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Drones at the borders – Security for whom?

An analysis of Italy's use of drones for border management and its impact on the rights of migrants, with a focus on the cooperation with Leonardo S.p.A. and Libya

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Contents

Summary

Italy is using drones to monitor migrants crossing the Mediterranean Sea. This is partially done through a contract with Leonardo S.p.A – one of the largest arms traders in the world – under which the company undertakes to operate drones in the area on behalf of the state. Meanwhile, Italy has withdrawn its naval assets and is hindering non-governmental organisations from carrying out *search-and-rescue operations*. Instead, Italy shares the information on migrant vessels with Libya – a state not considered safe for the purpose of returns – and Libyan authorities in turn intercept and pull the migrants back.

What makes Italy's use of drones unique is the fact that the state creates distance between itself and the migrants, both by outsourcing the operating of drones to a private company and by relying on Libya to carry out interceptions. Under these circumstances it is difficult to claim that Italy exercises jurisdiction under the approaches traditionally adopted by the European Court of Human Rights. However, applying an alternative model for jurisdiction would enable such a conclusion. In particular, applying the functional model suggested by Moreno-Lax, could result in Italy exercising jurisdiction in the current context, both with regard to the right to life and to the principle of non-refoulement. This would be in line with the principle of universality of human rights.

The practice has further blurred the distinguishing line between genuine search-and-rescue operations and *push- or pull-backs*. States increase their powers to interdict by claiming that they are engaging in search-and-rescue operations, while also deflating related obligations. As a result, both the right to life and the principle of non-refoulement are violated.

The central argument of this thesis is therefore that Italy's use of Leonardo S.p.A.'s drone-operation services and its cooperation with Libyan authorities engages its state responsibility and violates the right to life and the principle of non-refoulement.

Sammanfattning

Italien använder drönare för att övervaka migranters röresler över Medelhavet. Detta görs bland annat via ett kontrakt med Leonardo S.p.A – en av världens största vapenproducenter – under vilket företaget åtar sig att flyga drönarna och samla in information åt Italien. Samtidigt har Italien dragit tillbaka sina marina tillgångar och hindrar icke-statliga organisationer från att utföra så kallade *search-and-rescue operations*. Istället för Italien vidare den insamlade informationen till Libyen – ett land som inte anses säkert för migranter att återvända till – som i sin tur hindrar migranterna från att ta sig över havet.

Det som särskiljer upplägget är att Italien skapar distans mellan sig och migranterna genom att dels låta ett privat företag samla in den nödvändiga informationen, dels låta Libyen förhindra migranternas väg över havet. Detta upplägg gör det svårt att hävda att Italien har jurisdiktion enligt de traditionella modellerna. Om man däremot applicerar en funktionell jurisdiktionsmodell, såsom Moreno-Lax har föreslagit, kan Italien trots allt anses ha jurisdiktion i förhållande till rätten till liv och principen om non-refoulement. Detta skulle dessutom vara i linje med universalitetsprincipen.

Vidare har upplägget suddat ut skillnaden mellan genuina search-and-rescue operationer och så kallade *push- eller pull-backs*, då stater påstår sig utföra search-and-rescue operationer när de i själva verket förhindrar migranternas ankomst till Italien. Genom detta upplägg kränks rätten till liv och principen om non-refoulement.

Denna uppsats hävdar således att Italien genom sitt samarbete med Leonardo S.p.A. och Libyen kränker rätten till liv och principen om non-refoulement.

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Abbreviations

ECHR/the Convention	European Convention on Human Rights
ECtHR/the Court	European Court of Human Rights
EU	European Union
EUROSUR	European Border Surveillance System
FRA	European Union Agency for Fundamental Rights
Frontex	European Border and Coast Guard Agency
ICCPR	International Covenant on Civil and Political Rights
ICJ Statute	Statute of the International Court of Justice
IMO	International Maritime Organisation
LYCG	Lybian Coast Guard
MRCC	Maritime Rescue Coordination Centre
MoU	Memorandum of Understanding
NATO	North Atlantic Treaty Organisation
NCC	National Coordination Centre
NGO	Non-governmental Organisation
OSC	On-scene Command
PMSCs	Private Military and Security Companies
Refugee Convention	1951 Convention Relating to the Status of Refugees
SOLAS	International Convention for the Safety of Life at Sea
SAR	International Convention on maritime search and rescue
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

Destination states are currently using drones to gather information on migrants which is later shared with countries of transit. The countries of transit, instead of the countries of destination, then carry out pull-back operations. This is done to prevent the disembarkation of migrants on the territory of countries of destination. As a result, migrants are often returned to places where they face torture, ill-treatment and abuse.[1]

Italy is one of the states currently using drones to monitor migrants crossing the Mediterranean Sea. This is partly done through a contract with one of the biggest arms traders in the world – Leonardo S.p.A. – under which the company undertakes to operate drones over the area, on behalf of the state.[2] Libya, a country considered unsafe for migrants' returns by the United Nations High Commissioner for Refugees (hereafter UNHCR)[3], in turn relies on the information gathered by Italy, alongside the European Border and Coast Guard Agency (hereafter Frontex) and the European Union (hereafter EU), when it intercepts migrant vessels and pulls them back to Libyan territory.[4] It is possible to argue, as is done in this thesis, that by sharing such intelligence Italy carries out *de facto* push-backs which have severe implications in terms of the migrants' right to life and the principle of non-refoulement. What makes this collaboration formula special is thus that Italy

[1]United Nations Human Rights Council (UN HRC), Impact of the use of private military and security services in immigration and border management on the protection of the rights of all migrants: Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (9 July 2020) A/HRC/45/9, para 44.
[2]Antonio Mazzeo, 'Border surveillance, drones and militarisation of the Mediterranean' (Statewatch, 6 May 2021) <https://www.statewatch.org/analyses/2021/border-surveillance-drones-and-militarisation-of-the-mediterranean/> accessed 12 July 2021.
[3]United Nations High Commissioner for Refugees (UNHCR), UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea (September 2020) para 33.
[4]Daniel Howden, Apostolis Fotiadis and Antony Loewenstein, 'Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over' *The Guardian* (4 August 2019) <https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu> accessed 10 July 2021.

has created distance between itself and the migrants by using a private entity to gather intelligence and a third country to carry out pull-backs.

Italy is an example of a broader development. First, it is part of a development which sees regular modes of migration into the EU significantly restricted. As a result, more people turn to irregular routes instead, which are also increasingly restricted.[5] The Mediterranean Sea is such a route. Second, there is a growing trend of using autonomous technologies such as drones to monitor refugee movements.[6] Third, it is part of an increased outsourcing of state functions to private companies. Despite the fact that border officials could be tasked to operate the drones[7], it is common for states to purchase the services of private drone operators.

By sharing information, the migration control operations and potential violations of international law related to such operations are shifted to outside the EU.[8] Thus, Italy's use of drones to monitor its borders is also an example of border externalisation. Externalisation practices are border control measures, which are carried out outside a state's territory, and increasingly not even at its physical borders, to avoid having to fulfil human rights obligations in relation to migrants while also maintaining control over their movements.[9] Border externalisation is a growing trend among the Member States of the Council of Europe.[10] These policies have led to an increased number of deaths and increased abuse of migrants' rights.[11] More than 45 000

[5]A/HRC/45/9 (n 1) para 18.
[6]Petra Molnar, 'Technology on the margins: AI and global migration management from a human rights perspective' (2019) 8 Cambridge International Law Journal 305, 314; Matthias Monroy, 'Drones for Frontex: unmanned migration control at Europe's borders' (Statewatch, 27 February 2020) <https://www.statewatch.org/analyses/2020/drones-for-frontex-unmanned-migration-control-at-europe-s-borders/> accessed 12 July 2021; A/HRC/45/9 (n 1) para 22.
[7]A/HRC/45/9 (n 1) para 39.
[8]Mazzeo (n 2).
[9]A/HRC/45/9 (n 1) para. 20; Violeta Moreno-Lax, 'Protection at Sea and the Denial of Asylum' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford: Oxford University Press, forthcoming) 1–2.
[10]Commissioner for Human Rights, 'A distress call for human rights: The widening gap in migrant protection in the Mediterranean' (Follow-up report to the 2019 Recommendation, Council of Europe 2021) 25.
[11]A/HRC/45/9 (n 1) para 20; Moreno-Lax 'Protection at Sea' (n 9) 1–2.

people have since 2014 lost their lives while crossing a border world-wide, and around half of these deaths took place in the Mediterranean Sea.[12]

The European Court of Human Rights (hereafter the ECtHR or the Court) has already dealt with similar cooperation practices, including between Italy and Libya, for the interception and push-back of migrants at sea. It has for example done so in the case *Hirsi Jamaa,*[13] where Italy was found in breach of the principle of non-refoulement. Importantly, the state was considered exercising jurisdiction when intercepting migrants on the high seas and preventing them from reaching its borders.[14] There has since been a change in state practice, with Italy (and EU Member States more broadly) now refraining from physical contact in an attempt to avoid responsibility, as further discussed in this thesis.[15] These forms of contactless control are sometimes still presumed to be in line with human rights.[16] This is largely due to the presumption that a member state would lack jurisdiction in these situations.

Further, the distinguishing line between genuine search-and-rescue operations and push- or pull-backs has been blurred, as states increase their powers to interdict by claiming that they are engaging in search-and-rescue operations, while also deflating related obligations. Saving lives has thus turned into a disguise for carrying out interdictions.[17] As discussed in this thesis, the interdictions should rather be defined as refoulement operations. Italy's increased reliance on the Libyan Coast Guard (hereafter LYCG) in carrying out alleged search-and-rescue operations, as described in the case *SS v. Italy* pending before the ECtHR, can be explained against this background.

[12]Missing Migrants Project, '45,194 Missing Migrants since 2014' (Missing Migrants Project, 15 November 2021) <https://missingmigrants.iom.int/> accessed 23 November 2021.
[13]*Hirsi Jamaa and Others v. Italy* [GC] App no 27765/09 (ECHR 23 February 2012) ECHR 2012-II.
[14]*Hirsi Jamaa* (n 13) para 180.
[15]Mariagiulia Giuffré and Violeta Moreno-Lax, 'The rise of consensual containment: from 'contactless control' to 'contactless responsibility' for migratory flows' in Satvinder Singh Juss (ed), *Research handbook on international refugee law* (Edward Elgar, 2019) 85.
[16]Giuffré and Moreno-Lax (n 15) 92.
[17]Moreno-Lax 'Protection at Sea' (n 9) 14.

The use of drones constitutes a further continuation of this type of distance-creating practices.

The UN Working Group on the Use of Mercenaries has called for an assessment of how migration is managed.[18] Similarly, Violeta Moreno-Lax has encouraged other scholars to pay attention to recent migration control developments at sea threatening the integrity of the international protection regime.[19] To meet this need, this thesis seeks to investigate whether a state's use of drones for the purpose of border management engages its state responsibility under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the ECHR or the Convention)[20].

This thesis uses Italy as an emblematic example of states parties' use of drones for surveillance purposes in the context of migration. It is important to note, however, that the cooperation between Italy, Leonardo S.p.A., and Libya is far from unique. Italy is merely one of many states which uses drones in border management, as states are also involved in contractual agreements entered into by Frontex with private providers.[21] Several states make use of drones for the purpose of border control, primarily countries in the Balkans and along the Mediterranean coast.[22] Besides being bound by the ECHR,

[18]A/HRC/45/9 (n 1) para 77.
[19]Moreno-Lax 'Protection at Sea' (n 9) 15.
[20]Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (opened for signature 4 November 1950, entered into force 3 September 1953) (ECHR).
[21]Drones are also used for different purposes by different EU agencies, which cooperate with each other, and are the subject of several EU projects. See Statewatch, '€67 million for maritime surveillance drones' (Statewatch, 13 October 2016) <https://www.statewatch.org/news/2016/october/67-million-for-maritime-surveillance-drones/> accessed 12 July 2021; Monroy (n 6); Cordis 'Search And Rescue Aid and Surveillance using High EGNSS Accuracy: Drone plays lookout for sea rescue' (European Commission, 4 December 2020) <https://cordis.europa.eu/article/id/428504-drone-plays-lookout-for-sea-rescue> accessed 12 July 2021; Peter Gutierrez, 'UAS Secure the Mediterranean' (Inside Unmanned Systems, 21 April 2021) <https://insideunmannedsystems.com/uas-secure-the-mediterranean/> accessed 12 July 2021; Mark Akkerman, 'Financing Border Wars: The border industry, its financiers and human rights' (Transnational Institute and Stop Wapenhandel 2021) 25; Molnar (n 6) 314; Raluca Csernatoni, 'Constructing the EU's high-tech borders: FRONTEX and dual- use drones for border management' (2018) 27 European Security 175.
[22]United Nations General Assembly (UNGA) Contemporary forms of racism, racial discrimination, xenophobia and related intolerance: Note by the Secretary-General (10 November 2020) A/75/590, paras 7, 12, 14, 44–45; Andrei Popoviciu, ''They can see us in the dark': migrants grapple with hi-tech fortress EU' *The Guardian* (26 March 2021) <https://www.theguardian.com/global-development/2021/mar/26/eu-borders-migrants-hitech-surveillance-asylum-seekers> accessed 10 July 2021; Statewatch, 'Romania, Poland and Czech Republic acquiring drones for border surveillance, military purposes'

which is the central legal instrument of analysis for this thesis, Italy is a particularly relevant example due to its geographic and political position. Situated in the northern Mediterranean Sea, Italy is one of the countries many migrants attempt to reach, risking their lives in the process. Italy already has a well-established collaboration with Libya in terms of migration control, for which it has been found in violation of the principle of non-refoulement, as mentioned above.

Effectively, there are various other companies in addition to Leonardo S.p.A. that provide the same type of services.[23] Further, the performance of security services in states' border management carried out by private companies is expected to increase.[24] This thesis focuses on Leonardo S.p.A. since it is one of the world's largest arms sellers, it is partly state-owned by Italy and it produces many of the drones used in managing Europe's borders.[25] Italy and Leonardo S.p.A. thus serve as an example to facilitate the analysis, but the conclusions presented in this thesis are potentially relevant and applicable to the migration control practices of other states as well.

1.2 Central Argument

The central argument of this thesis is that Italy's use of Leonardo S.p.A.'s drone-operation services and its cooperation with Libyan authorities violates the right to life and the principle of non-refoulement. This claim builds on three main arguments.

First, it is argued that the use of drones serves as a security measure for both states and companies, but not for migrants. From the perspective of states, the use of drones serves as a security measure by responding to a perceived threat – the arrival of migrants. It also provides financial security for companies like

(Statewatch, 10 August 2020) <https://www.statewatch.org/news/2020/august/romania-poland-and-czech-republic-acquiring-drones-for-border-surveillance-military-purposes/> accessed 12 July 2021.

[23]Mazzeo (n 2); Monroy (n 6); Jasper Jolly, 'Airbus to operate drones searching for migrants crossing the Mediterranean' *The Guardian* (20 October 2020) <https://www.theguardian.com/business/2020/oct/20/airbus-to-operate-drones-searching-for-migrants-crossing-the-mediterranean> accessed 10 July 2021.

[24]A/HRC/45/9 (n 1) para 77.

[25]Akkerman 'Financing Border Wars' (n 21) 2–3 and 5.

Leonardo S.p.A., since it creates a never-ending demand for their services. For migrants, on the other hand, the use of drones does not provide security. On the contrary, the way drones are currently used has a negative impact on search-and-rescue operations and instead enables pull-backs to locations where migrants face human rights violations.

Second, it is argued that despite the difficulty in claiming that Italy exercises jurisdiction under the approaches traditionally adopted by the ECtHR, applying an alternative model of jurisdiction would indeed enable such a conclusion. In particular, applying the model suggested by Moreno-Lax could result in Italy exercising jurisdiction in the current context, both with regard to the right to life and to the principle of non-refoulement. This would be in line with the principle of universality of human rights and the general rationale already accepted by the Court that a state should not be allowed to do elsewhere what it cannot do within its own territory.[26]

The final argument put forward is that Italy through its cooperation with Leonardo S.p.A. and Libya violates articles 2 and 3 of the ECHR. It is argued that Italy's current use of drones results in insufficient search-and-rescue operations. Article 2 of the ECHR, read in light of other international instruments relevant to the maritime context, is therefore violated. Further, it is argued that Italy exposes migrants to *de facto* push-backs by transferring the information gathered by drones to Libya, resulting in pull-backs and thus violating article 3 of the ECHR.

1.3 Purpose and Research Question

The purpose of this thesis is to determine how one specific aspect of the border management industry – the use of drones for surveillance purposes – affects the human rights of irregular migrants, as well as the question of state responsibility.

[26] *Issa and others v. Turkey* App no 31821/96 (ECHR, 16 November 2004) para 71.

The research question is therefore: *Does the use of drones in border control engage state responsibility under the ECHR?*

To properly answer the research question, the following sub-questions will be addressed:

- In what way is Italy making use of drones produced by Leonardo S.p.A. in its border management operations, what problems does it cause and what are the underlying reasons for the use?
- Does Italy exercise jurisdiction in relation to the adverse human rights impact that the use of drones has on migrants?
- Does the use of drones for the purpose of monitoring irregular migrants violate the right to life and the principle of non-refoulement in the ECHR?

1.4 Delimitations

This thesis focuses solely on the ECHR, since this is the most influential regional instrument for human rights in Europe. It is monitored by the Court, and thus offers legal means for those affected. In addition, it is broader in its scope than other international legal instruments. For example, the ECHR's personal and material scope is broader than the one offered under the 1951 Convention Relating to the Status of Refugees (hereafter the Refugee Convention).[27] Therefore, other international instruments besides the ECHR, such as the International Covenant on Civil and Political Rights (hereafter the ICCPR) and the Refugee Convention will not be covered. Due to the thesis' limited length, EU law will also not be addressed.

The use of drones in migration management at sea actualises several human rights.[28] However, the right to life and the principle of non-refoulement, as enshrined in articles 2 and 3 of the ECHR, reflect core values of the

[27]European Union Agency for Fundamental Rights (FRA), *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law* (European Union Agency for Fundamental Rights, 2016) 11.
[28]For example the right to leave a state, the right to seek asylum, family unity, and the right to effective access to the procedure for determining refugee status.

democratic societies of the Council of Europe.[29] Further, the principle of non-refoulement is a primary obligation of a state, necessary for the international protection regime to properly function, and its applicability *ratione loci* is widely discussed.[30] The recent trend to carry out interceptions at sea risks violating the principle of non-refoulement. It does so under the guise of search-and-rescue operations, which purport to protect the right to life. For these reasons, these two rights constitute the focus of this thesis. More specifically, the thesis will focus on the positive duties connected to these rights, since states' positive duties have been claimed to be essential in expanding protection at sea.[31]

The responsibility of the state will be covered, since states are bound by the ECHR which is the relevant legal instrument for this thesis. The thesis only address independent responsibility, since this is what the ECtHR mostly has dealt with and since the scope of this thesis is limited.[32] The responsibility of companies, international organisations and individuals[33] is excluded. These actors' potential responsibilities deserve a thesis of their own. States may retain responsibility for actions of companies within their jurisdiction, while companies can be both directly responsible for, or complicit to, human rights abuses, for example by supplying technology used in violations.[34] There are instruments covering companies, for example the United Nations Guiding Principles on Business and Human Rights (hereafter UNGPs).[35] However, companies are not the traditional duty bearers in international law. The thesis will for these reasons not address the responsibility of Leonardo S.p.A.,

[29]Council of Europe/European Court of Human Rights (CoE/ECtHR), 'Guide on Article 2 of the European Convention on Human Rights: Right to life' (Council of Europe/European Court of Human Rights, 2021) para 2.
[30]Giuffré and Moreno-Lax (n 15) 92–93.
[31]Irini Papanicolopulu, International law and the protection of people at sea (1st edn, Oxford: Oxford University Press, 2018) 193.
[32]According to article 2 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, a conduct constitutes an internationally wrongful act if it breaches an international obligation, such as the right to life or the principle of non-refoulement under the ECHR, and is attributable to a state.
[33]Different views on the role and the responsibility of the individual drone operator have been presented, see Howden, Fotiadis and Loewenstein (n 4).
[34]A/HRC/45/9 (n 1) para 75–76.
[35]The focus of this thesis – state responsibility – is also covered by the first pillar of the UNGPs. For other relevant instruments, see A/HRC/45/9 (n 1) paras 29–32.

Frontex,[36] or the EU. These actors will only be mentioned to provide context. Due to the limited length of this thesis, it will not focus on states' regulations of companies either.

