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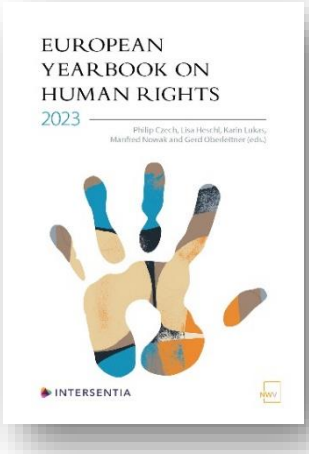

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EDITORS' PREFACE

Dear readers,

When we, the editorial team, issued the call for the edition of the European Yearbook on Human Rights (EYHR) 2023, we had the idea to provide our readership with the most innovative academic scholarship on how the current human rights framework can be rethought and adapted to address challenges to humanity's wellbeing and future. And indeed, the challenges the world and humanity are facing and the issues at stake, require new and innovative approaches in thinking and adapting human rights frameworks – an understanding which also informed the title of this special issue "Rethinking Human Rights". At a very crucial point in time, the European Yearbook on Human Rights 2023 as a platform for the discussion of important and topical human rights issues aims to prove the value and importance of human rights in addressing the most crucial threats to human wellbeing, including climate change, wars and the weakening of the rule of law and democracy. Contributions by both emerging and renowned scholars shed light on universal and individual human rights issues reflecting the complexities of the current times and showing the potential of human rights frameworks when applied and interpreted in an open way, putting equality, dignity and non-discrimination at the center.

This year's edition "Rethinking Human Rights" is divided into two parts. The first part is composed of 18 contributions dedicated to the whole spectrum of human rights. As is the tradition of the European Yearbook on Human Rights, the second part is dedicated to crucial developments in the jurisprudence of the European Courts – the European Court of Human Rights (ECtHR) and the European Court of Justice (CJEU) – in the field of human and fundamental rights.

The first five contributions are dedicated to climate change and the protection of the environment. Irene Sacchetti, in her contribution "Planetary Justice, Human Rights and the ECHR: Advancing Alternative Onto-Epistemologies to Face Climate-Related Challenges", analyses human rights law through the lens of planetary justice, a conceptual framework which demands an expanded vision of justice beyond borders, across generations and for non-humans, questioning the ability of the latter to deal with the intertemporal and interspecies dimensions of climatic harms. Subsequently, Kata Dozsa devotes her contribution "Shouldering the Burden of Intergenerational Justice: Children and Youth Representing Future Generations in Climate Change Politics, Law

and Litigation" to common and distinct features of "future generations" and "children" in the political discourse, in relevant international law, and in recent examples of climate change litigation in order to depict the whole array of implications for these groups when becoming responsible for climate change action. The next two contributions turn to the principal questions of how human rights can be used before the courts to challenge defaults in the field of climate change. Tomasz Sroka in his contribution "The Positive Obligations of States to Protect the Climate or the Environment as Part of the Protection of Human Life and Health under the European Convention on Human Rights" derives positive obligations related to the right to life and the right to private life as entry points to establish state responsibilities related to mitigating climate change and its impacts. Ebru Demir, in the subsequent contribution "Bringing the European Human Rights System and International Environmental Law Together in Climate Change Cases", looks beyond the narrow understanding of the ECtHR when accepting climate cases and suggests more engagement between the European Human Rights System and International Environmental Law in order to allow the Court to have a rather pro-active stance on environment and climate change. Clara Zimmermann in her contribution "Is the European Convention on Human Rights Equipped to Tackle the Plastic Crisis in the Mediterranean Sea?" explores arguments in favour of a state duty to protect against environmental harm caused by plastic pollution under the ECHR, as well as conceptual challenges for the integration of environmental protection within the existing, intrinsically anthropocentric European human rights framework.

The outbreak of the war in February 2022 was the most severe expression of the Russian aggression in Ukraine which had already started well before with the occupation of Crimea and the events in the Donbass area of eastern Ukraine in 2014. Annick Pijnenburg, in her contribution "Ukraine and the Netherlands v Russia: Taking Stock of the Latest Developments in the Case Law of the European Court of Human Rights on Extraterritorial Jurisdiction", analyses the recent admissibility decision by the ECtHR in the interstate case concerning events in the Donbass area of eastern Ukraine, including the downing of flight MH17, which the Court used as opportunity to clarify its general principles regarding (extraterritorial) jurisdiction, and which is likely to become the leading case on extraterritorial jurisdiction for years to come. The Russian aggression immediately resulted in a series of sanctions, including individual unilateral economic sanctions. Accordingly, the contribution by Iryna Bogdanova "Human Rights and Unilateral Economic Sanctions: A New Perspective on a Twisted Relationship" aims to explore perplexing and multifaceted relations between human rights and unilateral economic sanctions, an issue that is politically tainted and insufficiently analysed from a legal standpoint, and could not be more timely.

Especially in times of crises, ensuring freedom of expression and academic and artistic freedom are preconditions to addressing and raising important

human rights issues. Yet, freedom of expression, academia and artistic freedom are increasingly subject to limitations and threats themselves. Laurence Cuny and Véronique Guèvremont provide in their contribution "A European Perspective to Safeguarding the Diversity of Cultural Expressions and Artistic Freedom in the Digital Environment" an overview of efforts to protect artistic freedom and the diversity of cultures emphasizing States' obligations to make use of all existing *fora* to promote the protection of the diversity of cultural expressions and artistic freedom in the digital environment. Connected thereto, the contribution by Nina Lenglinger and Marie-Lou Deron, "Rethinking the Limits of Artistic Freedom: An Interdisciplinary Perspective on where to Draw the Line", analyses the limits to restrict artistic freedom in light of human rights. By providing historic examples, the contribution illustrates how creative freedom and its boundaries have been repeatedly challenged in the past, and how they are being called into question today. The contribution also examines the legal framework of artistic freedom and its limitations on the basis of the European understanding of human rights, in particular in the context of politically and ethically dialectic concerns. Klaus D. Beiter, Terence Karran and Denis Roynard in their contribution "The Commercial Attack on Universities: Academic Freedom an Orphan under the European Human Rights Framework?" move the debate to a different forum and seek to explain how the commercialisation of universities affects academic freedom and why academic freedom "violations 2.0" have largely remained below the radar in Europe requiring new ways to ensure its adequate protection.

Moving to the private sphere, the next two contributions deal with the most topical and personal questions concerning family and private life. Taking into account current discussions and policies restricting abortions, Spyridoula Katsoni in her contribution "Access to Abortion under the European Convention of Human Rights: Overcoming the Boundaries of Treaty Interpretation" critically analyses the interpretation techniques the Court uses in abortion cases, questioning its restrictive approach and suggesting a feminist interpretation in its jurisprudence on abortion. Subsequently, Paul Patreider and Domenico Rosani in their contribution "Recognising Children Born out of Surrogacy: A Review of the EU Draft Regulation on Cross-border Parenthood" turn to difficult questions related to surrogacy and the rights of the child and discuss the European Commission Proposal for a Regulation aimed at harmonising the rules of private international law related to parenthood within the European Union.

Despite their great positive potential, new technologies bear great risks when it comes to the protection of human rights. Ingrida Milkaite in her contribution "Walking the Tight Rope in the EU: Strengthening Children's Rights to Privacy and Data Protection in the Digital Environment" focuses on children as the most vulnerable group when it comes to the protection of their personal data taking into account the latest legislative and policy changes in the

European Union (EU) which specifically address children's rights to privacy and data protection in the digital environment. The rapid development of artificial intelligence (AI) technologies in the last years has spurred a lot of debate about issues of discrimination, privacy, freedom of expression, information and data protection. Sue Anne Teo, in her contribution "Rough around the Edges or a Fundamental Disconnect? (Re-)examining the Theory and Utility of Human Rights through the Six Systemic Distortions Afforded by Artificial Intelligence Systems" takes a legal and philosophical approach, engaging the intersections of human rights law and theory, philosophy of technology and law and technology in order to examine whether the theory and practice of the human rights law framework can address the systemic distortions afforded by AI systems.

One of the prevailing topics in the last decades in political debates has been (and remains) how to deal with migrants and refugees arriving in Europe and the role of human rights in the shaping of European migration and asylum policies. In these debates, policy makers placed particular emphasis on deterrence and containment policies and the strengthening of the external borders with human rights playing a subordinated role. Vicky Kapogianni and Noemi Magugliani in their contribution "When Aerial Surveillance Becomes the *Sine Qua Non* for Interceptions at Sea: Mapping the EU and its's Member States Complicity in Border Violence" take a critical stance on the increased reliance on aerial assets in European border controls and question the ability of the current legal framework and jurisprudence on jurisdictions to capture new modalities of 'soft' and 'detached' control resulting in violations of international human rights law and international refugee law. Against the background of increasing importance of migration movements and the growing share of long-term resident non-citizens in many countries, Andreas Th. Müller in his contribution "Exclusion of Migrants from Political Rights – Legitimate Choice or Unjustifiable Discrimination?" addresses important questions concerning the exclusion of non-citizen migrants from political rights and the tensions growing with respect to the fundamental democratic principle that governments should derive their powers from the consent of the governed.

Especially in times of crisis, calls for the immediate protection of human rights are raised. Yet, especially in the field of economic, social and cultural rights, rights are not a fixed entity but their objectives, rules and understanding might change. Pádraig McAuliffe dedicates his contribution "On Second (and Third) Thoughts: Raising, Revising and Reviving the Concept of Progressive Realisation over Time" to the implicit theory of change reflected in the "progressive realisation" principle contained in Art. 2 (1) of the International Covenant Economic, Social and Cultural Rights and analyses the different phases of evolution of the understanding of this principle.

In the last contribution of the first part of the European Yearbook of Human Rights, Isabella Meier and Klaus Starl in their contribution "Strengthening Human Rights at the Local Level in Georgia: A Case Study Based on the European

Charter of Local Self-Government" they turn to the local and more practical level reflecting the observations of two human rights consultants on a striking process of introducing human rights at the local level within the framework of a multi-level-governance effort initiated by the Council of Europe's Congress of Local and Regional Authorities.

In line with the tradition of the EYHR, part two is dedicated to important guiding jurisprudence in the field of human rights by the CJEU and the ECtHR. Alfred Benny Auner (CJEU) and Lorenzo Acconciamessa (ECtHR) have taken up the challenge of identifying significant developments in the case law of the European Courts, providing a detailed account of the growing corpus of human rights jurisprudence in Europe.

Rethinking human rights cannot take place in an isolated bubble. The editorial team of the EYHR composed of the European Training and Research Centre on Human Rights and Democracy of the University of Graz (UNI-ETC), the Austrian Human Rights Institute of the University of Salzburg, the Global Campus of Human Rights Venice, and the Vienna Forum for Human Rights would like to thank all our authors and reviewers for joining us in taking up this challenge. Our particular gratitude goes to the Global Campus of Human Rights for its financial support which makes this publication possible. Many thanks go further to Katharina Freller and Kirsten Reiterer for their excellent work and support. And lastly, particular thanks go to Harriet Palmann and Rebecca Moffat from Intersentia for their constant support, their availability and their flexibility during the whole publication process.

