria of *lex specialis*. To dismiss the *lex specialis* claim, it is therefore necessary to show that the two concepts are not in conflict.

2. Dispensability of Due Diligence's Precondition of Jurisdiction

The crucial question is whether due diligence obligations, hinging on jurisdiction, are intended to apply autonomously. Put differently, is jurisdiction of the assisting State indispensable to establish its responsibility for contributing to human rights violations?[84]

First of all, an explanation for the case law's reliance on due diligence instead of Art. 16 ASR is that it enables courts to circumvent rulings on the responsibility of the principal actor.[85] In the ECtHR cases, this was useful because the US was not a party to the ECHR, and therefore the court had no jurisdiction over its actions. However, this is a question of procedure, not of responsibility as such.[86] It does not allow conclusions as to the *lex specialis* character.

Secondly, one could consider that functionally, jurisdictional clauses impose a limitation on responsibility that competes with the general rules of State responsibility.[87] In the human rights context, the notion of jurisdiction departs from its traditional function to determine a State's legal competencies.

80 ASR Commentary, *supra* note 24, chap. IV [7].
81 Aust, *supra* note 24, 188-189.
82 Lanovoy, 'Complicity', *Principles of Shared Responsibility*, *supra* note 28, 139; Aust, *supra* note 24, 417.
83 *Ibid.*
84 Monnheimer, *supra* note 34, 265.
85 Cf. *Abu Zubaydah*, *supra* note 56, para. 584.
86 ASR Commentary, *supra* note 24, Art. 16 [11].
87 A. Klug & T. Howe, 'The Concept Of State Jurisdiction And The Applicability Of The Non-Refoulement Principle To Extraterritorial Interception Measures', in B. Ryan & V. Mitsilegas (eds), *Extraterritorial Immigration Control* (2010), 98.

Instead, it depicts direct links between the individual and the operating State.[88] The jurisdictional clause confines the reach of human rights obligations along those lines.[89] However, reading Art. 2(1) ICCPR as an exhaustive limitation would not align with a purpose-oriented interpretation following Art. 31(1) of the *Vienna Convention on the Law of Treaties* (VCLT):[90] The Covenant seeks to hold States accountable for human rights-violating conduct within their sphere of influence. Especially new forms of "contactless control"[91] such as funding, training, and equipping pose in the scale of their present occurrence risks not envisaged when the system was created.[92] This proves that jurisdiction alone is no longer a workable criterion to serve its purpose.[93] In *Soering*, the ECtHR argued that the nature of human rights treaties dictates an interpretation that renders the guaranteed rights effective.[94] The ruling has been read by some as pointing towards a general principle according to which a State must "refrain from any act that may facilitate human rights violations by other actors, even if it does not exercise effective control in that particular situation."[95] In sum, States must also be bound beyond their jurisdiction "when this would be reasonable in light of the specific facts of a case".[96]

88 Den Heijer, *Extraterritorial Asylum, supra* note 12, 111; F. Baxewanos, 'Relinking Power and Responsibility in Extraterritorial Immigration Control: The Case of Immigration Liaison Officers', in Gammeltoft-Hansen & Vedsted-Hansen, *supra* note 20, 199; Aust, *supra* note 24, 408.

89 Monnheimer, *supra* note 34, 265; Ciliberto, *supra* note 2, 521; resisting on jurisdiction as prerequisite for responsibility: S. Besson, 'The Sources of International Human Rights Law: How General Is General International Law?', in S. Besson & J. D'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (2018), 867; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), 125; Kim, *supra* note 38, 67.

90 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT].

91 Giuffré & Moreno-Lax, *supra* note 2.

92 Monnheimer, *supra* note 34, 320.

93 Baxewanos, *supra* note 88, 200; O. De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', 6 *Baltic Yearbook of International Law* (2006), 183, 245.

94 *Soering v. the United Kingdom,* ECtHR Application No. 1/1989/161/217, Judgment of 7 July 1989, para. 87 [*Soering*].

95 Baxewanos, *supra* note 88, 201; similarly, T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2013), 203 [Gammeltorf-Hansen, *Access to Asylum*]; however, such interpretation can be criticized for being too extensive as *Soering* dealt with an extradition situation where the individual had been present on the State's territory.

96 R. Jorritsma, 'Unravelling Attribution, Control and Jurisdiction: Some Reflections on the Case Law of the European Court of Human Rights', in H. Ruiz Fabri (ed.), *International*

Finally, the limitation to jurisdiction is motivated by the attempt to prevent excessive liability.[97] In principle, this endeavor is reasonable. It acknowledges the autonomy of sovereign States and resists the temptation to hold States with high human rights standards liable for all violations happening around the world. Without such limitation, States were likely to refrain also from desirable forms of cooperation, fearing that they would be held accountable for their partners' poor human rights records.[98] Hence, the problem is not the limitation of responsibility itself. The problem is the basis on which the concept of jurisdiction makes this limitation. Since Art. 16 ASR focuses on the factual contribution to human rights violations, rather than the executing actor, the argument this paper advances is that proliferation which discourages any form of cooperation can be more appropriately contained by a narrow scope of Art. 16 ASR than by general exclusion.[99] To conclude, interpretation suggests that a complementary application of Art. 16 ASR, besides due diligence responsibility conditional on jurisdiction, serves the ICCPR's purpose of counter-balanced human rights protection.[100] Hence, Art. 16 ASR is not replaced by *lex specialis*.[101]

D. Concrete Applicability of Art. 16 ASR to Italy's Contribution

Having established that Art. 16 ASR is applicable to violations of the ICCPR, the analysis will test whether it is capable of establishing responsibility for delegated migration control, using the example of Italian-Libyan cooperation under the MoU.

Law and Litigation (2019), 672.

97 Monnheimer, *supra* note 34, 266.

98 Aust, *supra* note 24, 266; G. Nolte & P. Aust, 'Equivocal Helpers - Complicit States, Mixed Messages and International Law', 58 *International and Comparative Law Quarterly* (2009) 1, 1, 15.

99 Aust, *supra* note 24, 266-267.

100 A. Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?', 60 *German Yearbook of International Law* (2018), 667, 705.

101 Straightforwardly applying Art. 16 ASR to human rights violations: Pijnenburg, *supra* note 2, 327, 329; Giuffré & Moreno-Lax, *supra* note 2, 102; Dastyari & Hirsch; *supra* note 32, 435; M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (2018), 167 [Fink, *Frontex*].

I. Cooperation of Italy and Libya Under the *Memorandum of Understanding*

For several years, Libya was a destination country for migrants and refugees. However, in 2000, a shift in labor policies and regime-fueled racist riots caused increasing movement towards Europe.[102] Given its geographical position and the Dublin system, this affected Italy the most.[103] In response, it arranged multiple bilateral agreements with Libya to reduce the migration flow.[104] The latest of those agreements is the non-binding MoU signed in 2017 with the Government of National Accord and renewed in 2020.[105] It aims to resume and extend cooperation practiced before the fall of the Gaddafi regime in 2011, particularly as laid down in the 2008 *Treaty of Friendship*.[106]

The objective of the cooperation is expressly to "stem illegal migration flows".[107] For this purpose, Italy commits to provide "technical and technological" support to Libyan institutions in charge of migration, particularly the Libyan Coast and Border Guard as well as the Department for Combating Illegal Migration (DCIM).[108] Provisions have taken the form of military patrol boats donated by Italy, training, knowledge sharing, and capacity-building.[109] The MoU assigns the financing of all listed measures to Italy.[110] It also identifies Italian and EU funds as resources to facilitate the "reception centers",[111] by which the DCIM detention centers are meant.[112] Both States commit to train the reception personnel "to face the illegal immigrants' conditions".[113] Although the Memorandum dictates the observance of international obligations and human

102 C. Heller & L. Pezzani, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration across the Mediterranean' (2018), Forensic Oceanography, 21, available at https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf (last visited 11 February 2024).

103 G. Pascale, 'Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?', 56 *Questions of International Law* (2019), 35, 38.

104 Dastyari & Hirsch, *supra* note 32, 446.

105 MoU, *supra* note 8.

106 *Ibid.,* Preamble.

107 *Ibid.,* Art. 1.

108 *Ibid*., Art. 1(c).

109 Ciliberto, *supra* note 2, 499.

110 MoU, *supra* note 8, Art. 4.

111 *Ibid.,* Art. 2(2).

112 M. Mancini, 'Italy's New Migration Control Policy: Stemming the Flow of Migrants From Libya Without Regard for Their Human Rights', 27 *Italian Yearbook of International Law Online* (2018), 259, 262.

113 MoU, *supra* note 8, Art. 2(3).

rights,[114] cooperation is not made conditional upon such compliance. The entire document does not differentiate between refugees and other migrants.[115] This is particularly precarious because Libya is neither a party to the 1951 *Refugee Convention*[116] nor has it a domestic asylum system in place.[117] In essence, the MoU sets the framework for an exhange of funding, training, and equipment against the containment of people on the move.[118]

II. Ill-Treatment Upon Detention in Libya

As a precondition, Art. 16 ASR requires the internationally wrongful act of another State.[119] When it comes to Libya's treatment of migrants and refugees, there is a wide range of human rights under attack.[120] Besides the violation of the right to leave,[121] return is regularly accompanied by exposure to severe harm. For this article, the ill-treatment migrants and refugees experience in DCIM detention centers upon return shall be of particular interest. Focus is placed on State-run centers because those scenarios pose no problems of attribution.[122] Violations of the prohibition of torture are omitted because its *jus cogens* nature warrants special consequences of responsibility under Art. 41(2) ASR.[123] Accordingly, the relevant norm is the prohibition of ill-treatment under Art. 7(1) ICCPR which reads, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." It is supplemented by Art. 10(1) ICCPR, according to which "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[124] States are regularly in breach of Art. 7(1) ICCPR when detainees

114 *Ibid.,* Art. 5.
115 E. Vari, 'Italy-Libya Memorandum of Understanding Italy's International Obligations', 43 *Hastings International and Comparative Law Review* (2020) 1, 105, 113; Liguori, *supra* note 46, 10; Mancini, *supra* note 112, 263.
116 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 [*Refugee Convention*].
117 Vari, *supra* note 115, 116; Liguori, *supra* note 46, 12.
118 Pascale, *supra* note 103, 39.
119 ASR, *supra* note 6, Art. 2.
120 For an overview see Dastyari & Hirsch, *supra* note 32, 456-457.
121 N. Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', 27 *European Journal of International Law* (2016) 3, 591.
122 Liguori, *supra* note 46, 34.
123 Lanovoy, 'Complicity', *MPIL*, *supra* note 22, para. 4.
124 Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 2;

experience violent treatment upon detention,[125] whereas general poor conditions are addressed under Art. 10(1) ICCPR.[126] Often, however, the HRC finds a combination of both norms.[127]

In Libya, there is no asylum system in place, and irregular entry and stay are criminalized.[128] Consequently, most of those disembarked in Libya are captured in detention centers.[129] Those centers are vastly overcrowded. More than 4,300 migrants and refugees are confirmed to be detained in DCIM centers, although the number of unreported cases is significantly higher.[130] Detainees suffer from malnutrition and medical care is not ensured.[131] Human

Human Rights Committee, *General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, para. 3.

