

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

Alison Beuscher*

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* The author is a law student at the University of Münster. The initial version of this article was written within the context of the seminar “Migration Law: The Law of Search and Rescue” under the guidance of Professor Nora Markard, Chair for International Public Law and International Human Rights Protection.

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Abstract

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

A. Introduction

The protection of human rights should be at the heart of any fair migration policy. This is especially apparent in the Mediterranean, where thousands of people have died since 2014.¹ The current approach by the Member States of the European Union has failed to prevent this unnecessary loss of lives.² While this is partly due to moral and political concerns, part of the issue is a maritime legal black hole.³ This black hole becomes visible in the juxtaposition of the law of the sea and human rights law:

On the one hand, coastal States must provide an “adequate and effective” search and rescue service according to the law of the sea.⁴ However, the law of the sea does not permit the establishment of actionable rights for individuals⁵ as there is no scholarly consensus on whether a right to be rescued exists thereunder⁶ or whether the legal framework merely allocates competencies⁷. Further, the

- 1 United Nations Refugee Agency, ‘Mediterranean Situation, Operational Data Portal – Refugee Situations’ (2021), available at <http://data2.unhcr.org/en/situations/mediterranean> (last visited 11 February 2024).
- 2 Council of Europe Commissioner for Human Rights, ‘Lives Saved. Rights Protected. Bridging the Protection Gap for Refugees and Migrants in the Mediterranean’ (2019), 7-9, 49-50, available at <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87> (last visited 11 February 2024) [‘Lives Saved. Rights Protected.’].
- 3 I. Mann, ‘Maritime Legal Black Holes: Migration and Rightlessness in International Law’, 29 *European Journal of International Law* (2018) 2, 347, 357 [Mann, ‘Maritime Legal Black Holes’]; Human Rights Committee, Individual Opinion of Committee Member Hélène Tigroudja (Concurring), *A.S., D.I., O.I. and G.D. v. Italy*, Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017 Annex VII, 28 April 2021, para. 1 [*A.S. v. Italy*, Concurring Opinion Tigroudja].
- 4 *United Nations Convention on the Law of the Sea*, 10 December 1982, Art. 98, 1833 UNTS 397 [UNCLOS]; *International Convention for the Safety of Life at Sea*, 1 November 1974, Chapter V, Regulation 15, 1184 UNTS 2 [SOLAS Convention]; *International Convention on Maritime Search and Rescue*, 27 April 1979, Chapter 2, Article 2.1.1, 1405 UNTS 97 [SAR Convention].
- 5 E. Papastavridis, ‘Is There a Right to Be Rescued at Sea? A Skeptical View’, 4 *Questions of International Law, Zoom-in* (2014), 17, 22-24 [Papastavridis, ‘Right to be Rescued at Sea’]; V. P. Tzevelekos & E. K. Proukaki, ‘Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?’, 86 *Nordic Journal of International Law* (2017) 4, 427, 437.
- 6 *Ibid.*, 437; Papastavridis, ‘Right to be Rescued at Sea’, *supra* note 5, 20-24.
- 7 S. Trevisanut, ‘Is There a Right to Be Rescued at Sea? A Constructive View’, 4 *Questions of International Law, Zoom-in* (2014), 3, 7 [Trevisanut, ‘A Constructive View’]; Papastavridis, ‘Right to be Rescued at Sea’, *supra* note 5, 20-21, 23; Tzevelekos & Proukaki, *supra* note 5, 437.

compulsory dispute settlement mechanism of the law of the sea does not provide redress to individual persons (except for private contractors).⁸ On the other hand, human rights law contains the positive obligation to protect the right to life⁹ from which an actionable right to be rescued could arise.¹⁰ However, human rights law is currently understood to give rise to extraterritorial obligations only in so far as the State exercises some physical control over migrant boats.¹¹ Consequently, if a State fails to comply with its obligation to rescue a migrant according to the law of the sea, it simultaneously does not exercise sufficient control over that vessel to trigger human rights law.

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

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

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

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

11 See section B.

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

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

14 *Ibid.*, 49-50.

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

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

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

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

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

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

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

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

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

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

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

19 *Ibid.*, 93-94.

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

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

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

23 Art. 2 UNCLOS.

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

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

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

the case law to require both *de facto* and *de jure* control cumulatively,²⁷ others believe that each category suffices individually.²⁸ The presumption of *de jure* control can extend onboard a ship through flag jurisdiction.²⁹ In other circumstances, generally, a certain level of physical control such as arrest or detention is required.³⁰ The Court also necessitates this *de facto* control as a precondition for jurisdiction on the high seas. The Court had affirmed this precondition in cases where a ship took persons in distress on board,³¹ collided with a migrant boat on the high seas,³² or in cases when it forcibly rerouted³³ or intercepted a ship.³⁴ Thus, the Court requires that some physical control over the person in question exists to establish jurisdiction under Article 1 of the ECHR outside a State's territory³⁵ ergo on the high seas.