Graz, Salzberg, Vienna, Venice – August 2023
Lisa Heschl, Philip Czech, Karin Lukas,
Manfred Nowak and Gerd Oberleitner

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WHEN AERIAL SURVEILLANCE BECOMES THE *SINE QUA NON* FOR INTERCEPTIONS AT SEA

Mapping the EU and its Member States' Complicity in Border Violence

Vicky Kapogianni and Noemi Magugliani

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ABSTRACT

Since the European Court of Human Rights' findings in *Hirsi Jamaa and Others v. Italy*, European states have progressively moved away from 'direct' forms of interdictions and pushbacks, towards 'indirect' or 'privatised' pushbacks (and pullbacks). The increased reliance on aerial assets, presented as a hybrid strategy for maritime surveillance and combating irregular migration, has raised legal and

political challenges. While, in theory, technological tools could be neutral, they rarely are when placed in context, as their use is influenced by the objectives of their owners and/or users. The *dronisation* of the EU's stronghold, in conjunction with Member States' increasing activities beyond their territorial borders, has muddied the already murky waters of jurisdiction. The critical question addressed herein is whether the airborne cooperation-based mechanisms with third countries – as a cutting-edge trend for bridling asylum-seekers and other migrants from reaching EU borders – are capable of insulating Member States from complicity and legal liability in ways that the first generation of pushback strategies were not. Could aerial surveillance, and the chain of events that unfolds *because of* such surveillance, be enough to establish a jurisdictional link? This contribution argues that the current understandings of jurisdiction are unable to capture new modalities of 'soft' and 'detached' control, which nonetheless result in violations of international human rights law and international refugee law. A dynamic and evolutive interpretation of jurisdiction that considers technological developments and their impact on the exercise of control, the contribution argues, is not only necessary, but also essential, to avoid protection gaps and unaccountability.

1. INTRODUCTION

Since the findings of the European Court of Human Rights (ECtHR) in *Hirsi Jamaa and Others v. Italy*, European states have progressively moved away from 'direct' forms of interdictions and pushbacks. Instead, 'indirect' or 'privatised' pushbacks (and pullbacks) have become predominant, albeit with some exceptions.[1] In particular, the European Union (EU) and its Member States have largely invested in what might be called a schizophrenic attitude[2] towards autonomous technologies for monitoring and securing border spaces. From unpiloted military-grade drones to sensor systems and experimental technology, autonomous technologies have been utilised as security/deterrent enablers in the Mediterranean and Aegean Seas for surveillance, interdiction and interception of migrants and refugees' vessels. The introduction of the emerging high-end technologies as a panacea against the failed EU policies in managing irregular migrations highlights the EU and its Member States' industry-driven approach[3]

1 See, e.g. the facts giving rise to two cases pending before the ECtHR, *GRJ v. Greece* and *AAJ and HJ v. Greece*, App. Nos. 15067/21 and 24982/21, available at https://hudoc.echr.coe.int/eng?i=001-214585, last accessed 12.02.2023.

2 J.C. Hathaway and T. Gammeltoft-hansen, 'Non-Refoulement in a World of Cooperative Deterrence', (2015) 53(1) *Columbia Journal of Transnational Law*, p. 235.

3 United Nations General Assembly, 'Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance', 10.11.2020, UN Doc A/75/590, 10.11.2020.

for capitalising their surveillance and remote-control capacities while granting discretionary powers at border operations.[4]

The increased reliance on aerial assets, presented as a hybrid strategy for maritime surveillance and combating irregular migration, has raised legal and political challenges. While, in theory, technological tools could be neutral, they rarely are when placed in context, as their use is influenced by the objectives of their owners/users. Although aerial surveillance could be used to increase 'situational awareness' by detecting situations of distress at sea, thus allowing a rapid search-and-rescue (SAR) response, it has been deployed primarily to detect and intercept boats at sea, or to instruct other parties to do so before they reach a state's territorial or contiguous waters. A recent report, for instance, highlighted that European 'aerial surveillance is *key* in enabling the Libyan Coast Guard to intercept migrant boats and return their passengers to Libya'.[5] Determined to remain formally engaged with its fair share of international obligations, the EU's 'smart borders' fortress enables a versatile, as well as an equivocal, normative strategy, through which states embrace their non-entrée policies without formally resiling from their international obligations.[6] The *dronisation* of the EU's stronghold, in conjunction with EU Member States' increasing activities beyond their territorial borders, extending them to the high seas and third countries, has muddied the already murky waters of jurisdiction.

The critical question addressed herein is whether the airborne cooperation-based mechanisms with third countries – as a cutting-edge trend for bridling asylum-seekers from reaching EU borders – are capable of insulating EU Member States from complicity and legal liability in ways that the first generation of pushback strategies were not.[7] When European assets detect migrant boats and relay the information to private parties, or to non-European, and arguably unsafe, countries, to allow them to perform interdictions, what, if any, level of responsibility does the European state (or agency) have for the fate of those intercepted? Could aerial surveillance, and the chain of events that unfolds *because of* such surveillance, be enough to establish a jurisdictional link? Despite recent human rights courts' decisions illustrating the emergence of a

4 R. Csernatoni, 'Constructing the EU's High-tech Borders: Frontex and Dual-Use Drones for Border Management', (2018) 27(2) *European Security*, p. 176.

5 Border Forensics, 'Airborne Complicity – Frontex Aerial Surveillance Enables Abuse', 12.12.2022, available at https://www.borderforensics.org/investigations/airborne-complicity/ (emphasis added), last accessed 21.06.2023.

6 J.C. Hathaway and T. Gammeltoft-hansen (2015), 'Non-Refoulement', *supra* note 2, p. 235.

7 Ibid.

new corpus of jurisprudence and new models of jurisdiction,[8] the implications of aerial surveillance technologies remain underexplored. In reaction to those jurisprudential developments, advanced types of digital and technologically derived evidence have increasingly been admitted to international proceedings,[9] changing the landscape of evidence provision and analysis in accountability processes. Yet, against the backdrop of emergent models of jurisdiction, not much attention has been devoted to their threshold criterion for the abstract recognition of human rights, and the trigger of the corresponding human rights duties, in instances where unmanned aerial vehicles (UAVs) are involved. This contribution endeavours to fill in this lacuna.

This contribution maps the complicity of the EU and its Member States in border control (and violence), exploring and analysing incidents that have formed the basis for complaints to regional and international courts, as well as incidents that have been reported but have not (yet) been scrutinised by human rights bodies. The analysis reveals that the current understanding of jurisdiction is unable to capture new modalities of 'soft' control, which nonetheless result in violations of international human rights law and international refugee law. A dynamic and evolutive interpretation of jurisdiction that considers technological developments and their impact on the exercise of control, the contribution argues, is not only necessary, but also essential, to avoid protection gaps and unaccountability.

The contribution unfolds in a three-pronged stream. The first section of the contribution pertains to the Janus-like nature of non-neutral technology in the digitalised border control and surveillance regime, and illustrates how the by-products of airborne data contribute towards the emergence of a new corpus of jurisprudence that is more comprehensive, and which opens up a new realm of possibilities through technologically derived evidence. The second section relates to the legal history of border control, with a focus on the Central Mediterranean, and the evolution of legal arguments around jurisdictional links between the actions of EU Member States and violations of human rights resulting from border violence, tracing the development in three steps – from direct *refoulement* to privatised *refoulement*, via pushbacks by proxy. The third section delves into the chameleonic nature of jurisdiction and the airborne

8 The Human Rights Committee, for example, recently found that where 'a special relationship of dependency [is] established between the individuals on the vessel in distress' and a state authority, and when 'the individuals … were directly affected by the decisions taken by [the State] in a manner that was reasonably foreseeable', jurisdiction is triggered. See CCPR, *A.S., D.I., O.I. and G.D. v. Italy*, UN Doc CCPR/C/130/D/3042/2017, 27.01.2021, para. 7.8.

9 A. Koenig, E. Stover, C. Crittenden et al., 'Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court', *UC Berkeley School of Law Human Rights Center*, 01.02.2014, available at https://humanrights.berkeley.edu/publications/digital-fingerprints-using-electronic-evidence-advance-prosecutions-international, last accessed 15.02.2023.

complicity in assisting EU Member States in insulating themselves from international obligations and responsibility.

2. (NON-)NEUTRAL TECHNOLOGY: GEOSPATIAL TECHNOLOGIES' HYBRID USAGE

While UAVs themselves are not illegal weapons, they have, when associated with military strikes, been appraised as harmful military technology.[10] This perception stems from the excessive use of armed drones, by (some) states, for the extraterritorial targeting of persons – either members of armed groups in international and non-international armed conflicts (IACs and NIACs), or civilians who directly participate in hostilities.[11] Reactions have also been reported about the practice of 'signature strikes' by means of armed drones that target groups of men associated with terrorist activity, but whose identities are undetermined.[12] Although armed drones have become a contentious aspect of modern warfare, drawing substantial controversy and public concern,[13] as a muddling development that threatens to undermine the international rule of law, these are beyond the scope of this contribution, whose purpose is to outline the Janus-like nature of UAVs, and their hybrid application in the digitalised border control and surveillance regime.[14]

Digital technologies, including data provided by aerial vehicles, generate 'digital affordances', enabling their users to gather significant amounts of data from areas which are often inaccessible by conventional means.[15] Data amassed

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10 B. Aydin, 'Public Acceptance of Drones: Knowledge, Attitudes, and Practice', (2019) 59(C) *Technology in Society*, p.1.

11 J. Pejic, 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications', (2015) 893 *International Review of the Red Cross*, p. 26.

12 A. Dworkin, 'Drones and targeted killing: defining a European Position', Policy Brief, European Council on Foreign Relations, 2013, p. 5, available at https://ecfr.eu/publication/drones_and_targeted_killing_defining_a_european_position211/, last accessed 14.02.2023; K. Heller, '"One Hell of a Killing Machine": Signature Strikes and International Law', (2013) 11(1) *Journal of International Criminal Justice*, p. 1; European Parliament, 'Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare', 03.05.2013, available at https://www.europarl.europa.eu/thinktank/en/document/EXPO-DROI_ET(2013)410220, last accessed 13.02.2023.

13 Ibid.

14 V. Kapogianni, 'The Reverberations of the Rise of Fencing Border Regimes: Pushbacks, Detention and Surveillance Technologies', *International Law Blog*, 21.11.2022, available at https://internationallaw.blog/2022/11/21/the-reverberations-of-the-rise-of-fencing-border-regimes-pushbacks-detention-and-surveillance-technologies/, last accessed 14.02.2023.

15 S. Livingston, 'Digital Affordances and Human Rights Advocacy', *SFB Working Paper Series*, March 2016, p. 9, available at https://www.sfb-governance.de/publikationen/sfb-700-working_papers/wp69/SFB-Governance-Working-Paper-69.pdf, last accessed 18.02.2023.

through technological means can be used to supplement evidence collected by eyewitness and survivor testimonies, while offering a more comprehensive illustration of abuses that have occurred in locations where access is denied, or which are too dangerous or remote for human rights agents and witnesses to engage directly with, and can thus entrench accountability.[16] Data and digital technologies are clustered according to their 'affordances', and do not necessarily determine particular outcomes, due to their possible and manifold uses, meaning how they should be, and how they are, used. Legal adaptations and practices from governments and non-state actors influence the use of such technologies, particularly in the border and immigration enforcement context, and especially when they are used to predict, control and monitor traffic across European and international borders, or even employed to intercept refugee and migrant boats, to coordinate pushbacks, instead of engaging SAR operations.[17] These practices introduce an unsettling and paradoxical aspect of the interlocking relationship of technologies and human rights: the same technologies that expand the reach of investigations for alleged human rights violations can, at the same time, expand the reach and efficiency of those who commit them.[18]

2.1. DIGITAL EVIDENCE IN COURTS: THE EMERGENCE OF A NEW CORPUS OF JURISPRUDENCE AND THE 'PROTECTIVE' USE OF TECHNOLOGY

Developments in geospatial technologies, particularly the use of remotely sensed data,[19] have become an important source of evidence for documenting human rights violations and holding perpetrators accountable. Due to their specialised high-tech capabilities, they can overcome technical and physical limitations by capturing patterns of attacks or pushbacks over a great scale, on land and at sea, demonstrating military movements in otherwise inaccessible spaces, and providing a baseline to coalesce and corroborate any evidence that has a spatial component.[20] When drones and other geospatial technologies are used for these purposes, not only do they increase situational awareness, but, through live feeds, they generate digital records of footage, which can be reviewed at a

16 Ibid.

17 United Nations General Assembly (2020), 'Contemporary Forms of Racism', *supra* note 3, p. 19.

18 S. Livingston (2016), 'Digital Affordances and Human Rights Advocacy', *supra* note 15.

19 T.L. Harris, J. Drake, J.M. Wyndham et al., 'Geospatial Evidence in International Human Rights Litigation: Technical and Legal Considerations', *American Association for the Advancement of Science (AAAS)*, 2018, p. 1, available at https://www.aaas.org/resources/geospatial-evidence-international-human-rights-litigation-technical-and-legal, last accessed 12.06.2023.

