

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

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Abstract

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

A. Introduction

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

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

1 *Hirsi Jamaa and Others v. Italy*, ECtHR Application No. 27765/09, Judgment of 28 February 2012 [*Hirsi*].

2 H. Arendt, *The Origins of Totalitarianism* (1973), 296-297.

3 Concurring Opinion of Judge Pinto de Albuquerque, *Hirsi*, *supra* note 1, para. 59.

4 A. L. Hirsch & N. Bell, 'The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime', 18 *Human Rights Review* (2017) 4, 417, 421-422.

5 *Ibid.*

6 T. Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control', 20 *European Journal of Migration and Law* (2018) 4, 452, 464.

7 M. Den Heijer, 'Europe Beyond Its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', in B. Ryan & V. Mitsilegas (eds), *Extraterritorial Immigration Control* (2010), 169, 169 [Den Heijer, 'Europe Beyond Its Borders'].

8 E. Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and Its Member States', in Ryan & Mitsilegas, *supra* note 7, 199, 199.

9 Den Heijer, 'Europe Beyond Its Borders', *supra* note 7, 170.

10 *Ibid.*

11 *Soering v. United Kingdom*, ECtHR Application No. 14038/88, Judgment of 7 July 1989, para. 88 [*Soering*]; UNHCR, *Interception of Asylum-Seekers and Refugees: The International*

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

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

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

- 12 *Hirsi*, *supra* note 1, para. 114; similar wording in *Soering*, *supra* note 11, para. 91.
- 13 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 1, 213 UNTS 222 (amended by the provision of Protocol No. 14 (CETS No. 194)) [ECHR].
- 14 *Banković and Others v. Belgium and Others*, ECtHR Application No. 52207/99, Decision as to the Admissibility of 12 December 2001, para. 54 [*Banković*]; *Drozd and Janousek v. France and Spain*, ECtHR Application No. 12747/87, Judgment of 26 June 1992, para. 91 [*Drozd and Janousek*]; V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2017), 272 [Moreno-Lax, *Accessing Asylum in Europe*].
- 15 E. Papastavridis, ‘Rescuing Migrants at Sea: The Responsibility of States Under International Law’, in T. Gammeltoft-Hansen & J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalization* (2016), 161, 184-185 [Papastavridis, ‘Rescuing Migrants at Sea’]; V. Moreno-Lax, ‘The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v. Italy*, and the “Operational Model”’, 21 *German Law Journal* (2020) 3, 385, 386 [Moreno-Lax, ‘Architecture of Functional Jurisdiction’].
- 16 S. Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To’, 25 *Leiden Journal of International Law* (2012) 4, 857, 867.

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

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

B. The Jurisdictional "Right to Have Rights"

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

I. Standard of Good Faith

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Basic Models of Jurisdiction

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

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

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

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

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

36 *Banković*, *supra* note 14.

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

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

39 *Ibid.*, para. 109.

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

41 *Ibid.*

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

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

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

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

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

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

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

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

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

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

49 *Ibid.*, para. 88.

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

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

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

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

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

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

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

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

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

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

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

58 *Ibid.*, para. 71.

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

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

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

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

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

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

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

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

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

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

67 Spijkerboer, *supra* note 6, 455-456.

68 Hathaway & Gammeltoft-Hansen, *supra* note 63, 237; Spijkerboer, *supra* note 6, 453.

69 Spijkerboer, *supra* note 6, 455.

70 *Hirsi*, *supra* note 1, para. 113; *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, ECtHR Application Nos 9214/80, 9473/81, 9474/81, Judgment of 28 May 1985, para. 67; M. N. Shaw, *International Law*, 8th ed. (2017), 361.

71 Gammeltoft-Hansen, *Access to Asylum*, *supra* note 29, 12-13.

72 T. Gammeltoft-Hansen, 'Extraterritorial Migration Control and the Reach of Human Rights', in V Chetail & C. Bauloz (eds), *Research Handbook on International Law and Migration* (2014), 114 [Gammeltoft-Hansen, 'Extraterritorial Migration Control']; G. S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd ed. (2007), 1.

73 Hathaway & Gammeltoft-Hansen, *supra* note 63, 282-283.

74 A. Shacknove, 'Asylum Seekers in Affluent States (Paper presented to the UNHCR conference "People of Concern", Geneva 1996)', quoted in UNHCR, *The State of the World's Refugees* (1997), 12.

75 M. J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (2004), 2; Hathaway & Gammeltoft-Hansen, *supra* note 63, 241; Spijkerboer, *supra* note 6, 454.