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

- 27 S. P. Bodini, 'Fighting Maritime Piracy Under the European Convention on Human Rights', 22 *European Journal of International Law* (2011) 3, 829, 847.
- 28 V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law* (2017), 321-322 [Moreno-Lax, *Accessing Asylum in Europe*].
- 29 Art. 87 and 92 (1) UNCLOS; *Banković Case*, *supra* note 18, paras 59-61, 73; *Medvedyev Case*, *supra* note 17, para. 65; *Hirsi Case*, *supra* note 17, para. 77; *Bakanova v. Lithuania*, ECtHR Application No. 11167/12, Judgment of 31 August 2016. 63; Moreno-Lax, *Accessing Asylum in Europe*, *supra* note 28, 322.
- 30 *Öcalan v. Turkey*, ECtHR Application No. 46221/99, Judgment of 12 May 2005, para. 91 [*Öcalan Case*]; *Al-Saadoon and Mufidhi v. the United Kingdom*, ECtHR Application No. 61498/08, Judgment of 2 March 2010, para. 140.
- 31 *Hirsi Case*, *supra* note 17, paras 81-82.
- 32 *Xhavara and Others v. Italy and Albania*, ECtHR Application No. 39473/98, Judgment of 11 January 2001; M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011), 162 [Milanovic, *Extraterritorial Application*].
- 33 *Medvedyev Case*, *supra* note 17, para. 67.
- 34 *Rigopoulos v. Spain*, ECtHR Application No. 37388/97, Judgment of 12 January 1999; *Women On Waves and Others v. Portugal*, ECtHR Application No. 31276/05, Judgment of 3 May 2009, para. 23; E. Papastavridis, 'European Court of Human Rights *Medvedyev et al. v. France* (Grand Chamber, Application No. 3394/03) Judgment of 29 March 2010', 59 *The International & Comparative Law Quarterly* (2010) 3, 867, 870-871 [Papastavridis, '*Medvedyev et al. v. France*'].
- 35 *Al-Skeini Case*, *supra* note 22, para. 136.

C. Other International Bodies: A Different Point of View

The Convention must be interpreted in light of present-day conditions as the ECtHR has made the Convention a living instrument with its dynamic and evolving interpretation.³⁶ In the past, the ECtHR referenced customary law and provisions of international law.³⁷ For example, for agents on ships flying the flag of a State, the Court has recognized that customary international law and treaty provisions had defined the extraterritorial exercise of jurisdiction of the relevant State.³⁸ The ECtHR has also referred to judgments of other international and regional bodies while interpreting and evolving the provisions of its Convention.³⁹ Notably, it has also referred to the IACtHR⁴⁰ and the HRC.⁴¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. A Causation-Centered Jurisdictional Link

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

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

46 Berkes, *supra* note 44, 2.

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

48 Berkes, *supra* note 44, 1.

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

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

51 *Ibid.*, para. 102.

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

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

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

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

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

53 As it did, for example, in *Öcalan Case*, *supra* note 30, paras 166, 183.

54 See *Kurt Case*, *supra* note 40, paras 67, 70, 84, 101; Individual Opinion of Judge Pettiti (Dissenting), *Kurt Case*, *supra* note 40, 50.

55 *Environment and Human Rights*, *supra* note 43, paras 75-81.

56 *Ibid.*, paras 95-100, 104(d).

57 E. Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility', in T. Gammeltoft-Hansen & J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (2017), 161, 166 [Papastavridis, 'Rescuing Migrants at Sea'].

58 *Environment and Human Rights*, *supra* note 43, para. 125.

59 *Ibid.*, paras 124.

60 *Ibid.*, para. 143, referring to *inter alia* 120.

61 *Ibid.*, paras 95-100, 104(f).

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

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

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

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

64 Art. 98 (2) UNCLOS.

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

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

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

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

3. Functional Jurisdiction

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

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

The Court rejected the proposal that special environmental protection regimes alone extend the jurisdiction of States under the ACHR⁷⁴ based on three reasons: First, according to the Court, jurisdiction under the ACHR “does not depend on a State's conduct taking place in a specific geographical area”.⁷⁵ Second, the geographical areas of the environmental protection regimes were delimited with the specific purpose of compliance with the obligations in

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

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

70 *Ibid.*, para. 88.

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

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

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

74 *Ibid.*, para. 92.

75 *Ibid.*, para. 88.

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

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

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

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

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

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

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

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* paras 89-90.