125 S. Joseph & M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed. (2014), para. 9.135; Human Rights Committee, *Wilson v. Philippines,* Communication No. 868/1999, UN Doc. CCPR/C/79/D/868/1999, 11 November 2003, para. 7.3.

126 Joseph & Castan, *supra* note 125, para. 9.134; Human Rights Committee, *Griffin v. Spain,* Communication No. 493/1992, UN Doc. CCPR/C/53/D/493/1992, 5 April 1995, para. 3.1; Human Rights Committee, *Kennedy v. Trinidad and Tobago,* Communication No. 845/1998, UN Doc. CCPR/C/74/D/845/1998, 26 March 2002, paras 7.7-7.8.

127 Human Rights Committee, *Portorreal v. Dominican Republic,* Communication No. 188/1984, UN Doc. CCPR/C/31/D/188/1984, 5 November 1987, paras 9.2, 11; Human Rights Committee, *Linton v Jamaica,* Communication No. 255/1987, UN Doc. CCPR/C/46/D/255/1987, 2 November 1992, para. 8.5; Human Rights Committee, *Brown v. Jamaica,* Communication No. 775/1997, UN Doc. CCPR/C/65/D/775/1997, 23 March 1999, para. 6.13; *Wilson v. Philippines*, *supra* note 125, para. 7.3.

128 *Report of the Secretary-General Pursuant to Security Council Resolution 2491 (2019)*, UN Doc. S/2020/876, 6 April 2020, para. 12.

129 *Ibid.,* 10, 13; United Nations Support Mission in Libya & Office of the United Nations High Commissioner for Human Rights, *"Detained and Dehumanised": Report on Human Rights Abuses Against Migrants in Libya* (13 December 2016), 19-20, available at https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf (last visited 11 February 2024) [UNSMIL & UNOHCHR]; Amnesty International, *Libya's Dark Web of Collusion. Abuses Against Europe-Bound Refugees and Migrants*' (2017), 28, 40, available at https://www.amnesty.org/en/documents/mde19/7561/2017/en/ (last visited 11 February 2024) [Amnesty, *Libya's Dark Web of Collusion*].

130 *Report of the Secretary-General on United Nations Support Mission in Libya*, UN Doc. S/2021/451, 11 May 2021, para. 55.

131 Amnesty International, *"Between Life and Death": Refugees and Migrants Trapped in Libya's Cycle of Abuse* (24 September 2020), 28-30, available at https://www.amnesty.org/en/documents/mde19/3084/2020/en/ (last visited 11 February 2024) [Amnesty, *Between Life and Death*]; UNSMIL & UNOHCHR, *supra* note 129, 15-17; *Report of the Secretary-General Pursuant to Security Council Resolution 2312 (2016)*, UN Doc. S/2017/761, 7 September 2017, paras 40-42.

rights reports testify that detainees regularly face severe beatings by officers for extortion[132] and sexual violence for humiliation.[133] In light of this, Libya violates Art. 7(1) and Art. 10(1) ICCPR.[134]

III. Substantial Requirements of Art. 16 ASR

Art. 16 ASR demands aid and assistance furnished in the possession of a mental element and the opposability of norms.

1. Material Element: Broadness of Aid or Assistance

The contribution must constitute aid or assistance in the sense of Art. 16 ASR.[135] Neither the ASR nor the Commentary give an abstract definition of what "aid or assistance means".[136] Complicity is discussed for *inter alia* permission to use territory, supply of economic aid or intelligence, and training of personnel.[137] It covers a wide range of activities.[138] *Crawford* points to this when he says: "no limitation is placed on the precise form of the aid or assistance in question – all that is required is a causative contribution to the illegal act."[139]

To establish such a causal nexus, attention must be paid to the impact rather than the type of conduct.[140] For this reason, the classification does not draw on a numerated list of activities but relies on a case-by-case assessment.[141] However, the precise threshold for such a link between the aid or assistance and the principal act is unsettled.[142] The Commentary stipulates that aid or

132 Amnesty, *Between Life and Death*, *supra* note 131, 28; Amnesty, *Libya's Dark Web of Collusion*, *supra* note 129, 22, 30-31.

133 *Report of the Secretary-General Pursuant to Security Council Resolution 2491 (2019)*, *supra* note 128, para. 15.

134 *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Libya*, UN Doc. A/HRC/37/46, 21 February 2018, para. 43.

135 Since the expressions are indistinguishable, they may be used interchangeably, see Aust, *supra* note 24, 197.

136 *Ibid*., 195; V. Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (2016), 165 [Lanovoy, *Complicity and Its Limits*].

137 Special Rapporteur J. Crawford, *Second Report on State Responsibility*, UN Doc. A/CN.4/498, 19 July 1999, 50, fn 349.

138 Giuffré & Moreno-Lax, *supra* note 2, 101.

139 Crawford, *supra* note 27, 402.

140 Fink, 'Blink Spot', *supra* note 20, 280.

141 Aust, *supra* note 24, 209; Lanovoy, *Complicity and Its Limits*, *supra* note 136, 184.

142 Crawford, *supra* note 27, 402-403; M. Jackson, *Complicity in International Law* (2015), 156-157 [Jackson, *Complicity*].

assistance must not be "essential" but must have "significantly" facilitated the commission of the internationally wrongful act.[143] To borrow the words of the Irish High Court, complicity is "a matter of substance and degree".[144] Despite the Commentary's dubious referral to assistance having "only incidental factors",[145] it is assumed that contribution must at least overcome a *de minimis* threshold.[146] On the other hand, the contribution must also not be too direct, as the State would then become a co-perpetrator incurring direct responsibility.[147]

Italy's funding, training, and equipping under the terms of the MoU poses aid or assistance of a sufficiently causal link.[148] Upon cooperation, interceptions by the Libyan Coast Guard, primarily deploying maritime patrol boats provided by Italy,[149] have significantly increased.[150] 2021 constituted a peak with over 32,000 returns. In 2022, nearly 25,000 people were returned.[151] The rise in numbers further worsens detention conditions.[152] Although Italy is framing its funding as humanitarian aid,[153] those centers would inoperable without its aid.[154] Scholars, therefore, agree that Italy's activities satisfy the material element under Art. 16 ASR.[155]

143 ASR Commentary, *supra* note 24, Art. 16 [5].
144 *Edward Horgan v. An Taoiseach and Others*, Irish High Court, Application Declaratory Relief (2003), IEHC 64, para. 174.
145 ASR Commentary, *supra* note 24, Art. 16 [10].
146 Nolte & Aust, *supra* note 98, 10; Lanovoy, *Complicity and Its Limits*, *supra* note 136, 185; Jackson, *Complicity*, *supra* note 142, 158.
147 *Report of the International Law Commission on the work of Its Thirtieth Session,* UN Doc A/33/10, 8 May-28 July 1978, 99, para. 2; Aust, *supra* note 24, 212; Pascale, *supra* note 103, 49.
148 Liguori, *supra* note 46, 25.
149 Heller & Pezzani, *supra* note 102, 44.
150 *Ibid.,* 54.
151 See International Organization for Migration, *IOM Libya's Maritime Update on Twitter*, https://twitter.com/IOM_Libya/status/1610263422125461505 (last visited 11 February 2024).
152 Heller & Pezzani, *supra* note 102, 85; Mancini, *supra* note 112, 260, 274.
153 Pascale, *supra* note 103, 43.
154 *Ibid.,* 53; Dastyari & Hirsch, *supra* note 32, 450.
155 Among others: Hathaway & Gammeltoft-Hansen, *supra* note 4, 279; Pijnenburg, *supra* note 2, 329; Vari, *supra* note 115, 130; Ciliberto, *supra* note 2, 523.