Given the emblematic example used in this thesis, focus will be on Italy's responsibility even though there are several other states which may be responsible for the potential ongoing violations. Under international law each actor is responsible for its own wrongdoings, despite the difficulties that may arise in situations where several actors are involved.[37] For this reason, the exclusive focus on Italy is motivated even though more parties may be involved, since Italy retains responsibility for its own actions. Actions taken by Libya will be addressed, but only to understand the context in which Italy's actions take place.[38]

Given the research question, this thesis will exclusively address the use of drones and how the gathered information is used. All other types of digital technologies used in border management, such as biometric data and smart walls, are excluded. Similarly, all other aspects of migration management which may be outsourced to private entities are also excluded from the analysis. This delimitation is motivated by the fact that some sectors of the border security market, and their impact on human rights, have already received attention.[39] Further, the exploitation of refugees by companies and in global supply chains have already been addressed by scholars involved in

[36]With regard to Frontex, concerns have been raised on how the organisation spends its money, how it can be held accountable as well as the lack of transparency. See Howden, Fotiadis and Loewenstein (n 4).
[37]André Nollkaemper, 'Shared responsibility for human rights violations: a relational account' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge Studies in Human Rights 2017) 28–30; *Corfu Channel Case (United Kingdom v. Albania)* (Judgment) [1949] ICJ Rep 244; *M.S.S. v. Belgium and Greece* [GC] App no 30696/09 (ECHR 21 January 2011) ECHR 2011-I.
[38]Libya is in addition not bound by the ECHR.
[39]A/HRC/45/9 (n 1) para 11.

business and human rights.[40] The use of drones, however, has not yet received such attention.

1.5 Method and Material

The method used throughout this thesis is the legal doctrinal research method. It involves the critical examination of both legislation and case law in order to make a correct statement of the law, which is necessary before criticising the law.[41] This is the purpose of this method in this thesis, since the thesis seeks to both determine what the law is (*de lege lata)* and discuss how the law ought to be constructed (*de lege ferenda)*. The *de lege ferenda* discussion will concern the concept of jurisdiction.

The hierarchy of legal sources in international law as envisaged in article 38(1) of the Statute of the International Court of Justice (hereafter the ICJ Statute) is central in the doctrinal research method. The article states that the primary legal sources in international law are treaties, customs, and general principles of law. Judicial decisions and doctrine can be used as subsidiary means for establishing what the law is.[42] This thesis therefore primarily relies on the black-letter law of the ECHR. In addition, it relies on the case law of international courts, most notably the ECtHR, as well as doctrine. This material is used when making arguments both for *de lege lata* and *de lege ferenda* purposes. In order to properly describe the factual situation and context, the thesis relies on reports from for example the United Nations (hereafter UN), the European Union Agency for Fundamental Rights (hereafter FRA) and civil society, as well as on news articles.

[40]Daria Davitti, 'The Rise of Private Military and Security Companies in European Union Migration Policies: Implications under the UNGPs' (2019) 4:1 Business and Human Rights Journal 33, 33.
[41]Terry Hutchinson, 'Doctrinal research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 13–15.
[42]Statute of the International Court of Justice (1946) United Nations (ICJ Statute) aritcle 38.1.

The rules accepted by the Court for the purpose of treaty interpretation will be relied upon.[43] The first set of rules accepted by the Court include articles 31 – 33 of the Vienna Convention on the Law of Treaties (hereafter VCLT).[44] Article 31 of the VCLT states that a treaty shall be interpreted in good faith, that the ordinary meaning shall be given to the terms in their context, and that the object and purpose of the treaty shall be considered. Subsequent agreement or practice on the interpretation shall also be considered when interpreting a treaty, as well as other relevant rules of international law. Given the topic of this thesis and its context, primarily the United Nations Convention on the Law of the Sea (hereafter UNCLOS),[45] the International Convention on Maritime Search and Rescue (hereafter SAR),[46] and the International Convention for the Safety of Life at Sea (hereafter SOLAS)[47] will be considered as such other relevant rules of international law. Article 32 of the VCLT further states that when interpretation done in accordance with article 32 leads to an ambiguous or obscure meaning, or a result which is manifestly absurd or unreasonable, recourse can also be made to for example the treaty's preparatory works.

The second set of rules is the concepts which the ECtHR has invented itself because of the Convention's specific nature as a human rights treaty. Importantly, this set of rules includes the concept of margin of appreciation, which gives states discretion when implementing the Convention since each state is deemed the best suited to do so within its own territory. Further, comparative interpretation techniques are used when deciding whether there is a European consensus on a certain issue or not. The living instrument doctrine is also part of this second set of interpretation rules. Lastly, the

[43]Conall Mallory, Human rights imperialists : the extraterritorial application of the European Convention on Human Rights (Oxford: Hart, 2020) 41.
[44]Mallory (n 43) 41; Vienna Convention on the Law of Treaties (with annex) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[45]United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).
[46]International Convention on maritime search and rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR Convention).
[47]International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 2 (SOLAS Convention).

principle of effectiveness is applied, which states that the rights shall be interpreted in a manner which makes them practical and effective.[48]

1.6 Theory and Perspective

This thesis aims at providing a critical analysis with both *de lege lata* and *de lege ferenda* elements. The starting point for these discussions is the universality of human rights and the thesis will concentrate on the perspective of irregular migrants. It is thus assumed that it is normatively desireable for the right to life and the principle of non-refoulement, as enshrined in the Convention, to apply in regard to Italy's use of drones for border management, since this would strengthen the protection of the rights of migrants. This assumption shall not impact the de lege lata discussion, but will be the starting point in the *de lege ferenda* discussion.

Universality is one of the key principles in international human rights law, and is in essence a moral position to allow a broad application of rights. It can however also have the effect of denying the application of the ECHR, as in the *Bankovic* case, where the so-called all-or-nothing approach was affirmed, meaning that either all or none of the rights enshrined in the ECHR must apply, in order to safeguard the integrity of the Convention.[49]

Given that universality is the starting point in relation to which other values must be considered, the result in practice is that the denial of rights must have a rational jursticiation. For this reason, circumstances such as territory, sovereignty and citizenship are irrelevant for the application of human rights. Regionalism could be considered a principled justification for a certain right not to apply, but is still in fundamental contrast with universality.[50]

[48]Mallory (n 43) 42–43.
[49]Marko Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (Oxford: Oxford University Press, 2011) 56 – 57.
[50]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 106–109.

For universality to serve its purpose, it has to be balanced with the principle of effectiveness.[51] There are four essential values which need to be considered for the purpose of effectiveness. These include *flexibility*, under which the requirements states face should be realistic and might need to be adjusted depending on the circumstances. This should be safeguarded when deciding on the merits of a case, for example by judges doing balancing, considering other legal regimes and allowing derogation. Consideration must however also be made to the *impact* of the adjustment. Given that the purpose of applying the rights extraterritorialy is to achieve some kind of change, the adjustments cannot be so great that such change is rendered impossible. Further, the *integrity of the regime* must be safeguarded, so that it is not compromised as a whole. Lastly, the application must be clear and predictable. This can be achieved both through the jurisdiction assessment and on the merits of each case.[52]

In sum, the extraterritorial application of human rights must be sufficiently flexible in order to avoid unreasonable results but not that flexible that the purpose of applying them or the integrity of the regime is lost, and the rules must be clear and predictable.[53]

1.7 Contribution to Current Research

This thesis concerns the rights pertaining to people migrating by sea, which is a topic that has received a lot of attention from civil society, politicians, lawyers and scholars alike. The use of technology in this context is also increasingly covered by scholars, such as Petra Molnar.[54] While the use of drones is often mentioned in this context, it has not yet been covered in much detail. This thesis therefore seeks to fill this gap within current research, by

[51]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 55.
[52]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 109–115.
[53]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 116–117.
[54]See e.g. Molnar (n 6).

mapping how and why drones are used as well as what legal problems such use causes.

Similarly, jurisdiction is widely discussed in the scholarly literature, and has often been discussed with regard to the concept of universality. The work of scholars such as Marko Milanovic and Yuval Shany are significant examples of this.[55] It has also been covered in the context of migrants' rights, most notably by Violeta Moreno-Lax and Efthymios Papastavridis.[56] Jurisdiction in relation to the use of drones in migration management is, however, left largely unresearched. This thesis therefore draws upon the work already done by the aforementioned scholars, and contributes to existing research by examining how the currently accepted models of jurisdictions can be applied to this specific context and whether Italy can be considered as exercising jurisdiction under these models. Likewise, the thesis also applies the proposed but not yet accepted models of jurisdiction to the use of drones.

More specifically, the rights of migrants at sea have been thoroughly discussed by scholars such as Violeta Moreno-Lax and Irini Papanicolopulu.[57] The use of drones and how it affects the rights of migrants is however less researched, with Natalie Klein being one of few scholars having published on the topic.[58] In her most recent article, however, the ECHR is only briefly mentioned. There is thus a gap to fill in current research on how the rights under the ECHR are affected specifically by the use of drones. This thesis therefore thouroughly assess the affect the use of drones

[55]See e.g. Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49); Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 Law & Ethics of Human Rights 47.
[56]See e.g. Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model"' (2020) 21 German Law Journal 385; Efthymios Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention under the Law of the Sea Paradigm' (2020) 21 German Law Journal 417.
[57]See e.g. Moreno-Lax 'Protection at Sea' (n 9); Papanicolopulu (n 31).
[58]See e.g. Natalie Klein, 'Maritime autonomous vehicles and international laws on boat migration: Lessons from the use of drones in the Mediterranean' (2021) 127 Marine Policy.

has on the right to life and the principle of non-refoulement as enshrined in the ECHR.

Lastly, since it is concluded that the critical step in engaging state responsibility under the ECHR with regard to the use of drones in migration management is the establishing of jurisdiction, the thesis contributes to current research by providing a *de lege ferenda* discussion on what model of jurisdiction *should* be applied, based on their respective outcomes in regard to the use of drones.

1.8 Terminology

Drones include all sorts of Unmanned Aerial Vehicles, Unmanned Aircraft System and Remotely Piloted Aircraft Systems.

Migrants are "all persons who are outside the state of which they are a citizen or national, or, in the case of stateless persons, their state of birth or habitual residence".[59] Therefore, this definition covers all types of migrants: refugees, asylum seekers, economic migrants but also people who migrate because of their jobs and families.

Irregular migrants are migrants who travel by irregular routes. Migrants travelling by irregular means are often refugees, asylum seekers and economic migrants, while migrants who move because of their jobs and family ties usually travel by regular means. There are however exceptions, for example refugees who travel by regular means because they have already been given refugee status by the UN. Thus, it is the mode of migration that is relevant for this term, rather than the reason for their migration or their status in terms of international protection. The focus of this thesis are those migrants who attempt to cross the Mediterranean Sea by boat, which constitute an irregular mode of migration. Thus, irregular migrants are the focus of this thesis. However, for the sake of simplicity, the terms *migrants* and *irregular migrants* will be used interchangeably in this thesis.

[59] A/HRC/45/9 (n 1) para 16.

The term *push-backs* has been described as "measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border".[60] For the purpose of this thesis, it is however important to distinguish between actions taken by countries of destination and actions taken by countries of transit or departure. In this thesis, *push-backs* therefore refer to actions taken by a country of destination to stop migrants from reaching its borders or, in case they have already crossed its border, to force them to leave. *Pull-backs* refer to actions taken by countries of transit or departure to prevent migrants from leaving or, in case they have already left, bring them back. The terms *de facto push-backs* and *push-backs by proxy* are used interchangeably to describe a situation where a country of destination enables *pull-backs*.

Private Military and Security Companies (hereafter PMSCs) are companies providing military or security services on a compensatory basis. The services may include knowledge transfer, air reconnaissance and unmanned flight operations of any kind. The term may also include defence companies, airlines, and companies specialised in information, and advanced technologies.[61]

1.9 Outline

The second chapter answers the first sub-question of the thesis, and will map in what way Italy makes use of drones in its border management, what problems this causes and what the underlying reasons for the use are. The chapter begins with describing the use of drones in Italy's border management, focusing on the contracts awarded to Leonardo S.p.A. It then continues by explaining what problems arise due to the use with regard to the

[60]United Nations Human Rights Council (UN HRC), Report on means to address the human rights impact of push-backs of migrants on land and at sea: Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales (12 May 2021) A/HRC/47/30 para 34.
[61]A/HRC/45/9 (n 1) para 15.

relevant rights of migrants. Two of the main underlying reasons for the use of drones are then described. Finally, the chapter ends with a preliminary answer to the first sub-question of the thesis.

The third chapter answers the second sub-question, by exploring whether Italy exercises jurisdiction with regard to the impact the use of drones has on migrants. The chapter first covers the traditional notions of jurisdiction used by the ECtHR. It then examines whether Italy's jurisdiction is engaged in relation to the impact the use of drones has on migrants under any of these traditional approaches. Further, three non-traditional approaches to jurisdiction which have been discussed in the existing scholarly debate are presented, as well as their ability to engage Italy's jurisdiction in the current situation. The chapter concludes with a preliminary answer to the second sub-question.

The fourth chapter answers the third sub-question, and therefore sets out to assess whether the use of drones for the purpose of monitoring irregular migrants violates the right to life and the principle of non-refoulement in the ECHR. The chapter begins with addressing the right to life. This is done by analysing article 2 of the ECHR, and interpreting what the article entails in relation to migrants in distress at sea. It is then assessed whether the use of drones in this context violates the right to life. The chapter continues by addressing the principle of non-refoulement. This is done by analysing article 3 of the ECHR, and interpreting what this article entails in relation to migrants at sea. It is then assessed whether the use of drones in this context violates the principle of non-refoulement. A preliminary answer to the third sub-question is presented in the conclusion of the chapter.

The fifth chapter concludes the thesis by answering the research question. By drawing upon the conclusions of the previous chapters, it is thus concluded whether Italy's use of drones for border management engages state responsibility under the ECHR. Using Italy as an emblematic example, the chapter also discusses what notion of jurisdiction should be applied.

2 Mapping the problem

2.1 Introduction

The purpose of this chapter is to answer the first sub-question of the thesis:

> *In what way is Italy making use of drones produced by Leonardo S.p.A. in its border management operations, what problems does it cause and what are the underlying reasons for the use?*

The chapter begins with describing the use of drones in Italy's border management, focusing on the contracts awarded to Leonardo S.p.A. It then continues with explaining what problems pertaining the right to life and the principle of non-refoulement arise due to this use. Further, two of the main underlying reasons for the use of drones are described. Finally, the chapter ends with a preliminary answer to the first sub-question of the thesis.

2.2 Drones in Italy's Border Management

Italy and Frontex have awarded private companies with multi-million euro contracts to monitor the Mediterranean Sea by using drones for border surveillance purposes.[62] One of the producers of drones used in managing Europe's borders is Leonardo S.p.A. The company is one of the world's largest arms sellers and is partly owned by the Italian state.[63] Its headquarter is in Rome and its major shareholder is the government of Italy.[64] On its website, the company states that drones can have a crucial role for national border control operations when used in combination with manned aircraft, helicopters and ships.[65] Their service formula is claimed to be an advantage

[62]Statewatch, 'Italy and Frontex now monitor the Mediterranean Sea with large drones' (Statewatch, 27 October 2020) <https://www.statewatch.org/news/2020/october/italy-and-frontex-now-monitor-the-mediterranean-sea-with-large-drones/> accessed 12 July 2021.
[63]Akkerman 'Financing Border Wars' (n 21) 2–3 and 5.
[64]Akkerman 'Financing Border Wars' (n 21) 47.
[65]Leonardo S.p.a., 'Leonardo's Falco EVO drone is used to monitor irregular migration during Frontex operation' (Leonardo S.p.a. Press Release, 12 July 2019) <https://www.leonardocompany.com/en/press-release-detail/-/detail/12-07-2019-leonardo-s-falco-evo-drone-is-used-to-monitor-irregular-migration-during-frontex-operation> accessed 12 July 2021.

since it allows the end-user to buy the information instead of the actual drone. As a result, there is no need for the end-user to train its own personnel. The Italian government has made use of these services.[66] The nature of this contract creates a relationship where the state is increasingly dependent on the company for its border management. The fact that they focus on service provisions rather than the purchase of hardware is especially important for the purposes of this thesis, since it creates distance between the state and the migrants monitored. To provide some contextualisation of the relevant contractual infrastructure, this sub-chapter first describes the contract entered into by Frontex and the testing of Leonardo S.p.A.'s drones. The chapter then turns to the contract entered into by Italy.

2.2.1 The Contract Entered by Frontex

In 2017, Frontex signed a contract worth € 2.25 million with Leonardo S.p.A. under which the company was to provide 300 flight hours with the Falco EVO UAV System[67] during a period of six months. The purpose was to test the operative capabilities of drones over the Mediterranean Sea, at locations decided by Frontex and individual Member States. Italy was one of these locations.[68] All drone testing is carried out in close cooperation with national agencies, and even though Frontex coordinates the operations, each state remains in control over their own airspace.[69]

The testing of the Falco EVO drone started in Lampedusa in 2018, where the drones were deployed and did more than 280 flight hours for Frontex. The operations were planned by the Italian *Guardia di Finanza* (the Italian tax law

[66]Gutierrez (n 21).
[67]The Falco EVO UAV System is a dual-use drone produced by Leonardo. It can carry out surveillande 24/7 in any kind of weather and can by used in monioring borders and coasts and preventing immigration. It can carry varying types of equipment, including Electro-Optical/Infra-red/Laser Range Finder/Laser Designator, Synthetique Aperture Radar/GMTI, Multimode Surveillance Radar, Automatic Identification System, ESM, COMINT, Relay Package, Hyperspectral sensor, SATCOM. It has assisted and automatic flight management and automatic area surveillance modes. It is also adaptable to the customer's needs. See Leonardo S.p.a., 'Falco Evo UAV System' (Electronics Division, 2019) <https://www.leonardocompany.com/documents/20142/3149033/Falco+EVO+UAV+%28mm07818%29.pdf?t=1605279126547> accessed 12 July 2021.
[68]Mazzeo (n 2).
[69]Gutierrez (n 21).

enforcement agency and Customs Guard, operating under the authority of the Ministry of Economy and Finance) under the coordination of the Ministry of Interior. The operations were supported by the national civil aviation authority, the company responsible for the management of the airport in Lampedusa as well as the company in charge of civilian air traffic. The drones are owned, maintained, and operated by Leonardo S.p.A. During the trials, the drones were equipped with a maritime surveillance radar, an infra-red high-definition optical system, a thermal camera, a satellite data connection, and a Gabbiano TS Ultra-light radar, allowing long range operations at both day and night. An automatic system was also used to identify sighted objects.[70]

A representative from Leonardo S.p.A. has stated that the testings of the Falco EVO drone were directed by Italy's *Guardia di Finanza*, who in turn received instructions from Frontex. During the operations, three operators are involved: a pilot, a payload operator and a ground control station manager. In addition, there is a mission coordinator who usually represents the end user. Despite the drones being able to fly autonomously, the route can also change during an operation and new targets can be followed depending on the mission coordinator's instructions.[71]

There are two operations carried out with the purpose of intercepting migrants, which have been given special attention. During these operations, the drone was authorized to fly over both Maltese and Italian civilian airspace.[72] The senior vice president of airborne systems-electronics Italy at Leonardo believes that the company is the only operator who has been allowed to fly over two EU Member States.[73]

In a cooperation with other Frontex assets, Leonardo S.p.A.'s Falco EVO drone on the 20th of June 2019 identified a trawler from which 75-81 irregular migrants were transferred onto smaller boats, who later disembarked in Lampedusa. The trawler was monitored by the drone until Italian authorities

[70]Mazzeo (n 2); Leonardo S.p.a., 'Leonardo's Falco EVO' (n 65); Gutierrez (n 21).
[71]Gutierrez (n 21).
[72]Mazzeo (n 2).
[73]Gutierrez (n 21).

could seize it. On the 26th of June, the Falco EVO supported the interception of two boats after Italian authorities had requested help from Frontex to monitor the vessels in the area of Lampedusa. The operation lasted for over 17 hours and is the longest mission so far. The operation resulted in the intervention by Italian armed forces against the two vessels near the Pelagic Islands.[74]

2.2.2 The Contract Entered by Italy

In 2020 it was reported that the Falco EVO drone produced by Leonardo S.p.A. had also been employed by Italian public security authorities and was to undertake 1,200-1,800 flight hours under a 12-month period. This was the result of a decision taken by the Italian Interior Ministry's Central Directorate for Immigration and Border Police. The contract amounted to € 8,8 million and was funded with means from the Internal Security Fund.[75]

The indicated purpose of the agreement was to increase the know-how within the National Coordination Centre (hereafter NCC)[76] of the European Border Surveillance System (hereafter EUROSUR)[77], with support from Frontex. The drones will be operated from either Trapani-Birgi, Lampedusa or Ragusa-Comiso. Leonardo S.p.A. will carry out surveillance missions and transfer the gathered information to the NCC for further use and distribution. In addition, four pilots from Polizia di Stato and Guardia di Finanza will be trained to operate the drone. According to the Interior Ministry's Public Security department, all information, including information regarding human trafficking and search-and-rescue operations, is to be transferred to the NCC. The drone will conduct aero-maritime surveillance during both day and night,

[74]Leonardo S.p.a., 'Leonardo's Falco EVO' (n 65); Mazzeo (n 2).
[75]Mazzeo (n 2).
[76]The NCC provides an overview of the situation at the specific Member State's external border. This is done by coordinating and exchanging information between the national authorities involved, and with Frontex and other Member States' NCCs. See Migration and Home Affairs, 'Eurosur' (European Commission) <https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/border-crossing/eurosur_en> accessed 12 July 2021.
[77]EUROSUR is a framework for information exchange and cooperation between EU Member States and Frontex. Itr purpose is to prevent both cross-border crimes and irregular migration, while also protecting the lives of migrants. See Migration and Home Affairs (n 76).

and objects over two metre may be identified from a four kilometres' distance.[78]

2.3 The Problem

The means of surveillance, such as the use of drones, currently used by states has forced migrants to embark on more dangerous routes.[79] Together with other long-range and automated technology, it has led to unnecessary deaths as well as push- and pull-backs to states in North Africa, such as Libya.[80] This sub-chapter therefore focuses on the impact the use of drones has on search-and-rescue operations and the enabling of pull-backs.