⁷⁹ *Ibid.* para. 90, referring to *Banković Case*, *supra* note 18, para. 60.

⁸⁰ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR]; M. N. Shaw, *International Law*, 8th ed. (2017), 238-244.

the Mediterranean outside the national borders of both Italy and Malta.⁸¹ It then transited through and exited the Libyan search and rescue zone.⁸² Italy and Malta activated rescue operations and were in continuous contact with the distressed vessel via telephone.⁸³ Italy received the first two distress calls in the morning,⁸⁴ the Italian rescue center informed the Maltese rescue center in the early afternoon,⁸⁵ and after that, the distressed vessel also called the Maltese rescue center.⁸⁶ Malta then sent a navigational text message urging all ships in the vicinity, including the Italian rescue boat “ITS Libra”, to proceed toward the vessel’s position⁸⁷ and formally accepted Italy’s request to coordinate the rescue of the vessel.⁸⁸ The boat carrying the migrants capsized in the late afternoon within the Maltese SAR Zone, a zone in which Italy has, in the past, often been the only State willing and able to carry out rescue operations.⁸⁹ A Maltese military vessel arrived at the scene in the early evening and rescued 147 persons.⁹⁰ The ITS Libra, from which Malta requested help three times, saved 56 persons.⁹¹ Approximately 200 people drowned.⁹²

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

A.S., D.I., O.I., and G.D. filed a complaint against the State of Malta regarding the violation of the right to life of their relatives who were passengers on the vessel.⁹³ The HRC determined that Malta had exercised jurisdiction⁹⁴ although it had found that the complainants had failed to pursue domestic

81 Human Rights Committee, *A.S., D.I., O.I. and G.D. v. Italy*, Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017, 28 April 2021, paras 2.4, 7.7 [*A.S. v. Italy*]; Human Rights Committee, *A.S., D.I., O.I. and G.D. v. Malta*, Communication No. 3043/2017, UN Doc CCPR/C/128/D/3043/2017, 28 April 2021, paras 1.1, 2.1, 2.7 [*A.S. v. Malta*].

82 *Ibid.*, para. 4.5.

83 *Ibid.*, paras 2.1-2.3, 2.7.

84 *A.S. v. Italy*, *supra* note 81, paras 4.3, 5.2; *A.S. v. Malta*, *supra* note 81, paras 2.1-2.2.

85 *A.S. v. Italy*, *supra* note 81, para. 4.3; *A.S. v. Malta*, *supra* note 81, para. 4.5.

86 *Ibid.*, para. 3.1.

87 *Ibid.*, para. 4.5.

88 *A.S. v. Italy*, *supra* note 81, para. 4.3; *A.S. v. Malta*, *supra* note 81, para. 4.5.

89 *A.S. v. Italy*, *supra* note 81, para. 4.3; *A.S. v. Malta*, *supra* note 81, paras 2.7, 4.6.

90 *Ibid.*, para. 4.6.

91 *Ibid.*

92 *A.S. v. Italy*, *supra* note 81, para. 1.1; *A.S. v. Malta*, *supra* note 81, para. 1.1.

93 *Ibid.*, paras 1.1-1.2.

94 *Ibid.*, paras 6.1-6.7.

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

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

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

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

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

95 *Ibid.*, paras 6.8-7.

96 *Ibid.*, para. 6.3.

97 Chapter 2, para. 2.1.9. SAR Convention, Annex; Chapter V, Regulation 33, SOLAS Convention; formal acceptance of the rescue operation.

98 *A.S. v. Malta*, *supra* note 81, para. 6.7.

99 *A.S. v. Italy*, *supra* note 81, paras 7.7-7.8.

100 *Ibid.*, para. 7.8 (emphasis added).

101 *Ibid.*

102 *Ibid.*, para. 7.8.

103 *Ibid.*, para. 7.7.

104 *Ibid.*

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

Italy's legal obligations under the law of the sea, which constituted a special relationship of dependency, included a duty to respond reasonably to calls of distress under regulations of the SOLAS Convention, in particular Chapter V, Regulation 33, and a duty to cooperate with other States appropriately undertaking rescue operations according to the SAR Convention, particularly its Chapter 5.6.¹¹⁰

4. Conclusion

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

105 *Ibid.*, paras 4.6, 7.7.

106 *Ibid.*, para. 7.7.

107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

110 *Ibid.*, 7.8.

111 *Ibid.*, paras 7.5-7.5; *A.S. v. Malta*, *supra* note 81, paras 6.5-6.6.

112 M. Milanovic, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations' (2021), 3, available at <https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/> (last visited 11 February 2024) [Milanovic, 'Extraterritorial Human Rights Obligations'].