20 Ibid., p. 42.

later stage, and even used as evidence in courts, and thus assign individual or collective responsibility with technical and scientific evidence, instead of relying solely on witness testimony.[21] Nevertheless, although the levels of admissibility of digital evidence are spiralling, the weight assigned to it remains low, and it has been received, at times, as 'almost circumstantial' – although nothing prevents courts from relying on circumstantial evidence[22] – or 'open source evidence', which necessitates corroboration and triangulation from multiple sources,[23] along with an expert witness to explain it, which can be very compelling when done by knowledgeable witnesses, as it adds an authority layer with recognised credentials.[24]

Recent cases at the International Criminal Court (ICC) have been materially more convincing from an evidentiary standpoint than the initial witness-focused cases, as newer types of digital and technologically derived evidence have been used in international proceedings.[25] International criminal cases, such as *Ayyash*[26] and *Bemba*,[27] are both exemplary and precedent-setting, on account of digital evidence. In both cases, the prosecution based their cases on digital evidence,[28] namely on an intensified analysis of telecommunication data, which illustrates how technological progress and digitalisation are changing the landscape of provision and analysis of evidence[29] in accountability processes. There is, arguably, a sphere in which technologies, international human rights law and criminal prosecution intersect, and although this is new, it is advancing rather quickly. Consequently, decisions in these cases will serve as *stare decisis* – both in a persuasive and/or binding manner, subject to the jurisdiction – and thus contribute towards the emergence of a new corpus of jurisprudence that is more comprehensive, and which extends beyond the realm of physical evidence.

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21 L. Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials', (2018) 41(2) *Fordham International Law Journal*, pp. 329–330.

22 'Nothing in the statutory framework prevents the Chamber from relying on circumstantial evidence': see ICC, *Prosecutor v. Bemba et al.*, Case ICC-01/05-01/13 A10, 27.11.2019.

23 K. Hiatt, 'Open Source Evidence on Trial', *The Yale Law Journal Forum*, 03.03.2016, available at https://www.yalelawjournal.org/pdf/Hiatt_PDF_zxz3ufoz.pdf, last accessed 18.02.2023.

24 C. Giardullo, 'Surveillance Drones as Tools to Enhance Accountability for Human Rights and Humanitarian Law Violations', (2021) 166(3) *The RUSI Journal*, pp. 20–27.

25 A. Koenig, E, Stover, C. Crittenden et al. (2014), 'Digital Fingerprints', *supra* note 9.

26 Special Trib. Leb., *Prosecutor v. Ayyash et al.*, Case STL-11-01/T/TC, 18.08.2020.

27 ICC (2019), *Prosecutor v. Bemba et al*., *supra* note 22, para. 39.

28 The term 'digital evidence' is understood as evidence which is stored on, received or transmitted through digital means, such as social media posts, digital imagery, video and recordings and satellite imagery. See S. Bubberley, A. Koenig and D. Murray (eds.), *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation, and Accountability*, Oxford University Press Oxford 2020, p. 9.

29 L. Freeman, (2018), 'Digital Evidence and War Crimes Prosecutions', *supra* note 21, p. 290; M. Fremuth, '*Prosecutor v Ayyash et al.* (Special Trib. Leb.)', (2021) 60(3) *International Legal Materials*, pp. 357–447.

Beyond the ICC, other international and regional courts and tribunals[30] have also admitted evidence processed via technological means, such as remote sensing and the use of earth orbiting and aerial platforms, to amass data which is otherwise unavailable, as alleged atrocity crimes often occur in non-permissive environments, over extensive geographic zones, and across long and multiple time frames.[31] The International Criminal Tribunal for the former Yugoslavia (ICTY) was the first to examine satellite imagery in international criminal proceedings, during the Srebrenica trials.[32] In an interesting titbit, the ECtHR, pursuant to Rule A1 of the Annex to the Rules of Procedure, on 'investigative measures',[33] which essentially leaves the Court free to decide on the evidence that may be adopted, requested or generally admitted, proceeded by requesting satellite images.[34] In *Sargsyan v. Azerbaijan*, the ECtHR deemed it necessary to request satellite images and DVD footage of the relevant area and its surroundings, to ascertain the facts of the case. The Court had to rule on the responsibility of the state within whose jurisdiction the alleged violations fell, however access to the territory was cumbersome, since the case concerned a disputed area (the village of Gulistan), and it was, thus, not possible to establish the facts on the ground. The satellite images were crucial in raising the situational awareness of the area, and ascertaining whether or not a violation had occurred, regardless of the fact that images, too, have to be interpreted. The Court did not exclusively use the given data as evidence, but also judged, on the merits, of the use of images and DVD footage as evidence by Member States in national proceedings, and the compatibility of this with human rights. This bears testament to the potential that satellite images and data may have in protecting human rights and proving accountability for human rights abuses.

On the migration front, the ECtHR has similarly employed satellite imagery in deportation proceedings, to demonstrate that an internal displacement or settlement in a refugee camp could be a real risk to immigrants, and would be subject to Article 3 of the European Convention on Human Rights (ECHR), on ill-treatment. In *Sufi and Elmi v. United Kingdom*, the UK issued deportation

30 Other courts that have considered satellite imagery evidence are the Special Court for Sierra Leone (SCSL), in *Prosecutor v. Charles Ghankay Taylor* (Case No. SCSL 03-02-A), and the Extraordinary Chambers in the Courts of Cambodia (ECCC), in *Prosecutor v. Kaing Cuek Eav alias Duch* (001/18-07-2007-ECCC/SC).

31 Coalition for the International Criminal Court, 'Satellite Imagery as Evidence for International Crimes', 23.04.2015, available at https://www.coalitionfortheicc.org/news/20150423/satellite-imagery-evidence-international-crimes, last accessed 16.02.2023.

32 UN ICTY, 'Bridging the Gap in Srebrenica, Bosnia and Herzegovina: Conference Proceedings, Srebrenica, 21 May 2005', available at https://www.icty.org/x/file/Outreach/Bridging_the_Gap/srebrenica_en.pdf, last accessed 16.02.2023.

33 ECtHR, 'Rules of Court', 01.06.2015, available at https://www.echr.coe.int/Documents/Library_2015_RoC_ENG.PDF, last accessed 16.02.2023.

34 ECtHR, *Sargsyan v. Azerbaijan*, no. 40167/06 [GC] 16.06.2015, paras. 12–15.

orders for two Somali refugees to be returned to Somalia, following their convictions for a number of serious criminal offences.[35] The reports submitted by the United Nations (UN) Office of the High Commissioner for Refugees (UNHCR) on the current state of Somalia had used satellite imagery to demonstrate the movement of, and an estimated number of, displaced persons.[36] The Court, despite stressing the possibility of a great margin of error on the estimates of the internally displaced persons, nonetheless admitted that evidence based on satellite images can demonstrate the movement of people and the conditions in different areas.[37] In *Moghaddas v. Turkey*, the applicant had argued, under Article 3 of the ECHR, that he had been deported to Iraq by illegal means, which had exposed him to a smorgasbord of deadly hazards, such as drowning or being blown up by a mine.[38] In support of his claims, a satellite image of a border crossing between Iraq and Türkiye was submitted, along with a signed statement from a survivor of, and eyewitness to, a past incident where a number of refugees, forced to cross the same river in 2008, had drowned.[39]

The sketching out of the ad hoc cases clearly evinces the contribution and value of evidence stemming from geospatial technologies. Satellite imagery falls under the category of documentary evidence and, more precisely, is part and parcel of the narrower subcategory of digital evidence, as opposed to physical evidence,[40] with which it is, nonetheless, generally compounded. Satellite images can provide spatial and temporal details of the armed forces of the country where atrocities are taking (or have taken) place, upon which to knit together and corroborate other evidence, particularly witness testimonies, even for past crimes. Of particular note in the ICC *Al Mahdi* case was the amount of open-source evidence presented which connected satellite images with other digital evidence,[41] showing the potential of advanced technologies, provided that courts come to grips with them, instead of rejecting technological evidence due to their inability to encompass its use and comprehend it. The aforementioned cases can, therefore, be considered the precursor to a more inclusive jurisprudence contribution to the enhancement of the human rights' body of evidence, wherein geospatial and emerging digital technologies analysis is fully applied and admitted.

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35 ECtHR, *Sufi and Elmi v. The United Kingdom*, nos. 8319/07 and 11449/07, 28.06.2011, paras. 14–21.

36 Ibid., para. 119.

37 Ibid.

38 ECtHR, *Moghaddas v. Turkey*, no. 46134, 15.02.2011, para. 29.

39 Ibid., para. 31.

40 M. Roscini, 'Digital Evidence as a Means of Proof before the International Court of Justice', (2016) 21(3) *Journal of Conflicts and Security Law*, pp. 541–554.

41 L. Freeman (2018), 'Digital Evidence and War Crimes Prosecutions', *supra* note 21, pp. 312–316. See ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case ICC-01/12-01/15, 08.03.2018.

2.2. THE ASCENT OF THE AUTONOMOUS TECHNOLOGY BORDER REGIME: A LEEWAY TO CIRCUMVENT ACCOUNTABILITY

Surveillance technologies, namely drones, have increasingly been employed for monitoring and securing border spaces,[42] as they ostensibly proffer efficient and intelligent solutions for border management. Through the 'border-industrial complex',[43] these autonomous technologies underpin a neo-liberal rationality of governmental power,[44] which is correlative to the securitisation dynamics portrayed in the (in)security problems and security solutions context[45] in which the EU is currently trapped. The 'border-industrial complex' denotes 'the nexus between border policing, militarisation and financial interest', which also stresses governments' increasing turn to the private sector in aiming to curb the migration crisis, whether political or humanitarian, and transform it into something 'knowable', and hence 'governable'.[46] The externalisation, militarisation and automation of borders are trends that not only fuel the border-industrial complex,[47] but even more so nurture EU managerialism: a term which alludes to corporate governance, and in particular the EU's organisational public sector change, whereby the private sector's managerial tools and principles have been embedded into many countries' governments and administrations.[48] Managerialism can be puzzling, especially when (non-) neutral technologies, used for national security purposes, follow a managerial/ technocratic framework in which human rights are merely a box to tick, and are thus not necessarily compatible with human rights protections.[49] Anything but an impetus to circumvent human rights prohibitions may lead to displacing violence in unexpected ways,[50] instead of minimising it.

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42 United Nations General Assembly (2020), 'Contemporary Forms of Racism', *supra* note 3.