76 Den Heijer, 'Europe Beyond Its Borders', *supra* note 7, 169. Various terms are used to describe this phenomenon, among others extra-territorialization, external migration

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

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

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

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

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

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

79 Spijkerboer, *supra* note 6, 461.

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

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

their protection claims.⁸² Unlike situations in territorial waters⁸³ and contiguous zones,⁸⁴ States do not have general *de jure* jurisdiction over situations that occur on the high seas.⁸⁵ Whether States actually exercise jurisdiction when conducting interception measures on the high seas depends, among other things, on the degree of *de facto* control deemed sufficient to establish jurisdiction.⁸⁶

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

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

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

I. First Generation Measures of Extraterritorial Migration Control

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

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

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

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

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

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

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

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

1. Interception Measures Conducted with Full Physical Control

As a classic form of *non-entrée*, States attempt to deter migrants on the high seas to prevent them from entering territorial waters.⁹⁰ The term push-back was likely first used by the UN High Commissioner for Refugees (UNHCR) in a 2009 briefing note,⁹¹ referring to operations conducted by Italy and other countries that same year.⁹² In nine operations, 834 individuals were returned to Libya,⁹³ the return conducted directly by Italian authorities on Italian ships or through transfers by Italian authorities to the so-called Libyan Coast Guard.⁹⁴ These interceptions were carried out in accordance with bilateral agreements between Italy and Libya, including the Treaty on Friendship, Partnership, and Cooperation signed in August 2008.⁹⁵

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

88 Special Rapporteur on the Human Rights of Migrants, *supra* note 77, para. 55.

89 J. Carling, 'Migration Control and Migrant Fatalities at the Spanish-African Borders', 41 *International Migration Review* (2007) 2, 316, 340; Den Heijer, 'Europe Beyond Its Borders', *supra* note 7, 169; Gammeltoft-Hansen, 'Extraterritorial Migration Control', *supra* note 72, 113.

90 Hathaway & Gammeltoft-Hansen, *supra* note 63, 245.

91 UNHCR, 'UNHCR Interviews Asylum Seekers Pushed Back to Libya' (2009), available at <https://www.unhcr.org/4a5c638b6.html> (last visited 11 February 2024).

92 M. Den Heijer, 'Reflections on Refoulement and Collective Expulsion in the Hirsi Case', 25 *International Journal of Refugee Law* (2013) 2, 265, 269 [Den Heijer, 'Reflections on Refoulement'].

93 *Hirsi*, *supra* note 1, para. 101.

94 *Ibid.*, para. 20.

95 Den Heijer, 'Reflections on Refoulement', *supra* note 92, 269.

96 *Chris Sale et. al. v. Haitian Centers Council et. al.*, US Supreme Court 509 US 155, Judgment of 21 June 1993.

97 *Ibid.*, 173-174.

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

98 Hathaway & Gammeltoft-Hansen, *supra* note 63, 247-248.

99 *Hirsi*, *supra* note 1.

100 *Ibid.*, paras 134-135; Hathaway & Gammeltoft-Hansen, *supra* note 63, 248.

101 *Hirsi*, *supra* note 1, paras 81-82.

102 *Ibid.*, paras 11, 77.

103 UNCLOS, Art. 92.

104 *Rigopoulos v. Spain*, ECtHR Application No. 37388/97, Decision of 12 January 1999 [*Rigopoulos*].

105 *Banković*, *supra* note 14, para. 73.

106 *Hirsi*, *supra* note 1, para. 75.

107 *Ibid.*, para. 81.

108 *Medvedyev*, *supra* note 45.

109 *Ibid.*, para. 67.

110 J. Coppens, ‘Interception of Migrant Boats at Sea’, in V. Moreno-Lax & E. Papastavridis (eds), *‘Boat Refugees’ and Migrants at Sea: A Comprehensive Approach* (2017), 199, 218-219 [Moreno-Lax & Papstavridis, *Boat Refugees*].

111 *Hirsi*, *supra* note 1.

112 *Medvedyev*, *supra* note 45, para. 98.

113 *Hirsi*, *supra* note 1, para. 11.

2. Interception Measures Conducted with Lower Degree of Physical Control

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

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

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

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

116 *Xhavara*, *supra* note 64.

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

118 *Rigopoulos*, *supra* note 104.

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

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

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

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

123 *Ibid.*, para. 25.

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

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

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

125 *Ibid.*; Ciliberto, *supra* note 24, 518; Papastavridis, 'European Convention on Human Rights', *supra* note 114, 125.

126 Coppens, *supra* note 110, 219; Papanicolopulu, *supra* note 44, 423

127 *MN and Others*, *supra* note 65.

128 *Ibid.*, para. 125.

129 *Ibid.*, para. 118.