2. Mental Element: Ranging From Knowledge to Intent

The mental element under Art. 16(a) ASR is designed to narrow the scope of application given the broadness of the material element.[156] Its specific content is subject to heated debate fueled by the discrepancy between the wording and the Commentary. The former requires "knowledge of the circumstances of the internationally wrongful act". In contrast, the latter instructs that aid must be given "with a view to facilitating" the act.[157] The word "view" suggests that merely an awareness rather than a planned purpose is required.[158] Shortly afterward, however, the Commentary stipulates that a State should not be responsible unless it "intended […] to facilitate the occurrence of the wrongful conduct".[159]

The current state of debate ranges between knowledge versus intent. Many scholars propose that actual knowledge or virtual certainty would suffice to satisfy the mental element.[160] This view seemingly finds support in the *Bosnian Genocide* case, where the ICJ explained that complicity requires "at the least knowledge".[161] Others even accept constructive knowledge arguing that a State should incur responsibility once it "should have known" of the unlawful use of its assistance.[162] Lowering the threshold so severely ignores that States must be able to assume in good faith that their aid is not misused. However, this cannot prevail in the face of profound evidence of illegality.[163] Therefore, it is argued that instances of willful blindness where States deliberately ignore illegality could be equated with actual knowledge.[164]

In the other extreme, one could interpret Art. 16 ASR as requiring actual intent in the sense of purpose.[165] This contradicts the general rule of State responsibility, according to which, in the absence of a mental requirement within

156 B. Graefrath, 'Complicity in the Law of International Responsibility', 29 *Revue Belge de Droit International* (1996) 2, 370, 376.
157 ASR Commentary, *supra* note 24, Art. 16 [5].
158 Nahapetian, *supra* note 23, 108.
159 ASR Commentary, *supra* note 24, Art. 16 [5].
160 Jackson, *Complicity, supra* note 142, 161; Lanovoy, 'Complicity', *Principles of Shared Responsibility*, *supra* note 28, 156; Moynihan, 'Mental Element', *supra* note 40, 455.
161 *Bosnian Genocide*, *supra* note 24, para. 421, however, the ICJ only referred to Art. 16 ASR for comparison. Essentially, it dealt with a primary rule of complicity under Art. III Genocide Convention.
162 Hathaway & Gammeltoft-Hansen, *supra* note 4, 281.
163 Moynihan, 'Mental Element', *supra* note 40, 462-463; Aust, *supra* note 24, 248; Lanovoy, *Complicity and Its Limits*, *supra* note 136, 234-235.
164 Hathaway & Gammeltoft-Hansen, *supra* note 4, 281; Ciliberto, *supra* note 2, 524.
165 Aust, *supra* note 24, 237.

the primary obligation, only the act of the State matters.[166] Critics, particularly Graefrath, suggest that a requirement of intent would render the norm practically "unworkable".[167] It would pose a threshold that States would hardly ever surpass.[168] Moreover, proving a State's inner motives would be complicated. For one, intent could not be inferred from an individual official's state of mind. Meanwhile, public declarations would not disclose actual motives but paint the image a State wants to convey.[169] Most importantly, a strict understanding of intent would exclude the multitude of cases in which States accept the resulting violations while rendering assistance mainly for their own purposes.[170] However, such deliberate indifference is crucial for constellations, in which powerful States cooperate with States with weaker human rights records.

The core of the conflict is that responsibility must be reasonably limited without rendering the whole provision useless.[171] As has been argued, limitation is necessary from a legal-policy perspective to not deter States from desirable international cooperation.[172] Added to that, Art. 16 ASR engages responsibility for behavior that is per se lawful.[173] Drawing thereon, Aust argues that, doctrinally, additional intent as an element of fault is essential to justify responsibility.[174] On the other hand, Art. 16 ASR is only effective if it also covers cases where States calculate the wrongful act as an incidental cost of their personal motives[175] and if it excludes the possibility to escape from responsibility unilaterally.[176] Alongside

166 ASR Commentary, *supra* note 24, Art. 2 [10]; Lanovoy, 'Complicity', *Principles of Shared Responsibility*, *supra* note 28, 152; Aust, *supra* note 24, 232.

167 Graefrath, *supra* note 156, 375; similarly, J. Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57 *British Yearbook of International Law* (1987), 77, 111; Giuffré & Moreno-Lax, *supra* note 2, 102.

168 M. den Heijer, 'Europe Beyond Its Borders: Refugee And Human Rights Protection In Extraterritorial Immigration Control', in B. Ryan & V. Mitsilegas (eds), *Extraterritorial Immigration Control* (2010), 195; M. Gibney, K. Tomasevski & J. Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights', 12 *Harvard Human Rights Journal* (1999), 267, 294; Giuffré & Moreno-Lax, *supra* note 2, 102.

169 Nahapetian, *supra* note 23, 110, 126; Quigley, *supra* note 167, 111; Fink, 'Blind Spot', *supra* note 20, 280.

170 Giuffré & Moreno-Lax, *supra* note 2, 102; Nahapetian, *supra* note 23, 126; Quigley, *supra* note 167, 111.

171 Cf. B.IV.2.

172 Aust, *supra* note 24, 266; Nolte & Aust, *supra* note 98, 15.

173 Special Rapporteur Roberto Ago, *Seventh Report on State Responsibility*, UN Doc. A/CN.4/307, 29 March, 17 April, 4 July 1978, para. 72.

174 Aust, *supra* note 24, 238-239.

175 Nahapetian, *supra* note 23, 126-127.

176 Moynihan, 'Mental Element', *supra* note 40, 466; Nolte & Aust, *supra* note 98, 15.

Crawford, reconciliation may be found in adopting an intent element that can be imputed by actual knowledge.[177] It is argued that assistance in the face of actual knowledge would demonstrate intent because anticipated consequences could always be conceived as intended.[178] This interpretation, which is supplemented by a comparative reading of Art. 30(2)b *Rome Statute*,[179] understands intent as intentional conduct rather than volitional desire.[180] This approach is in line with the explanations accompanying the drafting process of Art. 16 ASR. As early as 1978, Special Rapporteur Ago indicated that knowledge could be used to establish intent.[181] In 1999, when the ILC adopted the final wording, Special Rapporteur Crawford noted that the mental element would "retain the element of intent, which can be demonstrated by proof of rendering aid or assistance with knowledge of the circumstances".[182]

According to the MoU, the purpose of the cooperation is to stem the migration flow. Thus, Italy directly aimed for the containment of asylum seekers but not for the subsequent ill-treatment in detention centers.[183] Nevertheless, applying the previous findings, intent can be assumed because Italy had positive knowledge of the detention conditions. Its interaction with the Committee against Torture testifies to this.[184] In light of the numerous reports publicly declaring the human rights risks upon containment and the consequences of cooperation, Italy can also be found to have had actual knowledge of the contributing factor of its assistance.[185]

177 Crawford, *supra* note 27, 408; Jackson, *Complicity, supra* note 142, 160; Nolte & Aust, *supra* note 98, 15; Fink, *Frontex, supra* note 101, 164; Moynihan, 'Mental Element', *supra* note 40, 468.

178 V. Lowe, 'Responsibility for the Conduct of Other States', 101 *Journal of International Law and Diplomacy* (2002) 1, 1, 8; R. Mackenzie-Gray Scott, 'State Responsibility for Complicity in the Internationally Wrongful Acts of Non-State Armed Groups', 24 *Journal of Conflict and Security Law* (2019) 2, 373, 398.

179 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 [Rome Statute]; Mackenzie-Gray Scott, *supra* note 178, 399.

180 Fink, 'Blind Spot', *supra* note 20, 281.

181 Special Rapporteur Ago, *Seventh Report on State Responsibility*, *supra* note 173, para. 72.

182 Special Rapporteur Ago, *Second Report on State Responsibility*, *supra* note 173, para. 188, fn. 362.

183 Ciliberto, *supra* note 2, 524.

184 Committee Against Torture, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy*', CAT/C/ITA/CO/5-6, 18 December 2017, para. 22; Vari, *supra* note 115, 130.

185 Ciliberto, *supra* note 2, 524; s above, particularly Amnesty, *Libya's Dark Web of Collusion*, *supra* note 129, 56-58.

3. Opposability of Norms

Finally, Art. 16(b) ASR requires that the aided and aiding State are bound by the same obligation.[186] Regardless of the discussion whether non-identical human rights obligations of the same content are sufficient,[187] opposability is certainly given because Italy and Libya are both parties to the ICCPR and thus subject to the obligations under Art. 7(1) and 10(1). For these reasons, Italy does incur responsibility under Art. 16 ASR for contributing to the ill-treatment of migrants and refugees in Libyan detention centers.

E. Conclusion

The underlying question this article has addressed is to what extent it is *appropriate* to hold destination States responsible for their involvement in containment and the resulting human rights violations. Despite human rights' theoretically universal nature, human rights treaties rest on the presumption that the observance of their compliance can reasonably be assigned only to the State, which stands in a relationship to the individual.[188] Problematically, the concept of jurisdiction proves incapable of detecting indirect links within the modern nets of cooperation and the multiplication of actors.[189] Delegated migration control serves to naturalize the containment of migration flows in distant States and makes the phenomenon appear both physically and ethically distant from destination States.[190] Art. 16 ASR serves as a remedy for this defect because it is capable of additionally assigning responsibility to initiating destination States. The article has proven that it is not replaced by *lex specialis*. Given its mental threshold and the appraisal of individual facts, its application also does not lead to the dreaded human rights imperialism.

Against this background, why is it that the provision is still highly underused by courts?[191] Prima facie, the answer is that courts hold on to the rebutted perception that Art. 16 ASR is displaced by the jurisdictional clauses

186 ASR Commentary, *supra* note 24, Art. 16 [6] drawing on the *pacta tertiis* rule codified in Art. 34, 35 VCLT.

187 Lanovoy, 'Complicity', *Principles of Shared Responsibility, supra* note 28, 159.

188 S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To', 25 *Leiden Journal of International Law* (2012) 4, 857, 860.

189 Baxewanos, *supra* note 88, 200.

190 Moreno-Lax & Lemberg-Pedersen, *supra* note 1, 8.

191 Monnheimer, *supra* note 34, 48; Gammeltoft-Hansen, 'International Cooperation on Migration' *supra* note 15, 382.

in Art. 2(1) ICCPR. Below this lays the submission to a political reality,[192] which demonstrates a general skepticism towards migration and legitimizes protectionism over Europe.[193] Rather than risking political backlash to progressive rulings, courts pursue a gradual approach that governments are more willing to go along with. However, the progress achieved this way remains insignificant: instead of setting an end to the practice itself, expanding notions of jurisdiction are answered by adjusted migration control.

It remains to be hoped that the authority of the existing law will be restored and that both the courts and the public will condemn the practice of delegating migration control to actors who disregard human rights for what it is: an act of complicity under Art. 16 ASR, by which destination States themselves incur responsibility for severe human rights violations.

192 Cf. M Blauberger *et al.*, 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence', 25 *Journal of European Public Policy* (2018) 10, 1422, 1429.

193 A. Pijnenburg & K. van der Pas, 'Strategic Litigation Against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route', 24 *European Journal of Migration and Law* (2022) 3, 401, 426.

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Nigerien Law 2015-36: How a New Narrative in the Fight Against Smugglers Affects the Right to Leave a Country

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Abstract

In 2015, the Republic of the Niger adopted an anti-migrant smuggling law (Law 2015-36) with direct involvement of the European Union (EU). Since then, concerns have been raised that this law constitutes a *de facto* travel ban for anyone moving northwards from Niger.