2.3.1 Impact on Search-and-Rescue Operations

A detailed account of the legal framework concerning search-and-rescue operations will be presented in chapter four, but the most fundamental rule is that all states must promote the establishment, operation and maintenance of search-and-rescue services.[81] States must therefore establish Maritime Rescue Coordination Centres (hereafter MRCCs) and make sure that the operating procedures for emergencies and search-and-rescue operations are followed. The International Maritime Organisation (hereafter the IMO) has also divided the world's oceans into different search-and-rescue zones, with one specific state acting as a coordination party for each zone.[82] The Human Rights Commissioner has raised the concern that the search-and-rescue system has been undermined by the withdrawal of states' naval ships, the obstruction of vessels of non-governmental organisations (hereafter NGOs)

[78]Mazzeo (n 2).
[79]A/HRC/45/9 (n 1) paras 44-45; Akkerman 'Financing Border Wars' (n 21) 4.
[80]A/75/590 (n 22) para. 12; Statewatch, 'Italy and Frontex now monitor the Mediterranean Sea with large drones' (n 62); Mazzeo (n 2).
[81]Article 98 UNCLOS (n 45).
[82]European Union Agency for Fundamental Rights, 'Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations - 2018' (European Union Agency for Fundamental Rights, 1 October 2018) <https://fra.europa.eu/en/publication/2019/fundamental-rights-considerations-ngo-ships-involved-search-and-rescue> accessed 12 July 2021.

and the refusal/delaying of access to ports. This is claimed to be done in order to enable interceptions by Libya.[83]

Despite a decrease in the number of people trying to cross the Mediterranean Sea in 2016, there was a drastic increase of deaths.[84] 14 % of those who tried to cross the Mediterranean in 2019 died during their attempt.[85] As of 18 November 2021, 1,644 migrants have died or gone missing in the Mediterranean Sea during 2021, with 1,303 of those cases being recorded along the Central Mediterranean route.[86]

There is currently a lack of rescue capacity on the Mediterranean Sea. Despite the Human Rights Commissioner calling on states in 2019 to make ships and other assets available, and to ensure an effective coordination of search-and-rescue operations, no more ships have been deployed. Moreover, states respond to distress calls very slowly, which has put people's lives at risk. Collectively, the protection of migrants has worsened due to states' lack of search-and-rescue capacity.[87]

Concurrently, it has been suggested that the EU has strengthened its air surveillance at the expense of the search-and-rescue missions in the Mediterranean. For example, Italy's interior minister was a strong proponent of carrying out the EUNAVFOR MED Operation Sophia exclusively from air. From 2019 onwards, the operation has used unarmed Predator drones produced by the American company General Atomics.[88] The main problem with the use of drones is therefore that it has substituted the deployment of naval ships, instead of supplementing it.

The problem with using technology in border management does not necessarily lie in the technology itself.[89] If used differently, drones would not

[83]Commissioner for Human Rights (n 10) 8–11.
[84]Giuffré and Moreno-Lax (n 15) 84.
[85]Howden, Fotiadis and Loewenstein (n 4).
[86]Missing Migrants Project, '1,644 Missing Migrants Recorded in Mediterranean (2021)' (Missing Migrants Project, 18 November 2021) <https://missingmigrants.iom.int/region/mediterranean?region_incident=All&route=All&year%5B%5D=2500&month=All> accessed 23 November 2021.
[87]Commissioner for Human Rights (n 10) 9–11.
[88]Monroy (n 6).
[89]Molnar (n 6) 317.

necessarily cause a human rights concern. For example, had drones been used for the purpose of detecting migrant boats in distress and to notify naval ships in order to bring them ashore to a genuine port of safety, they would not cause a concern in relation to the right to life and non-refoulement. This would however require the presence of naval ships fit to carry out rescue missions, since drones are not capable of carrying out such operations. Since states substitute their naval ships with drones, there are not enough actors present who could actually assist the detected vessels.

As states lack or refuse to deploy appropriate search-and-rescue capacity, the importance of other actors, such as commercial vessels, increases.[90] NGO vessels have saved a significant number of people in recent years.[91] During the first six months in 2017, NGO vessels carried out operations rescuing around 40% of the in total 82,187 people rescued in the Mediterranean Sea. This number is comparable to the percentage rescued by the Italian Coast Guard in 2017 and the first half of 2018, which also amounted to about 40%.[92] Restricting the work of NGO vessels clearly has negative consequences for the safety at sea.

Despite this, in addition to stopping their own rescue missions in the Mediterranean, states have also restricted the presence and work of NGO vessels, further limiting the search-and-rescue capacity available. This has been done by initiating criminal and administrative legal proceedings against them and by limiting the access to ports.[93]

As of June 2021, there were six NGO assets still operational in the Mediterranean Sea. Out of these, only five were in the central Mediterranean

[90]Commissioner for Human Rights (n 10) 11.
[91]European Union Agency for Fundamental Rights, 'June 2021 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights' (European Union Agency for Fundamental Rights, 18 June 2021) <https://fra.europa.eu/en/publication/2021/june-2021-update-ngo-ships-sar-activities> accessed 12 July 2021.
[92]European Union Agency for Fundamental Rights, 'Fundamental rights considerations' (n 82).
[93]Commissioner for Human Rights (n 10) 10–11 and 23.

Sea and only two of these were naval assets and thus the only ones capable of performing search-and-rescue operations.[94]

There is a trend among EU Member States, including Italy, to criminalise NGOs carrying out search-and-rescue operations. For example, a Code of Conduct for NGOs has been introduced, under which NGOs are prohibited from for example entering Libyan territorial waters and communicating with smugglers.[95] The increased resort to legal actions against NGOs is one of the reasons why so few NGO vessels are now operational. This has in turn led to a further decrease in search-and-rescue assets present in the Mediterranean Sea.[96] There are reports on both administrative and criminal proceedings having been initiated against NGO vessels.[97] Ships have been seized and crew members along with other individuals taking part in the search-and-rescue operations have been made subject for investigations. Most of the cases initiated in the Mediterranean Sea have either ended with an acquittal or been discontinued due to lack of evidence.[98] Around 20 new proceedings were initiated during the period June 2019 – December 2020, and the majority of them were initiated in Italy.[99] Only in the past six months there have been eight new legal cases in Italy. Half of these were initiated due to technical irregularities, and the other half concerned crew members who were charged for having aided and abetted illegal immigration.[100]

[94]European Union Agency for Fundamental Rights, 'June 2021 Update' (n 91).
[95]A/HRC/45/9 (n 1) para. 19; European Union Agency for Fundamental Rights, 'Fundamental rights considerations' (n 82).
[96]European Union Agency for Fundamental Rights, 'Fundamental rights considerations' (n 82); European Union Agency for Fundamental Rights, 'June 2021 Update' (n 91).
[97]Commissioner for Human Rights (n 10) 10; European Union Agency for Fundamental Rights, 'Fundamental rights considerations' (n 82).
[98]European Union Agency for Fundamental Rights, 'Fundamental rights considerations' (n 82).
[99]Commissioner for Human Rights (n 10) 21; European Union Agency for Fundamental Rights, 'June 2020 update – NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them' (European Union Agency for Fundamental Rights, 19 June 2020) <https://fra.europa.eu/en/publication/2020/2020-update-ngos-sar-activities> accessed 27 November 2021; European Union Agency for Fundamental Rights, 'December 2020 update – NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them' (European Union Agency for Fundamental Rights, 18 December 2020) <https://fra.europa.eu/en/publication/2020/december-2020-update-ngo-ships-involved-search-and-rescue-mediterranean-and-legal> accessed 27 November 2021.
[100]European Union Agency for Fundamental Rights, 'June 2021 Update' (n 91).

Even during ongoing search-and-rescue operations both NGO and commercial vessels have been prevented from assisting, and this is suspected to be done for the purpose of enabling Libyan interceptions.[101] Vessels have also been prevented from disembarking.[102] In 2018, there were 16 instances where vessels had to wait before entering a safe port, which can be compared with 28 similar instances in 2019 and 22 instances in 2020.[103] It should be noted that the ongoing pandemic also has influenced the work of NGOs. With regard to the pandemic, Italian ports were closed due to safety reasons. These restrictions resulted in an absence of NGOs. In March and May 2020 no NGOs were present in the area. There were two NGO vessels in April, but only for five days. After June 2020, the work started to resume.[104]

To conclude, there is an ongoing development on the Mediterranean Sea where available search-and-rescue capacities are being limited by states. As a result of the lack of genuine and efficient search-and-rescue operations, migrants crossing the Mediterranean Sea face an increased risk against their lives. The purpose of the withdrawal and restriction of available assets seems to be to enable the interceptions carried out by Libya. This further serves the purpose of preventing migrants from reaching the Italian shores. The use of drones is a continuation of this practice. Since drones, unlike naval ships, are not covered by UNCLOS, the deployment of drones enables the state to monitor and locate migrants attempting to cross the ocean, without (allegedly) triggering the states' responsibility to engage in search-and-rescue operations. Instead, Italy shares the information with Libya, a scheme which the thesis will now continue to examine in the next sub-chapter.

2.3.2 De Facto Push-Backs

As stated earlier, the world's oceans are divided into different search-and-rescue zones and each zone is the primary responsibility of a different state.[105]

[101]Commissioner for Human Rights (n 10) 11 and 19.
[102]Commissioner for Human Rights (n 10) 10.
[103]European Union Agency for Fundamental Rights, 'June 2021 Update' (n 91).
[104]Commissioner for Human Rights (n 10) 19–20.
[105]European Union Agency for Fundamental Rights, 'Fundamental rights considerations' (n 82).

In 2016, the European Commission assigned the identification and establishment of a Libyan search-and-rescue region to the MRCC in Rome, which in turn gave Libya the responsibility to carry out search-and-rescue missions within the zone in 2018. Thereby Libya's direct involvement in the interception of migrants on the Mediterranean Sea was made legitimate.[106] The establishment of a Libyan search-and-rescue region, combined with the withdrawal of search-and-rescue capacities (both states' own assets and those of NGOs), has enabled Member States to avoid their responsibility to carry out search-and-rescue operations and instead let Libya carry out pull-backs.[107]

Since information about a vessel in distress is required to be sent to the nearest MRCC, Libya is provided with intelligence on vessels in distress through its MRCC.[108] The information gathered from air and by automated technologies, for example through the use of drones, is shared by European Member States' with third countries' authorities, for example Libya.[109] Libya relies on the information gathered by Italy, Frontex and the EU to the extent that its own coast guard does not patrol the area themselves.[110] Since Libya risks being the competent rescue coordination centre, disembarkation may take place on Libyan soil, putting migrants at risk of human rights violations.[111] Many of those who attempt to leave Libya by sea are returned, after being "rescued" by the LYCG. In 2018 the number returned was nearly 15,000.[112] During 2019 and 2020 around 20,000 people were returned in total.[113] Over 30 private vessels have, after having rescuing them, returned migrants to Libya since 2018, as a result of the transition of responsibility over the search-and-rescue operations to Libya.[114] The Human Rights Commissioner has called

[106]Mazzeo (n 2).
[107]Commissioner for Human Rights (n 10) 14.
[108]Mazzeo (n 2).
[109]Commissioner for Human Rights (n 10) 14; Mazzeo (n 2).
[110]Howden, Fotiadis and Loewenstein (n 4).
[111]Commissioner for Human Rights (n 10) 15.
[112]European Union Agency for Fundamental Rights, 'June 2021 Update' (n 91).
[113]Commissioner for Human Rights (n 10) 8; European Union Agency for Fundamental Rights, 'June 2021 Update' (n 91).
[114]Commissioner for Human Rights (n 10) 14; Patrick Kingsley, 'Privatized Pushbacks: How Merchant Ships Guard Europe' *The New York Times* (20 March 2020) <https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html> accessed 27 November 2021.

on Member States not to enable Libyan pull-backs, and to assess what impact the surveillance carried out might have.[115]

In 2017, a Memorandum of Understanding (hereafter MoU) was signed between Italy and Libya. Italy funds reception centres in Libya and provide Libyan authorities with technical and financial support, as well as training and assistance.[116] The migration control systems, training and equipment provided by Italy are then used in actions violating the principle of non-refoulement.[117] The cooperation between EU Member States and Libya has enabled the interceptions and returns by LYCG.[118] Italy extended the cooperation agreement with Libya in February 2020.[119] The MoU was extended for three years and the Commissioner has called on Italy to suspend the cooperation due to the lack of clear safeguards in the MoU, and due to the situation in Libya being more or less the same.[120]

The interest in Libya can be explained by the central Mediterranean route having the highest number of migrants' crossings since the Aegean border was closed. Italy supports Libya in order for Libyan authorities to autonomously carry out pull-backs during operations where search-and-rescue is combined with border control. The cooperation between Italy, the EU and Libya is an example of how EU states outsource migration control to third countries and disguise this aim by framing the operations as serving a different purpose, in this case the saving of lives.[121]

The withdrawal of search-and-rescue capacity, the hindering of NGOs and the establishment of a Libyan search-and-rescue area enable Member States to escape their responsibilities in relation to migrants, while also allowing the LYCG to intercept and return them without interference.[122] Thus, the purpose of relying on and cooperating with Libya is not to save lives. Instead, it is to

[115]Commissioner for Human Rights (n 10) 17.
[116]Giuffré and Moreno-Lax (n 15) 89-90.
[117]Davitti (n 40) 45; Mark Akkerman, 'Border Wars: The arms dealers profiting from Europe's refugee tragedy' (Transnational Institute and Stop Wapenhandel 2016) 28–29.
[118]Commissioner for Human Rights (n 10) 14; Kingsley (n 114).
[119]European Union Agency for Fundamental Rights, 'June 2021 Update' (n 91).
[120]Commissioner for Human Rights (n 10) 23–24.
[121]Giuffré and Moreno-Lax (n 15) 89, 90 and 97.
[122]Commissioner for Human Rights (n 10) 14.

prevent migrants from reaching Italian soil without having physical contact with them.

When the Italian Coast Guard's request for Libya to be provided with equipment as well as training was authorised through a programme within the framework of the Emergency Trust Fund for Africa, the establishment of a MRCC was only part of the second phase of that programme. As a result, Libya was given the responsibility to carry out the search-and-rescue operations around one-and-a-half or two years before there was an MRCC.[123] If the cooperation had been a genuine effort to save lives, Italy would have started by making sure Libya had enough capacity to carry out search-and-rescue on its own, before transferring the responsibility of the search-and-rescue zone. The fact that other actors, who have sometimes been better situated to assist, have been asked to not take part in ongoing search-and-rescue operations, as previously mentioned in sub-chapter 2.3.1, also indicates that the saving of lives is not the primary objective. In addition, if the cooperation had been a genuine attempt to protect those rescued, they would have been taken somewhere safe.

The Human Rights Commissioner has in general terms called on Member States to make sure disembarkation takes place somewhere safe.[124] It has called on states to end push-backs as well as coordination of pull-backs where migrants are returned to places where they face abuse.[125] All cooperation that leads to the return to places where human rights are violated, either directly or indirectly, was to be suspended.[126] Already in the case *Hirsi Jamaa* the ECtHR ruled that Libya is not safe, due to the state's documented treatment of migrants and asylum-seekers.[127] Since then, several other actors have also stated that Libya is no place of safety, with reference to both the treatment of migrants and the political situation in the country.[128] For example, the

[123]Mazzeo (n 2).
[124]Commissioner for Human Rights (n 10) 13.
[125]Commissioner for Human Rights (n 10) 8.
[126]Commissioner for Human Rights (n 10) 26.
[127]Giuffré and Moreno-Lax (n 15) 98; *Hirsi Jamaa* (n 13).
[128]UNHCR, Position on Lybia (n 3) para 33; Giuffré and Moreno-Lax (n 15) 98; Davitti (n 40) 43; United Nations General Assembly (UNGA) Unlawful death of refugees and migrants: Note by the Secretary-General (15 August 2017) A/72/335, 23; Office of the

UNHCR has specifically called on states not to return anyone to Libya.[129] The Human Rights Commissioner has similarly urged states not to provide any support which may result in such returns.[130] This has however not stopped the cooperation with Libya for migration purposes.[131] Rather, it has increased despite the evidence of human rights violations.[132] Notably, the LYCG is connected to the smugglers as well as to the owners of various detention centres[133] More importantly, LYCG's violence against migrants is well documented.[134] Interceptions are thus also problematic since they end with disembarkation in Libya. In the next sub-chapter two of the main reasons behind the use of drones will be explained.

2.4 Underlying Reasons

2.4.1 Securitisation

The concept of securitisation builds on the idea that there are no objective security issues, and that security threats are merely social constructs. Securitisation legitimatises treating an issue as a priority and using extraordinary means to manage it. Originally securitisation was believed to be done through discourse only, but lately scholars have argued that it can also be done through practice. Arguably, there are two types of securitising practices, firstly resorting to measures commonly taken in response to already securitised issues such as terrorism, and secondly cooperating with bodies that are considered security bodies, for example bodies dealing with military issues.[135]

United Nations High Commissioner for Human Rights (OHCHR) in cooperation with the United Nations Support Mission in Libya (UNSMIL), Abuse Behind Bars: Arbitrary and unlawful detention in Libya (April 2018).

[129]UNHCR, Position on Lybia (n 3) para 34.

[130]Commissioner for Human Rights (n 10) 23.

[131]Commissioner for Human Rights (n 10) 23.

[132]Commissioner for Human Rights (n 10) 8.

[133]Howden, Fotiadis and Loewenstein (n 4).

[134]UNHCR, Position on Lybia (n 3) para 14.

[135]Sarah Léonard and Christian Kaunert, 'The securitisation of migration in the European Union: Frontex and its evolving security practices' [2020] Journal of Ethnic and Migration Studies, 2 – 5; Barry Buzan et al., Security: a new framework for analysis (Boulder: Lynne Rienner, 1998) 26.

It is widely recognized that migration is a securitised issue in Europe and worldwide.[136] Migration has been framed as a security issue, and migrants as threats.[137] For example, migration management is linked to security issues within the European Agenda on Migration, and the Valletta Summit connects the prevention of irregular migration with the prevention of smuggling and trafficking.[138] It has also been claimed that the use of the term migration "management" in itself frames migrants as a threat to national sovereignty.[139] Using this rhetoric can be considered to contribute to the securitisation of migration. The framing of migration as a security issue is reinforced by the presence of PMSCs, an issue which will be discussed in the next sub-chapter.