130 See S. P. Bodini, 'Fighting Maritime Piracy Under the European Convention on Human Rights', 22 *European Journal of International Law* (2011) 3, 829, 835; R. Geiß & A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011), 108.

131 Report of the Special Rapporteur of the Human Rights Council, *supra* note 81, para. 64.

132 *Ibid.*

133 *Al-Skeini*, *supra* note 40.

134 *Ibid.*, para. 136.

135 Papastavridis, 'European Convention on Human Rights', *supra* note 114, 125; see also Guilfoyle, *supra* note 114, 89.

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

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

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

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

136 UNHCR, 'Submission in the Case of Hirsi and Others v. Italy' (2010), para 4.3.2, available at <https://www.unhcr.org/protection/operations/4decc19/submission-office-united-nations-high-commissioner-refugees-case-hirsi.html> (last visited 11 February 2024).

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

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

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

II. Cooperation-Based Measures of Extraterritorial Migration Control

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

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

139 *ND and NT*, *supra* note 38.

140 *Ibid.*, para. 208.

141 Markard, *supra* note 22, 610.

142 Hathaway & Gammeltoft-Hansen, *supra* note 63, 249; Markard, *supra* note 22, 593.

143 Ciliberto, *supra* note 24, 526; M. Den Heijer & J. Schechinger, ‘Refoulement’, in A. Nollkaemper & I. Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017), 496.

144 Giuffré & Moreno-Lax, *supra* note 22, 4.

145 T. Gammeltoft-Hansen, ‘Growing Barriers: International Refugee Law’, in M. Gibney & S. Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (2010), 74 [Gammeltoft-Hansen, ‘Growing Barriers’].

146 Giuffré & Moreno-Lax, *supra* note 22, 15.

147 Giuffré & Moreno-Lax, *supra* note 22, 15.

148 D. Lutterbeck, ‘Migrants, Weapons and Oil: Europe and Libya After the Sanctions’, 14 *The Journal of North African Studies* (2009) 2, 169, 172.

149 Boswell, *supra* note 81, 619.

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

1. Coordination of Interception Measures Conducted by a Third State

The case pending before the ECtHR, *SS and Others v. Italy*,¹⁵³ can serve to illustrate the jurisdictional problems that arise in the context of remote migration control through cooperation with the local administration of a third State.¹⁵⁴ The application was filed by the Global Legal Action Network based on the reconstruction of events alleged to have occurred on November 6th, 2017.¹⁵⁵ Compared to the push-backs in *Hirsi*,¹⁵⁶ the underlying policy objective was the same, which was preventing migrants from reaching Italian territorial waters, even if the actors were different.¹⁵⁷ In *SS and Others*, it was not the Italian authorities that conducted the operation but their Libyan counterparts.¹⁵⁸ Although the Maritime Rescue Coordination Center (MRCC) in Rome was the first to receive the distress call of the sinking dinghy with around 150 migrants on the high seas, Italian authorities were not physically involved in the operation.¹⁵⁹ They communicated the situation to nearby ships, including Libya’s *Ras Al Jadar*.¹⁶⁰ In addition, it appears that the MRCC in Rome communicated

150 Giuffré & Moreno-Lax, *supra* note 22, 14-15; C. Oeppen, “Leaving Afghanistan! Are You Sure?” – European Efforts to Deter Potential Migrants Through Information Campaigns’, 9 *Human Geography* (2016) 2, 57, 59.

151 Giuffré & Moreno-Lax, *supra* note 22, 3.

152 *Ibid.*

153 *SS and Others v. Italy (Exposé des faits)*, ECtHR Application No. 21660/18, communicated on 26 June 2019 [*SS and Others*].

154 Moreno-Lax, ‘Architecture of Functional Jurisdiction’, *supra* note 15, 387.

155 *Ibid.*

156 *Hirsi*, *supra* note 1.

157 Ciliberto, *supra* note 24, 499.

158 *SS and Others*, *supra* note 153, paras 7-8.

159 Pijnenburg, *supra* note 27, 409.

160 *SS and Others*, *supra* note 153, paras 3-4.

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

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

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

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

162 *Hirsi*, *supra* note 1.

163 *Ibid.*, para. 180.

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

165 Pijnenburg, *supra* note 27, 422.

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

167 *Banković*, *supra* note 14.

168 *Ibid.*, para. 75.