Rather than addressing the involvement of the EU, this article will focus on the direct obligations of Niger, including those set by regional human rights agreements, as the country where the so-called cooperative migration control takes place. People on the move towards Libya will be a special focus as the most affected by the Nigerien law. First, the Nigerien law and its provisions will be described, in order to then assess whether the law and its application infringe the human right to leave any country including one's own. Drawing from the findings of non-governmental organizations and the United Nations Special Rapporteur on the Human Rights of Migrants, this article argues that Law 2015-36 renders it impossible for non-Nigerien nationals to leave the country without risking their life and safety. Thus, Law 2015-36 infringes the right to leave. The third part explores possible justifications for the law with a focus on the interests of people on the move, the interests of bordering States, and national interests. It finds that Law 2015-36 is disproportionate and, in fact, impairs the essence of the right to leave, resulting in an unjustified interference. The concluding fourth part contains recommendations for possible amendments to the law.

A. Introduction: Setting the Scene

"*Saving the lives of innocent people is the number one priority. But saving lives is not just about rescuing people at sea. It is also about stopping the smugglers and addressing irregular migration.*"[1] This was said in 2015 by Donald Tusk, then President of the European Council, in the context of an affirmation of European efforts in preventing illegal migration flows through increasing its support to the Republic of "Niger [(Niger)] among others, to monitor and control the land borders and routes [as well as to] reinforce [its] political cooperation […] in order to tackle the cause of illegal migration and combat the smuggling […] of human beings".[2]

This narrative of a fight against smugglers was the backdrop against the adoption of Niger's anti-migrant smuggling law in 2015[3], with the involvement of the European Union Capacity Building Mission in Niger during the drafting process and financial support from the European Union Emergency Trust Fund for Africa.[4] Since then, concerns have been raised both in Niger and internationally, inter alia by the Special Rapporteur on the Human Rights of Migrants, that this law constitutes a *de facto* travel ban for any foreign nationals moving northwards from Niger.[5]

1 European Council, 'Special Meeting of the European Council, 23 April 2015' (2015), available at https://www.consilium.europa.eu/en/meetings/european-council/2015/04/23/ (last visited 11 February 2024).

2 European Council, 'Special Meeting of the European Council, 23 April 2015 – Statement' (2015), available at https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/ (last visited 11 February 2024).

3 Republic of the Niger, *Loi No. 2015-36 du 26 Mai 2015 Relative au Trafic Illicite de Migrants*, Law 2015-36, available at https://www.refworld.org/docid/60a505e24.html (last visited 11 February 2024).

4 J. Brachet, 'Manufacturing Smugglers: From Irregular to Clandestine Mobility in the Sahara', 676 *The ANNALS of the American Academy of Political and Social Science* (2018) 1, 16, 25; A. Dauchy, 'La loi Contre le Trafic Illicite de Migrant·es au Niger: État des Lieux d'un Assemblage Judiciaire et Sécuritaire à l'Èpreuve de la Mobilité Transnationale', 51 *Anthropologie & Développement* (2020), 121, para. 1, 29; for a detailed account of the involvement of the EU, see T. Spijkerboer, 'The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger', in P. E. Minderhoud, S. Mantu & K. Zwaan (eds), *Caught in Between Borders: Citizens, Migrants and Humans* (2019), 49, 51-55 [Spijkerboer, 'The New Borders of Empire'].

5 Global Detention Project, 'Niger, Submission to the Universal Periodic Review, 38th Session of the UPR Working Group: Issues Related to Immigration Detention' (2021), para. 1.8, available at https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=8644&file=EnglishTranslation (last visited 11 February 2024); Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger, Report of the Special*

Rather than addressing the involvement of the European Union (EU), this article will focus on the direct obligations of Niger, including those set by regional human rights agreements, as the country where the so-called cooperative migration control takes place.[6] People on the move towards Libya will be a special focus as the most affected by the Nigerien law.[7] It will examine whether the law violates the fundamental human right to leave any country, including one's own. First, a closer look will be taken at the Nigerien law and its provisions (B.), in order to then assess whether it creates an unjustifiable infringement of the aforementioned right (C.). This article will conclude by recommending possible amendments to the law (D.).

B. The Nigerien Law 2015-36

According to its Article 1, the purpose of Law 2015-36 is to prevent and combat migrant smuggling, to protect the rights of smuggled migrants, and to promote national and international cooperation to that effect, as defined in its origin, the *Protocol against the Smuggling of Migrants by Land, Sea, and Air*.[8] The penalty for smuggling under this law is five to thirty years of incarceration, a fine of up to 30 million CFA francs ($49,350; Articles 10, 17, 18 of Law 2015-36) and the confiscation of the vehicle used to transport the migrants (Article 19 of Law 2015-36).

This paper will mainly focus on Article 10 of Law 2015-36, in which the offense of migrant smuggling is characterized more broadly than in the

Rapporteur on the Human Rights of Migrants, UN Doc A/HRC/41/38/Add.1, 16 May 2019, para. 32 [Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*]; M. Wali, '"Es ist, als Hätte man uns die Luft Abgeschnürt.": Perspektiven der Jugend in Agadez auf die Auswirkungen der Europäischen Migrationspolitik in Niger' (2018), Brot für die Welt, 10-11, available at https://www.brot-fuer-die-welt.de/fileadmin/mediapool/blogs/Fischer_Martina/2018_niger_studie.pdf (last visited 11 February 2024); Human Rights Committee, *Concluding Observations on the Second Periodic Report of the Niger*, UN Doc CCPR/C/NER/CO/2, 16 May 2019, para. 38.

6 For more information on this *topographical approach,* see N. F. Tan & T. Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control', 21 *German Law Journal* (2020) 3, 335.

7 S. Gabriël & B. Rijks, 'Migration Trends From, to and Within the Niger: 2016-2019' (2020), International Organization for Migration, 11, available at https://publications.iom.int/system/files/pdf/iom-niger-four-year-report.pdf (last visited 11 February 2024).

8 *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507 [Smuggling Protocol].

definition given in the Smuggling Protocol. The latter defines smuggling in its Article 3(a) as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the *illegal entry* of a person into a State Party of which the person is not a national or a permanent resident" (emphasis added). Whereas the Nigerien law incorporates this definition under Article 3 as a general provision, its Article 10 further criminalizes the action of procuring the *illegal exit* from Niger and is limited to migrants who are neither Nigerien nationals nor permanent residents of that State territory. This criminalization of the *procurement of illegal exit* has similarly been adopted in Algerian, Mauritanian, and Egyptian law.[9] Interestingly, there is no definition of the term within Law 2015-36, even though it is a crucial element of the definition of smuggling given under Article 10. Article 3 of Law 2015-36 only defines the term *illegal entry*, in line with Article 3(b) of the Smuggling Protocol, as the crossing of borders without complying with the necessary requirements for legal entry into the receiving State. With regard to the definition of illegal *exit*, it can be assumed that, in the case of a landlocked country like Niger, any illegal entry into a bordering country constitutes an illegal exit from Niger.[10]

C. The Right to Leave

This section will analyze how the criminalization of smuggling under Law 2015-36 affects the right to leave the country, with a special emphasis on the prohibition of illegal exit contained in Article 10. In this regard, the right to leave and its significance in codified law and customary international law will be introduced (I.). In order to prove the thesis that the Nigerien law violates international human rights guaranteed under the *International Covenant on Civil and Political Rights* (ICCPR),[11] as well as the *Universal Declaration of Human Rights* (UDHR),[12] the *African Charter on Human and Peoples' Rights* (ACHPR),[13]

9 D. Perrin, 'Smuggling of Migrants: The Misused Spirit of the Palermo Protocol, in the Light of the Nigerien Experience' (2020), available at https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/05/smuggling (last visited 11 February 2024).

10 *Ibid*.

11 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 1057 [ICCPR]. Niger acceded on 7 March 1986.

12 *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc A/810, 10 December 1948 [UDHR].

13 *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 [ACHPR]. Niger ratified on 15 July 1986.

and customary international law, the scope of the right to leave and the resulting obligations for Niger will be determined (II.). Following this, the existence of an infringement of Niger's duties regarding the right to leave will be assessed (III.). Finally, the permitted restrictions on the right to leave will be examined, so as to demonstrate that Law 2015-36 does not fall under such restrictions (VI.).

I. General Background

The right to leave any country, as an integral part of the fundamental freedom of movement,[14] is an indispensable prerequisite for the free development of an individual[15] as well as the enjoyment of a variety of other human rights.[16] These include, in particular, the right to international protection from torture, inhuman or degrading treatment, or punishment,[17] which is why it is also referred to as the right to flee from persecution and other severe human rights violations.[18]

On the basis of Article 13(1) of the UDHR, the right to leave became universally binding through Article 12(2) of the ICCPR.[19] On the regional level, it is further protected by Article 12(2) of the ACHPR. A comparison of these

14 N. Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', 27 *European Journal of International Law* (2016) 3, 591, 594.

15 Human Rights Committee, *CCPR General Comment No. 27: Freedom of Movement (Article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 1 [HRC, *CCPR General Comment No. 27*]; G. S. Goodwin-Gill, 'The Right to Leave, the Right to Return and the Question of a Right to Remain', in V. Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (1994), 62, 65.

16 Council of Europe Commissioner for Human Rights, 'The Right to Leave a Country' (2013), 5, available at https://www.coe.int/t/commissioner/source/prems/prems150813_GBR_1700_TheRightToLeaveACountry_web.pdf (last visited 11 February 2024) ['The Right to Leave a Country']; R. Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (2019), 325.

17 'The Right to Leave a Country', *supra* note 16, 5.

18 V. Chetail, 'The Transnational Movement of Persons Under General International Law – Mapping the Customary Law Foundations of International Migration Law', in V. Chetail & C. Bauloz (eds), *Research Handbook on International Law and Migration* (2014), 1, 10; F. Ouguergouz, *La Charte Africaine des Droits de l'Homme et des Peuples* (1993), para. 55; Markard, *supra* note 14, 594; V. Stoyanova, 'The Right to Leave Any Country and the Interplay Between Jurisdiction and Proportionality in Human Rights Law', 32 *International Journal of Refugee Law* (2020) 3, 403, 437.