The securitisation of migration has also been achieved through practice. Merely 17 % of the world's internationally displaced people are hosted by high-income countries.[140] Despite this relatively low number, states in Europe, North America and Australia attempt to prevent the entry of refugees, and the framing of migration as a security issue is a strong driver of these policies.[141] Various methods of pre-emption and deterrence of asylum seekers have been used, especially by those states receiving large numbers of migrants.[142] The securitisation of EU borders has forced migrants to embark on more dangerous routes, which in turn has led to more deaths.[143] As migrants have resorted to irregular pathways, due to the lack of regular ways, states have adopted laws and policies to stop the irregular migration. These measures are inconsistent with the perception of migrants as rights holders. The protection of migrants has decreased and states' measures to criminalise

[136]Léonard and Kaunert (n 135) 2.
[137]Akkerman 'Financing Border Wars' (n 21) 21.
[138]Davitti (n 40) 47.
[139]Molnar (n 6) 325.
[140]United Nations High Commissioner for Refugees (UNHCR), Global Trends: Forced Displacement in 2020 (2021) 19.
[141]Akkerman 'Financing Border Wars' (n 21) 7; Moreno-Lax 'Protection at Sea' (n 9) 1; Natalie Klein, 'A Maritime Security Framework for the Legal Dimensions of Irregular Migration by Sea' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *Boat refugees and migrants at sea: a comprehensive approach: integrating maritime security with human rights* (International refugee law series: volume 7, Brill 2016) 53.
[142]A/75/590 (n 22) para. 13; Molnar (n 6) 314.
[143]Davitti (n 40) 45.

irregular migration and externalize their border controls have had a large impact on this development.[144]

The increased use of drones is part of the militarisation of Europe's borders in the Mediterranean.[145] The nexus between immigration, national security, and the criminalisation of migration is strengthened by the use of quasi-military autonomous technology.[146] There are concerns that the increased use of autonomous systems such as drones may promote the use of weaponised systems, which would increase the risk for migrants' lives.[147]

Further, securitisation enables physical and moral distancing under which migrants are made into merely objects of surveillance. The use of drones enforces this dehumanisation.[148] It is argued that the reason why drones are put to use is to allow states to monitor the Mediterranean Sea while not having to carry out search-and-rescue operations. With search-and-rescue operations comes a risk of having migrants disembark on European soil, which is why states want to avoid these operations.[149] Thus, Italy attempts to create a situation where it can monitor its borders and prevent the arrival of migrants, without engaging its responsibility to carry out search-and-rescue operations. This clearly demonstrates that rather than viewing migrants as rights-bearers entitled of protection, they are perceived as threats from which the state has to protect itself.

Viewing migrants as threats rather than rights-bearers is precisely the problem with securitising migration. When migrants are framed as threats, their human rights are put at risk.[150] As already stated, the aim of securitisation is to give an issue priority and legitimise the use of extraordinary means to handle it. [151] In the case of Italy, the securitisation of migration has led to the prevention of arrivals being prioritised over the rights of migrants. The capacity to monitor, and not rescue, is prioritised. This has resulted in the use of drones.

[144]A/HRC/45/9 (n 1) paras 18 – 20.
[145]Mazzeo (n 2).
[146]A/75/590 (n 22) para 13; Molnar (n 6) 314.
[147]Akkerman 'Financing Border Wars' (n 21) 4.
[148]A/HRC/45/9 (n 1) para 43.
[149]Howden, Fotiadis and Loewenstein (n 4); Jolly (n 23).
[150]Akkerman 'Financing Border Wars' (n 21) 21.
[151]Léonard and Kaunert (n 135) 3; Buzan et al. (n 135) 26.

At the same time, the use of drones as a securitisation practice reinforces the securitisation process. Therefore, it may be both the reason for, and the result of, securitisation.

2.4.2 Privatisation

Border controls is just one of many state functions being outsourced.[152] The border industry is thriving, especially in Europe where the border security market has a uniquely high annual growth rate of 15 % compared to a predicted rate of 7.2% and 8.6% worldwide. Despite being in its early stages, drones are already one of the technologies that drive the border industrial complex.[153]

The dominating companies on the border security market globally are primarily from the Global North.[154] The border security market is dominated by military and security companies with units specific for border security.[155] Many of the corporations involved are either military companies, arms sellers or information technology companies.[156] Some of the largest arms sellers in the world are involved in this field.[157] The private actors are often linked to states, either through the influence they exercise in national and international decision-making, or through their joint ventures.[158] In addition, some companies are partly state-owned.[159] There are numerous companies on the border security market that provide products and services specifically to Europe.[160] For example, Leonardo S.p.A. is one of the world's biggest arms sellers, is partly state-owned by Italy and produces many of the drones used in managing Europe's borders.[161]

[152]A/HRC/45/9 (n 1) para 17.
[153]A/75/590 (n 22) para 17; Akkerman 'Financing Border Wars' (n 21) 8 – 9.
[154]A/HRC/45/9 (n 1) para 37; A/75/590 (n 22), para 17; Akkerman 'Financing Border Wars' (n 21) 9.
[155]Akkerman 'Financing Border Wars' (n 21) 9.
[156]A/75/590 (n 22) para 17.
[157]Akkerman 'Financing Border Wars' (n 21) 2.
[158]See A/75/590 (n 22) para 17.
[159]Akkerman 'Financing Border Wars' (n 21) 3.
[160]See Akkerman 'Financing Border Wars' (n 21) 16 – 17.
[161]Akkerman 'Financing Border Wars' (n 21) 2 – 3 and 5.

Corporations' search for economic profit has had an essential role for the increased use of digital technologies in border management, and they are therefore central when assessing related human rights impact.[162] PMSCs are involved in the shaping of migration policies.[163] The involvement takes place on three levels: through research where irregular migration is framed as a security threat, through the marketing of the PMSCs' own products and services as dual-use technologies, and through lobbying.[164] To provide states with products and services, PMSCs frame migrants as security threats and lobby for a corresponding response from the EU. Effectively, they are likely to contravene their responsibility to respect human rights, as outlined in the UNGPs.[165]

Further, states have become dependent on PMSCs, where the expertise is now increasingly located. There is a never-ending demand for the services offered by the PMSC since states rely on technology which is constantly being updated.[166] Leonardo S.p.A. offers an example of how PMSCs have an impact through research.

As an example, Leonardo S.p.A. is involved in the EU-funded project Horizon 2020, and one of its subsidiaries has conducted research where migrants are framed as threats. Davitti has pointed out that calling migrants illegal, rather than irregular, contravenes the principle of non-penalization of migrants for irregular entry as enshrined in article 31 of the Refugee Convention. This is indeed the way migrants are framed in the aforementioned research. When migrants are framed as threats, states are enabled to respond to the problem accordingly, with security solutions.[167]

The companies have also played an important role in the creation of these business opportunities.[168] A prominent example of how companies influence decision-making is the influence given to PMSCs within the EU.[169] Leonardo

[162]A/75/590 (n 22) para 16.
[163]A/HRC/45/9 (n 1) para 33; Davitti (n 40) 38.
[164]Davitti (n 40) 38.
[165]Davitti (n 40) 53.
[166]A/HRC/45/9 (n 1) para 38.
[167]Davitti (n 40) 39.
[168]Akkerman 'Financing Border Wars' (n 21) 10.
[169]A/HRC/45/9 (n 1) para 33; A/75/590 (n 22) para 17.

S.p.A. is the world's ninth largest arms seller, with strong state connections since it is partly owned by Italy. In addition, it is a member of two lobbying organisations which have influence over EU policies.[170]

The growth of the border security market is a result of the increased militarisation and externalisation of borders.[171] Private actors portray themselves to benefit the security approach taken by states. As a result, border management has developed into a flourishing business.[172] The involvement of PMSCs in border management increased as the securitisation of states' approaches to migration progressed, and as these approaches received more funding in state budgets.[173] It is therefore clear that securitisation enables privatisation.

Privatisation does, however, also reinforce securitisation. The border industrial complex is not only the result of the securitisation of migration and the altering of human rights, but also one of the drivers of the same.[174] The possibility of making a profit has reinforced securitisation since there have been an interest in that specific type of response.[175] The industry uses its influence to reinforce the approach already taken by several states, and further stresses the need for security and militarised responses to migration through new and dual-use technologies.[176] PMSCs do, for example, enable externalisation practices, without paying due regard to human rights. One of the most apparent examples are private detention centres, but the technology sold and the training of officials on how to use the technology is another example since it is often used to prevent the arrival of migrants.[177] Externalisation can therefore be viewed as securitisation done through practice, which leads to the disregard of human rights. Privatisation is clearly not only the result of securitisation practices, but also a driver of the same since it enables states to respond with security measures.

[170]Davitti (n 40) 40.
[171]Akkerman 'Financing Border Wars' (n 21) 10.
[172]A/HRC/45/9 (n 1) para 21.
[173]A/HRC/45/9 (n 1) para 17.
[174]Akkerman 'Financing Border Wars' (n 21) 7.
[175]A/HRC/45/9 (n 1) para 37.
[176]A/HRC/45/9 (n 1) para 35.
[177]A/HRC/45/9 (n 1) paras 59-60.

Securitisation of migration and related economic profit contribute to migrants being subject to human rights violations.[178] The involvement of private actors in border management has turned the traditional state function to ensure protection and security for people into a primarily profit-making activity.[179] The outsourcing of border management through new technologies also allows the interest of national security to prevail over human rights.[180] The privatisation of migration is thus problematic since economic profit is prioritised over the rights of migrants, creating an incitement for corporations to carry on with their activities.

Another problem with privatisation is that the line between state and private actors has become blurred.[181] The increased outsourcing has led to more corporate involvement in situations where human rights violations take place.[182] Furthermore, outsourcing has led to less transparency in, and accountability for, potential violations that occur within border management.[183] It has been argued that states attempt to avoid responsibility by cooperating with private actors.[184] States do this by referring to their partnerships with private actors, proprietary technology, private interest, and discretion.[185] Many digital technologies used in border management enable the circumvention of legal and judicial constraints.[186]

2.5 Conclusion

The purpose of this chapter was to answer the first sub-question of the thesis:

> *In what way is Italy making use of drones produced by Leonardo S.p.A. in its border management operations, what problems does it cause and what are the underlying reasons for the use?*

[178] A/75/590 (n 22) para 3.
[179] A/HRC/45/9 (n 1) para 23.
[180] A/75/590 (n 22) para 16.
[181] A/75/590 (n 22) paras 16–17.
[182] Akkerman 'Financing Border Wars' (n 21) 1 and 30–31.
[183] Akkerman 'Financing Border Wars' (n 21) 1 and 30–31.
[184] Molnar (n 6) 327; A/75/590 (n 22) paras 16–17.
[185] Molnar (n 6) 327; A/75/590 (n 22) para 16.
[186] A/75/590 (n 22) para 19.

The chapter has described Italy's use of drones, with a focus on the contracts awarded to Leonardo S.p.A. It has explained what problems arise due to the use of drones in relation to the rights of migrants relevant for the purpose of this thesis. Further, two of the main underlying reasons for the use of drones were described.

In sum, Italy is making use of drones in its border management to keep migrants from reaching its borders. The state makes use of contracts which it has entered itself, and contracts which Frontex has entered into with drone operators. The Italian arms seller Leonardo S.p.A. is one of the companies providing these services. The use of drones is problematic since it has led to less search-and-rescue operations being carried out, and instead increases the number of de facto push-backs to Libya. The main underlying reasons for the use of drones are securitisation of migration and privatisation.

The thesis will now continue by exploring whether Italy exercises jurisdiction by making use of drones in its border management (chapter 3).

3 Question of Jurisdiction

3.1 Introduction

The question of jurisdiction is unsettled in situations where a state engages in capacity building activities in a third country, shares intelligence with a third state to prevent migrants from reaching the state's own borders, and in search-and-rescue operations.[187] The purpose of this chapter is therefore to answer the second sub-question of the thesis:

> *Does Italy exercise jurisdiction in relation to the adverse human rights impact that the use of drones has on migrants?*

To answer this question, the chapter will first cover the traditional notions of jurisdiction used by the ECtHR. It will then examine whether Italy's jurisdiction is engaged with regard to the impact that the use of drones has on migrants under any of these traditional approaches. Further, three non-traditional approaches to jurisdiction, which have been discussed in the existing scholarly debate, will be presented as well as their ability to engage Italy's jurisdiction in the current situation. Finally, the chapter will conclude whether Italy's jurisdiction is indeed engaged under any of these approaches.

3.2 General Remarks

Jurisdiction is the first legal threshold, which needs to be met for a State to be responsible for a violation of the ECHR.[188] Article 1 of the ECHR prescribes the jurisdiction of the state, not the court.[189] It reads as follows:

> *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*[190]

[187]FRA (n 27) 30–31, 34–36, 37–38.
[188]*Catan and Others v. The Republic of Moldova and Russia* [GC] App nos 43370/04, 18454/06 and 8252/05 (ECHR, 19 October 2012) ECHR 2012-V para 103.
[189]Mallory (n 43) 25.
[190]ECHR (n 20) article 1.

As already stated, article 31(1) of the VCLT provides that article 1 of the ECHR shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". A textual interpretation of the article is, however, not enough to decide how to approach the concept of jurisdiction.[191] Judges have therefore been needed to make law in order to give it meaning.[192] Thus, the case law of the ECtHR is of fundamental importance to understand what is needed to meet the jurisdictional threshold. Unfortunately, its case law is both vast and incoherent regarding the interpretation of jurisdiction.[193] Before indulging further in the case law of the Court, a few points must be made.

Article 1 of the ECHR combines two legal areas, both public international law and international human rights law.[194] While jurisdiction under public international law is something states strive for, jurisdiction in international human rights law is something they try to avoid. This is because public international law gives them rights, whereas jurisdiction under international human rights law rather gives them responsibilities.[195] Therefore, the concept of jurisdiction in public international law conflicts with the universality of human rights.[196] This may give reason to be careful with *which* other rules of international law one relies on when interpreting article 1 of the ECHR, in accordance with article 31(3)(c) of the VCLT.

As to the supplementary means of interpretations, these are only to be considered if the interpretation done in accordance with article 31 of the VCLT is not sufficient.[197] Thus, the preparatory works of the Convention are to be given less weight than for example subsequent practice in application and other relevant rules of international law. Interestingly, the applicability of the Convention was questioned already during the drafting of the ECHR.

[191]Mallory (n 43) 31.
[192]Mallory (n 43) 32.
[193]Marko Milanovic, 'Extraterritoriality and human rights: prospects and challenges' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge Studies in Human Rights 2017) 54.
[194]Mallory (n 43) 25**.**
[195]Mallory (n 43) 27.
[196]Mallory (n 43) 29.
[197]VCLT (n 44) article 32.

In an earlier draft of the Convention, states were only obliged to undertake the securing of the rights of the Convention "to everyone residing in their territories".[198] According to the preparatory works this wording was considered too restrictive, given that it excluded individuals not residing within the area. For this reason, the wording was replaced by the current phrase "within its own jurisdiction".[199] However, the preparatory works do not provide a clear answer as to the intention of the drafters on the extraterritorial applicability of the Convention.[200] More importantly, the preparatory works may only serve as a supplementary means of interpretation.

Turning to its case law, the ECtHR has asserted that the question of jurisdiction within the meaning of article 1 of the ECHR is separate from the questions of responsibility[201] and imputability.[202] What type of rule/measure a case concerns has no importance for the question of jurisdiction, and no part of a state's jurisdiction is excluded.[203] Neither does the seriousness of the allegation influence the question of jurisdiction.[204] Instead, when assessing whether a state has jurisdiction, the factual context of each case and the relevant rules of international law are considered.[205] Attention is also given to both the issues in a present case and to its general context.[206] A state is responsible also when its agents engage in actions *ultra vires* or contrary to

[198]Council of Europe/European Court of Human Rights, 'Guide on Article 1 of the European Convention on Human Rights: Obligation to respect human rights – Concepts of "jurisdiction" and imputability' (Council of Europe/European Court of Human Rights, 2021) para 2; Mallory (n 43) 17–18.
[199]Council of Europe, Collected edition of the "Travaux préparatoires" of the European Convention on Human Rights (Vol. 3 Committee of experts 2 February - 10 March 1950, Nijhoff 1976) 260.
[200]Mallory (n 43) 21–23.
[201]*Loizidou v. Turkey* (preliminary objections) (1995) Series A no 310 paras 61 and 64.
[202]*Loizidou v. Turkey* (merits) [GC] App no 15318/89 (ECHR 18 December 1996) ECHR 1996-VI para 52.
[203]*N.D. and N.T. v. Spain* [GC] App nos 8675/15 and 8697/15 (ECHR 13 February 2020) para 102.
[204]Council of Europe/European Court of Human Rights 'Guide on Article 1' (n 198) para 8; *Abdul Wahab Khan v. The United Kingdom* App no 11987/11 (ECHR, 28 January 2014) § 26.
[205]*Jaloud v. the Netherlands* [GC] App no 47708/08 (ECHR 20 November 2014) ECHR 2014-VI para 141.
[206]*Loizidou v. Turkey* (merits) (n 202) para 53.

instructions.[207] A state's acquiescence or connivance in violations committed by private individuals may also engage its responsibility.[208]

3.3 Traditional Notions of Jurisdiction

3.3.1 Territoriality as a General Rule

3.3.1.1 *Bankovic*

One of the most well-known cases where the Court has interpreted jurisdiction is *Bankovic.*[209] The case concerned North Atlantic Treaty Organisation (hereafter NATO) armed forces who had bombed Serbian radio and television premises in Belgrade. The bombing resulted in the deaths of family members to the applicants and the injury of one of the applicants. The applicants argued that if a person suffered the negative effects of an act attributable to a contracting state, that state exercised jurisdiction regardless of where the act was committed or where the consequences of it was felt.[210] The Court did not accept this argument and gave primarily five reasons for this.

Firstly, the Court used article 31(1) of the VCLT in order to argue that the primary notion of jurisdiction is the territorial one, while other notions are considered exceptional and in need of further justification in each case.[211] This has later been reaffirmed in other cases.[212] Secondly, the Court stated that the practice of states should guide the interpretation, and noted that extraterritorial jurisdiction had not been applied in similar cases.[213] It further stated that such intent from states cannot be read out from the preparatory works either.[214] This statement has been criticised by scholars such as Shany

[207]*Ilaşcu and Others v. Moldova and Russia* [GC] App no 48787/99 (ECHR 08 July 2004) ECHR 2004-VII para 319.
[208]*Ilaşcu* (n 207) para 318; *Solomou and Others v. Turkey State* App no 36832/97 (ECHR, 24 June 2008) § 46.
[209]*Banković and Others v. Belgium and Others* (dec.) [GC] App no 52207/99 (ECHR 12 December 2001) ECHR 2001-XII.
[210]Council of Europe/European Court of Human Rights 'Guide on Article 1' (n 198) para 14.
[211]*Banković* (n 209) paras 61, 67, 71.
[212]*Catan and Others* (n 188) para 104.
[213]*Banković* (n 209) para 62.
[214]*Banković* (n 209) para 63.

for reinforcing state-centrism and misinterpreting the intent of the drafting states.[215] Thirdly, the Court held that the applicants' approach to jurisdiction would make jurisdiction synonymous with causation, and would thus include too many situations. Fourthly, the Court held that the Convention cannot be divided and tailored.[216] Shany argues that "the farther one moves away from activities falling within state borders, the less plausible is a total application of the convention".[217] Lastly, the Court held that as a regional instrument the Convention operated only in the legal space (*espace juridique*) of the Member States. According to the Court, the Convention was not meant to be applied universally, not even in cases concerning the conduct of the Member States. Since the Federal Republic of Yugoslavia was not a state party, the convention was not applicable. A jurisdictional link was not considered to be at hand.[218]

The principle of territoriality has later been affirmed by the Court.[219] It has, however, received vast criticism. The Court has been accused of confusing the application of extraterritorial jurisdiction with the *right* to exercise governmental power.[220] This confusion allegedly leads to exempting a state who unlawfully exercise governmental powers abroad from its international human rights law obligations.[221] On a more basic note, the case has received criticism for not being compatible with the Court's previous case law.[222] Fundamentally, the judgement has the result that states may engage in actions abroad, which they would not be allowed to engage in within its own territory.[223]

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[215]Shany (n 55) 55–56.
[216]*Banković* (n 209) para 75.
[217]Shany (n 55) 55.
[218]Council of Europe/European Court of Human Rights 'Guide on Article 1' (n 198) para 14; *Banković* (n 209) para 80.
[219]*W. v. the United Kingdom* App no 9348/81 (Commission decision 28 February 1983) Decisions and Reports 32; *W. v. Ireland* App no 9360/81 (Commission decision 28 February 1983) Decisions and Reports 32.
[220]Shany (n 55) 56; Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 29-30; Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 398.
[221]Shany (n 55) 56; Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 398.
[222]Shany (n 55) 56; Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 182.
[223]Shany (n 55) 56.