43 Ibid., p. 9.

44 M. Foucault, The Birth of Biopolitics, Lectures at the Collège de France, 1978–1979, Palgrave Macmillan, London 2008, p. 3.

45 B.O. Martins and M. Gabrielsen Jumbert, 'EU Border Technologies and the Co-production of Security "Problems" and "Solutions"', (2022) 48(6) *Journal of Ethnic and Migration Studies*, p. 1431.

46 C. Robinson, 'Making Migration Knowable and Governable: Benchmarking Practices as Technologies of Global Migration Governance', (2018) 12 *International Political Sociology*, p. 418.

47 T. Miller, 'Why climate action needs to target the border industrial complex', *Al Jazeera*, 01.11.2019, available at https://www.aljazeera.com/opinions/2019/11/1/why-climate-action-needs-to-target-the-border-industrial-complex/, last accessed 20.02.2023.

48 G. Esposito, E. Ferlie and G.L. Gaeta, 'The European Public Sectors in the Age of Managerialism', (2018) 38(4) *Politics*, p. 480.

49 N. Keady-Tabbal and I. Mann, 'Weaponizing Rescue: Law and the Materiality of Migration Management in the Aegean', (2023) 36 *Leiden Journal of International Law*, p. 63.

50 Ibid.

The normalisation of military, or quasi-military, autonomous technology, in conjunction with the rise of EU managerialism, project the EU's – or at least several of its members' – pursuit of augmenting their sovereign violence, both outside as well as inside their borders,[51] through an unproblematic instrumentalisation and rationalisation of drones, which are promoted as security enablers in border surveillance.[52] States, particularly those at the forefront, which are faced with large numbers of migrant arrivals, have been using aerial assets to pre-empt, deter and leave adrift asylum-seekers. The hybrid fabric of these aerial assets encapsulates complex regimes of violence. By exacerbating a verticalisation of surveillance, from where a ubiquitous authority can efficiently monitor, police and aerially target migrants,[53] migrants are converted into security objects and data points to be analysed and, by extension, to be potentially criminalised, through the usage of risk-based taxonomies[54] which tend to dislocate or render a secondary place to human life, within the decisional cycle.[55]

A huge deployment of drones in maritime surveillance activities has been conducted, since 2016, by the European Border and Coast Guard Agency, Frontex.[56] In this context, EU Member States, in parallel with the investment in the usage of surveillance drones, decided to cease maritime patrols[57] in Central Mediterranean waters, after Italy's populist government threatened to veto Operation Sophia.[58] By halting rescue-boat patrols and relying solely on the deployment of aerial assets,

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51 P. Boucher, 'Domesticating the Drone: The Demilitarisation of Unmanned Aircraft for Civil Markets', (2015) 21(6) *Science and Engineering Ethics*, pp. 1393–1412.

52 R. Csernatoni (2018), 'Constructing the EU's high-tech Borders', *supra* note 4, p. 191. See also A. Papachristodoulou, 'The Ban-Opticon of Migration: Technologies at Maritime Borders and Extraterritorial Jurisdiction', *Border Criminologies Blog*, 11.05.2022, available at https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2022/05/ban-opticon, last accessed 22.05.2023.

53 G. Chamayou, *A Theory of the Drone*, The New Press, New York 2015.

54 D. Van Den Meerssche, 'Virtual Borders: International Law and the Elusive Inequalities of Algorithmic Association', (2022) 33(1) *European Journal of International Law*, p. 183.

55 I. Shaw and M. Akhter, 'The Unbearable Humanness of Drone Warfare in FATA, Pakistan', (2012) 44(4) *Antipode*, p. 1500.

56 M. Monroy, 'Security Architectures in the EU – Border drones (Part 1): Unmanned surveillance of the EU's external borders by Frontex', 22.07.2021, available at https://digit.site36.net/2021/07/22/border-drones-part-1-unmanned-surveillance-of-the-eus-external-borders-by-frontex/, last accessed 25.02.2023; A. Papachristodoulou, 'The Crotone Migrant Shipwreck: A Cat-and-Mouse Blame Game and the Role of Technologies at External Borders', *EJIL:Talk!*, 12.04.2023, available at https://www.ejiltalk.org/the-crotone-migrant-shipwreck-a-cat-and-mouse-blame-game-and-the-role-of-technologies-at-external-borders/, last accessed 22.05.2023.

57 A. Radjenovic, 'Search and rescue in the Mediterranean', *European Parliamentary Research Service*, January 2021, p. 5, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659442/EPRS_BRI(2021)659442_EN.pdf, last accessed 25.02.2023.

58 J. Rankin, 'EU to stop Mediterranean migrant rescue boat patrols', *The Guardian*, 27.03.2019, available at https://www.theguardian.com/world/2019/mar/27/eu-to-stop-mediterranean-migrant-rescue-boat-patrols, last accessed 25.02.2023.

a different dynamic emerged: aerial assets, primarily used to enhance situational awareness and increase reaction effectiveness, have been weaponised against migrants in distress at sea, and have become the agents of their interceptions. The paradox is that UAVs prescribed for SAR are not bound to the legal obligations covered by the Article 98(1) 'duty to render assistance' of the UN Convention on the Law of the Sea (UNCLOS)[59] and, therefore, the person (or persons) who is (or are) responsible for the drone's operations is (or are) not bound by maritime law to provide assistance to a vessel in distress, including via a SAR operation. In the same vein, EU Member States' SAR activities are not covered by a common EU legal framework, save for those Frontex-led joint operations carried out at sea.[60] Consequently, since Frontex prioritises the deployment of UAVs, which are not bound by the UNCLOS framework, this not only provides a carte blanche for unaccountability, but also threatens human rights protections, and the fulfilment of the *non-refoulement* principle enshrined in Article 18 of the EU Charter of Fundamental Rights (CFR).[61]

3. JURISDICTIONAL CHALLENGES AND ACCOUNTABILITY GAPS: A (LEGAL) HISTORY OF BORDER CONTROL IN AND AROUND THE CENTRAL MEDITERRANEAN

Within the international and European human rights law framework, the common baseline position is that rights are owed to everyone,[62] and that the *non-refoulement* principles apply to all persons within the jurisdiction of a state.[63]

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59 'The duty to render assistance of the UN Convention on the Law of the Sea', United Nations Convention on the Law of the Sea, UNTS 1833 (p. 3), Art. 98(1), p. 60.

60 Regulation (EU) No. 656/2014 of the European Parliament and the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L189/93, Art. 6 ('Frontex Regulation656').

61 I.B. Puntas, 'The use of drones for maritime surveillance and border control', *Working Papers Centre Delàs*, June 2022, p. 6, available at https://centredelas.org/wp-content/uploads/2022/06/WP_DronesFrontex_ENG.pdf, last accessed 25.02.2023.

62 See Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Art. 1; Convention on the Rights of the Child, Art. 2(1), 1577 UNTS, p. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 4 February 1985, entered into force 26 June 1987) 1465 UNTS 85 (CAT), Art. 22(1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 2(1).

63 CAT, *supra* note 63, Art. 2(1).

The UN Human Rights Committee, in its explicit statement on the meaning of jurisdiction through the lens of international human rights law, stressed that the obligations enshrined in Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) must

> be respected and ensured to all persons within [a State's] territory and subject to [its] jurisdiction. This indicates that [a State] must respect and ensure the rights laid down in the Covenant to anyone within its power or effective control, even if the [State] is acting outside of its territory.[64]

Legal accountability for human rights violations is, thus, inextricably linked with jurisdiction: jurisdiction works as a trigger for human rights obligations;[65] otherwise, in absence of a jurisdictional link between a state and a certain individual, no human rights duties can be ascribed.

As this contribution will explore in the following subsections, the concept of jurisdiction remains in constant evolution.[66] The ECtHR, within the context of Article 1 of the ECHR, has asserted that individuals present, lawfully or otherwise, on a state's territory fall under that state's jurisdiction. Through its jurisprudence,[67] the ECtHR has long since acknowledged that such jurisprudence is not exclusively territorial, and that the ECHR's scope can be extended beyond the State Party's territory, particularly through state agents' authority or effective control over an area.[68] Despite the initial confusion spread by the ECtHR in *Bankovic*, in which the Court determined that extensions beyond territorial jurisdiction are 'exceptional and require special justification in the particular circumstances of each case',[69] in the recent past the open-ended language about the versatile meaning of jurisdiction adopted in *Bankovic* has been built upon in such a way that the European regional human rights law is substantially in alignment with the UN Human Rights Committee meaning of jurisdiction, also affirmed by the International Court of Justice (ICJ).[70]

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64 HRC, 'General Comment 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13, 26.05.2004, para. 10.

65 ECtHR, *Catan and Others v. The Republic of Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06 [GC] 10.10.2012, para. 103.

66 ECtHR, *Al-Skeini and Others v. the United Kingdom*, no. 55721/07, 07.07.2011, para. 4.

67 ECtHR, *Loizidou v. Turkey (Preliminary Objections)*, no. 15318/89, 23.03.1995, para. 62; ECtHR, *Al-Skeini and Others v. the United Kingdom*, *supra* note 66, para. 131; ECtHR, *Issa and Others v. Turkey*, no. 31821/96, 16.11.2004, paras. 68–71.

68 ECtHR, *Al-Skeini and Others v. the United Kingdom*, *supra* note 66.

69 ECtHR, *Banković and Others v. Belgium* and 16 Contracting States, no. 52207/99 [GC] 12.12.2001, para. 61.

70 The ICJ has pointed out that 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory': ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 109.

Aerial surveillance has, over recent years, become fundamental in the EU's strategy to enhance circumstantial awareness and to prevent asylum-seekers and other migrants from reaching Europe, especially via maritime routes. Through their 'eyes in the sky', the EU and its Member States have attempted, and have partially managed, to remove themselves spatially, physically and – thus far – legally from their responsibilities.[71] Aerial surveillance is not, however, the first avenue that has been attempted in order to circumvent accountability through *detachment*. The progressive detachment – be that through orchestration,[72] or through physical (and other forms of) distancing – to avoid legal responsibility has been a pattern since, and arguably even before, *Hirsi*.[73] This section will explore the trends and patterns of externalisation and detachment, and associated jurisdictional issues, in three steps: direct *refoulement*, pushbacks by proxy, and privatised *refoulement*, all precursors to interceptions through aerial surveillance.

3.1. DIRECT *REFOULEMENT*: *HIRSI JAMAA AND ORS. v. ITALY*, COLLECTIVE EXPULSIONS AND *DE JURE* JURISDICTION

When discussing direct *refoulement* in the Central Mediterranean context, it is impossible to avoid referring to the *Hirsi* case. The applicants in *Hirsi*, 11 Somali nationals and 13 Eritrean nationals, were part of a group of around 200 people that left Libya aboard three vessels, in May 2009, with the objective of reaching European shores. On 6 May 2009, the vessels were intercepted by the Italian Revenue Police and coastguard, in the Maltese SAR zone. The applicants, alongside the rest of the people on board the vessels, were transferred on to an Italian military ship, and returned *directly* to Tripoli, where they were handed over to the Libyan authorities.

The ECtHR was called upon to evaluate the issue of jurisdiction, only a year after its judgment in *Al-Skeini*, where it recognised that, increasingly, states exercised human rights jurisdiction beyond their territory,[74] and that the decisive criterion in such cases was 'the exercise of physical power and control over the person in question'.[75] Responding to such a framing, the Italian government was quick to argue, *inter alia*, that, though the events took place on an Italian

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71 Human Rights Watch, 'EU: Frontex Complicit in Abuse in Libya', 12.12.2022, available at https://reliefweb.int/report/libya/eu-frontex-complicit-abuse-libya-enarit, last accessed 27.02.2023.