19 E. Klein, 'Movement, Freedom of, International Protection', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), para. 3; W. A. Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary*, 3rd ed. (2019), 309; Markard, *supra* note 14, 594.

provisions indicates that they are similar in substance, differing only slightly in wording and scope, which shows a consistent interpretation and application by States and a common understanding of the importance of the right.[20]

This common understanding of the right to leave also supports the presumption of it being a norm of customary international law.[21] Even though some scholars question the existence of a sufficient consensus,[22] the number of international, regional, and domestic implementations of the right to leave speaks in favor of its status as a customary norm, which has been acknowledged by a wide range of scholars.[23] Ultimately, the question of whether the normative scope of the customary right to leave exceeds the aforementioned human rights instruments can remain unanswered if Law 2015-36 already falls within the scope of the latter.

II. The Scope of the Right to Leave

Article 12(2) of the ICCPR and Article 12(2) of the ACHPR, treaties to which Niger is a State party, guarantee the right of all persons to leave any country, including their own, with the same scope.[24]

This right is not limited to citizens of the State of departure[25] nor to individuals residing lawfully within the territory of that State.[26] Likewise, it is

20 'The Right to Leave a Country', *supra* note 16, 15; Klein, *supra* note 19, para. 3; Schabas, *supra* note 19, 301.

21 Chetail, *supra* note 18, 20-21.

22 H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', 25 *Georgia Journal of International and Comparative Law* (1996) 1, 287, 346; Goodwin-Gill, *supra* note 15, 66; Klein, *supra* note 19, para. 2.

23 Special Rapporteur on Analysis of Current Trends and Developments in Respect of the Right of Everyone to Leave Any Country Including His Own and to Return to his Country, *Analysis of the Current Trends and Developments Regarding the Right to Leave any Country Including One's Own, and to Return to One's Own Country, and Some Other Rights or Consideration Arising Therefrom*, UN Doc E/CN.4/Sub.2/1988/35, 20 June 1988, 7, para. 33; K. Hailbronner, 'Comments on: The Right to Leave, the Right to Return and the Question of a Right to Remain', in Gowlland-Debbas, *supra* note 15, 73, 73; for a detailed account and further discussion, see notably Chetail, *supra* note 18, 20-27.

24 Ouguergouz, *supra* note 18, para. 55; Schabas, *supra* note 19, 309.

25 Schabas, *supra* note 19, 300; Hailbronner, *supra* note 23, 73; Human Rights Committee, *CCPR General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13, 26 May 2004, 4, para. 10 [HRC, *CCPR General Comment No. 31*].

26 Unlike Art. 12(1) ICCPR; cf. HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 8; Schabas, *supra* note 19, 310.

the right of the individual to freely decide upon the destination State towards which he or she is leaving the country.[27] Nevertheless, it rests upon the State of destination to determine the conditions of admission of those seeking to enter the country[28] since no right of entry and residence exists for non-nationals.[29] The right to leave is granted under Article 12(2) of the ICCPR regardless of the specific purpose or duration of the individual's stay outside the country.[30] Therefore, in cases which are not subject to the possible restrictions permitted by international law, Niger must respect the freedom of non-nationals being unlawfully within its territory to leave towards Libya for the purpose of fleeing persecution, as well as to work periodically in Libya or to cross Libya and try to travel further e.g., to Europe in order to emigrate or work there for some time.[31]

Both positive and negative obligations for the State of residence and the State of nationality can be derived from the freedom to leave and emigrate.[32] The State of nationality must facilitate the exercise of the right to leave,[33] i.e., by issuing or renewing travel documents.[34] The State of residence's primary obligation consists in avoiding interference with the freedom to leave the country, i.e., not preventing the departure.[35]

III. Interference With the Right to Leave

The offense defined by Article 10 of Law 2015-36 focuses exclusively on the actions of smugglers, whereas the smuggled person remains unpunished.

27 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 8.

28 *Ibid*., para. 8; Markard, *supra* note 14, 595; Schabas, *supra* note 19, 300; Klein, *supra* note 19, para. 1; Goodwin-Gill, *supra* note 15, 66.

29 Klein, *supra* note 19, para. 1; Ouguergouz, *supra* note 18, para. 59.

30 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 8; Schabas, *supra* note 19, 309.

31 Brachet, *supra* note 4, 19; Klein, *supra* note 19, para. 5.

32 Human Rights Committee, *Samuel Lichtensztejn v. Uruguay*, Communication No. 77/1980, UN Doc CCPR/C/18/D/77/1980, 31 March 1983, para. 6.1. [HRC, *Lichtensztejn v. Uruguay*]; HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 9.

33 Schabas, *supra* note 19, 310.

34 Human Rights Committee, *Vidal Martins v. Uruguay*, Communication No. 57/1979, UN Doc CCPR/C/15/D/57/1979, 23 March 1982, paras 7, 9, 10; HRC, *Lichtensztejn v. Uruguay*, *supra* note 32, paras 8.2-8.3.

35 Schabas, *supra* note 19, 312; Klein, *supra* note 19, para. 5; F. Mégret, 'Nature of Obligations', in D. Moeckli, S. Shah & S. Sivakumaran (eds), *International Human Rights Law*, 2nd ed. (2014), 96, 102; African Commission on Human and Peoples' Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/ 02, 15 May 2006, para. 152 [AfCHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*].

Therefore, the law does not pose in itself any direct legal restrictions on the illegalized departure.[36] However, it must be asked whether Niger, by enforcing Law 2015-36, prevents the departure of non-nationals towards Libya in a manner which infringes its obligation to respect the right to leave (1.). The second part of this analysis will examine whether Niger failed to take the necessary steps to prevent its State organs from infringing upon this right, thereby neither protecting nor promoting it adequately (2.).

The conduct under assessment is attributable to Niger, since the legislature as well as the law enforcement agencies and the judiciary are State organs pursuant to Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (ASR)[37], working within their official capacity.[38]

1. Obligation Not to Prevent Departure

The following section will analyze if Niger, by enforcing Law 2015-36, infringes upon its primary obligation under the right to leave, i.e., not to prevent people's departure. As this includes allowing non-Nigerien nationals that are legally expelled from Niger to freely choose their country of destination, subject to the agreement of that State,[39] Niger does not fulfil its obligation by sending intercepted migrants back to their countries of origin.[40] An interference of the

36 Perrin, *supra* note 9.

37 Appended to GA Res. 56/83, UN Doc A/RES/56/83, 12 December 2001.

38 J. Crawford, *Brownlie's Principles of Public International Law,* 9th ed. (2019), 527-533; O. Dörr, 'Völkerrechtliche Verantwortlichkeit', in K. Ipsen (ed.), *Völkerrecht: Ein Studienbuch*, 7th ed. (2018), 644-645.

39 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 8; Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, UN Doc HRI/GEN/1/Rev.9 (Vol. I), 11 April 1986, para. 9.

40 C. Jakob, 'Endstation Agadez: Wie Niger die Fluchtrouten Dichtmacht', die Tageszeitung (18 December 2017), available at https://taz.de/Wie-Niger-die-Fluchtrouten-dichtmacht/!5468121/ (last visited 11 February 2024). This applies all the more to individuals facing persecution, torture or inhuman or degrading treatment or punishment in their country of origin, as their deportation is not permitted under the different prohibitions on refoulement. See *Convention Relating to the Status of Refugees*, 28 July 1951, Art. 33, 189 UNTS 137 [*Refugee Convention*] (Niger acceded on 25 August 1961); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 June 1987, Art. 3, 1465 UNTS (Niger acceded on 5 October 1998); T. Gammeltoft-Hansen & J. C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', 53 *Columbia Journal of Transnational Law* (2015) 2, 235, 237-239; Hailbronner, *supra* note 23, 76; see generally J. C. Hathaway, *The Rights of Refugees Under International Law*, 2nd ed. (2021), 313-464.

right to leave does not require a total inability to leave the country – excluding only certain countries suffices.[41] It is therefore critical to question to what extent the criminalization of smuggling affects the overall possibility of non-nationals to leave Niger towards Libya.

a. Criminalizing Irregular Mobility

In order to analyze the impact of Law 2015-36 on the mobility options of people, it is essential to look at the mobility in Niger before its implementation. The country has a long-standing history as a key transit country for people seeking temporary work in Maghreb States and in Europe.[42] As Niger is a member of the Economic Community of West African States (ECOWAS), nationals of other member States are in principle allowed to travel inside the country without a visa, as long as they are carrying national identification documents.[43] However, mobility and migration in Niger have predominantly taken place through irregular means. This is mostly due to the obstacles that hinder legal travel. In Sub-Saharan Africa, only 46% of births are registered[44] and even those who are registered may not necessarily be able to afford travel documents.[45] In addition, there is widespread distrust in institutions and

41 Markard, *supra* note 14, 596.

42 Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 4; L. Yuen, 'Overview of Migration Trends and Patterns in the Republic of the Niger, 2016-2019', in P. Fargues & M. Rango (eds), *Migration in West and North Africa and Across the Mediterranean: Trends, Risks, Development and Governance* (2020), 77; J. Black, '"No One Talks About What it's Really Like" – Risks Faced by Migrants in the Sahara Desert', in P. Fargues & M. Rango (eds), *Migration in West and North Africa and Across the Mediterranean: Trends, Risks, Development and Governance* (2020), 149, 150.

43 See *The Revised ECOWAS Treaty*, 24 July 1993, Art. 59, 35 ILM 660 and *Protocol Relating to Free Movement of Persons, Residence and Establishment*, 29 May 1979, Art. 3, A/P.1/5/79; D. Breen, '"On This Journey, no one Cares if you Live or Die": Abuse, Protection, and Justice Along Routes Between East and West Africa and Africa's Mediterranean Coast' (2020), 13, available at https://mixedmigration.org/wp-content/uploads/2020/07/127_UNHCR_MMC_report-on-this-journey-no-one-cares-if-you-live-or-die.pdf (last visited 11 February 2024); Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 9.

44 UNICEF, 'Percentage of Children Under Five Years of Age Whose Births Are Registered, by Region 2011-2020' (2021), available at https://data.unicef.org/topic/child-protection/birth-registration/ (last visited 11 February 2024).