3.3.1.2 *Al-Skeini*: *Bankovic* Partly Overturned

The ruling in *Bankovic* was partly over-turned by the Court's reasoning in the *Al-Skeini* case. Firstly, the Court in *Al-Skeini* reiterated earlier case law where control over persons had been found to give rise to extraterritorial jurisdiction.[224] However, it did not offer a coherent model for extraterritorial jurisdiction.[225]

Further, the Court stated that there can be no jurisdiction over the actions of states who are not states parties to the convention, and the states parties cannot be required to impose its human rights standards on states not parties to the Convention.[226] It also held that when a state party occupies another state party, the occupying state is to be held responsible for violations under the ECHR. The rationale behind this reasoning is that there would otherwise be a legal vacuum within the legal space (*espace juridique*) of the Member States. Importantly, the Court also stated that this does not mean that jurisdiction can never be found outside the legal space of the Member States, and thereby partly departed from its previous ruling in *Bankovic*.[227]

Lastly, the *Al-Skeini* case partly rejected the all-or-nothing approach taken in *Bankovic*, by saying that the Convention can indeed by tailored and divided when a state exercises control over individuals.[228] In regard to control over territory, however, the all-or-nothing approach still holds, although some flexibility has been introduced since the threshold for effective control may be low.[229]

3.3.2 Extraterritoriality as an Exception

What *Al-Skeini* did not overturn was the view that extraterritorial jurisdiction is to be understood as something exceptional.[230] The Court still recognised

[224]*Al-Skeini and Others v. The United Kingdom* [GC] App no 55721/07 (ECHR 7 July 2011) ECHR 2011-IV, paras 133-140.
[225]Shany (n 55) 60.
[226]*Al-Skeini* (n 224) para 141.
[227]*Al-Skeini* (n 224) para 142.
[228]*Al-Skeini* (n 224) para 137; *Banković* (n 209) para 75.
[229]Shany (n 55) 59.
[230]*Al-Skeini* (n 224) para 131.

the need to limit the applicability of the Convention, and thus reaffirmed the concept of public powers from *Bankovic*.[231]

There are indeed exceptions to the main rule of territoriality, and certain circumstances give rise to jurisdiction outside the state's own territory.[232] The ECtHR has for example applied the ECHR extraterritorially in situations where a person faced a risk of torture or degrading treatment. There is a duty to prevent refoulement if a state exercises jurisdiction, wherever this may be.[233] However, critics claim that viewing extraterritorial jurisdiction as something exceptional leads to a too narrow understanding of jurisdiction.[234]

Also after the ruling in *Al-Skeini*, the grounds and limits of extraterritorial jurisdiction remain arbitrary and uncertain.[235] In order to determine whether there are circumstances which may give rise to extraterritorial jurisdiction one must look at the facts of each individual case.[236] The fact that a case has international elements is not enough *per se* to give rise to extraterritorial jurisdiction.[237] If the acts of a State's authorities give rise to extraterritorial effects, the jurisdiction of that State may extend to cover also those acts.[238]

In short, extraterritorial jurisdiction is accepted if a state exercises effective control, but it remains unclear what actually constitutes effective control.[239] Currently, only two models of extraterritorial jurisdiction have been accepted: the spatial model and the personal model.[240]

3.3.2.1 Spatial Model

The spatial model is the exception to the main rule of territoriality, which has the most textual support[241] and is the least controversial one.[242] Under this

[231]Milanovic 'Extraterritoriality and human rights: prospects and challenges' (n 193) 58.
[232]Council of Europe/European Court of Human Rights 'Guide on Article 1' (n 198) para 34.
[233]Giuffré and Moreno-Lax (n 15) 93.
[234]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 399.
[235]Milanovic 'Extraterritoriality and human rights: prospects and challenges' (n 193) 58.
[236]*Al-Skeini* (n 224) para 132.
[237]Council of Europe/European Court of Human Rights 'Guide on Article 1' (n 198) para 35.
[238]*Al-Skeini* (n 224) para 133.
[239]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 399.
[240]*Al-Skeini* (n 224) paras 133-137 and 138-140 respectively.
[241]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 127.
[242]Milanovic 'Extraterritoriality and human rights: prospects and challenges' (n 193) 55.

approach, a state exercises extraterritorial jurisdiction if it has effective control over an area outside its territory.[243] As decided by the Court in *Loizidou*, when a state exercises effective control over an area as a result of a military action, it also has jurisdiction for the purpose of the ECHR. Such control can be exercised directly or through a subordinate local administration.[244]

An area could be defined as anything from a piece of territory to a place.[245] This broad definition has been criticised by Milanovic since it makes it difficult to separate the spatial model from the personal one. He supports this argument by making a reference to the *Eichmann* case, saying that one could then argue that Israel had jurisdiction in relation to Eichmann because it had control over the apartment where he was held, and not because of the control exercised over Eichmann. This would lead to the two models not being separable, which Milanovic describes as the spatial model "collapsing into" the personal one.[246]

What is decisive for the establishment of jurisdiction is the effective overall control, regardless of whether the control is a result of a lawful action or not.[247] Thus, it is the *de facto* control, which matters.[248] It can both be carried out directly or through a subordinate local administration.[249] If the action was carried out through a subordinate local administration, overall control is considered enough for establishing jurisdiction. Thus, the state does not have to have detailed control over the local administration's policies and actions. It is enough if that administration survives because of the support. If these

[243]*Al-Skeini* (n 224) para 138; *Catan and Others* (n 188) para 106.
[244]*Loizidou v. Turkey* (preliminary objections) (n 201) para 62.
[245]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 129-134.
[246]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 129-134.
[247]*Al-Skeini* (n 224) para 138; *Catan and Others* (n 188) para 106; *Loizidou v. Turkey* (preliminary objections) (n 201) para 62.
[248]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 136.
[249]*Al-Skeini* (n 224) para 138; *Loizidou v. Turkey* (preliminary objections) (n 201) para 62; *Cyprus v. Turkey* [GC] App no. 25781/94 (ECHR 10 May 2001) ECHR 2001-IV para 75; *Catan and Others* (n 188) para 106.

requirements are fulfilled, the active state has jurisdiction with regard to all the substantive rights.[250]

The threshold for effective overall control is rather high.[251] Such control can be established for instance due to a military action.[252] In fact, when establishing an active state's extraterritorial jurisdiction, the Court has primarily looked at the number of soldiers deployed.[253] The state does not, however, have to exercise the same level of control as it does within its own territory.[254]

At times, the Court has also found jurisdiction even though a lower level of control had been exercised. The Court has in such cases emphasised that the support received by the subordinate local administration has given the active state effective authority and decisive influence over the region, even though the region is located outside of the state's territory. Further, the fact that the subordinate local administration survives as a result of the support it receives from the active state has been considered.[255]

Milanovic has described the level of control required by the ECtHR to be a continuum since it sometimes requires both a *de facto* government, an administration and the exercise of public powers, whereas less permanent state control is enough in other instances. The benefits of a high threshold, in his view, is that unless a state has enough control, it cannot be expected to comply with its obligations. However, Milanovic also points out that no control over territory is needed in order to comply with negative obligations. Further, he argues that positive obligations are of a due diligence character which also limits the expectations on states.[256]

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[250]*Cyprus v. Turkey* [GC] App no. 25781/94 (n 249) paras 76-77; *Al-Skeini* (n 224) para 138; *Catan and Others* (n 188) para 106; Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 137.
[251]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 141.
[252]*Al-Skeini* (n 224) para 138; *Catan and Others* (n 188) para 106.
[253]*Loizidou v. Turkey* (merits) (n 202) paras 16 and 56; *Ilaşcu* (n 207) para 387.
[254]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 141.
[255]*Ilaşcu* (n 207) paras 387-394; *Al-Skeini* (n 224) para 139.
[256]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49)141.

When it comes to control over places and objects – i.e. areas that are spatially limited - there are different views on whether a state can have spatial jurisdiction over all sorts of places, or if they need to be of a special nature.[257] Embassies, consulates, ships and aircrafts have been up for debate. With regard to embassies and consulates, Milanovic points out that the Court in *Bankovic, X v Federal Republic of Germany* and *Cyprus v Turkey,* when discussing extraterritorial jurisdiction over embassies, applies the personal model rather than the spatial one.[258] Also with regard to ships and aircrafts, he concludes that in many of the cases brought before the Court, it did not consider article 1 of the ECHR at all, and that when it did, it did not address the special nature of ships or aircrafts. Instead, what was decisive was the authority and control exercised by state agents over an individual. Again, the personal, not the spatial, model was at play. Therefore, the cases give no support for what the Court said in *Bankovic* regarding the special nature of ships/aircrafts.[259]

If effective control is found, the state has two main obligations. Firstly, it has a negative obligation to refrain from actions incompatible with the ECHR.[260] Secondly, it has the positive obligation to guarantee the respect for the ECHR, at least as set out in Court's case law.[261] When there is overall control, all substantive rights must be ensured.[262] According to *Al-Skeini,* however, only the rights relevant in the specific case needs to be ensured if the state only has discrete forms of geographic control.[263]

The benefit of the spatial model is its clarity. More importantly, by applying the spatial model, both the principle of effectiveness and universality are to some extent arguably safeguarded, since the model allows for extraterritorial application of the ECHR when states exercise control. It covers the situations

[257]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 151.
[258]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 154–155.
[259]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 163–167.
[260]*Ilaşcu* (n 207) paras 320-321.
[261]*Ilaşcu* (n 207) para 322.
[262]*Al-Skeini* (n 224) para 138.
[263]*Al-Skeini* (n 224) para 137.

where human rights abuses are most likely to occur but also easy for the state to prevent. Many situations do, however, remain outside the scope of the ECHR if the spatial model is applied. Considering the principle of universality, the model can thus still be deemed both unjust and arbitrary.[264] It can also be deemed too restrictive, since a state indeed can violate rights without having control over the relevant area.[265]

Due to these universality concerns the spatial model is commonly complemented with the personal model.[266] Milanovic argues that the spatial model only serves a purpose if the personal model is not accepted, especially for restricting the applicability of a state's positive obligations. He argues that if the personal model is accepted, there is in practice no jurisdictional threshold at all.[267]

3.3.2.2 Personal Model

The second established exception to the main rule is the personal model. What is relevant for the establishment of jurisdiction *ratione personae* is whether the state effectively exercise authority or control over the person in question. For there to be such authority or control, there must be an exceptional circumstance in the nature of the connection between the state and the applicant.[268] Merely the fact that a decision has impact on persons outside a state's territory is not enough to establish a jurisdictional link between that state and those persons.[269]

The personal model was rejected by the Court in *Bankovic*, primarily because the cause-and-effect rationale was not accepted.[270] However, both previous and later case law has indeed applied the model.[271] The personal model is

[264]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 128–129 and 170–173
[265]Milanovic 'Extraterritoriality and human rights: prospects and challenges' (n 193) 55.
[266]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 170–173.
[267]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 169–170.
[268]*M.N. and Others v. Belgium* App no 3599/18 (ECHR 5 May 2020) paras 112–113.
[269]*M.N.* (n 268) para 112.
[270]*Banković* (n 209) para 75.
[271]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 174.

adopted because the approach taken in Bankovic may lead to unacceptable outcomes.[272]

One of the cases before *Bankovic* where the personal model was applied, was *Cyprus v Turkey*[273]. In this case, the Court ruled that the ECHR applies to all persons under actual authority and responsibility of a certain state, even if such persons are abroad. It also held that nationals of a state as well as ships/aircraft flying its flag, are to be considered partly within its jurisdiction regardless of where they are. This also pertains state agents abroad, who in turn bring others into a state's jurisdiction if they exercise authority over them.[274]

The Court has adopted the personal model also after the ruling in *Bankovic*. In the case *Issa*[275] the Court acknowledged the personal model in addition to the spatial one. It said that a state has jurisdiction if it exercises authority and control through agents acting abroad.[276] The rationale behind this was that a state should not be allowed to do elsewhere what it cannot do on its own territory. Milanovic has pointed out that there is a stark contrast between *Issa* and *Bankovic*. In *Issa*, the Court relied on case law which it rejected in *Bankovic*, and it based its judgment on universality as framed as in the *Lopez Burgos* case.[277]

The *Lopez Burgos* case concerned a person living in Argentina who was kidnapped and held in detention by Uruguayan security forces in Argentina and was later brought to Uruguay. The question was whether the ICCPR applied extraterritorially in this case. The initial actions took place outside Uruguay's territory. [278] The Committee held that article 1 of the Optional Protocol and article 2(1) of the ICCPR constituted no obstacle because

[272]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 183.
[273]*Cyprus v. Turkey* App nos 6780/74 and 6950/75 (Commission decision 26 May 1975).
[274]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 181-182; *Cyprus v. Turkey* App nos 6780/74 and 6950/75 (n 273) para 8.
[275]*Issa* (n 26).
[276]*Issa* (n 26) para 71.
[277]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 183–184.
[278]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49) 175 and 177–178.

Uruguayan agents acted abroad. Firstly, The Committee held that article 1 of the Optional Protocol refers to the relationship between the state and the individual. Further, article 2(1) of the Covenant does not exclude accountability for what agents do abroad. In addition, the Committee held that article 5(1) states that the ICCPR cannot be interpreted in a way which restricts the rights more than what there is ground for. For these reasons, the Committee stated that article 2 shall not be interpreted in a manner, which allows states to do abroad what it cannot do within its own territory.[279]

The case *Pad and Others*, concerned an applicant who was killed by state agents. In this case, there were uncertainties regarding the location and it might have taken place on Iranian territory. The Court ruled that a state can exercise jurisdiction regardless of whether the violation takes place within the legal space of the contracting parties or not.[280] The Court here seemed to have relied largely on its previous decision in *Issa*. As a result, *Pad and Others* conflicts with the ruling in *Bankovic* despite the fact that both cases concern killing executed from aircrafts.[281]

In the case *Isaak and others*, the Court cited *Issa* and ruled that the state had jurisdiction through its agents in relation to a killing that took place in the UN buffer zone in Cyprus. In a similar case, *Andreou v. Turkey*, the Court was, however, not clear on what ground it found jurisdiction. It could either be because the shots were fired from Turkish territory, or because the applicant was within the *espace juridique* when she was hit. It is unclear why the Court chose not to apply the same test as in *Issa*, despite its similarities with *Isaak and Others*.[282] Further, Milanovic argues that the Court in the case *Medvedyev* affirmed the *Bankovic*-ruling by rejecting the cause-and-effect notion while

[279]UN Human Rights Committee, *Sergio Ruben Lopez-Burgos v Uruguay* Communication No 52/1979 (29 July 1981) UN Doc CCPR/C/13/D/52/1979, paras 12.2–12.3.
[280]*Pad and others v. Turkey* App no 60167/00 (ECHR, 28 June 2007) paras 53 – 54.
[281]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49)184–185.
[282]Milanovic, Extraterritorial application of human rights treaties: law, principles and policy (n 49)185–186.

allowing for the application of the personal model when the action is not instantaneous.[283]

What is decisive under the personal model is, as already stated, whether state agents have exercised authority and control over individuals. In *Al-Skeini* three distinct situations which may trigger extraterritorial jurisdiction were reaffirmed: acts of diplomatic or consular agents, exercise of public powers by agreement, physical power and control over individuals or ships in foreign land/waters may trigger a state's jurisdiction.[284]

If diplomatic or consular agents exercise authority and control over persons or property abroad, this may trigger the sending state's jurisdiction under the personal model.[285] One case where the Court found such jurisdiction was the case *X v. The United Kingdom.* The case concerned a British national who had her child taken to Jordan by the child's father, and therefore asked a British consul in Jordan for help to regain custody of the child. This was enough to trigger the jurisdiction of the United Kingdom.[286] An example where such jurisdiction was not found was *M.N. and Others*. In this case, Syrian nationals applied for visas at the Belgian embassy in Lebanon. They did so on the ground that they risked ill-treatment in Syria. The Court ruled that there was no jurisdiction because the applicants were not Belgian nationals, and the diplomatic agents never exercised *de facto* control over them since they came there on their own initiative and could leave at any time.[287]Acts taken by diplomatic or consular agents on board of aircrafts and ships registered in or flying the flag of a state can similarly trigger extraterritorial jurisdiction under this model.[288]

Extraterritorial jurisdiction also arises if a state exercises all or part of the public powers in another state, with the consent or acquiescence of that other

[283]*Medvedyev and Others v. France* [GC] App no 3394/03 (ECHR 29 March 2010) ECHR 2010-III para 64; Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 187.
[284]*Al-Skeini* (n 224) paras 133-140.
[285]*Banković* (n 209) para 73.
[286]*X v. the United Kingdom* App no 7547/76 (Commission decision, 15 December 1977) Decisions and Reports 12.
[287]*M.N*. (n 268) para 118.
[288]*Banković* (n 209) para 73; *Medvedyev* (n 283) para 65; *Bakanova v. Lithuania* App no 11167/12 (ECHR, 31 May 2016) para 63; *Hirsi Jamaa* (n 13) para 75.

state or by invitation from that state.[289] Thus, if a state carries out executive or judicial functions in such a situation, that state may be responsible for the breaches of the convention which are attributable to it.[290]

Lastly, the use of force by a state's agents abroad may trigger that state's jurisdiction, regardless of whether the operation is lawful or not.[291] The rationale behind this principle is that a state cannot be allowed to carry out actions abroad, which it would not be allowed to carry out within its own territory.[292] In the case *Öcalan v. Turkey*, the Court held that Turkey had exercised jurisdiction from the moment the applicant was handed over to Turkish security agents by Kenyan officials. Despite this taking place outside Turkey, the applicant was considered to be under the authority and control by Turkish officials since he was arrested and forced to return to Turkey.[293] Another example is the case of *Hirsi Jamaa*. This case concerned the interception of Somali and Eritrean nationals by Italian Revenue Police and Coastguard ships. The applicants were transferred onto Italian military ships and returned to Libya. The Court held that despite the alleged nature of the operation – a rescue mission – the principle of exclusive jurisdiction of the flag state gave Italy jurisdiction over the events, although there was a low level of control. The applicants were considered to have been under the exclusive and continuous *de jure* and *de facto* control of Italy since the moment they boarded Italy's military ships.[294] Moreno-Lax argues that direct physical contact, however, is not always needed. What is relevant, in her view, is instead whether the control is effective. Moreno-Lax suggests that contactless control may constitute a ground for jurisdiction, especially if there's also a *de jure* basis for the control.[295]

Importantly, the *Al-Skeini* case partially overturned *Bankovic* since the Court in *Al-Skeini* held that the Convention may indeed be divided and tailored when a state exercise jurisdiction under the personal model. Thus, the state

[289]*Banković* (n 209) para 71.
[290]*Al-Skeini* (n 224) para 135.
[291]*Al-Skeini* (n 224) para 136.
[292]*Issa* (n 26) para 71.
[293]*Öcalan v. Turkey* App no 46221/99 (ECHR, 12 May 2005) ECHR 2005-IV, para 91.
[294]*Hirsi Jamaa* (n 13) paras 76–82.
[295]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 401.

only has extraterritorial jurisdiction over a person in relation to the rights relevant to the situation of that specific individual.[296]

What is tempting with the personal model is its broad coverage, but this also means that jurisdiction may no longer serve its purpose as a threshold. According to Milanovic, if one applies a broad understanding of what constitutes control over an individual, the personal model collapses in the sense that there is no threshold at all. At the same time, the model can only be limited in arbitrary ways.[297]

One way is to only apply it in cases involving physical custody, as there are many cases concerning detention. Milanovic, however, argues that this is not justified. There are many cases not involving detention, but instead killings such as *Pad and Issak*. In line with the principle of universality and the *Issa*-case[*298*], Milanovic holds that it does not make sense to delimit the model's applicability to cases of detention since this would risk encouraging killings instead of capturing.[299]

Another potential way of solving this problem is to only apply the model when the control is exercised in a specific place, or by specific agents. This solution has, however, no support in case law. Further, difference can be made based on nationality and membership in the armed forces, but this is neither ethical nor in line with the principle of universality.[300]

Another alternative is to delimit the model to cases that concern law enforcement. There are several cases which support the understanding that when law enforcement is exercised, the state also exercises jurisdiction. All these cases concern legal processes taking place outside the state's territory over which the state does not exercise jurisdiction under the spatial model, but where such a result would be considered unjust. Milanovic holds that if

[296]*Al-Skeini* (n 224) para 137; *Hirsi Jamaa* (n 13) para 74.
[297]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 173 and 207.
[298]*Issa* (n 26) para 71.
[299]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 187–191.
[300]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 193.

one accepts the personal model, one must also accept that a legal process is enough to constitute authority and control. However, jurisdiction would be easy to avoid if the model was restricted exclusively to cases involving law enforcement. The model can therefore not be properly restricted.[301]

It would apply to any extraterritorial state action, which is why it was rejected in *Bankovic*.[302] Currently, the Court applies the personal model only when the spatial model would have an unsatisfactory result, if a deferral from the spatial model is not deemed to be too controversial.[303]

3.3.3 Application to the Use of Drones

The issue of border externalisation and jurisdiction has been dealt with by the European Union Agency for Fundamental Rights (hereafter FRA), particularly in relation to non-refoulement. The applicability of the principle of non-refoulement when Member States engage in capacity building activities in third countries have been deemed unclear due to uncertainties as to whether enough control is exercised. Regarding interceptions on the high sea, the control exercised has been deemed enough only in certain circumstances.[304] This does not, however, provide enough guidance as to whether Italy exercises jurisdiction through its use of drones, given that private entities are now operating the drones, and that Libyan authorities carry out the interceptions.