72 P. Müller and P. Slominski, 'Breaking the Legal Link but not the Law? The Externalization of EU Migration Control through Orchestration in the Central Mediterranean', (2021) 28(6) *Journal of European Public Policy*, pp. 801–820.

73 ECtHR, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, 23.02.2012.

74 ECtHR, *Al-Skeini and Others v. the United Kingdom*, *supra* note 66, para. 132.

75 Ibid., para. 136.

military ship, Italian authorities had never had *absolute and exclusive control* over the applicants, and that the interception was performed 'in accordance with the bilateral agreements [between Italy and Libya] of 2007 and 2009'.[76] The Court, first, recognised the essentially territorial notion of jurisdiction, and pointed to how, 'only in *exceptional* cases … acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention'.[77] The Court then placed an emphasis on the nationality of the ship as the (arguably most) relevant factor in determining whether Italy had exercised jurisdiction: considering that, 'by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying',[78] Italy was exercising *de jure* jurisdiction capable of engaging its responsibility under the ECHR.[79] More importantly for the scope and purpose of this contribution, the Court found that it could not 'subscribe to the Government's argument that Italy was not responsible for the fate of the applicants on account of the *allegedly minimal control exercised by the authorities over the parties concerned* at the material time'.[80] This will be returned to in the examination of other 'detachment' steps below. It suffices to emphasise, for the time being, that the Court was satisfied that the events fell within Italy's jurisdiction.

Also relevant in the *Hirsi* context is the Court's evaluation of the applicability of the 'collective expulsion' framework to the case. While the Italian government argued that 'the measure in issue was a refusal to authorise entry into national territory rather than "expulsion"',[81] the Court preferred to adopt a functional and teleological interpretation of Article 4 of Protocol 4, noting, *inter alia*, that its wording 'does not in itself pose an obstacle to its extraterritorial application'.[82] If, the Court went on, Article 4 of Protocol 4

> were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision [and] Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase.[83]

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76 Ibid., para. 65.

77 Ibid., para. 72 (emphasis added).

78 Ibid., para. 77.

79 See also L. Komp, *Border Deaths at Sea Under the Rights to Life in the European Convention on Human Rights*, Routledge, London/New York 2023, pp. 51–53. Only at a second stage did the Court examine the issue of *de facto* control.

80 ECtHR, *Hirsi Jamaa and Others v. Italy, supra* note 73, para. 79 (emphasis added).

81 Ibid., para 160. See also ECtHR, *Xhavara and Others v. Italy and Albania*, no. 39473/98, 11.01.2001, where the Court, however, did not rule on the applicability of Art. 4 of Protocol No. 4.

82 ECtHR, *Hirsi Jamaa and Others v. Italy, supra* note 73, para. 173.

83 Ibid., para. 177.

While *Hirsi* is often being pointed to as being the 'case zero' in strategic litigation, and the stance of the Court as one of the reasons giving rise, inadvertently, to States' detachment responses,[84] extraterritorialisation was already a dominant trend in the EU and its Member States' immigration policies. The model whereby admission or rejection takes place at physical or political borders, or within territories of so-called destination, was already deemed to be anachronistic in the early 2000s, when states sought instead to ensure that 'as much immigration control activity as possible [took] place elsewhere, either on the territory of other states, or in international waters, where the presumption is that states lack jurisdiction'.[85]

3.2. PUSHBACKS BY PROXY: *SS AND ORS v. ITALY*, CONTACTLESS INTERCEPTIONS AND THE OPERATIONAL MODEL OF JURISDICTION

In the evolving geopolitics of mobility, EU Member States – beyond their tight-knit cooperation with the EU's border agency, Frontex – have also been cooperating with third countries, mainly from the south and east of the Mediterranean (Libya and Türkiye), which are commonly migrants' transit countries.[86] Looking at the migration management agreements and policies, the conceptualised dynamic of 'rescue-through-interdiction/rescue-without-protection'[87] has been interpreted into a rescue, through interception, and return/rescue through the externalisation of responsibility paradigm. Through these framed and coordinated policies of interdiction being 're-defined into life-saving devices',[88] interceptions at sea, by coastguards of these third countries, accommodate the agency's externalised mode of operation and interventions linked to the interception and return of migrants, and thus its unaccountability. In this way, the responsibility falls upon those third countries, as the EU and its Member States have strategically managed to forge gaps in refugee and

84 P. Müller and P. Slominski (2021), 'Breaking the Legal Link but not the Law?', *supra* note 72, pp. 801–820.

85 B. Ryan and V. Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, Leiden/Boston, 2010, p. 3.

86 United Nations General Assembly, 'Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea', A/HRC/47/30, 12.05.21, para. 76. See also N. Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', (2016) 27(3) *European Journal of International Law*, pp. 591–616.

87 V. Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-Through-Interdiction/Rescue-Without-Protection"', (2018) 56 *Journal of Common Market Studies*, p. 119.

88 Ibid.

human rights protections by indirectly detaching from the international legal obligations that stem from the exercise of sovereignty within territorial waters, or from the effective control exercised, in the case of those intervening beyond their territorial seas.[89]

To further facilitate interceptions and the transfer of responsibility, EU Member States have also gradually criminalised, delegitimised and expelled SAR non-governmental organisations (NGOs)[90] from the Central Mediterranean, by creating a militarised regime of border protection relying heavily on aerial assets and outsourced cooperation. To this effect, they have sought to rebuild and politically legitimise increasing cooperation with third countries and non-state actors, while equipping and supporting them to become key actors in preventing migration flows.[91] The justification for the SAR capabilities withdrawal is founded on the grounds that the ad hoc NGOs' activities operate as a 'pull factor' for migrants to EU countries[92] – that NGOs collaborate with smugglers, and somehow encourage new arrivals – though no clear evidence has proved this contention.[93] Nevertheless, these perceptions have generated a climate of mistrust towards civil society, as well as giving leverage to important justification for criminal and related administrative measures to be instituted against NGOs, consequently making them susceptible to public attacks and acts of vigilante violence.[94]

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89 ECtHR, *Hirsi Jamaa and Others v Italy*, *supra* note 73, para. 70. The Italian government, in this case, argued that the state's involvement in search and rescue absolved it from its human rights obligations, since the coastguard was involved in rescuing the migrants from drowning, and therefore, Italy had no *non-refoulement* obligations towards them. Although the ad hoc argument was dismissed by the Court, the counterarguments invoked by the Italian government are significant in framing the attitude towards border enforcement and the various normative interpretations given to evade accountability.

90 C. Ferstman, 'Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States', *Conference of INGOs of the Council of Europe*, 01.12.2019, available at https://rm.coe.int/expert-council-conf-exp-2019-1-criminal-law-ngo-restrictions-migration/1680996969, last accessed 28.02.2023.

91 Alarm Phone, Borderline Europe, Mediterranea – Saving Humans et al., 'Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean', 17.06.2020, available at https://eu-libya.info/img/RemoteControl_Report_0620.pdf, last accessed 28.02.2023.

92 S. Carrera, 'Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update', 2018, pp. 8–9, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf, last accessed 28.02.2023.

93 Ibid., p. 9.

94 Ibid., p. 21; E. Cusumano and M. Villa, 'Sea rescue NGOs: a pull factor of irregular migration?', Policy Brief 2019/22', *European University Institute, Robert Schuman Centre for Advanced Studies*, 2019, available at https://cadmus.eui.eu/handle/1814/65024, last accessed 28.02.2023.

There is a significant and close connection between the ousting of rescue vessels from the Central Mediterranean and the financial and material support of the so-called Libyan Coast Guard (LYCG).[95] The political rationale of the assistance to the LYCG was to 'fill a gap' in the Mediterranean – a gap, however, caused in the first place by the crackdown on NGOs, and by the retreat of EU assets from the maritime borderlands. Following the signature, in 2017, of the first memorandum of understanding (MoU) between Italy and Libya, Italy significantly intensified capacity-building programmes for the LYCG, including through EU funding for border management and migration control in Libya, which includes objectives such as strengthening authorities' capacity in maritime surveillance and rescue at sea.[96] The EU and Italian funding of the LYCG has led to a situation whereby, effectively, the LYCG would not be able to exist, nor to operate, without such support. As a result of this cooperation, Libya was rendered able to notify the designation of its SAR region to the International Maritime Organization (IMO), under a (fictional) presumption of operational capacity.[97]

It is against this background that the case of *S.S. and Ors. v. Italy*, which is currently pending before the ECtHR, was submitted.[98] The case concerns the LYCG 'rescue' – arguably, interception – in November 2017, of a migrant dinghy on the high seas. The above-mentioned fictional presumption of operational capacity of the LYCG is at the centre of the case. At that point, the LYCG was far from being fully (and independently) operational, as it was both incapable of operating at a self-sustaining level, and still needed significant sustainment, including in operational terms.[99] With the LYCG unable to function without external support, it was Italy that secured these necessary functions. The case, as Moreno-Lax highlights,

> offers a paradigmatic example of the kind of policy and operational control that portrays the functional approach to jurisdiction [as] it entails a series of elements characteristic of public powers that are exercised by the Italian State – both territorially and extraterritorially; both directly and through the intermediation of the LYCG – that taken together generate overall effective control.[100]

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95 See, *inter alia*, P. Müller and P. Slominski (2021), 'Breaking the Legal Link but not the Law?', *supra* note 72; N. Markard (2016), 'The Right to Leave by Sea', *supra* note 86.

96 Forensic Oceanography, 'Death by Rescue: The lethal effects of the EU's policies of non-assistance', available at https://deathbyrescue.org/, last accessed 29.03.2023.

97 V. Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model"', (2020) *German Law Journal* 21, pp. 385–416, at pp. 404–405. See also P. Müller and P. Slominski (2021), 'Breaking the Legal Link but not the Law?', *supra* note 72.

98 See ECtHR, *S.S. and Ors v. Italy*, no. 21660/18, 26.06.2019.

99 V. Moreno-Lax (2020), 'The Architecture of Functional Jurisdiction', *supra* note 97, pp. 404–405.

100 Ibid.

The argument presented in *S.S. and Ors. v. Italy* is centred around the construction of another modality of jurisdiction beyond territorial and effective control. To capture instances of 'contactless' interception and pushback of migrants, the case for 'operational jurisdiction' has been brought forward, grounded in the understanding that, though 'exercised through remote management techniques and/or in cooperation with a local administration acting as a proxy',[101] instances of contactless interception may nonetheless engage the coordinating state's human rights obligations. The legal argument is built to a considerable extent on the ECtHR's position in *Ilascu and Others v. Moldova and Russia*, where the Court held that a state (the Russian Federation) could be responsible for the acts of a third actor, where the latter was under its 'decisive influence' and/or it survived by 'virtue of the military, economic, financial and political support given to it' by the state.[102] The Court, in this context, did not seem to attach importance to the fact that the Russian Federation had not directly participated in the events that were the subject of the complaint. Contrariwise, the fact that Russia had neither acted 'to prevent' nor 'to put an end' to the violations was sufficient for the applicants to fall under Article 1 of the Convention.[103] Hence, the duty to take preventive actions apropos of human rights violations emanates principally from the influence that a state exercises in a particular situation, which can also be evinced by means of financial support.[104] Consequently, what the ECtHR seems to imply is that if it is within the state's power to prevent human rights violations, and it does not do so, its conduct could trigger the applicability of Article 1 ECHR; hence, its responsibility is engaged, even in circumstances where the violations occurred extraterritorially, and the contracting state did not exercise effective control.[105]

In light of the increased prevalence of externalisation practices in the evolving geopolitics of mobility, the interpretation of the meaning – legally and practically – of jurisdiction, and of the applicability of Article 4 of Protocol 4, in *Hirsi*, suggested that the ECtHR was both able and willing to ensure that State Parties would not be allowed to implement practices contrary to the spirit and legal letter of the ECHR without being held accountable. Pijnenburg and van der Pas' mapping of existing strategic litigation regarding the Central Mediterranean migration route, however, provides an exemplary summary of

101 Ibid., p. 389.
102 ECtHR, *Ilascu and Others v. Moldova and Russia*, no. 48787/99, 08.07.2004, paras. 392–394.
103 Ibid., para. 393.
104 Ibid., para. 392.
105 ECtHR, *Hirsi Jamaa and Others v. Italy*, *supra* note 73, para. 178; 'A State cannot do by another what it cannot do by itself': ILC Commentary on State Responsibility on Article 16, A/56/10, 2001, para. 6.

a significantly different trend,[106] culminating in the recent ECtHR judgment in *N.D. and N.T. v. Spain*,[107] which departs significantly from *Hirsi*,[108] and applies an 'own conduct doctrine' which might undermine the potential of *S.S. and Ors. v. Italy* to succeed in achieving a protective outcome, even if the Court was to accept the 'operational jurisdiction' argument.