45 Spijkerboer, 'The New Borders of Empire', *supra* note 4, 51; K. Arhin-Sam *et al.,* 'The (In) Formality of Mobility in the ECOWAS Region: The Paradoxes of Free Movement', 29 *South African Journal of International Affairs* (2022) 2, 187, 194.

authorities, which is why many West Africans usually travel irregularly, without identification or with falsified documents.[46] Moreover, changes in immigration policy have rendered most people unable to obtain the necessary documents to legally enter Maghreb countries such as Libya.[47] It is thus all but impossible to leave Niger towards Libya without the help of smugglers.[48]

In response to this need, the task of *smuggling* in the Sahara has traditionally been taken on by traders who were familiar with the desert and picked up people on their way for a small fee.[49] This form of mobility has changed with time and increasing demand. Local structures were formed, some of which were run professionally, like the *agences de courtage*, which were legally registered companies that paid taxes,[50] while others were operated by individuals and often limited to contacts between two points.[51] For over half a century, this form of irregular mobility was tolerated by national authorities and there was no criminal offense for smugglers.[52] "In other words, migration through the Sahara was irregular but not clandestine."[53]

This changed with the implementation of Law 2015-36. Since the aforementioned mobility offers are intended to bring people across the border, whether they have the necessary documents to render them legal or not, in exchange for payment, they inevitably fall under the offense of smuggling as stipulated in Article 10 of Law 2015-36. However, additional factors have contributed to the *de facto* emergence of a travel ban. Due to the element of illegal exit, the law enforcement agencies have focused on the exit from Niger. This particularly affects the routes passing through the desert from Agadez, which lies about 350 kilometers from Niger's border with Libya.[54] The controls did not only take place at the border, but from Agadez and even further inside the country.[55] This is due to the fact that Article 13 of Law 2015-36 also criminalizes attempted smuggling.[56]

46 Perrin, *supra* note 9.
47 Black, *supra* note 42, 150.
48 Breen, *supra* note 43, 13.
49 Black, *supra* note 42, 154; Brachet, *supra* note 4, 17.
50 *Ibid*., 21.
51 Perrin, *supra* note 9; see also Wali, *supra* note 5, 11.
52 Black, *supra* note 42, 17; Brachet, *supra* note 4, 29.
53 *Ibid*., 20.
54 Wali, *supra* note 5, 7.
55 Gabriël & Rijks, *supra* note 7, 5; Jakob, *supra* note 40.
56 Perrin, *supra* note 9; Brachet, *supra* note 4, 26; M. Müller, 'Migrationskonflikt in Niger: Präsident Issoufou Wagt, der Norden Verliert', in A. Koch, A. Weber & I. Werenfels (eds), *Migrationsprofiteure? Autoritäre Staaten in Afrika und das Europäische*

While in principle this is also provided for in the Smuggling Protocol under Article 6(2)(a), the comprehensive criminalization of previously tolerated acts is due to the rigorous enforcement of Law 2015-36.[57] This is particularly evident in the jurisprudence of the *Tribunal de Grande Instance* (TGI) of Niamey.[58] The court qualifies movements as attempted smuggling even when the objective of crossing the border cannot be clearly established. It is for this reason that most of the judgments only refer to the transport of foreigners within Niger and confirm the criminal offense of smuggling without proving a link to an upstream or cross-border network, merely because the person provided part of the alleged journey, e.g., from the south to Agadez.[59]

The combination of the extensive criminalization under Law 2015-36, its rigorous enforcement by law enforcement authorities, and the broad and often misguided interpretation of the crime by the judiciary[60] thus "makes it possible to penalize mobility on Nigerien territory whose irregularity is presumed by the use of secondary roads".[61] Any kind of irregular and informal mobility, in effect all forms of mobility towards the north, are assumed to fall under the definition of smuggling under Law 2015-36. Transportation means, mainly trucks, were confiscated by the police and carriers were incarcerated.[62] Locals, being well-versed in crossing the desert, became afraid of being charged for smuggling and stopped taking non-nationals with them along the way. This led to a great decline of transportation and mobility options, making it all but impossible for non-Nigerien nationals to leave the country.

b. A Shift Towards Clandestine Smuggling

While the strict enforcement of Law 2015-36 did lead to a decline in informal transportation options for people on the move, it did not lead to an overall decline in the number of persons wishing to go to Libya.[63] In response

Migrationsmanagement (2018), 36, 41; Spijkerboer, 'The New Borders of Empire', *supra* note 4, 50.

57 Wali, *supra* note 5, 10.

58 Perrin, *supra* note 9.

59 Wali, *supra* note 5, 10; *Ministère Public v. Kamparin Djabwanga*, Case 18/2019 (TGI of Niamey), as cited by Perrin, *supra* note 9; Brachet, *supra* note 4, 26.

60 Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 31.

61 Perrin, *supra* note 9; see also Brachet, *supra* note 4, 25.

62 Gabriël & Rijks, *supra* note 7, 5; Jakob, *supra* note 40.

63 Gabriël & Rijks, *supra* note 7, 1, 8.

to this demand, and as crossing the desert on one's own is impossible,[64] new mobility practices arose.[65]

These emerging actors began to use bypass routes to evade intensified controls by defense and security forces, exposing people on the move to increased risks and dangers such as breakdowns on remote tracks and bandit attacks. Smugglers sometimes even abandon their passengers in the middle of the desert when they fear arrest. As these unofficial routes pass through isolated and perilous areas of the desert, control and data collection are impaired, and consequently protection and potential rescues through existing infrastructures are rendered difficult or even impossible.[66] "According to many observers, […] 'the Sahara may be as deadly as the Mediterranean' […]. The recorded deaths may represent only the tip of the iceberg."[67]

Law 2015-36 thus led to significant changes in smuggling networks in Niger, making it all but impossible to leave the country without risking one's life and safety.

c. Considering the Factual Effect of Law 2015-36

The preceding analysis leads to the conclusion that the criminalization of smuggling affects foreigners' overall possibility of leaving Niger towards Libya to an extent that amounts to a *de facto* travel ban. Such effects must be taken into account when assessing an infringement of human rights as the International Court of Justice (ICJ) has confirmed in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[68]

64 Black, *supra* note 42, 153-154.

65 Brachet, *supra* note 4, 29; Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 33; Wali, *supra* note 5, 12.

66 Gabriël & Rijks, *supra* note 7, 6; Brachet, *supra* note 4, 27-28; Black, *supra* note 42, 152-153, 155-156; Yuen, *supra* note 42, 79-80; Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 32; Jakob, *supra* note 40; Wali, *supra* note 5, 12-13; Border Forensics, 'Investigation Report: Mission Accomplished? The Deadly Effects of Border Control in Niger' (2023), 65, 70, available at https://www.borderforensics.org/app/uploads/2023/05/Report_Sahara_EN.pdf (last visited 11 February 2024) ['Sahara Investigation Report'].

67 Brachet, *supra* note 4, 28; Breen, *supra* note 43, 14; Black, *supra* note 42, 152.

68 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 [ICJ, *Advisory Opinion of 9 July 2004*]; discussed in F. Becker, 'IGH-Gutachten Über »Rechtliche Konsequenzen des Baus Einer Mauer in den Besetzten Palästinensischen Gebieten«', 43 *Archiv des Völkerrechts* (2005) 2, 218; A. Orakhelashvili, 'International Public Order and the International Court's Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied

In this Advisory Opinion, the ICJ addressed the effect caused by the construction of a wall by the State of Israel, a substantial part of which was built on the territory of the Palestinian people.[69] The court concluded that the wall amounted to a *de facto* annexation of the enclaved Palestinian territory in violation of the right to self-determination of the Palestinian people.[70] In particular, the ICJ noted that the inhabitants of the Palestinian enclaves could only leave under strict control and were thus cut off from workplaces, educational and health facilities, and elements of civilized care in the broadest sense.[71] The wall and the regime associated with it had created a *fait accompli*, with the potential to become permanent. This *de facto* annexation "severely impedes the exercise by the Palestinian people of its right to self-determination and is therefore a breach of Israel's obligation to respect that right".[72]

It follows that the creation of a factual situation can lead to a violation of public international law. Consequently, as in the Advisory Opinion, in which the *de facto* annexation of Palestinian territory resulted in a violation of the Palestinian people's right to self-determination, the *de facto* impossibility of leaving Niger towards Libya for non-Nigerien nationals results in a violation of their right to leave. Whereas, in the Wall Advisory Opinion, the *de facto* situation was affirmed "on the basis of what, irrespective of the probabilities involved, amounts to possibilities of annexation",[73] the effects of Law 2015-36 have already been observed since its entry into force, allowing a concrete assessment of its *de facto* impact on the right to leave, as has been shown. Thus, Niger fails to comply with its primary obligation to respect the right to leave and not to prevent the departure of persons on the move.

Furthermore, the State infringed upon its obligation to fulfil[74] and promote[75] the right to leave by failing to adopt implementation measures that

Palestinian Territory', 43 *Archiv des Völkerrechts* (2005) 2, 240; J.-F. Gareau, 'Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', 18 *Leiden Journal of International Law* (2005) 3, 489.

69 ICJ, *Advisory Opinion of 9 July 2004*, *supra* note 68, 136, para. 67.

70 *Ibid*., paras 121-122.

71 *Ibid*., para. 133.

72 *Ibid*., paras 121-122.

73 Gareau, *supra* note 68, 514.

74 AfCHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, *supra* note 35, para. 152.

75 Mégret, *supra* note 35, 103; AfCHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, *supra* note 35, para. 152.

ensure its full exercise.[76] While it conducted trainings for the law enforcement agencies, aiding them to identify conduct constituting smuggling under Law 2015-36,[77] it should have further trained them with respect to the protection of the human rights of migrants.[78] This obligation is also laid down in Article 14(1) in conjunction with Article 19(1) of the Smuggling Protocol.[79]

2. Obligation to Prevent Law Infringements

Prior to Niger's obligation to adopt human rights-conscious implementation measures, it was its responsibility not to enact laws that violate the right to leave in the first place.[80] This duty of the legislature was reaffirmed in Article 16(1) of the Smuggling Protocol.[81] While it is the State's obligation to amend its domestic law or practice *ex post* to meet the standards imposed by the right to leave,[82] it can also *a fortiori* be required of the State, when drafting new laws, to ensure that they do not even *de facto* violate human rights.