In the case of a rescue operation on the high sea there are more uncertainties. If the vessel involved is a member state vessel, the member state is deemed to exercise enough control, but if an MRCC from a member state instructs a private vessel to rescue, the situation is less clear. Arguments can be made both in favour and against the Member State having enough control in such circumstances.[305]

[301]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 199–202 and 206–207.
[302]Milanovic 'Extraterritoriality and human rights: prospects and challenges' (n 193) 57.
[303]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 208–209.
[304]FRA (n 27) 30–31 and 33.
[305]FRA (n 27) 34–36.

The FRA also addressed the applicability of non-refoulement at the EU's external border in relation to intelligence sharing with third countries in order to prevent the entry of vessels in EU Member States' territorial waters. It is clear that the principle applies both when EU Member States stop migrants at the border and once migrants have crossed the border. The situation is, however, less clear if migrants are stopped while moving *towards* the border between the territorial waters of an EU Member State and a third country, and the EU Member State shares intelligence with the third country to prevent the migrants from reaching the border. Here, the FRA claims that arguments can be made both for and against the applicability of the principle of non-refoulement.[306]

The legal situation thus seems to be unclear. The question whether migrants are within a state's jurisdiction if the state is remotely involved in rescue operations has been addressed by Papastavridis. He suggests that the law of the sea should be relied upon, in accordance with article 31(3)(c) of the VCLT, when assessing whether a state in such situations exercises enough authority and control over migrants for it to have jurisdiction.[307]

He first makes the argument that a state exercises enforcement jurisdiction – under the law of the sea – when they carry out their obligations under UNCLOS, SOLAS and SAR.[308] A detailed account of these obligations will be addressed in chapter 4 of this thesis. He then continues by discussing whether such enforcement jurisdiction is also enough to trigger the ECHR. Drawing upon the Courts decision in *Jaloud*, Papstavridis argues that since one must consider the factual situation and the relevant rules of international law, the rules concerning search-and-rescue operations are of relevance. He therefore argues that two criterions must be met in order for the ECHR to be triggered.[309]

First, a situation of distress must be identified. With reference to the *Arctic Sunrise Case*, Papastavridis argues that such identification may be achieved

[306]FRA (n 27) 36–41.
[307]Papastavridis (n 56) 426.
[308]Papastavridis (n 56) 432–433.
[309]Papastavridis (n 56) 433–435.

by the use of drones. Second, an on-scene coordinator must be present. These two steps are both needed for there to be jurisdiction, since merely knowledge of a situation is not enough as it does not entail physical control and authority. Therefore, the presence of both an on-scene coordinator and rescue units is needed. Papastavridis argues that it is of no importance what state the units/facilities belong to, as long as they are under the direction of a state's Rescue Coordination Center through the on-scene coordinator. By bringing up the case *SS v Italy*, he reiterates that knowledge and control should be decisive for the establishment of jurisdiction. He argues that it should be enough to show that Italy had knowledge about the situation, despite the rescue units being Libyan, and that it designated and instructed the on-scene coordinator, for Italy to have jurisdiction.[310]

When assessing the strength of Papastavridis argument, it is important to reiterate what was said about article 1 of the ECHR in the very beginning of this chapter, in regard to combining public international law and international human rights law.[311] While it is true that article 31(3)(c) of the VCLT opens up for interpreting article 1 of the ECHR in light of other relevant rules of international law, caution is needed since the concept of jurisdiction under different areas of international law may differ. By applying Papastavridis' line of reasoning to the context of this thesis, Italy could be considered exercising jurisdiction if it has received information about a vessel in distress from the drones operated by Leonardo S.p.A. *and* if its MRCC instructs a vessel operating as an on-scene coordinator. It is unclear whether Papastavridis' assessment is in line with the Court's current case law, but it seems like a far step from both the spatial and the personal model. Given the Court's current case law, applying the traditional notions of jurisdiction to the use of drones for the purposes of migration control is unlikely to engage the responsibility of Italy.

Firstly, the use of drones does not suffice to establish jurisdiction under the main rule of territoriality. The drones are operated from Italian territory, but

[310]Papastavridis (n 56) 433–435.
[311]Mallory (n 43) 25.

the effect is felt by irregular migrants outside of its territory, on the Mediterranean Sea. For state responsibility to arise from the traditional notions of jurisdiction one would have to rely on one of the exceptions to the main rule of territoriality.

Secondly, extraterritorial jurisdiction is also unlikely to be triggered under the spatial model. The model requires control over territory, and the surveillance missions which drones carry out are not likely to suffice for the establishment of such control. Given that the Court usually looks at the number of soldiers or the support given to a subordinate local administration, the drones carrying out surveillance missions would not be enough for Italy to be considered exercising effective control over the sea.

Lastly, the personal model does not offer a ground for establishing jurisdiction either. The drones are unmanned and operated by a private actor for monitoring purposes, thus there are no diplomatic, consular or any other state agents present who can be said to exercise power over the migrants. There is no invitation from another state to carry out the operations either. If the migrants board a ship or if violence is used against them by Italian personnel, jurisdiction may be triggered under this model. However, since Italy has withdrawn its ships from the area and relies instead on the Libyan Coast Guard to carry out the interceptions and pull-backs, Italian personnel is also unlikely to be involved. Libya is not a party to the ECHR, so state responsibility cannot be engaged on their end either – creating a legal gap in terms of accountability.

In conclusion, it seems unlikely that jurisdiction would arise from the use of drones in accordance with any of the traditional notions of jurisdiction.

3.4 Non-traditional Notions of Jurisdiction

3.4.1 Milanovic's Approach

In order to live up to the principle of universality, the personal model was adopted by the Court. However, it has been argued that the personal model eliminates jurisdiction as a threshold altogether. Therefore, Milanovic

suggests an alternative notion of jurisdiction, which for the purpose of this thesis will be referred to as Milanovic's model, based on the fundamental differences between positive and negative obligations.[312]

Milanovic argues that the same jurisdictional threshold does not necessarily have to apply to both positive and negative obligations.[313] A certain level of control is needed for a state to fulfil its positive obligations. Positive obligations are also due diligence obligations, i.e. a state is required to, to the best of its abilities, do what it can to fulfil its positive obligations. To fulfil its negative obligations, on the other hand, a state merely needs to control its own agents. Milanovic therefore argues that the jurisdictional threshold is only needed with regard to positive obligations, particularly since these involve the protection of individuals from third parties.[314] Against this background, Milanovic suggests that *de facto* effective control over areas should be required for a state to exercise jurisdiction, but that this threshold should only be applied with regard to positive obligations. Negative obligations should apply universally.[315]

Milanovic's distinction between positive and negative obligations is however not a clear cut one, since he holds that certain positive obligations should also apply universally. The most obvious example of such rights are those that are procedural and/or prophylatic in nature. This exception is a logic consequence of Milanovic position that the state's *need* of a certain level of control for the fulfilment of a certain obligation should determine what jurisdictional threshold should be applied. Therefore, a positive obligation which exist to make a negative obligation effective should also apply universally. [316]

In conclusion, under Milanovic's model the negative obligations would apply universally, since a state can always be expected to refrain from violating

[312]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 209.
[313]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 214.
[314]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 210–212.
[315]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 210.
[316]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 211–212 and 216.

human rights. Since the fulfilment of positive obligations often require territorial control, a jurisdictional threshold should apply with regard to positive obligations. The strength of this model is that it would lead to an increased certainty as to when the ECHR applies extraterritorially. There is no attempt from Milanovic's side to argue that his model is in line with the current case law of the ECtHR. He does, however, claim that his model is in line with *Bankovic* in the sense that it does not divide and tailor the rights, since they must always be *respected* (i.e. states must refrain from violating rights themselves). Milanovic further makes the theoretical example of the United Kingdom sharing intelligence with Pakistani authorities, who then torture a suspect. The United Kingdom would in such a case have a universal negative obligation not to be complicit in the violation of article 3 of the ECHR.[317] He claims that the most important strength is that the model balances the principle of universality of human rights and the principle of effectiveness.[318]

The approach has, however, received criticism. Firstly, it does not consider that positive and negative obligations are usually dependent on each other. Shany has argued that applying Milanovic's model would release the state from the obligation to protect foreigners from private actors acting from within the state's territory since this is a positive obligation. Shany questions the rationale behind this exclusion, arguing that according to a universalist approach it should not matter if it is a private or public actor who causes the harm. Further, this differentiation is especially problematic given the ambiguity in the public-private divide. Shany also states that it is unclear why the victim's location should be given such importance rather than the state's functional capability. Shany argues that it is both arbitrary and contrary to idea of universality to differentiate between the obligations in this way.[319]

Another point of criticism raised by Shany is that a universalist and functionalist approach cannot support the singling-out of prophylactic and

[317]Milanovic, Extraterritorial application of human rights treaties : law, principles and policy (n 49) 211–212 and 217–220.
[318]Milanovic 'Extraterritoriality and human rights: prospects and challenges' (n 193) 54.
[319]Shany (n 55) 62–63.

procedural obligations. He argues that if a state can investigate a violation, it should be required to do so regardless of whether the alleged perpetrator is a private or public actor. He also states that positive and negative obligations can be intertwined in other areas as well.[320]

3.4.2 Functional Jurisdiction

3.4.2.1 Shany's Functional Approach

There are three ideas from *Bankovic,* which managed to outlive both the *Al-Skeini* judgement and Milanovic's proposed model. Firstly, in the *Al-Skeini* judgement, the Court reiterated the idea that extraterritorial jurisdiction is exceptional.[321] Secondly, the partial application of the Convention is still not accepted.[322]

Although allowing for differential treatment of positive and negative obligations, Milanovic argues in favour of an all-or-nothing approach to positive obligations (except for prophylactic and procedural obligations). If there is no effective spatial control, no positive obligations apply. Similarly, according to the *Al-Skeini* judgement, direct control over individuals may allow for tailoring and dividing the obligations, but the all-or-nothing approach is still present with regard to spatial jurisdiction. Shany poses the question why the all-or-nothing approach is still relevant, although it has been determined that dividing and tailoring is acceptable in some contexts depending on the nature of the obligations/control. Further, Shany questions why states are to be released from all obligations just because they cannot carry out all of them. Shany argues that since states can project its powers across its borders – for example by using drones – the indivisibility of obligations risks leading to large parts of State actions being left unregulated. He also points out that in certain situations, such as in the context of an occupation, states can simply not be expected to provide all human rights. This should, however, not relieve them from all their obligations. Shany

[320]Shany (n 55) 63.
[321]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 399; *Banković* (n 209) para 61.
[322]Shany (n 55) 63.

summarises his main point in the following way*:* "A state should be obliged to respect and protect the human rights of those it is in a position to respect and protect, to the extent that is in a position to do so".[323]

Thirdly, the rejection of the cause-and-effect notion of jurisdiction also managed to slip through the *Al-Skeini* judgement and Milanovic's model. The cause-and-effect notion implies that the ability to violate a given right gives a state the obligation not to do so. Although Shany accepts that this notion would render jurisdiction rather meaningless as a threshold, he is optimistic that a functional criterion can be added to keep jurisdiction as a threshold. He suggests that violation, and the capacity to violate/not violate should be kept analytically separate. Jurisdiction should according to Shany, be proven either by a violation of a negative obligation (capacity to generate harm), or by the observance of a positive obligation (capacity to protect). Had it not been for the additional restraints suggested by Shany, his approach would be very similar to the cause-and-effect notion.[324]

Effectively, Shany introduces a functional approach to jurisdiction. A purely functional approach, such as the approach Judge Bonello suggested in the *Al-Skeini* case, would be too broad since it could be used to argue that the US is under the obligation to stop starvation in North Korea, just because of its capacity of doing so. Therefore, Shany suggests two alternative restraints. The first restraint would be that the potential impact of the act/omission has to be direct, significant, and foreseeable. Effectively, the obligation of the US to solve the starvation in North Korea is refuted. This would allow for the inclusion of both positive and negative obligations. The second restraint would be that there has to be a special legal relationship between the state and the individual. Such relationship exists if the state is particularly well-situated to extend its protection over certain individuals and there are strong expectations that the state would do so.[325]

[323]Shany (n 55) 64–65.
[324]Shany (n 55) 65–67.
[325]Shany (n 55) 68–69.

3.4.2.2 Moreno-Lax's Functional Approach

Another type of functional approach to jurisdiction is offered by Moreno-Lax. She claims that her approach unifies the spatial and personal models of jurisdiction and offers a solution on how to assess extraterritorial actions.[326]

Moreno-Lax views jurisdiction as a normative power exercised by a sovereign over an individual with a claim to legitimacy, which creates a link between them relevant to human rights. It is irrelevant whether the state acted ultra vires. By referring to the cases *Lopez Burgos* and *Issa*, she argues that if there is a sovereign authority-nexus, it does not matter if an action is carried out within or outside a territory. There is a presumption of jurisdiction if an act is carried out within the territory of a state, which does not exist if the act is carried out extraterritorially. The premise is, however, the same. If there is a concrete public-power relationship, there is jurisdiction, and as a result a state's human rights obligations are triggered. However, Moreno-Lax argues that not necessarily all human rights must apply and be triggered in all situations, which is in line with the *Al-Skeini* judgement. By unifying the premise of all forms of jurisdiction, the model normalises extraterritorial jurisdiction. Moreno-Lax claims that it properly overturns the *Bankovic* judgement. She also argues that this is the intended understanding of the ECHR.[327]

In conclusion, jurisdiction under Moreno-Lax's functional model stems from the exercise of public powers, either through policy delivery and/or operational action, which translates into what she calls "situational control". Moreno-Lax draws upon *Al-Skeini*, and more specifically paragraph 150 of the decision, by considering what the state knew and the extent of the due-diligence carried out. She also draws upon *Bankovic*, paragraph 75, to exclude random, one-off haphazard encounters between a state and its subjects. By applying this model, contactless control by a state through remote management techniques and/or in cooperation with the local administration of other states acting as a proxy, can therefore constitute "effective control"

[326]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 386.
[327]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 397–398.

and lead to a state having jurisdiction – regardless of whether it is over persons, territory or a specific situation abroad. The absence of direct physical contact is under this approach no obstacle for establishing jurisdiction. Moreno-Lax claims that this approach therefore has the potential of closing accountability gaps.[328]

Moreno-Lax argues that a state can express its powers as a sovereign through policy implementation and operational action. Therefore, in addition to effective control over persons/territory, control over general policy areas or individual tactical operations, which are performed or cause effects abroad should also be considered enough to establish jurisdiction. By referring to *Loizidou*, *Öcalan*, *Hirsi* and *Jaloud*, Moreno-Lax argues that the action relevant for establishing jurisdiction has been part of a wider military, security, or rescue operation through which the state exercised effective control in all the extraterritorial cases where the ECtHR has recognised a jurisdictional link.[329]

She argues that control should be considered effective "when it is determinative for the material course of events unlocked by the exercise of jurisdiction". Effectively, the intensity or directness of the activity's potential physical force is insignificant.[330] Her functional approach considers both *de facto* and *de jure* factors when establishing jurisdiction, making legislative, executive and/or judicial activity equally important.[331]

Moreno-Lax exemplifies her approach by referring to the pending case of *SS and Others v. Italy*, arguing that the events on the 5th and the 6th of November 2017 were within Italy's jurisdiction under article 1 of the ECHR in a way comparable to the *Hirsi Jamaa* case. She challenges the collaboration between Italy and Libya, which makes use of contactless control. On the 5th of November 2017, a dinghy carrying 150 migrants departed from Tripoli. Not long after departure, a distress signal was received by the MRCC in

[328]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 387–388.
[329]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 403.
[330]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56); *Hirsi Jamaa* (n 13) para 180.
[331]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 404.

Rome, which sent a request to all ships transiting the area to assist the dinghy. The exact coordinates of the dinghy were communicated an hour later, when the dinghy already had started sinking.[332]

A Portuguese military aircraft, a French warship, and an Italian navy helicopter were present in the area. It took one hour before a ship from the LYCG and the NGO vessel SW3 arrived. Despite being onsite first, the LYCG did not initiate assistance. When SW3 arrived, it took on the on-scene command (hereafter OSC), which LYCG objected to despite being unresponsive on radio communication and improperly equipped for the operation. Survivors claim that the LYCG did not try to help them, but instead cursed at them, beat people in the water with ropes and created waves causing people to sink. LYCG asked the SW3 to stay away, claiming that they had the OSC, whereas the SW3 asserted it had orders from the MRCC to assist the dinghy. It is unclear what the orders were, since the MRCC and LYCG Joint Operation Room in Tripoli communicated via phone. The transcript allegedly gives reason to believe that the LYCG had said it would carry out the rescue-mission and take on the OSC.[333]

The LYCG used direct violence against the migrants who were already in the water and threw objects at them. It also made people who were in the dinghy fall into the water, and forced the SW3 to retreat, resulting in drownings. Those migrants who were taken aboard the LYCG's ship were tied up and threatened with firearms. The SW3 managed to rescue 59 people, including 6 applicants who jumped overboard from the LYCG. These people and the body of a child were taken to Italy. Two applicants were taken to the Tajura camp in Libya by the LYCG. They were abused and subsequently agreed on voluntary repatriation when faced by the alternative of indefinite detention. Two witnesses who had also been pulled back by the LYCG were still in Libya when the complaint was filed.[334]

[332]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 387–388.
[333]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 389.
[334]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 390.

Moreno-Lax makes the argument that Italy had effective control over these events, due to its political, financial, and operative involvement.[335] Both Italy and the EU have invested in the establishment of the Libyan search-and-rescue and interdiction capacity to hinder irregular migration and secure rescue missions and disembarkation.[336]

The legal ground for the cooperation between Italy and Libya is the 2008 Treaty of Friendship. Article 19 of the treaty concerns actions to hinder irregular migration but does not mention human rights. This cooperation later led to the *Hirsi Jamaa case*. The MoU of February 2017 develops the Treaty and expands article 19, which once again concerns the hindrance of irregular migration without mentioning human rights. Under the MoU, Italy is to provide financial, technical, technological and other means to the LYCG. It will also provide the financing of detention centres, training, overall support to return and readmission from Libya. Under article 4, the cost for this is born by Italy, partially through EU funding. The EU has provided financial and logistic assistance and "celebrated" the cooperation between the two countries.[337]

Italy has supported Libya with funding and equipment. Through the Africa Fund, € 2.5 million have been spent on Libyan boats and the training of crew. Italy has also secured EU funding for Libya, mounting to € 160 million. In addition, the Italian Coast Guard was awarded an EU project, through which the border management and migration control in Libya received € 46.3 million. The aim of the project was specifically to strengthen the operational capacity of the LYCG, and to provide it with initial capacity to better organise their control operations and coordinate maritime interventions. Within the project, a MRCC was to be established (this was estimated to be done in 2020). Libya received assistance in defining and declaring a Libyan search-and-rescue region, which the IMO recorded in June 2018. Finally, despite its malpractices being known to the Italian Coastguard, the LYCG received ten

[335]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 396.
[336]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 390.
[337]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 391.

fast patrol boats. The allegedly most prominent one, *Ras Al Jadar*, was the ship active on the 6th of November 2017.[338]

With regard to the operational involvement, Moreno-Lax points out that Italy for a long time was the only state carrying out search-and-rescue operations in the relevant waters. At its best, LYCG in 2018 (thus after the event relevant in this case) carried out only 54% of all search-and-rescue operations. Moreno-Lax argues that the Libyan interventions was de facto Italian-led, and that the MoU from 2017 constituted the legal basis for this. At first, the LYCG started operating with the support from basic operational rooms with limited space and lacking communication capabilities, which hindered Libya from exercising command and control for the coordination of search-and-rescue operations. Thus, the LYCG was not self-sustained. Instead, Italy secured the necessary functions through its *Nauras operation* under which four ships, four helicopters and 600 servicemen were deployed in Libya, either at sea or in Tripoli's harbour. The naval assets in turn worked as a communication centre and a floating MCCC for Libya, which had contact with the assets carrying out search-and-rescue operations, the Italian Coast Guard and MRCC centres. During these events, it was tasked with carrying out the command and control. The LYCG received distress calls through the MRCC in Rome and through the naval ships deployed as part of operation Nauras. Further, it relied on Italian and EUNAVFOR MED infrastructure to communicate and coordinate. A common course of event is that Italy or EUNAVFOR MED locates a vessel from air, and that this information is shared with the LYCG through Nauras' warship in Tripoli. The following operation is then coordinated by Italy, on behalf of Libya. For these reasons, Moreno-Lax argues that Italy was in charge of the overall coordination of the LYCG, both remotely and directly (through the MRCC in Rome and its military presence in Libya respectively).[339]

Moreno-Lax concludes that Italy's sovereign decisions, which had effects abroad, and its support to LYCG, including the direct involvement in

[338]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 392–393.
[339]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 393–396.

command-and-control capabilities, amounted to contactless but effective control over Libya's search-and-rescue and interdiction functions. Its public powers were expressed through the impact felt, Italy's decisive influence and its operative involvement, and thus triggered jurisdiction. By investing in LYCG, Italy had achieved by proxy what it could not achieve itself without breaching international law.[340]

3.4.3 Application to the Use of Drones

Applying Milanovic's suggested approach to the use of drones would result in engaging Italy's jurisdiction with regard to both positive and negative obligations only within its own territory and in areas where it exercises effective control. Since Milanovic does not offer any clear definition of effective control of his own, one must assume that effective control is to be understood the same way as in the traditional approaches. Since Italy was not considered in effective control under the traditional approaches, this would therefore also be the case if one applies Milanovic's approach. As a result, Italy would not have any positive obligations with regard to the migrants affected by its use of drones. In line with Shany's criticism, this would in turn give Italy no obligation to protect the migrants against private actors acting from within Italy, since this constitutes a positive obligation. This would consequently leave room for arguing that Italy has no obligation to protect the migrants from the use of drones and its effects, since Leonardo S.p.A. is operating the drones. In addition, Italy would have no obligation to protect the migrants from the actions taken by Libya.