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

170 Pijnenburg, *supra* note 27, 423.

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

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

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

There are cases where the Contracting Party's involvement is limited to indirectly supporting third States in conducting interceptions through funding, as well as providing equipment and training.¹⁷⁴ In the context of the November 2017 incident, the longstanding cooperation between Italy and Libya was already acknowledged in *Hirsi*.¹⁷⁵ The Libyan ship that carried out the interception had been donated by Italy¹⁷⁶ and the Libyan crew had been trained by the EUNAVFOR MED mission.¹⁷⁷ In addition, Italy supports the Libyan Coast Guard by funding the maintenance of their patrol boats,¹⁷⁸ providing technical and logistical advice,¹⁷⁹ and by setting up a center for coordinating operations.¹⁸⁰ In 2017, Italy actively supported Libya in establishing its own Search and Rescue Region and assisted Libya in building its own MRCC.¹⁸¹ Moreover, Italy funded several migrant detention centers in Libya.¹⁸²

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

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

172 Pijnenburg, *supra* note 27, 426.

173 *Ibid.*, 411.

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

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

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

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

178 *Ibid.*

179 *Ibid.*

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

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

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

183 *Ilascu*, *supra* note 53.

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

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

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

184 *Ibid.*, para. 392.

185 *Ibid.*

186 *Ibid.*

187 Pijnenburg, *supra* note 27, 415.

188 *Ilascu*, *supra* note 53, para. 392.

189 Ciliberto, *supra* note 24, 527-528; Giuffré & Moreno-Lax, *supra* note 22, 23-24.

190 Ciliberto, *supra* note 24, 528.

191 *Ilascu*, *supra* note 53, para. 392.

192 Ciliberto, *supra* note 24, 528.

193 *Sandu and Others v. The Republic of Moldova and Russia*, ECtHR Application Nos 21034/05 and 7 others, Judgment of 3 December 2018, para. 34; *Ilascu*, *supra* note 53, para. 331.

194 Ciliberto, *supra* note 24, 528.

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

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

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

Some scholars in international law seem to assume that any exercise of migration control, whether territorial or extraterritorial, entails the exercise of jurisdiction.¹⁹⁵ Although the Court in *Medvedyev*¹⁹⁶ stated that the maritime environment is not a place devoid of human rights protection,¹⁹⁷ current jurisprudence of the ECtHR does not follow this entirely.¹⁹⁸ The primarily territorial nature of jurisdiction and a comparatively strict threshold for effective control¹⁹⁹ make the assumption of jurisdiction in the context of extraterritorial

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

196 *Medvedyev*, *supra* note 45.

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

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

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

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

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

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

200 *Banković*, *supra* note 14.

201 L. Loucaides, ‘Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case’, in L. Loucaides, *The European Convention on Human Rights: Collected Essays* (2007), 73-75 (with further references); V. Mantouvalou, ‘Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality’, 9 *International Journal on Human Rights* (2005) 2, 147, 159.

202 *Ilascu*, *supra* note 53.

203 *Andreou*, *supra* note 122.

204 *Issa*, *supra* note 57; Gammeltoft-Hansen, *Access to Asylum*, *supra* note 29, 150.

205 See parts (C.I.) and (C.II.) of this paper.

206 Pijnenburg, *supra* note 27, 407.

207 Hathaway & Gammeltoft-Hansen, *supra* note 63, 235; T. Gammeltoft-Hansen & N. F. Tan, ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy’, 5 *Journal of Migration and Human Security* (2017) 1, 28, 31.

208 Hathaway & Gammeltoft-Hansen, *supra* note 63, 235.

209 *Ibid.*, 284.

210 See parts (C.I.) and (C.II.) of this paper.

211 Giuffré & Moreno-Lax, *supra* note 22, 5.

212 Den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 76, 178.

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

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

213 Gammeltoft-Hansen, *Access to Asylum*, *supra* note 29, 146-147.

214 *Ibid.*, 149; *Al-Skeini*, *supra* note 40, para. 142; see also *Cyprus*, *supra* note 52, para 78.

215 Special Rapporteur on the Human Rights of Migrants, *supra* note 77, para. 56; Gammeltoft-Hansen, *International Refugee Law and Refugee Policy*, *supra* note 137, 586.

216 I. Mann, ‘Maritime Legal Black Holes: Migration and Rightlessness in International Law’, 29 *European Journal of International Law* (2018) 2, 347, 348.

217 *Banković*, *supra* note 14.

218 *Hirsi*, *supra* note 1; Gammeltoft-Hansen, ‘International Refugee Law and Refugee Policy’, *supra* note 137, 584.

219 Boswell, *supra* note 81, 622.

220 Gammeltoft-Hansen, ‘International Refugee Law and Refugee Policy’, *supra* note 137, 588.

221 *Ibid.*

222 *Ibid.*

223 Report of the Special Rapporteur of the Human Rights Council, *supra* note 81, para. 36.

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

224 *Banković*, *supra* note 14, 59.

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

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