113 *Ibid.*, 5.

114 *Ibid.*, 3.

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

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

115 *Ibid.*

116 *Ibid.*, 5.

117 S. Trevisanut, 'The Recognition of a Right to Be Rescued at Sea' (2021), at minutes 5-6, 25-27, available at <https://podcasts.ox.ac.uk/recognition-right-be-rescued-sea> (last visited 11 February 2024).

118 *Ibid.*, at minutes 3-5.

119 *Ibid.*, at minutes 25-26.

120 *Ibid.*, at minutes 25-27.

121 M. Giuffré, 'A Functional-Impact Model of Jurisdiction: Extraterritoriality Before of the European Court of Human Rights', 82 *Questions of International Law, Zoom-in* (2021), 53, 76-77 [Giuffré, Functional-Impact Model of Jurisdiction]; Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 26, 397, 403-404.

122 Giuffré, 'Functional-Impact Model of Jurisdiction', *supra* note 121, 76-77.

123 Moreno-Lax, 'Architecture of Functional Jurisdiction', *supra* note 26, 402-403; referencing: M. Gavouneli, *Functional Jurisdiction in the Law of the Sea* (2007).

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

D. Potential Drawbacks of the Cases’ Jurisdictional Links

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

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

I. The Conflation of Jurisdiction With Substantive Obligations

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

124 Moreno-Lax, ‘Architecture of Functional Jurisdiction’, *supra* note 26, 414.

125 *Ibid.*, 404, 414.

126 *Ibid.*, 403.

127 *Ibid.*, 406-408.

128 *Ibid.*, 403-404.

129 Milanovic, ‘Extraterritorial Human Rights Obligations’, *supra* note 112, 8.

respected by following the State's international obligation to rescue at sea.¹³⁰ Accordingly, "power and control" concepts must be construed considering the specific circumstances.¹³¹ This method of interpretation is supported by the rule that a court or body may take into account sources of international law such as conventions when interpreting the term jurisdiction so far as those sources have been consented to by the parties of the proceedings under Article 31 (3) VCLT.¹³² Further, as human rights are not self-contained, they should be implemented in harmony with the law of the sea and duly integrated into the broader system of international law.¹³³ Consequently, the ECtHR could read law of the sea obligations – such as that coastal States should operate adequate and effective search and rescue services and require ships flying its flag to render assistance to persons in danger¹³⁴ – into the term jurisdiction, provided the coastal State in question is a party to the SAR Convention.¹³⁵

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

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

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

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

133 Tzevelekos & Proukaki, *supra* note 5, 439; E. Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm', 21 *German Law Journal* (2020) 3, 417, 419-421, 426-435 [Papastavridis, 'ECHR and Migration at Sea'].

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

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

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

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

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

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

138 *Ibid.*, 6-7.

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

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

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

142 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

152 *Ibid.*, 590-591.

153 *Ibid.*, 590.

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

II. Ambiguous Requirements

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

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

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

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

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

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

159 *Ibid.*, paras 101, 103.

160 *Ibid.*, para. 180.

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

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

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

162 Human Rights Committee, *General Comment No. 36 Article 6: Right to Life*, UN Doc CCPR/C/GC/36, 3 September 2019, para. 22.

163 *Andreou v. Turkey (Admissibility)*, ECtHR Application No. 45653/99, Judgment of 3 June 2008, 11.

164 *Ilaşcu Case*, *supra* note 22, para. 317.

165 *Rantsev Case*, *supra* note 37, para. 215.

166 Trevisanut, ‘A Constructive View’, *supra* note 7, 12-13.

167 Milanovic, ‘Extraterritorial Human Rights Obligations’, *supra* note 112, 6.

168 *Ibid.*

169 *A.S. v. Italy*, Dissenting Opinion Shany, Heyns, Pazartzis, *supra* note 24, para. 5.

170 *A.S. v. Italy*, Dissenting Opinion Shany, Heyns, Pazartzis, *supra* note 24, para. 4.

171 Milanovic, ‘Extraterritorial Human Rights Obligations’, *supra* note 112, 7.

172 *Ibid.*

E. Construing a Jurisdictional Link

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

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

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

F. Applying the Jurisdictional Link

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

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

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

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

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

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

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

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

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

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

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

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

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

182 *Ibid.*, 318, 369.

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

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

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

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

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

183 *Ibid.*, 366, 369.

184 *A.S. v. Italy*, Dissenting Opinion Zimmermann, Annex II, *supra* note 139, para. 4.

185 Concurring Opinion of Judge Pinto de Albuquerque, *Hirsi Case*, *supra* note 17, 79.

186 See human rights violations noted by Mann, *Dialectic of Transnationalism*, *supra* note 174, 368.

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