Milanovic's approach does, however, leave Italy with negative obligations with regard to the migrants since states in this connection have universal jurisdiction. This would mean Italy has to refrain from violating the right to life and the principle of non-refoulement (among other rights). However, Italy does not have to ensure the enjoyment of the rights. This could possibly be interpreted as obliging Italy to refrain from sharing the coordinates collected by drones with states such as Libya since this, in turn, is likely to lead to a

[340]Moreno-Lax 'The Architecture of Functional Jurisdiction' (n 56) 414.

breach of the principle of non-refoulement. This will be further discussed in chapter four. Collectively, Milanovic's approach would not give rise to jurisdiction with regard to its positive obligations under article 2 of the ECHR, but possibly concerning its negative obligations under article 3. This might be enough to protect migrants from breaches of the principle of non-refoulement in a manner consistent with a universalist approach.

Moving to Shany's suggested approach, Italy would be obliged to respect and protect the right to life and the principle of non-refoulement (amongst others) if Italy is in a position to respect and protect these rights, to the extent it is in a position to do so. Given Italy's support and vast cooperation with Libya, and Italy's influence over the withdrawal of EU's naval ships in the Mediterranean, it is possible to argue that Italy is in such a position. Although it might be unreasonable to expect Italy to single-handedly rescue all migrants on the Mediterranean Sea, the state is without doubt in a position to choose not to enter into contracts with drone operators, which result in human rights violations as well as the securitisation and externalisation of borders.

The first restraint Shany imposes in order not to make the concept of jurisdiction too broad is that the impact must be direct, significant, and foreseeable. Due to this restraint, the pull-backs would likely not be covered by Italy's jurisdiction. Even though the pull-backs are indeed significant and foreseeable, they are not a direct consequence of Italy's actions. It is still Libya who carries out the pull-backs. While the pull-backs may not have been possible without the coordinates provided by Italy, the pull-backs are not an unavoidable result of the sharing of coordinates. The loss of life, however, could indeed be considered a direct, significant, and foreseeable consequence of Italy's deployment of drones instead of naval ships and the alerting of Libyan Coastguard rather than other actors in the area.

The second restraint is that there should be a special legal relationship between Italy and the migrants. Italy could be considered well-situated to extend its protection and generate strong expectations given its equipment and capacity to carry out rescue missions as well as the state's influence on the policies and projects in the area. Already the existence of frameworks

such as UNCLOS and the ECHR generate such expectations, despite the frameworks not always being fulfilled. Collectively, Shany's approach could be used to establish Italian jurisdiction pertaining to the right to life, but probably not with regard to the principle of non-refoulement.

Lastly, the functional approach presented by Moreno-Lax is the approach most likely to successfully establish Italian jurisdiction. If it were to be accepted by the ECtHR, it would facilitate the possibility of triggering state responsibility for contactless control by a state through remote techniques.

The situation relevant for this thesis is very similar to the situation in the *SS and Others v Italy* case. The legal ground for cooperation between Italy and Libya and the support with funding and equipment is basically the same today as it was in 2017. The main difference is that unmanned drones are monitoring the Mediterranean Sea instead of airplanes, with private actors operating the drones instead of state agents. This difference could facilitate the argument that it is not actually the state (Italy), but the operator (Leonardo S.p.A.), who is exercising contactless control. However, given that the use of drones is part of Italy's policy implementation, and given that Italy takes part in the operational action by taking on the role as the end-user and by giving the operator instructions, the use of drones should be considered as an expression of Italy's power as a sovereign. Through its contract with Leonardo S.p.A., Italy should therefore be considered as exercising contactless control.

As discussed earlier in this chapter, Moreno-Lax argues that the control is effective if it is determinative for the material course of events. If this is the case, it does not matter whether the activity's potential physical force is direct or how intense it is. It is safe to say that without the shared coordinates of migrant boats Libya would not have been able to carry out the pull-backs. Further, these coordinates would not have been collected had it not been for Italy's contract with drone operators. Italy's outsourcing to Leonardo S.p.A. and its involvement in the actual surveillance missions were therefore indeed determinative for the material course of events. As a result, Italy's jurisdiction is triggered. This is also in line with *Al-Skeini* and *Hirsi Jamaa*, where the ECtHR has ruled that a state should not be allowed to achieve abroad what it

cannot do within its own territory. By involving Libya, Italy creates a distance between itself and the consequences of its actions. This is done in order to avoid state responsibility. Involving a drone operator is yet another step in the same direction, trying to circumvent the purpose and essence of the ECHR. This development could be hindered by applying the approach suggested by Moreno-Lax.

3.5 Conclusion

The purpose of this chapter was to answer the second sub-question of the thesis:

> *Does Italy exercise jurisdiction in relation to the adverse human rights impact that the use of drones has on migrants?*

To answer this question, the chapter began by covering the traditional notions of jurisdiction accepted by the ECtHR. It was examined whether Italy has jurisdiction with regard to the impact the use of drones has on migrants under any of these traditional approaches. Further, three non-traditional approaches to jurisdiction which have been discussed in doctrine were presented. Consequently, the chapter assessed whether Italy has jurisdiction with regard to the impact the use of drones has on migrants under any of these approaches. The answer to the second sub-question will now be concluded.

Whether Italy exercises jurisdiction pertaining to the impact the use of drones has on migrants depends on which notion of jurisdiction is applied. Jurisdiction is unlikely to arise from the use of drones under any of the traditional notions, which are the only ones currently accepted by the ECtHR.

Under Milanovic's approach, jurisdiction would probably only arise with regard to negative obligations. This might be enough to offer migrants protection from the pull-backs, but not from the loss of lives at sea. In contrast, Shany's approach would likely trigger Italian jurisdiction with regard to the right to life, but not the principle of non-refoulement. The approach suggested by Moreno-Lax is the one most likely to give Italy jurisdiction over both of the two aspects of the problem covered by this thesis.

It is, however, important to keep in mind that neither of these three notions have been accepted by the Court yet, even though their proponents find support for their suggestions in the Court's case law.

The thesis will now continue by exploring whether the lack of search-and-rescue missions and the occurrence of *de facto* push-backs constitute a breach of the right to life and/or the principle of non-refoulement (chapter 4).

4 Compliance with ECHR

4.1 Introduction

The right to life and the principle of non-refoulement, as enshrined in articles 2 and 3 of the ECHR respectively, reflect core values of the democratic societies of the Council of Europe.[341] As all rights guaranteed by the ECHR, they are to be interpreted and applied in a manner which makes the safeguards practical and effective.[342] As discussed in chapter two, the use of drones has led to the loss of lives at sea, as well as pull-backs mainly operationalised by the LYCG. The purpose of this chapter is therefore to answer the third sub-question of the thesis:

> *Does the use of drones for the purpose of monitoring irregular migrants violate the right to life and the principle of non-refoulement in the ECHR?*

To answer this question, the chapter will begin with addressing the right to life. This will be done by first looking at article 2 of the ECHR, and then interpret what the article implies in relation to migrants in distress at sea. It will then be assessed whether the use of drones in this context violates the right to life. Further, the chapter will address the principle of non-refoulement. This will be done by analysing article 3 of the ECHR, and consequently interpret what the article implies with regard to migrants at sea. It will then be assessed whether the use of drones in this context violates the principle of non-refoulement. Finally, a preliminary answer to the third sub-question will be presented in the conclusion of this chapter.

4.2 The Right to Life

4.2.1 Article 2 of the ECHR

The right to life is enshrined in article 2 of the ECHR, and is one of the most fundamental articles of the Convention from which no derogation can be

[341] CoE/ECtHR 'Guide on Article 2' (n 29) para 2.
[342] *McCann and Others v. the United Kingdom* (1995) Series A no 324 para 146.

made in peace time. Therefore, its provisions are supposed to be strictly construed.[343] The article reads as follows:

> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
>
> *(a) in defence of any person from unlawful violence;*
>
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
>
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection.*[344]

The article has two limbs. Firstly, there is a substantive limb, which entails both an obligation to protect the right to life, and a prohibition of the intentional deprivation of life (with a list of exceptions). Secondly, there is a procedural limb under which a state is obliged to investigate alleged breaches of the right to life.[345] Since the primary goal must be to prevent the loss of lives, not merely to properly investigate it, the substantive limb is the focus of this thesis. Further, the use of drones involves the omission to save lives at sea rather than the intentional killing of migrants, which is why the positive obligation to protect the right to life is more relevant than the negative obligation to refrain from the intentional deprivation of life.

The positive obligation applies in the context of any activity, both public and private. The ECtHR has for example held that it applies in the context of incidents on board of a ship and in the context of a state's failure to react promptly to a disappearance in life-threatening circumstances. It does not, however, guarantee an absolute level of security. The ECtHR has held that this is especially the case when the applicant has exposed him/herself to unjustified danger. The nature of the positive obligation to protect the right to

[343]CoE/ECtHR 'Guide on Article 2' (n 29) para 2; *McCann* (n 342) para 147.
[344]ECHR (n 20) article 2.
[345]CoE/ECtHR 'Guide on Article 2' (n 29) para 3.

life requires states to take appropriate steps to safeguard the lives of those within its jurisdiction. This means that a state must both provide a regulatory framework and take preventive operational measures.[346]

Human rights treaties, such as the ECHR and UNCLOS, consist of positive obligations, but due to the generic language used, it is not always clear what these obligations actually require. The lack of clarity on what the obligations actually require is also a result of positive obligations often being relative in nature, which leaves room for discretion. In the case of ECHR, the Court has stated that an interpretation of the obligations shall not impose an impossible or disproportionate burden on the state.[347]

The Court has also held that consideration should be made to the unpredictability of human conduct and operational choices. What measures to take in order to fulfil the positive obligation under the ECHR is within a state's margin of appreciation.[348] This means that each state has some discretion when deciding what measures to take, which risks further adding to the uncertainty of what is actually required from states.

Despite the Court's significant amount of case law on the article, there are not many cases where the right of life has been interpreted in the context of migrants in distress at sea. The Court has, however, held that the positive obligation under article 2 with regard to accidents in general requires states to adopt regulations for the protection of people's safety in public spaces and ensure its effective functioning. In this context, a state's responsibility under article 2 can be triggered by a state's acts/omissions in the context of policies to ensure safety in public places. However, the Court has stated that errors of judgment or negligent coordination are not enough to trigger state responsibility.[349] Despite these statements on accidents in general, the Court's

[346]CoE/ECtHR 'Guide on Article 2' (n 29) paras 9–13.
[347]Papanicolopulu (n 31) 176; *Osman v. The United Kingdom* [GC] App no 23452/94 (ECHR 28 October 1998) para 116; CoE/ECtHR 'Guide on Article 2' (n 29) para 59.
[348]CoE/ECtHR 'Guide on Article 2' (n 29) paras 59–60.
[349]CoE/ECtHR 'Guide on Article 2' (n 29) paras 57–58; *Smiljanić v. Croatia* App no 35983/14 (ECHR 25 March 2021) para 70.

case law does not provide sufficient clarity as to what is required by states in order for the protection of life at sea to be fulfilled.

4.2.2 Migrants in Distress at Sea

Under article 2 of the ECHR, states have to ensure the safety of those whose lives are at risk, and make sure that they are assisted.[350] The right to life arguably triggers additional state obligations when at sea, due to the dangerous nature of the sea.[351] The protection of life at sea is one example where a comprehensive protection is achieved by combining the duties deriving from human rights with duties under the law of the sea. This is made possible by the systemic nature of international law and the willingness of judges to combine different areas of law.[352] Given the lack of clarity regarding what the obligation to protect lives under article 2 of the ECHR means in practice, one must look elsewhere for guidance. The ECHR should therefore be interpreted in light of other relevant instruments in international law, in accordance with article 31(3)(c) of the VCLT.

The primary instrument relevant to look at for guidance on what a state may be required to do to fulfill its positive obligation to protect the right to life under article 2 of the ECHR at sea is UNCLOS.[353] Article 98(1) is a codification of the customary duty to assist people in distress at sea.[354] UNCLOS is therefore relevant for article 2 of the ECHR since the duty to rescue and the right to life has been considered to mirror each other.[355]

In addition, since human rights treaties have a generic language, technical instruments are useful when determining whether a state has fulfilled its obligations or not. Human Rights bodies already make use of these instruments, but a lack of clarity remains regarding activities at sea.[356]

[350]Papanicolopulu (n 31)189-190; *Osman* (n 347) paras 115-116.
[351]Papanicolopulu (n 31)200.
[352]Papanicolopulu (n 31) 179.
[353]UNCLOS (n 45).
[354]Papanicolopulu (n 31) 187.
[355]Papanicolopulu (n 31) 189.
[356]Papanicolopulu (n 31) 179.

Pertaining to UNCLOS, treaties such as SOLAS[357] and SAR[358] provide a more detailed account on what measures states must take.[359] Therefore, the following section will rely on UNCLOS as well as SOLAS and SAR to determine what the positive obligation to save lives under article 2 of the ECHR entails with regard to migrants in distress at sea.

UNCLOS requires states to "promote the establishment, operation and maintenance" of search-and-rescue services.[360] In doing so, UNCLOS extends the state obligations provided by international human rights law.[361] SAR specifies that states shall participate in the development of such services, to ensure that people in distress receive the assistance they need.[362] SAR and SOLAS state that search-and-rescue regions are to be established. While each state is primary responsible over its own region, it is also important to remember that the purpose of establishing regions is to effectively support search-and-rescue services. [363]

Importantly, UNCLOS ascribes a duty to assist those in distress at sea.[364] When a state receives information that a person appears to be in distress, it is required to ensure that the person is assisted.[365] The obligation is triggered regardless of how the knowledge of the situation arose.[366] If the rescue unit receiving the information is not in a position to assist, it shall nevertheless transfer the information to the relevant MRCC.[367] The duty to assist applies to all maritime zones.[368] It also applies regardless of the nationality or status of the person in distress.[369] It could involve situations where a vessel is

[357]SOLAS Convention (n 47).
[358]SAR Convention (n 46).
[359]Klein 'Maritime autonomous vehicles' (n 58) 2; Papanicolopulu (n 31) 200.
[360]UNCLOS (n 45) article 98(2).
[361]Papanicolopulu (n 31) 200.
[362]SAR Convention (n 46) Annex 2.1.1.
[363]SAR Convention (n 46) Annex 2.1.3 and 2.19; SOLAS Convention (n 47) Chapter V Regulation 7.1.
[364]UNCLOS (n 45) article 98.
[365]SAR Convention (n 46) Annex 2.1.1
[366]Moreno-Lax 'Protection at Sea' (n 9) 8.
[367]SAR Convention (n 46) Annex 4.3.
[368]UNCLOS (n 45) Article 98; SOLAS Convention (n 47) Chapter V Regulation 1.1; Papanicolopulu (n 31) 187–188.
[369]SAR Convention (n 46) Annex 2.1.10; SOLAS Convention (n 47) Chapter V Regulation 33.1.

endangered, has collided with another vessel or has sunk, putting the persons on board at risk of being lost at sea.[370]

It is settled that the duty to assist applies both to the flag state of a ship and the coastal state.[371] However, most migrant vessels do not have a flag state. In addition, while states indeed have a duty to assist those in distress, it remains unclear *which* state has to provide the search-and-rescue operations.[372] All states are required to ensure that those in distress are assisted.[373] In addition, each state has the *primary* duty to, within its assigned area, rescue people in distress either by its own vessels or by coordinating the use of other available vessels.[374]

To determine whether a state has fulfilled its obligations, one must first establish what constitutes a search-and-rescue operation. *Search* is an operation carried out to locate persons in distress.[375] *Rescue* involves the retrieving of persons in distress, the providing for their initial needs and the delivery of persons to safety.[376] A *distress phase* is defined as "a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance".[377] Given this definition, Moreno-Lax argues that migrant vessels may per definition be in distress, since they are usually not seaworthy.[378]

The question of disembarkation is of particular interest. Given the definition of *rescue*, it is implied that people in distress must be brought to safety.[379] It is also settled that a ship can only be considered a temporary place of safety.[380] People thus have to disembark *somewhere* before the rescue operation is

[370]Papanicolopulu (n 31) 188.
[371]UNCLOS (n 45) Article 98; SAR Convention (n 46) Annex 2.1.1; Moreno-Lax 'Protection at Sea' (n 9) 6; Papanicolopulu (n 31) 188.
[372]Papanicolopulu (n 31) 189.
[373]SAR Convention (n 46) Annex 2.1.1 SAR Convention.
[374]SAR Convention (n 46) Annex 2.1.9 and 3.1.9; SOLAS Convention (n 47) Chapter V Regulation 33.1-1; Moreno-Lax 'Protection at Sea' (n 9) 8.
[375]SAR Convention (n 46) Annex 1.3.1 SAR.
[376]SAR Convention (n 46) Annex 1.3.2; Papanicolopulu (n 31) 189.
[377]SAR Convention (n 46) Annex 1.3.13.
[378]Moreno-Lax 'Protection at Sea' (n 9) 7.
[379]SAR Convention (n 46) Annex 1.3.2; Papanicolopulu (n 31) 189.
[380]Papanicolopulu (n 31) 189; International Maritime Organisation (IMO), 'Guidelines on the Treatment of Persons Rescued at Sea' Res MSC.167(78) (International Maritime Organisation 2004) IMO Doc MSC 78/26/Add.2 (IMO Guidelines) para 6.13.

completed. The issue of *where* to disembark is however a difficult one.[381] Account must be taken to both the principle of territorial sovereignty and the principle of non-refoulement.[382] It remains unclear whether a state is considered to have fulfilled its obligations if it establishes a search-and-rescue zone and coordinates a rescue, or whether it in addition must make sure that disembarkation takes place somewhere safe.[383] The argument has been made that the state responsible for the search-and-rescue area should allow for the disembarkation, if there are no other options available.[384] Due to the issue not being settled conflicts arise from which powerful states benefit. [385]

By combining different sets of norms, states can be required to provide for the establishment and management of search-and-rescue facilities. The coordination between the facilities, including those of neighbouring states, must also be provided for. Operative measures must also be taken. If states fail to do this, they are in violation of international human rights law and can be brought before a competent court or tribunal such as the ECtHR.[386] That being said, there has only been one successful case before the ECtHR regarding an alleged violation of article 2 of the ECHR at sea, and it concerned the flag state's duty to investigate.[387] Since this thesis focuses on the substantive limb of article 2 of the ECHR, and since migrant vessels rarely have a flag state, this case is not relevant for the purpose of this thesis.

To conclude, interpreting article 2 of the ECHR in light of UNCLOS – and especially the duty to assist in article 98 – leaves room to argue that states are under the obligation to assist migrants' vessels in distress, even if such assistance takes place in the territorial sea of another state. A failure to do so would be in violation of the right to life. For a coastal state to fulfil its obligations, it has to promote the establishment, operation and maintenance

[381]Moreno-Lax 'Protection at Sea' (n 9) 8.
[382]Papanicolopulu (n 31)189.
[383]Papanicolopulu (n 31)194.
[384]Moreno-Lax 'Protection at Sea' (n 9) 8; International Maritime Organisation (IMO), 'Principles relating to administrative procedures for disembarking persons rescued at sea' (International Maritime Organisation 2009) FAL.3/Circ.194 para 2.3.
[385]Moreno-Lax 'Protection at Sea' (n 9) 8.
[386]Papanicolopulu (n 31) 192.
[387]Papanicolopulu (n 31) 190; *Bakanova* (n 288) para 67.

of search-and-rescue facilities, as well as providing for these. It has to take operative measures and carry out search-and-rescue operations. This is in line with the ECtHRs case law as described above, which requires states to implement a regulatory framework and take preventive operational measures. The duty to assist under the law of the sea is not an obligation of result, which is in accordance with the Court's case law stating that article 2 of the ECHR does not offer an absolute level of security and shall not be interpreted as imposing impossible or disproportionate duties on the state. In order to fulfil the right to life a state thus has to carry out or promote search-and-rescue operations, which includes bringing those rescued to a place of safety. The migrants must thus be disembarked *somewhere*, but states remain sovereign and are not necessarily required to let migrants disembark on their territory. However, if the alternative constitutes a breach of the principle of non-refoulement, allowing disembarkation may indeed be required. This will be further discussed in chapter 4.3.