3.3. PRIVATISED *REFOULEMENT*: *SDG v. ITALY*, ORCHESTRATION AND THE IMPACT MODEL OF JURISDICTION

The changing pattern(s) of border control at sea analysed thus far – from direct *refoulement* to contactless interception – already emphasises developing and significant challenges in terms of establishing jurisdictional links between the acts of EU Member States and human rights violations faced by people on the move. While the majority of interceptions are now performed by the LYCG, though with the *necessary* – yet, at times, insufficient – support of EU Member States (and, in particular, of the Italian authorities), the structural gaps of the LYCG have led to situations where the LYCG has been *unable* to intervene to perform rescues/interceptions. In a number of these cases, and in absence of EU assets and NGO vessels, private merchant vessels have been mobilised to perform rescues/interceptions.[109] In a *vacuum* created by the (over)reliance on constructive *refoulement*, and on interdiction by omission, seafarers have been compelled to take responsibility for the rescue/interception of migrants – a role that merchant vessels had already taken up in the mid 2010s, when the rise in people moving through the Central Mediterranean meant that *all* vessels had to participate in SAR activities.[110] The distinction between the mid 2010s and the more 'current' involvement of merchant vessels, however, is one of nature and not of degree: indeed, rather than being called upon to perform *rescue* and being directed towards *safe* ports, merchant vessels have been being strategically mobilised for *interdiction* and *refoulement*.[111]

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106 A. Pijnenburg and K. van der Pas, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route', (2022) 24 *European Journal of Migration*, pp. 401–429.

107 ECtHR, *N.D. and N.T. v. Spain*, no. 8675/15 and 8697/15 [GC] 13.02.2020.

108 See S. Carrera, 'The Strasbourg court judgement *"N.D. and N.T. v. Spain"*: a "carte blanche" to push backs at EU external borders?', (2020) EUI Working Paper RSCAS 2020/21 pp. 8–9.

109 V. Moreno-Lax (2020), 'The Architecture of Functional Jurisdiction', *supra* note 98. See also P. Müller & P. Slominski (2021), 'Breaking the Legal Link but not the Law?', *supra* note 72.

110 Forensic Oceanography, 'The *Nivin* Case: Migrants' resistance to Italy's strategy of privatized push-back', University of London, 2019, available at https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf, last accessed 29.03.2023.

111 Ibid. See also Forensic Oceanography, 'Death by Rescue', *supra* note 96.

The quintessential example of this development has been the *Nivin* incident, which led to the submission of the individual complaint of *S.D.G. v. Italy* to the UN Human Rights Committee.[112] The case concerned a privatised pushback operation carried out by a Panamanian merchant vessel, the *Nivin*, in November 2018. In the course of the operation, the Italian Maritime Rescue Co-ordination Centre (MRCC) directed the *Nivin* to 'rescue'/intercept a migrant boat adrift on the high seas in the Central Mediterranean, and to liaise thereafter with the so-called LYCG through the Italian MRCC, though Italian assets were never present on scene.[113] From a jurisdictional perspective, the complete *physical* absence of Italian assets would not have allowed for a *Hirsi*-like finding of *de jure* jurisdiction. Similarly, the lack of direct engagement of the LYCG would have made the functional jurisdiction model harder to apply. The complaint thus relies on a third – or arguably fourth – model of jurisdiction: the impact model. The submission relies extensively on General Comment No. 36, which provides that:

> a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner. States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life …. States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.[114]

It was thus argued that the conduct of the Italian authorities, including their coordination with and *on behalf of* the LYCG, and with the *Nivin*, had major effects on the right to life of the individuals concerned, in a direct and foreseeable manner, such as to engage the responsibility of Italy under the ICCPR.[115]

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112 V. Moreno-Lax, I. Mann and N. Magugliani, *'SDG v. Italy'*, 2019, pp. 1–44, available at https://www.glanlaw.org/_files/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf, last accessed 29.03.2023. The case, which was submitted by the Global Legal Action Network, has been deemed inadmissible by the Human Rights Committee, due to lack of exhaustion of domestic remedies. The case is currently being continued by the de:border migration justice collective and the Association for Juridical Studies on Immigration (ASGI).

113 The full reconstruction of the events has been compiled by Forensic Oceanography. See Forensic Oceanography (2019), 'The *Nivin* Case', *supra* note 110.

114 CCPR, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 03.09.2019, para. 63.

115 V. Moreno-Lax, I. Mann and N. Magugliani (2019), *supra* note 112.

While the Human Rights Committee, arguably, missed an opportunity to elaborate on General Comment No. 36, and the impact model of jurisdiction, in *S.D.G. v. Italy*, by declaring the case inadmissible, it did unpack the potential implications of the model in *A.S., D.I., O.I. and G.D. v. Italy*.[116] Significantly, the Committee held that, 'in the particular circumstances of the case, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy', to the extent that the complainants were within the jurisdiction of Italy, despite the events having occurred in the Maltese SAR area.[117] In particular, the Committee found that, 'the individuals on the vessel in distress were *directly affected* by the decisions taken by the Italian authorities in a manner that was *reasonably foreseeable* in light of the relevant legal obligations of Italy, and that they were thus subject to Italy's jurisdiction for the purposes of the Covenant'.[118] While arguing that the Committee would have come to a similar conclusion in *S.D.G. v. Italy* is speculative at best, the findings in *A.S., D.I., O.I. and G.D.*, and the operationalisation of General Comment No. 36, are to be welcomed, and are not only to be considered as being in line with the aims and objectives of the ICCPR, but also with a functional and teleological interpretation of jurisdiction, which becomes crucial in light of the changing patterns of border control and the consolidating geopolitics of mobility.

4. AIRBORNE COMPLICITY, 'REMOTE' RESPONSIBILITY? TRIGGERING JURISDICTION IN THE INTERCEPTION REGIME

The Mediterranean space has, as analysed above, seen new tactics in identifying, tracking and containing maritime movement, based not only on European policies, but also originating from American and Australian precedents.[119]

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116 CCPR, *A.S., D.I., O.I. and G.D. v. Italy*, *supra* note 8.

117 See also N. Magugliani, 'Operationalising General Comment No. 36 and the impact model of jurisdiction: Unpacking the UN Human Rights Committee's findings in *A.S., D.I., O.I. and G.D. v Italy*', *Irish Centre for Human Rights*, 11.02.2021, available at https://ichrgalway.wordpress.com/2021/02/11/operationalising-general-comment-no-36-and-the-impact-model-of-jurisdiction-unpacking-the-un-human-rights-committees-findings-in-a-s-d-i-o-i-and-g-d-v-italy/, last accessed 29.03.2023; P. Vella De Fremeaux (Mallia) and F.G. Attard, 'Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning *A.S., D.I., O.I., and G.D. v. Italy*, Communication No. 3042/2017 (U.N. Hum. Rts. Comm.)', (2021) 61(1) *International Legal Materials*, pp. 41–60.

118 CCPR, *A.S., D.I., O.I. and G.D. v. Italy*, *supra* note 8.

119 See D. Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World*, Cambridge University Press, Cambridge 2018, pp. 74–99; see also M. Casas-Cortes, S. Cobarrubias and J. Pickles, '"Good Neighbours make Good Fences": Seahorse Operations, Border Externalization and Extra-territoriality', (2016) 23(3) *European Urban and Regional Studies*, pp. 231–251.

These rescue duty policies, coupled with the use of aerial assets for intercepting migrants at sea, not only generate a 'militarised technological regime' of border spaces but also lack accountability frameworks and oversight mechanisms,[120] resulting in the legal grounds for such actions being frail, obscure or even absent. In this regard, it becomes easier to muddy the already murky jurisdictional waters which follow from the implications of several intersecting areas of law, including human rights law, international refugee law and maritime law, as well as international criminal law.[121] Despite the broad reach of the rescue obligation, the protection afforded is not comprehensive: first, due to a failure to embed technological developments and their impact on the exercise of control; and, secondly, because the obligation fails to consider policies that have emerged which are characterised as performing 'rescue', which fall through the net of nucleus human rights and *non-refoulement* obligations.[122]

Could aerial surveillance assets, deployed for coordinating interceptions at sea, trigger jurisdiction and thus responsibility? Pursuant to the Article 98 UNCLOS 'duty to render assistance', UAV operations are not explicitly covered by the Convention, and thus UAV are not bound by any legal obligations to aid vessels in distress. Drones operate in a legal grey zone, and even though they are not legally bound to conduct rescue operations, they have increasingly been replacing vessels which are legally bound to rescue people in distress at sea.[123] The aerial strategy employed by EU agencies, such as Frontex and the European Union Naval Force Mediterranean (EU NAVFOR MED),[124] as well as by EU Member States, such as Italy and Malta, is centred on spotting migrant rafts from the sky and then feeding intelligence on their positions to a rescue – or, arguably, interception – agency or actor,[125] this being the Libyan Coast Guard since 2017, rather than to European rescue vessels, whose numbers have been constantly decreasing, due to ongoing criminal and administrative proceedings which have caused several of them to be blocked in ports pending

120 United Nations General Assembly (2020), 'Contemporary Forms of Racism', *supra* note 3, p. 8.

121 B. Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception', (2006) 30(1) *Fordham International Law Journal*, p. 92.

122 Ibid., p. 87.

123 European Parliament, 'Question for written answer E-002403/2018 to the Commission: Frontex long-range drones for border surveillance', available at https://www.europarl.europa.eu/doceo/document/E-8-2018–002403_EN.pdf, last accessed 06.03.2023.

124 European Parliament, 'The EUNAVFOR MED Operations SOPHIA and the Cooperation with Third Countries. Answer given by the Vice-President Borrell on behalf of the European Commission', 08.01.2020, available at https://www.europarl.europa.eu/doceo/document/E-9-2019–002654-ASW_EN.html, last accessed 04.03.2023.

125 D. Howden, A. Fotiadis and A. Loewenstein, 'Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over', *The Guardian*, 04.08.2019, available at https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu, last accessed 06.03.2023.

legal proceedings.[126] In this way, the responsibility is handed over to the Libyan forces, and hence the legal margin for triggering jurisdiction remains trapped in the grey zone. Since EU Member States have increasingly been extending their border management activities beyond their territorial borders, such as on to the high seas and into third countries, the debate revolves around the question of when a person is considered to fall under their jurisdiction, and, in particular, whether EU Member States' *non-refoulement* obligations remain applicable in instances where border controls are within, or under the authority of, third countries. Under these circumstances, does the *non-refoulement* principle have extraterritorial effect in cases where aerial surveillance assets assist third-country vessels with intercepting people at sea?