When drafting a national law, it is therefore imperative that the State has analyzed the potential consequences on human rights before enactment, e.g., by conducting an *ex ante* human rights impact assessment (HRIA).[83] This applies regardless of the fact that the Smuggling Protocol allows for a

76 HRC, *CCPR General Comment No. 31*, *supra* note 25, para. 7; Schabas, *supra* note 19, 32-33; Murray, *supra* note 16, 23; Mégret, *supra* note 35, 103.

77 Perrin, *supra* note 9.

78 Murray, *supra* note 16, 28.

79 P. Oberoi, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence* (2010), 75.

80 Murray, *supra* note 16, 24; Schabas, *supra* note 19, 32-33; HRC, *CCPR General Comment No. 31*, *supra* note 25, paras 3-4.

81 T. Spijkerboer, 'Moving Migrants, States, and Rights: Human Rights and Border Deaths', 7 *The Law & Ethics of Human Rights* (2013) 2, 213, 228-229 [Spijkerboer, 'Moving Migrants, States, and Rights'].

82 HRC, *CCPR General Comment No. 31*, *supra* note 25, para. 13; Murray, *supra* note 16, 20.

83 J. Harrison, 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment', 3 *Journal of Human Rights Practice* (2011) 2, 162, 164, 166; for further information on the HRIA process, read E. Felner, 'Study on Human Rights Impact Assessments: A Review of the Literature, Differences With Other Forms of Assessments and Relevance for Development' (2013), available at https://documents1.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIA-Web.pdf (last visited 11 February 2024).

broader criminalization by setting only the minimum requirements.[84] Rather, an assessment of the potential human rights impact of a proposed law is all the more necessary when the State, in implementing an international treaty such as the Smuggling Protocol, criminalizes acts not mentioned in the source document and its legislative guide. Moreover, the Smuggling Protocol explicitly states in its Article 19 that its regulatory content must not affect the human rights of migrants. In order not to undermine the right to leave in its application, the legislator would have had to adapt the law to the circumstances of people on the move in the respective country. The lack of involvement of key stakeholders during the drafting process was also criticized by local elected officials in Niger.[85] It would also have been possible for the government to react to the numerous reports attributing the emergence of a *de facto* travel ban to Law 2015-36[86] after its entry into force. Niger has thus violated its obligation not to enact laws infringing human rights or to amend them accordingly.

Niger therefore infringes the right to leave, not only under its negative obligation to refrain from preventing departure, or its positive obligation to train its law enforcement authorities regarding human rights, but also by failing to ensure that its legislature does not enact laws that inherently lead to a violation of human rights.

IV. Justifying Law 2015-36

Neither the right to leave enshrined in Article 12(2) of the ACHPR nor in Article 12(2) of the ICCPR are absolute.[87] The restrictions to which the right may be subject are formulated, which deserves to be emphasized regarding the ACHPR, with a clarity and rigor not shared by any of the other limitation clauses in this Charter. They are only possible if they are provided for by law and necessary to protect "national security, law and order, public health or morality".[88] Article 12(3) of the ICCPR allows for similar limitations of the right

84 United Nations Office on Drugs and Crime, 'Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto' (2004), 351, para. 58, available at https://www.unodc.org/documents/congress/background-information/Transnational_Organized_Crime/Legislative_guide_E.pdf (last visited 11 February 2024).

85 Wali, *supra* note 5, 12.

86 In particular Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 32.

87 Schabas, *supra* note 19, 312; Ouguergouz, *supra* note 18, para. 60.

88 *Ibid*., para. 60.

to leave and further stipulates that they must be consistent with all other rights recognized in the Covenant.[89]

A decisive criterion when assessing the permissibility of the restriction is its necessity for the protection of the pursued purpose.[90] In this regard, "[e]very interference […] requires a precise balancing between the right to freedom of movement and those interests to be protected by the interference", taking into account its severity and intensity.[91] This principle of proportionality must be respected by both the law providing for the restriction and the administrative and judicial authorities applying it.[92] The principle entails the consideration of three aspects: first, the restrictive measure must be appropriate to achieve the legitimate protective function; second, it must constitute the least intrusive means to safeguard the protected interest;[93] and, finally, it must be proportionate to the interest to be protected.[94] "In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right."[95] Thus, the restriction of the right to leave must be an exception and may not become the rule.[96]

Applying the legal criteria outlined above, the following section will balance the right to leave, to which persons are entitled notwithstanding their attempt to be smuggled,[97] with the purpose of Law 2015-36 to protect the interests of people on the move (1.), the interests of bordering States (2.), or the national interest of Niger (3.). A derogation, even though possible,[98] is not to be assumed.

89 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 11.

90 HRC, *CCPR General Comment No. 31*, *supra* note 25, para. 6; HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 14.

91 Schabas, *supra* note 19, 317; O. de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 2nd ed. (2014), 378.

92 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 15.

93 Eighth Colloquium on Challenges in International Refugee Law, 'The Michigan Guidelines on Refugee Freedom of Movement', 39 *Michigan Journal of International Law* (2018) 1, 5, para. 5.

94 Schabas, *supra* note 19, 317; HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 14; De Schutter, *supra* note 91, 368-369; Murray, *supra* note 16, 337.

95 HRC, *CCPR General Comment No. 31*, *supra* note 25, para. 6.

96 Schabas, *supra* note 19, 317; HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 13.

97 C. Harvey & R. P. Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law', 19 *International Journal of Refugee Law* (2007) 1, 1, 14.

98 Schabas, *supra* note 19, 303; T. Buergenthal, 'Human Rights', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), para. 17.

1. In the Interest of People on the Move: Saving Lives

By adopting Law 2015-36, Niger could argue that their interference was justified because it aimed to protect the lives and safety of people on the move who potentially fall victim to exploitative smugglers.[99] While this is a legitimate aim, and to pursue and criminalize the action at the source of the danger seems appropriate at first glance, studies show that "policies that reduce the number of active smugglers in the area are likely to raise the mean exploitation in the market". This is presumed to be caused by the rise in risks and costs for smugglers, which drives non-exploitative smugglers out of the market.[100] The Special Rapporteur concludes that the associated "recourse of migrants to riskier routes [further] raises questions as to the effectiveness of the law as a means to protect the life of migrants and prevent deaths in the desert".[101]

A less intrusive but more efficient means to secure the lives of people on the move would be to enhance the dissemination of information about the risks of travelling through the desert. Niger could therefore support non-governmental organizations, such as Afrique-Europe-Interact and Alarme Phone Sahara, which distribute illustrated information flyers advising people on the move about the risks of desert crossing, as well as their rights and available protection measures in case of emergency.[102] Their educational work, which they carry out with the aim of enabling people to make autonomous informed decisions, could be combined with the training of law enforcement officers working in transit towns such as Agadez, where a large number of persons on the move begin their journey through the desert.

The measure is thus ineffective at saving the lives of people; rather, it increases the risks, as demonstrated above. It is also not the least intrusive means to achieve this aim. Moreover, if a person wishes to leave Nigerien territory on

99 R. Piotrowicz & J. Redpath-Cross, 'Human Trafficking and Smuggling', in B. Opeskin, R. Perruchoud & J. Redpath-Cross (eds), *Foundations of International Migration Law* (2012), 234, 247-249; Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 29; Stoyanova, *supra* note 18, 404; Jakob, *supra* note 40.

100 A. Triandafyllidou & T. Maroukis, *Migrant Smuggling: Irregular Migration From Asia and Africa to Europe* (2012), 11.

101 Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 33.

102 Alarme Phone Sahara, 'Advice to Migrants When Crossing the Desert', available at https://alarmephonesahara.info/system/refinery/resources/W1siZiIsIjIwMTkvMTAvMjMvMXg5bnl6ZncwbF9mbHllcl9lbi5wZGYiXV0/flyer_en.pdf (last visited 11 February 2024).

the basis of a free and autonomous decision, Niger, as "the state of departure may not lawfully restrict the right to leave on the basis of concerns about risk to the individual's life or safety during the process of leaving or traveling".[103]

2. In the Interests of Bordering States: Preventing Illegal Entry Into Libya

The definition of smuggling entails the illegal entry into the receiving State. By its criminalization, Law 2015-36 could thus aim at preventing violations of Libya's immigration laws. While this is undoubtedly a Libyan public order interest,[104] it is Niger's own interest that is of relevance for the justification as it triggered the violation of the right to leave.[105] The Nigerien criminalization of smuggling can therefore not be justified under the purpose of protecting Libya's immigration laws.[106]

This is all the more valid as the right to seek asylum and the principle of *non-refoulement*, affirmed in Article 19(1) of the Smuggling Protocol and binding on Libya as a customary norm,[107] would otherwise be frustrated. According to Article 31 of the Refugee Convention, the illegal entry of refugees shall not be criminalized. This acknowledges that refugees may find themselves in the situation of entering a country not having the required documents. Together with the right to leave and the principle of *non-refoulement*, this creates "a limited right of (at least) temporary admission for asylum seekers to access fair and effective refugee status determination procedures".[108] Even though this is not the case for persons that are not entitled to any protection or only to subsidiary protection, "a potential protection status must be immaterial at departure". It cannot be up to Niger as the departure State to determine migrants' protection status and thus decide who is allowed to leave its territory.[109] It is its duty "not to frustrate the exercise of [the right to leave to seek asylum]" by imposing "intentional policies and practices of containment without protection".[110] This duty cannot be absolved by arguing that the refugees can seek asylum in Niger,

103 Eighth Colloquium on Challenges in International Refugee Law, *supra* note 93, para. 6.
104 Schabas, *supra* note 19, 319.
105 Eighth Colloquium on Challenges in International Refugee Law, *supra* note 93, para. 7; Markard, *supra* note 14, 603, 606.
106 Schabas, *supra* note 19, 321.
107 G. S. Goodwin-Gill & J. McAdam, *The Refugee in International Law,* 4th ed. (2021), 515.
108 *Ibid*., 477, 746.
109 Markard, *supra* note 14, 603, 606.
110 Goodwin-Gill, *supra* note 15, 66 (emphasis omitted).

since refugees have a certain choice in which State they want to request asylum, regardless of whether they could have received *de jure* or *de facto* protection in a previous transit country of their flight.[111]

With regard to its bordering countries, Niger could argue that it intended to counter transnational criminal networks. While Articles 6 and 9 of Law 2015-36 encourage the transnational prosecution of smuggling, the elements of transnationality and organized crime are not included in Article 10. In fact, the law is mostly applied to cases that do not involve border crossing, let alone a transnational network. Its concrete manifestation is therefore neither suitable nor the least intrusive means.