A priori, for an expression of jurisdiction, state actions or omissions do not necessarily have to be lawful; they only need to flow, by definition, from a lawfully organised institutional and constitutional framework through which these state agents exercise some kind of normative power with a claim to legitimacy, even if that claim might prove to be unjustified.[127] What is of importance for identifying state conduct as jurisdiction, from the human rights angle, is the underlying sovereign authority nexus that links the state with its authority, and the control it thereby purports to exercise, whether *de jure* or *de facto*, instead of the legality of its conduct.[128] Ultimately, whether there is a legal or factual dimension, or even a mere combination of both, jurisdiction remains the external manifestation of the power of the state.[129] Hence, no jurisdictional link can be established unless it is explicitly buttressed by a prescriptive executive and/or adjudicative authority, with or without legal title, through which definite state activity has taken place.[130] In this regard, if the sovereign authority link has been ascertained and established, there seems to exist no principled reason justifying a differentiation based on the locus of such activity, whether it be territorially or extraterritorially exercised, in deeming it a manifestation of jurisdiction.[131] Therefore, instantly after a concrete public-power relation has been entrenched, a jurisdictional association is activated, triggering the application of human rights obligations.[132]

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126 European Union Agency for Fundamental Rights (FRA), 'June 2022 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights', 20.06.2022, available at https://fra.europa.eu/en/publication/2022/june-2022-update-ngo-ships-sar-activities, last accessed 04.03.2023.

127 S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To', (2012) 25 *Leiden Journal of International Law*, p. 85.

128 V. Moreno-Lax (2020), 'The Architecture of Functional Jurisdiction', *supra* note 97, p. 397.

129 M. Gavouneli, *Functional Jurisdiction in the Law of the Sea*, Martinus Nijhoff Publishers, Leiden/Boston 2007, p. 6.

130 V. Moreno-Lax (2020), 'The Architecture of Functional Jurisdiction', *supra* note 97, p. 397.

131 Ibid.

132 Ibid. p. 398.

It is also clear from the above analysis of the jurisprudence of the ECtHR and the UN Human Rights Committee that territorial control, while sufficient, does not constitute a *sine qua non* for establishing human rights jurisdiction. Jurisdiction can also exist where refugees and other migrants are intercepted and their movements controlled by state agents acting extraterritorially, or in instances where extraterritorial control is indirect, as in the *Marine I* case, where there were blockades and a forcible escort of vessels carrying asylum-seekers on the high seas.[133] In each of these ways, the modern understanding of jurisdiction, particularly in its human rights sense, presents a powerful device for challenging the common assumption underlying pushback and *non-entrée* policies, where core refugee protection responsibilities rarely, if ever, apply, since they can easily be circumvented.[134] The UN Human Rights Committee emphasised that the importance does not lie in the locus where the violation occurred, 'but rather … in the relationship between the individual and the State in relation to the violation of any of the rights set forth in the ICCPR, wherever they occurred'.[135] Consequently, location is not decisive in establishing jurisdiction, but is instead contingent upon the exercise of *de facto* control. Hence, it is irrelevant whether surveillance and patrol activities are carried out on the high seas or in the territorial waters of third countries. As noted in *Cyprus v. Turkey*, responsibility followed not because of the relevant actions taken by government agents, but from the fact of a relevant act or omission taking place within an area of effective control.[136]

The exercise of public powers in a third country can also be an indicator for establishing a jurisdictional link, as these can be interpreted as 'mediators' that bridge the gap between territorial and extraterritorial conceptualisations.[137] Extant case law suggests that states may also have jurisdiction where they exercise public powers abroad. In *Al-Skeini* the question raised was whether the UK had jurisdiction over civilians killed in the course of security operations by British soldiers in Basrah.[138] The ECtHR, instead of determining the issue of responsibility by reference to either territorial or personal control, held that, where states are entitled to exercise public powers abroad, jurisdiction for human rights purposes will follow under certain circumstances,[139] namely whenever three requirements have been met: first, acts of the legal authority

133 CAT, *J.H.A. v. Spain*, UN Doc CAT/C/41/D/323/2007, 21.11.2008, para. 8.2.

134 J.C. Hathaway and T. Gammeltoft-hansen (2015), 'Non-Refoulement', *supra* note 2, p. 266.

135 CCPR, *López Burgos v. Uruguay*, Communication no. 52/1979, 29.07.1981, paras. 12.1–12.3.

136 ECtHR, *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, 26.05.1975, paras. 136–137.

137 V. Moreno-Lax (2020), 'The Architecture of Functional Jurisdiction', *supra* note 97, p. 402.

138 ECtHR, *Al-Skeini and Others v. the United Kingdom*, *supra* note 66, paras. 102, 130–150.

139 Ibid.; ECtHR, *Jaloud v. The Netherlands*, no. 47708/08 [GC] 20.11.2014, paras. 128–129 and 135.

of the extraterritorial state must be established 'in accordance with custom, treaty or other agreement'.[140] Nevertheless, when it comes to cooperation-based *non-entrée* policies, these are routinely implemented through inter-state arrangements, or even through informal agreements – memoranda of understanding, or an exchange of letters – which suffice to demonstrate the requisite consent. The facts of *Al-Skeini* suggest that the legal grounds for the exercise of public powers may stem from international legal authorisation, such as a UN resolution.[141] Second, state acts that amount to an 'exercise of public powers normally to be exercised by [a national] Government' may also reach the threshold and count as an exercise of jurisdiction.[142] The third requirement concerns human rights breaches resulting from the exercise of public powers. Where this is the case, responsibility may be incurred by the contracting state for breaches of the ECHR 'as long as the acts in question are attributable to it rather than to the territorial State'.[143] In such instances, the link required can readily be established where the sponsoring state has, in effect, deployed officers or vessels engaged directly in enforcement.[144] Yet, under general principles of international law, conduct is further attributable to a sponsoring state where private actors or third-state authorities operate under the directions and control of the sponsoring state,[145] or where effective control has been placed at the disposal of an international organisation and, therefore, the officials otherwise carrying out migration control are fully seconded to that organisation.[146]

Given the consonance and interconnection of the three requirements for jurisdiction – which may extend to acts of state authorities which produce effects outside their territorial realm – and the nature of many cooperation-based *non-entrée* practices, this emerging line of jurisprudence can have a cardinal import for considering technological developments and their impact on the exercise of control, which, as this contribution argues, is not only necessary but essential, to avoid protection gaps and unaccountability. Even where no territorial or personal control exists, the fact that sponsoring states can be said to exercise – even indirectly – migration control functions beyond

140 ECtHR, *Al-Skeini and Others v. the United Kingdom*, *supra* note 66, para. 135.
141 Ibid., para. 144.
142 Ibid., para. 135.
143 Ibid.
144 J.C. Hathaway and T. Gammeltoft-hansen (2015), 'Non-Refoulement', *supra* note 2, p. 268.
145 ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Judgment, ICJ Reports, 27.06.1986; J. Crawford, State Responsibility: The General Part, Cambridge University Press, New York 2013, pp. 126–132 and 146–161.
146 United Nations General Assembly, 'Report of the International Law Commission. Draft Articles on the Responsibility of International Organizations', A/66/10 Art. 7, 2011, p. 87.

their borders will often suffice to establish jurisdiction regardless of formal opposing assertions.[147] In addition to this, the ECtHR has clarified that direct physical contact is not a *sine qua non*, as long as the control exercised is indeed effective. Hence, in *Women on Waves and Others v. Portugal*, where the Portuguese authorities refused entry to the ship and blocked it, by way of a warship, from accessing Portugal's territorial waters, the jurisdictional link was not contested.[148] Similarly, the jurisdictional test in *Medvedyev* was deemed to be met, despite the rerouting of the Cambodian vessel (named the *Winner*) and the imposition of a specific course without boarding it.[149] In fact, jurisdiction was exercised from the moment of interception and throughout the enforced navigation period.[150] In this respect, the 'non-physical, non-spatial contact' requirement unfolds a number of feasible configurations in which instances of 'airborne control' may be deemed as an expression of jurisdiction, and thus international responsibility may be engaged, by lending a *de jure* basis for action, notably when exercised from an existing legal competence.[151]

While territoriality is central to the construction of jurisdiction in international law instruments, such as the ICCPR and the ECtHR, the EU CFR does not define its territorial scope, nor does it encompass any jurisdictional clauses. However, it is applied to the EU and its Member States solely when those parties act within the scope of EU law.[152] EU law, and more specifically Article 52(2) of the Treaty of the European Union (TEU), specifies to which territories it applies, and even allow for specific regimes pursuant to Article 355 of the Treaty on the Functioning of the European Union (TFEU).[153] The Charter has the same legal value as the EU Treaties, and its commitment is detailed

147 J.C. Hathaway and T. Gammeltoft-hansen (2015), 'Non-Refoulement', *supra* note 2, p. 269.

148 ECtHR, *Women on Waves v. Portugal*, no. 31276/05, 03.02.2009; A. Buyse, '*Women on Waves*', *ECHR Blog*, 04.02.2009, available at https://www.echrblog.com/2009/02/women-on-waves.html, last accessed 13.03.2023.

149 ECtHR, *Medvedyev and Others v. France*, no. 3394/03, 29.03.2010, paras. 62–67; D. Guilfoyle, 'ECHR Rights at Sea: *Medvedyev and Others v. France*', *EJIL:Talk!*, 19.04.2010, available at https://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/, 13.03.2023.

150 Ibid.

151 V. Moreno-Lax (2020), 'The Architecture of Functional Jurisdiction', *supra* note 97, p. 401.

152 M. Fink and K. Gombeer, 'In search of a safe harbour for the *Aquarius*: the troubled waters of international and EU law', *EU Immigration and Asylum Law and Policy*, 09.07.2018, available at https://eumigrationlawblog.eu/in-search-of-a-safe-harbour-for-the-aquarius-the-troubled-waters-of-international-and-eu-law/, last accessed 06.03.2023.

153 European Union Agency for Fundamental Rights (FRA), Scope of the principle of non-refoulement in contemporary border management: evolving areas of law, FRA, Luxembourg 2016, p. 16, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-scope-non-refoulement_en.pdf, last accessed 06.03.2023.

in Article 6 of the TEU, which is applied horizontally to all EU actions.[154] Territoriality, therefore, is not considered a separate dimension when the Charter's applicability is examined.[155] By the same token, jurisdiction, as it flows from international human rights law, is not a threshold requirement for EU human rights law's applicability.[156] Notwithstanding this, the concept of jurisdiction in international public law, which is generally understood as being attached to the notion of sovereignty,[157] differs from the concept and the specific role attributed to jurisdiction in international human rights law. Jurisdiction in the latter has long attracted doctrinal attention, and an overlong debate as to its effectiveness and centrality for establishing responsibility for human rights violations, as it has been fundamental for dissecting and understanding the relationship that amalgamates human rights-holders and duty-bearers.[158] Hence, jurisdiction, in this relational sense,[159] has a vital role to play in arbitrating between duty, capability and willingness of compliance by any specific state towards any specific human rights-holders.[160] For this reason, jurisdiction should be acknowledged as an 'all-or-nothing' condition for setting in motion human rights obligations, rather than a gradual or incremental one.[161]

Against this backdrop, Frontex aerial surveillance activities in the Central Mediterranean have intensified, and have increasingly been related to interception events. Data suggests that almost one-third of the people Libyan forces captured at sea and forced back to Libya, in 2021, were intercepted owing to intelligence gathered by Frontex through aerial surveillance.[162] The EU's increasing reliance on surveillance drones, and decreasing deployment of surface assets to conduct necessary rescues of any people in distress at sea, has been heavily criticised. Objections include the fact that the EU has entered

154 Ibid.

155 Ibid.

156 V. Moreno-Lax and C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, The Effectiveness Model', in S. Peers and A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford 2014, p. 1662.