3. In National Interests: Prevention of Crime

The main purpose of Law 2015-36 is to combat the activities of smugglers, in other words the prevention of crime,[112] falling under Niger's interest of *ordre public*.[113] Its suitability could be derived from the provision of Article 6(1)(a) of the Smuggling Protocol. However, it is questionable whether Niger's sovereignty and security concerns, based on the fear that actions of smugglers interfere with orderly migration,[114] are being met appropriately by Law 2015-36.

First, the extent to which the criminalization of small-scale and self-organized activities constitutes a protection to Niger's public order must be questioned.[115] Second, it cannot be assumed that the State's failure to act against this socially rooted and tolerated form of mobility would be understood as a threat to the security of its citizens.[116]

Yet, given that smuggling activities are considered criminal, a suitable measure would need to address, in particular, the demand for clandestine

111 United Kingdom: High Court (England and Wales), *R v. Uxbridge Magistrates' Court and Another Ex Parte Adimi*, (2001) QB 667, 678 [*Adimi*]; supported by: UNHCR, *Conclusions on International Protection Adopted by the Executive Committee 1975-2017,* No. 15 (XXX): Refugees Without an Asylum Country (1979), para. (h), HCR/IP/3/Eng/REV.2017, available at https://www.refworld.org/docid/5a2ead6b4.html (last visited 11 February 2024); see also Goodwin-Gill & McAdam, *supra* note 107, 495-496.

112 Stoyanova, *supra* note 18, 430-431; Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 29.

113 Schabas, *supra* note 19, 319.

114 A. Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', 23 *Human Rights Quarterly* (2001) 4, 975, 976.

115 Stoyanova, *supra* note 18, 430.

116 Piotrowicz & Redpath-Cross, *supra* note 99, 247.

movement.[117] This demand stems from the lack of opportunities for lawful mobility. It has already been established that people on the move in Sub-Saharan Africa often lack personal identification documents. There is also widespread distrust in State institutions and authorities. Law 2015-36, however, does not address these reasons for the demand for smugglers. It is therefore not a suitable measure to respond to Niger's sovereignty and security concerns.

While Law 2015-36 can neither be understood as suitable nor as the least intrusive means due to its criminalization beyond the Smuggling Protocol and its arbitrary enforcement,[118] its proportionality is also questionable.[119] When assessing the proportionality of Law 2015-36, the severity and intensity of the interference, which also depend on its duration,[120] play a decisive role.[121] In the case at hand, there is no prospect for the affected people to have the *de facto* travel ban lifted, as it finds its origin in Law 2015-36, which would have to be annulled for this purpose. The duration of the interference to their right to leave is therefore unlimited.

The indefinite nature of the restriction is exacerbated in its effect by the fact that Law 2015-36 presents the holders of the right to leave with a *fait accompli*. To circumvent the restrictive effect of Law 2015-36 and cross the border to Libya, non-Nigerien nationals would have to obtain travel documents and use legal routes instead of seeking out smugglers. However, the obstacles in this regard have already been highlighted, making it all but impossible to leave Niger towards Libya without the help of smugglers. Law 2015-36 thus deprives people on the move of any possibility to influence its restricting effect and therefore completely disregards their vulnerability, let alone assesses their individual situation.[122] In the case of the established permissible restrictions, such as that the affected person is currently undergoing legal proceedings and has to appear in court, has unpaid debts, has to perform military or alternative service, or is serving a prison sentence,[123] the reason for the restriction always lies with the person seeking to leave the country. The restriction of the right to leave by Law 2015-36, in contrast, affects non-nationals in a general and abstract way, without the reason being a duty they must fulfil or another condition depending

117 Stoyanova, *supra* note 18, 430.
118 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 13; Murray, *supra* note 16, 337.
119 Markard, *supra* note 14, 609.
120 *Ibid*., 596.
121 Schabas, *supra* note 19, 317.
122 Markard, *supra* note 14, 609.
123 Schabas, *supra* note 19, 311, 318, 320; Harvey & Barnidge, *supra* note 97, 9.

on them personally. There is no way for them to escape the *de facto* ban on leaving the country, thereby making Law 2015-36 a particularly severe restriction.

Regarding its severe nature, the procedures following the adoption of Law 2015-36 are especially decisive.[124] It has already been established that Niger infringed upon its obligation to assess the consequences of Law 2015-36 and to give due consideration to concerns raised with regard to the infringing and arbitrary nature of the law's enforcement. In this respect, the lack of effective remedies for people whose rights have been violated[125] by Law 2015-36 is concerning. This finding leads to the conclusion that "the authorities have not acted with the requisite caution in interfering with the right"[126] to leave, thus violating the requirement of proportionality.

Taking all these factors into account, with special consideration for both its indefinite nature as well as the impossibility for people on the move to escape the restrictive effect of the law and to leave the country by other means, it can be concluded that the law impairs the essence of the right to leave in its implementation. Niger thus violates the principle that "the relation between right and restriction, between norm and exception, must not be reversed".[127]

D. Conclusion

In conclusion, the enforcement of Law 2015-36 represents an unjustified interference in the right to leave of non-Nigerien nationals. Among its many consequences, such as economic decline and the lack of prospects for young people in the Agadez region,[128] the shift in the smuggling business towards exploitative and life-threatening mobility services to the north of Agadez is particularly worrisome. This development has not only been increasingly criticized by the local population in recent years, but also by the UN Special Rapporteur who, in his report on a 2019 visit to Niger, has also seen reason to identify the consequences of Law 2015-36 in detail and to call on Niger to take action. The report recalls how the Smuggling Protocol emphasizes[129]

124 De Schutter, *supra* note 91, 371.

125 HRC, *Concluding Observations on the Second Periodic Report of the Niger*, *supra* note 5, para. 39; Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 72.

126 De Schutter, *supra* note 91, 369.

127 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 13.

128 Wali, *supra* note 5, 7.

129 United Nations Office on Drugs and Crime, 'Model Law Against the Smuggling of Migrants' (2010), 57, available at https://www.unodc.org/documents/legal-tools/Model_

"that migration is not a crime and migrants in irregular situations should not be treated as criminals or deprived of their liberty and security". The Special Rapporteur further calls on Niger to amend the law to conform to the guidelines and standards of international human rights as well as ECOWAS' principle of freedom of movement.[130]

The present analysis of the law with regard to the right to leave leads to the conclusion that the element of *illegal exit* in Article 10 of Law 2015-36 should be removed. In particular, the law should not merely apply the element of an organized criminal group as an aggravating circumstance (Article 16 of Law 2015-36) but should integrate it as a mandatory requirement for the offense of smuggling. Such an amendment would arguably target a more limited set of interactions[131] and thus account for the regional context of mobility in Niger. In addition, the judiciary must be encouraged not to affirm the crime of smuggling on the basis of assumptions without proper proof. After the amendment of the offense, the prosecutor should have to prove intent to cross the border and participation in a smuggling network before people are sentenced to prison. It is also recommended that the Nigerien government draft any amendment to the law in cooperation with civil society stakeholders and those potentially affected by the law. While this process should focus on the protection of human rights, it is especially true for the implementation of the law that, in some situations, "protecting the rights of irregular migrants may require non-enforcement of anti-smuggling measures".[132]

Finally, it can be said that the intensive involvement of the EU[133] in the implementation of the law should be viewed critically. In view of human rights violations within its sphere of influence, further involvement of the EU, especially through development aid,[134] should be linked to a comprehensive

Law_Smuggling_of_Migrants.pdf (last visited 11 February 2024).

130 Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, paras 34, 72.

131 C. M. Ricci, 'Criminalising Solidarity? Smugglers, Migrants and Rescuers in the Reform of the 'Facilitators' Package'', in V. Mitsilegas, V. Moreno-Lax & N. Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (2020), 34, 43.

132 Oberoi, *supra* note 79, 68.

133 Crawford, *supra* note 38, 537-538; 'Sahara Investigation Report', *supra* note 66, 71; for a detailed discussion on the EU's involvement in Niger, see Spijkerboer, 'The New Borders of Empire', *supra* note 4, 51-55.

134 Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 38.

impact assessment of its actions that are detrimental to human rights.[135] The conclusions drawn in this article will be of particular interest for the discussion on the European practice of externalizing migration control[136], as well as for an analysis of the EU's responsibility[137] under the rules of attribution and joint responsibility laid down in the ASR with regard to the violation of the right to leave through the organizational and financial support of the implementation of Law 2015-36.

135 For HRIAs within the framework of human rights activities and project management cycles of the EU, see European Commission, C*ommunication From the Commission to the Council and the European Parliament*, 8 May 2001, COM(2001)252, Annex 2, 28; the human rights dimension of impact assessments as a fundamental part of Better Law-Making within the EU has been affirmed by European Parliament, Council of the European Union, European Commission, *Interinstitutional Agreement Between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making*, 13 April 2016, OJ 2016 L 123/1, paras 6, 12-18; European Commission, C*ommunication From the Commission on Impact Assessment*, 5 June 2002, COM(2002) 276, Annex 2, 15.

136 Spijkerboer, 'The New Borders of Empire', *supra* note 4, 56-57; Markard, *supra* note 14, 610-614; for an analysis of the impact on the ECOWAS principle of freedom of movement, see Arhin-Sam *et al.*, *supra* note 45, 191-192, 194-195, 198-199.

137 For an analysis of the international responsibility of EU member states for supporting third countries in preventing departure at sea in violation of international norms, see Markard, *supra* note 14, 614-616.