157 M. Den Heijer and R. Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"', in M. Langford, W. Vandenhole, M. Sheinin et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge University Press, New York 2013, p. 163.

158 S. Besson (2012), 'The Extraterritoriality of the European Convention on Human Rights', *supra* note 127, p. 866.

159 The relational nature of jurisdiction has been emphasised. See UN Human Rights Commission, *Lopez Burgos v. Uruguay*, UN Doc A/36/40, 176, 29.06.1986, para. 12.1; *Celiberti de Casariego v. Uruguay*, UN Doc A/36/40, 185, 29.06.1981, para. 10.3.

160 S. Besson (2012), 'The Extraterritoriality of the European Convention on Human Rights', *supra* note 127, p. 860.

161 ECtHR, *Banković*, *supra* note 69, para. 75 (argumentation by the applicants).

162 Border Forensics (2022), 'Airborne Complicity', *supra* note 5.

into contracts with Israeli military companies to supply war drones for the surveillance of asylum-seekers at sea.[163] Absence of both transparency and an accountability framework in relation to Frontex's inappropriate use of drones has been described as 'a way to spend money without having the responsibility to save lives'.[164] This strategic stance has raised a number of concerns: first, the fact that the drones are not deployed for sea rescue operations, but for improving capacities against unwanted migration, which arguably causes more loss of life at sea, and also violates international obligations.[165] Second, Frontex's drones are not governed by the UNCLOS or any international law obligations relating to SAR. Third, aerial assets in the Mediterranean have been used to facilitate the involvement of Libyan authorities, by instructing them to intercept and forcibly transfer people back to the places from where they had fled.[166]

What ensues from the previous section is that human rights norms do apply in these circumstances, and although a humanitarian lens would add a different perspective, and take account of the SAR regime and human rights and refugee law obligations concurrently applicable to the law of the sea,[167] EU policy decisions do not seem to favour this approach. Despite the fact that UNCLOS is inapplicable to UAVs, under Article 98(2) of the UNCLOS, coastal states are, nevertheless, required 'to promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea'.[168] Thus, if coastal states employ drones merely to locate vessels or persons in distress without taking further action, that would

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163 Euro-Mediterranean Human Rights Monitor, 'EU Should Cancel €59M Contract with Israeli Companies for Drones to Surveille Migrants', Press release, 05.05.2020, available at https://euromedmonitor.org/en/article/3529/EU-Should-Cancel-%E2%82%AC59M-Contract-with-Israeli-Companies-for-Drones-to-Surveille-Migrants, last accessed 15.03.2023.

164 D. Howden, A. Fotiadis and A. Loewenstein (2019), 'Once migrants on Mediterranean were saved by naval patrols', *supra* note 126; Impact, 'EU slammed over use of drones in refugee effort', available at https://amesnews.com.au/latest-articles/eu-slammed-over-use-of-drones-in-refugee-effort/, last accessed 16.03.2023.

165 R. Wadi, 'Death and drones in the Mediterranean', *Eureka Street*, 23.08.2019, available at https://www.eurekastreet.com.au/article/death-and-drones-in-the-mediterranean#, last accessed 16.03.2023.

166 Amnesty International, 'Libya's dark web of collusion: Abuses against Europe-Bound refugees and migrants', 11.12.2017, available at https://www.amnesty.org/en/documents/mde19/7561/2017/en/, last accessed 18.03.2023; UN Support Mission in Libya, 'Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya', 20.12.2018, available at https://www.ohchr.org/sites/default/files/Documents/Countries/LY/LibyaMigrationReport.pdf, last accessed 18.03.2023.

167 V. Moreno-Lax, D. Ghezelbash and N. Klein, 'Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia', (2019) 32(4), *Leiden Journal of International Law*, p. 728.

168 United Nations Convention on the Law of the Sea, *supra* note 59, p. 60.

be a violation of the UNCLOS requirement. Due diligence entails 'an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost', which is, in fact, an obligation of 'conduct' and not 'of result'.[169] In this vein, if effective control is exercised through the exchange of information, responsibility for the EU Member State action could be triggered on account of harm suffered by people as a result of their interception by a third country.[170] Article 20(5) of the Eurosur Regulation[171] proscribes sharing information with third countries. This reflects a due diligence duty for EU Member States which obliges them to take stock of the situation in the third country, and avoid taking any action when they know, or should be aware, that the individuals concerned might face human rights abuses. Hence, if a coastal state, via the use of drones, locates and returns people in distress to – by the coastal state's own admission – a non-safe country, this violates the due diligence provision, for failing to 'promote the operation of an adequate and effective search and rescue service'.[172] Yet, the vital question remains: under which circumstances could a state operating a drone be responsible for human rights violations, since UAVs are pilotless aircrafts, and no physical/spatial effective control is being exercised over vessels transporting migrants? Is there an exceptionalist approach of dependency when drone operators' actions are constrained to searching for, gathering and providing information?

It has been argued that 'State operations in presumptively perilous or hazardous situations impose a special duty of care, a form of absolute liability in which the obligation not to harm – interpreted as not to violate human rights – is effectively translated into a *positive obligation to protect*'.[173] Frontex has confirmed that all drone operators, staff and private contractors are subject to EU law,[174] and thus the protection of human life requirement aligns with the human rights obligations reflected in EU Regulation 656/2014.[175] It follows that drone operators must respect the fundamental right to life of any

169 ITLOS, 'Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)', ITLOS Reports, 2011, para. 110, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf, last accessed 18.03.2023.

170 FRA (2016), 'Non-Refoulement', *supra* note 153, p. 38.

171 Regulation (EU) No. 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System, OJ L 295, Art. 20(5) ('Eurosur Regulation').

172 United Nations Convention on the Law of the Sea, *supra* note 59, Art. 98(2), p. 60.

173 G.S. Goodwin-Gill, 'The Mediterranean Papers: Athens, Naples and Istanbul', (2016) 28(2) *International Journal of Refugee Law*, pp. 276–309.

174 D. Howden, A. Fotiadis and A. Loewenstein (2019), 'Once migrants on Mediterranean were saved by naval patrols', *supra* note 125.

175 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189,

migrant aboard a vessel in distress, and take all necessary actions to inform the relevant authorities, to ensure that SAR operations are carried out promptly.[176] Notwithstanding this, several difficulties persist in attributing responsibility and establishing complicity. First, EU Member States retain responsibility for SAR, whereas Frontex is primarily concerned with migrant-smuggling operations.[177] On this note, it could be argued that, under the Frontex Regulation, the agency is expected to adhere to fundamental rights throughout its operations.[178] Second, when states of the Mediterranean Sea employ drones for border security purposes, they can be held responsible for violating human rights obligations, owing to their failure to prevent such violations.[179] Third, if a state is not to be considered directly responsible for human rights violations while using drones for referral of boat migrants to Libyan authorities, it could be argued that derived responsibility can be incurred for aiding and abetting such violations, under Article 16 of the ILC Articles on State Responsibility (ASR).[180] The proposition that the threshold should not be deemed met unless the relevant state, by means of the aid and assistance provided, intends to facilitate the wrongful conduct,[181] could be setting the bar quite high, thus making recourse to Article 16 ASR near impossible.[182] Nonetheless, the fact that funds, training, and other capacity-building activities have (by their own admission) been delivered by the EU Member States to Libya, for the explicit purpose of 'significantly reducing migratory flows', 'combating transit' and

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27.6.2014. See also Regulation (EU) No. 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and Repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624 (hereinafter 'Frontex Regulation'), OJ L 295.

176 Euro-Mediterranean Human Rights Monitor (2020), 'EU Should Cancel €59M Contract with Israeli Companies for Drones to Surveille Migrants', *supra* note 164.

177 Preamble, para. 2 of the Frontex Regulation, *supra* note 175.

178 Art. 10 of the Frontex Regulation, *supra* note 175.

179 In *Corfu Channel*, Albania was held responsible, owing to its failure to warn the UK about mines in Albanian waters that were laid by a third state, which demonstrates that states are required to take measures when they are aware, or should be aware, of a risk to life: ICJ, *Corfu Channel, United Kingdom v. Albania*, Merits, [1949] ICJ Rep 4; M. Giuffre, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Pushbacks to Libya?', (2012) 24(4) *International Journal of Refugee Law*, pp. 692–734.

180 J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge 2002. In addition, consideration can be given to the International Law Commission's draft articles on the responsibility of international organizations (DARIO): see International Law Commission, Draft articles on the responsibility of international organizations, 2011 (A/66/10).

181 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), p. 66, para. 5, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, last accessed 19.03.2023.

182 V. Moreno-Lax and M. Giuffre, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows', in S. Singh Juss, *Research Handbook on International Refugee Law*, Edward Elgar, Cheltenham/Northampton 2019.

'preventing departures', appears, by all accounts, to meet this threshold,[183] and therefore it could be argued that responsibility could be engaged, even if 'remotely'.

5. CONCLUSIONS

Direct *refoulement*, pushbacks by proxy, privatised *refoulement* and *dronisation* are consecutive and partially overlapping containment modalities that have been deployed by the EU and its Member States to prevent asylum- seekers and other migrants from entering into the European jurisdictional space. In a time when 'borders are becoming mobile discontinuous nodes of surveillance and policing across multiple territories and jurisdictions',[184] the limits of traditional approaches to jurisdiction have become evident. The use of technology, and, in particular, of aerial surveillance, necessarily requires a new approach towards 'extraterritoriality' and jurisdiction, which is to be 'interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory'.[185] While traditional models of jurisdiction – territorial and effective control, but also, arguably, the operational model – appear unable to capture the move towards detached modalities of containment and *refoulement*, the impact model is the only construction of jurisdiction that offers adjudication-based protective potential. While the ECtHR has moved backwards since its decision in *Hirsi Jaama and Ors v. Italy*, in *N.D. and N.T. v. Spain* (awaiting its judgment in *S.S. v. Italy*), the foundational element in favour of an impact model (as elaborated upon by the Human Rights Committee), and moving away from 'effective control', had already been introduced into the jurisprudence of the ECtHR in *Hirsi*, where the Court held that it could not 'subscribe to the Government's argument that Italy was not responsible for the fate of the applicants on account of the *allegedly minimal control exercised by the authorities over the parties concerned* at the material time'.[186] Under the impact model, it is sufficient that 'a special relationship of dependency' is established between the affected individuals and a state, and that individuals are *directly affected*, in a manner that is *reasonably foreseeable*, to allow for the establishment of a jurisdictional link. Arguably, the use of aerial surveillance could lead to all three criteria being met. Considering not only substantive rights, but also jurisdiction, as 'living' concepts, courts should embrace, rather than avoid, holistic understandings of jurisdiction in light of the aim and purposes of the legal rights they were set up to protect.

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183 European Union: Council of the European Union, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017, paras. 3, 5 and 6(j).

184 M. Casas-Cortes, S. Cobarrubias and J. Pickles (2016), '"Good Neighbours make Good Fences"', *supra* note 119, p. 246.

185 ECtHR, *Hirsi Jamaa and Others v. Italy*, *supra* note 73, para. 175.

186 Ibid., para. 79 (emphasis added).