4.2.3 The Use of Drones

Concerns have been raised that UNCLOS does not cover the use of drones.[388] It is true that drones are not covered by article 98(1) of the UNCLOS, which explicitly refers to ships. This should not, however, be decisive for the obligations of states in relation to the use of drones under article 98(2) of the UNCLOS. Thus, for the requirement on states to promote the establishment, operation and maintenance of search-and-rescue services, it is not relevant that drones do not fall within the definition of a ship.

What is more relevant is that drones neither constitute search-and-rescue facilities nor search-and-rescue units, since they cannot be used to retrieve persons in distress.[389] Klein therefore argues that given the definition of *rescue*, the use of drones for search purposes is not enough for a state to fulfil its obligation. To do so, it must instead deploy other assets *in combination*

[388]Klein 'Maritime autonomous vehicles' (n 58) 4; Phil McDuff, 'Using drones to watch refugees drown exposes the inhumanity of border enforcement' *The Guardian* (6 August 2019) <https://www.theguardian.com/commentisfree/2019/aug/06/drones-refugees-drown-inhumanity-border-enforcement> accessed 23 November 2021.
[389]SAR Convention (n 46) Annex 1.3.7 and 1.3.8.

with the drones. This conclusion is further supported by the requirements on the on-scene coordination in annex 4.7.1 SAR to ensure the most effective results. This obligation is also one of due diligence. For the most effective result to be reached, it is not enough to merely locate a vessel in distress.[390]

Further, Klein argues that a coastal state cannot be deemed to have promoted an *adequate and effective* search-and-rescue operation, as required by article 98(2) of the UNCLOS, if it returns those rescued to a place where the they cannot enjoy their human rights. This is because a search-and-rescue operation includes bringing those rescued to a place of safety, which would mean that they are not exposed to further human rights violations. In addition, arranging for persons in distress to be taken to a location where their human rights are not respected does not ensure the most effective result of a search-and-rescue operation either. While making this argument, Klein also points out that the lack of obligations for a state to disembark those rescued within its territory may rise difficulties in this context.[391]

As previously stated, SAR requires states to develop search-and-rescue services. To fulfil this due diligence obligation, Klein argues that aeronautical services can be used for coordination purposes under annex 2.4 SAR, and that this would be necessary for meeting the obligation in annex 2.4.1 SAR. By using drones, a state's ability to detect vessels in distress, and thus also their capability to fulfil the obligation to develop services to render assistance, increases. Klein also points out that the information gathered by drones can shift the uncertainty phase[392] into an alert[393] or distress phase[394], and thus trigger the state's obligation to take further action in accordance with annex 4.5 SAR. Drones can therefore also be used to save lives at sea. The use of drones could make states more capable of meeting their obligations to search, gather information and give technical assistance.[395]

[390]Klein 'Maritime autonomous vehicles' (n 58) 4.
[391]Klein 'Maritime autonomous vehicles' (n 58) 4.
[392]SAR Convention (n 46) Annex 1.3.11 and 4.4.1.
[393]SAR Convention (n 46) Annex 1.3.12 and 4.4.2.
[394]SAR Convention (n 46) Annex 1.3.13 and 4.4.3
[395]Klein 'Maritime autonomous vehicles' (n 58) 4–5 and 7.

In sum, drones could be used to protect the right to life, if deployed alongside other assets or other states' authorities in a manner that guarantees efficient search-and-rescue operations. As shown in this section, however, and against the background provided in chapter 2, this is not how drones are currently used by Italy. By interpreting article 2 of the ECHR in light of article 98(2) of the UNCLOS as well as SAR and SOLAS, it could be argued that Italy's substitution of its naval ships with drones constitutes a breach of the right to life when this leads to the loss of migrant lives at sea.

While coordination with the search-and-rescue facilities of other states is required, it is here argued that Italy's reliance on Libya is highly problematic. In this connection, the relatively recent establishment of a Libyan search-and-rescue region is of importance, since it risks resulting in Libya having the primary responsibility for the search-and-rescue operations. This can be – and has been – used to justify the return of migrants to Libya.[396] If Libya did indeed carry out genuine search-and-rescue operations, concluded by disembarkation in a port of safety, this would not be a problem. It would rather be an example of states cooperating for the purpose of saving lives in line with international law. In such a situation, Italy could have been expected to share the gathered information with Libyan authorities in order to protect the right to life.

The problem is that Libya does not carry out genuine search-and-rescue operations. Already the establishment of Libya's search-and-rescue region was controversial.[397] As discussed in chapter 2, Italy relies on the LYCG to carry out search-and-rescue operations which result in interceptions and returns to Libya. This is done despite the LYCG not having the capacity, nor the will, to carry out necessary search-and-rescue operations.

While the fact that Libya does not carry out genuine search-and-rescue operations does not necessarily mean that another state has violated international law, there is neither any support under UNCLOS, SAR or SOLAS for excluding the obligations of other states on the ground that Libya

[396]Klein 'Maritime autonomous vehicles' (n 58) 3.
[397]Klein 'Maritime autonomous vehicles' (n 58) 3 (in footnote 11).

is the primary duty bearer. In fact, annex 2.1.1 SAR states that parties shall ensure that assistance is rendered to any person in distress, without making any distinctions based on the search-and-rescue regions.[398] Further, Italy is partly responsible for the situation, given its role in the establishment of the Libyan search-and-rescue region.

In a context where the primary duty bearer – Libya – is unable and unwilling to carry out genuine search-and-rescue operations, it is reasonable to expect another state to get involved once they are aware of the situation. This is particularly the case when the other state bears part of the responsibility for the situation, which is the case with Italy. This conclusion is further strengthened by Italy's capacity to carry out search-and-rescue operations. It has indeed previously carried out such operations, but now chooses not to. For these reasons, Italy's deployment of drones cannot be deemed sufficient, not even – or rather particularly not – in connection with the operations carried out by the Libyan Coastguard.

In sum, what Italy actually does by sending the information collected by drones to Libya is not to cooperate with another state for the purpose of saving lives. Instead, it attempts to outsource the management of its borders to Libya. By doing so, Italy fails to provide for an adequate search-and-rescue system, and further risks violating the principle of non-refoulement, which the thesis will now cover.

4.3 The Principle of Non-Refoulement

4.3.1 Article 3 of the ECHR

The principle of non-refoulement is reflected in article 3 of the ECHR read in conjunction with the ECtHR's developed jurisprudence. The article reads as follows:

> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*[399]

[398]SAR Convention (n 46) Annex 2.1.1.
[399]ECHR (n 20) article 3.

In the *Soering* case, the ECtHR acknowledged that the expected conditions on death row amounted to a violation of article 3.[400] The Court held that an extradition of a person to such circumstances can trigger article 3 for the extraditing state. The Court has later consistently reaffirmed that the removal of a person can trigger a state's responsibility under both article 2 and article 3, if there is a real risk that the person will be subject to treatment contrary to the articles in the country of destination.[401] If there is such a risk, articles 2 and 3 impose an obligation on the state not to follow through with the deportation.[402]

In *Saadi v. Italy*, the Court stated that the principle of non-refoulement is absolute, and that there can be no weighing of the risk of ill-treatment against the reasons to remove the person in question. If the applicant face a substantial threat of ill-treatment he/she cannot be sent back, regardless of the level of threat he/she might pose.[403]

4.3.2 Migrants at Sea

In the specific context of migrants at sea, it is important to note that push-backs at sea may very well constitute a violation of article 3 of the ECHR. This was the case in *Hirsi Jamaa and Others v. Italy*. In this case, a vessel carrying 200 migrants was intercepted by the Italian coastguard. The interception took place on the high seas within the search-and-rescue area of another contracting party. Following the interception, the migrants were returned to Libya. The Court held, after stating that Italy had exercised jurisdiction, that Italian authorities knew or should have known that the migrants would be subject to treatment contrary to the ECHR, that they would

[400] *Soering v. the United Kingdom* (1989) Series A no 161 paras 88, 90–91.
[401] Council of Europe/European Court of Human Rights, 'Guide on the case-law of the European Convention on Human Rights: Immigration' (Council of Europe/European Court of Human Rights, 2021) para 2.
[402] *F.G. v. Sweden* [GC] App no 43611/11 (ECHR 23 March 2016) paras 110–111.
[403] *Saadi v. Italy* [GC] App no 37201/06 (ECHR 28 February 2008) ECHR 2008-II paras 119, 125, 138-139; *Othman (Abu Qatada) v. the United Kingdom* App no 8139/09 (ECHR 17 January 2012) paras 183–185.

not be given any protection and that there were not enough guarantees that they would not be arbitrarily returned to their country of origin.[404]

A removal to a third country may also constitute a violation if the reception conditions in the receiving state are inadequate.[405] In addition, the refusal to let someone disembark at a port may in certain circumstances also violate article 3.[406] The Court has in *Ilias and Ahmed v Hungary*[407] held that the removing state has a duty to thoroughly examine whether there is a risk that the asylum seeker will be denied access to an adequate asylum procedure which protects him from being removed, directly or indirectly, to his country of origin without a proper assessment of the risks in relation to article 3.[408] If the existing guarantees are not good enough, the state cannot remove the person. It has to be assessed whether the state considered, in an adequate manner and on its own initiative, the available general information on the third country and its asylum system. It also needs to be examined whether the applicant was given sufficient opportunity to demonstrate that the third country was not a safe third country in its particular case.

4.3.3 The Use of Drones

As has been shown in chapter 2, Italy enables Libya to carry out pull-backs of migrants' vessels by sharing the information gathered by Leonardo S.p.A.'s drones. Moreno-Lax has previously addressed the issue of genuine search-and-rescue operations. She argues that the ECtHR through its ruling in *Hirsi* dismissed the view of interdictions and rescue operations as equal.[409] She claims that rescue operations are currently being used to increase states'

[404]*Hirsi Jamaa* (n 13).
[405]*M.S.S. v. Belgium and Greece* (n 37) paras 362–368.
[406]*Kebe and Others v. Ukraine* App no 12552/12 (ECHR 12 January 2017).
[407]This case has been criticised by Vladislava Stoyanova. In her comment to the case, she criticise the ruling for being incoherent. While Hungary was considered violating article 3 ECHR for not properly assessing the risk of illtreatment upon return, no violation of article 5 was considered to be at hand since the applicant was not considered at direct risk if he was to return to Serbia. See Vladislava Stoyanova, 'Introductory note to Ilias and Ahmed v. Hungary (EUR. CT. H.R.)' (2020) 59 The American Society of International Law 495 (note).
[408]*Ilias and Ahmed v. Hungary* [GC] App no 47287/15 (ECHR 21 November 2019) para 137.
[409]Moreno-Lax 'Protection at Sea' (n 9) 12; *Hirsi Jamaa* (n 13).

interdiction possibilities while also avoiding state responsibility, and that this leaves migrants without protection at sea.[410] Moreno-Lax further argues that there are three types of interdiction; direct, indirect (where contact is avoided by for example relying on third countries and pull-backs by proxy) and interdiction by omission.[411]

Interdiction by omission is achieved by abandoning those in distress, withdrawing naval assets, reducing the areas of operation, closing ports and criminalising the activity of NGOs. Moreno-Lax particularly points out the EU's use of drones and the sharing of information with LYCG through Italian authorities – and the consequent pull-backs carried out by Lybia – as part of an example of this type of interdiction, and argues that the principle of non-refoulement and the requirement of a place of safety was not fulfilled.[412] Clearly, the situation presented by Moreno-Lax is very much similar to Italy's present strategy on the Mediterranean Sea. By applying Moreno-Lax's line of reasoning, Italy can be argued to be at fault for its use of drones, both in relation to the right to life and the principle of non-refoulement.

The reliance on Libya in border management and the fact that migrants are returned to Libya have caused serious concerns in relation to the human rights violations entailed.[413] There have been allegations that information gathered by drones are shared with Libya for the purpose of enabling pull-backs.[414] Libya is not considered a place of safety.[415] The fact that the purpose of information-sharing sometimes is said to be to enable search-and-rescue operations does, however, complicate the situation. States can share coordinates and argue (as they already do) that it is for search-and-rescue purposes when it actually leads to breaches of non-refoulement. Notwithstanding the rhetoric used by states, the conditions that migrants face

[410]Moreno-Lax 'Protection at Sea' (n 9) 8–9.
[411]Moreno-Lax 'Protection at Sea' (n 9) 9–10.
[412]Moreno-Lax 'Protection at Sea' (n 9) 12–14.
[413]Klein 'Maritime autonomous vehicles' (n 58) 5; United Nations Support Mission in Libya (UNSMIL) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya (20 December 2018).
[414]Klein 'Maritime autonomous vehicles' (n 58) 5.
[415]UNHCR, Position on Lybia (n 3).

in Libya and the risk of further removal suggest that letting migrants be returned to Libya does indeed violate the principle of non-refoulement. By sharing the information collected by drones with Libya and by supporting the Libyan Coastguard, Italy engages in actions that are inherently different from the ones in *Hirsi* in the sense that there is no contact between Italian authorities and the migrants, but the outcome is the same as in *Hirsi*, which the Court ruled as unlawful. Thus, Italy's present strategy is to carry out interceptions and returns by proxy through the LYCG. Since the outcome remains the same, this should also be considered unlawful.

Given that the reliance on LYCG results in returns to Libya, one must look at alternative ways of action for Italy not to act in violation of the principle of non-refoulement. The most straight forward alternative would be not to share the information gathered by drones with Libya. This would however still leave migrants to drown, thus violating the right to life under article 2 of the ECHR. Italy would thus need to either re-deploy its naval ships in the area and carry out search-and-rescue operations on its own or share the information with vessels who carry out the search-and-rescue operations while also allowing them to disembark on Italian soil, if no other safe option is available.

Some would argue that this would not be in accordance with current international law. There is a well-established principle in international law which awards each state the right to control the entry to its territory, to grant residence permits and to carry out expulsions. In line with this principle, the ECHR does not explicitly contain any right to access a state's territory.[416] In addition, Libya has the primary responsibility to deliver persons rescued within its search-and-rescue area to safety.[417] To require Italy to let migrants disembark on its soil, or to argue that Italy should be obliged to carry out search-and-rescue operations within the Libyan search-and-rescue area might

[416]Council of Europe/European Court of Human Rights, 'Guide on the case-law of the European Convention on Human Rights: Immigration' (n 401) paras 2–4.
[417]Klein 'Maritime autonomous vehicles' (n 58) 3; SOLAS Convention (n 47) Chapter V Regulation 33.1-1.

therefore be considered too far-reaching. On their own, these objections are reasonable to make from a purely legal perspective.

However, having the information that a person is in distress at sea without acting upon it results in a breach of the right to life. Similarly, sharing the information with Libya does lead to a breach of the principle of non-refoulement. In light of this, the only alternative left is for Italy to share the information with actors who do carry out genuine search-and-rescue operations, or to carry them out on its own. Indeed, the Court has ruled that the rights are to be interpreted in a way which makes them effective in practice. This should be given particular importance in relation to the right to life and the principle of non-refoulement, since these are two of the core rights of the ECHR, with the principle of non-refoulement having *jus cogens* status. Thus, it could be argued that the right to life and the principle of non-refoulement are closely intertwined, and that the current strategy adopted by Italy violates them both.

4.4 Conclusion

The purpose of this chapter was to answer the third sub-question of the thesis, which reads as follows:

> *Does the use of drones for the purpose of monitoring irregular migrants violate the right to life and the principle of non-refoulement in the ECHR?*

To answer this question, the chapter began by addressing the right to life. This was done by first analysing article 2 of the ECHR, and then interpreting what the article entails in relation to migrants in distress at sea. It was then assessed whether the use of drones in this context violates the right to life. The chapter then continued by addressing the principle of non-refoulement. This was done by first analysing article 3 of the ECHR, and then interpreting what the article entails in relation to migrants at sea. It was then assessed whether the use of drones in this context violates the principle of non-refoulement. The answer to the third sub-question will now be concluded.

Italy's use of drones does violate the right to life, since Italy does not fulfil its positive obligations under article 2 of the ECHR interpreted in the light of UNCLOS, SOLAS and SAR. The main reason for this is that Italy fails to deploy other assets in parallel with the drones, which when deployed on their own cannot be sufficient to carry out search-and-rescue operations. It is thus not the deployment of the technology itself, but rather how it is used, which raises concerns. In fact, if used for genuine search-and-rescue operations rather than push- or pull-backs, drones could be used to protect the right to life.

Italy's use of drones also violates the principle of non-refoulement under article 3 of the ECHR, since the information gathered is shared with the Libyan Coast Guard. Italy thereby enables pull-backs to Libya, where migrants are exposed to the risk of death, torture and other inhuman and degrading treatment.

The thesis will now be concluded with a few final remarks (chapter 5).

5 Final Remarks

The purpose of this thesis was to examine how one specific aspect of the border management industry – the use of drones for surveillance purposes – affects the human rights of irregular migrants. The research question was therefore: *Does the use of drones in border control engage state responsibility under the ECHR?* By answering and discussing the research question, this chapter will now conclude the thesis. This will be done by drawing upon the conclusions of the previous chapters.

5.1 Conclusions

The second chapter set out to answer the first sub-question: *In what way is Italy making use of drones produced by Leonardo S.p.A. in its border management operations, what problems does it cause and what are the underlying reasons for the use?* The chapter concluded that Italy uses drones in its border management to keep migrants from reaching its borders. The state benefits from both its own contracts with drone operators, and contracts which Frontex has entered into. The Italian arms seller Leonardo S.p.A. is one of the companies which provide the services. Further, the chapter concluded that the use of drones has led to less search-and-rescue operations being carried out, and resulted in increased reliance on Libya to carry out pull-backs. Lastly, the securitisation of migration and the privatisation of border management was held to be the main underlying reasons for the use of drones.

The third chapter answered the second sub-question: *Does Italy exercise jurisdiction in relation to the adverse human rights impact that the use of drones has on migrants?* The chapter concluded that whether Italy exercises jurisdiction in relation to the impact the use of drones have on migrants depends on which notion of jurisdiction is applied. It was considered unlikely that jurisdiction would arise under any of the traditional notions, which are the only ones currently accepted by the ECtHR. Under the three non-traditional notions of jurisdiction, however, Italy is more likely to be

considered exercising jurisdiction. Under Milanovic's approach, jurisdiction would only arise in regard to negative obligations. This might be enough to offer migrants protection from the pull-backs, but not from the loss of lives at sea. In contrast, Shany's approach would trigger Italian jurisdiction in regard to the right to life, but not the principle of non-refoulement. The approach suggested by Moreno-Lax is the one most likely to give Italy jurisdiction in regard to both the right to life and the principle of non-refoulement. In light of these findings, this chapter will now offer a discussion on what notion of jurisdiction *should* be applied, notwithstanding the fact that only the traditional forms have been accepted by the Court. Before that, however, the fourth chapter will be recalled.

The fourth chapter was devoted to the third sub-question: *Does the use of drones for the purpose of monitoring irregular migrants violate the right to life and the principle of non-refoulement in the ECHR?* It was concluded that Italy's use of drones does indeed violate the right to life, since Italy does not fulfil its positive obligations under article 2 of the ECHR interpreted in the light of UNCLOS as well as SOLAS and SAR. It is *how* drones are used, rather than the technology itself, that leads to this conclusion. Currently, Italy fails to deploy other assets along with the drones, which on their own cannot carry out search-and-rescue operations. If drones were used in combination with naval assets within the frame of genuine search-and-rescue operations, they could serve as a valuable tool for the protection of the right to life. Further, it was concluded that the use of drones also violates the principle of non-refoulement under article 3 of the ECHR, since the information gathered is shared with the Libyan Coast Guard and thus enables pull-backs to Libya where migrants are exposed to the risk of death, torture and other inhuman and degrading treatment.

In sum, the use of drones in border control has the potential of engaging state responsibility under the ECHR, with the critical question being the one concerning jurisdiction rather than whether the rights in substance have been violated.

5.2 Discussion

That human rights are indeed *human* rights is the normative starting point of this thesis, and particularly for the following discussion on what notion of jurisdiction should be applied.

In light of the principle of universality, the traditional notions of jurisdiction are normatively unacceptable. The main rule, that a state exercises jurisdiction within its own territory, is in conflict with universality since it allows a state to do abroad what it would not have been allowed to do within its territory. It is true that states have different capacity to ensure human rights depending on where in the world violations take place. For example, it would be absurd to require Portugal to carry out search-and-rescue operations on the other side of the Atlantic Ocean. But this is rarely what is suggested by those in favour of extraterritorial application of human rights. In the current contex, Italy has clearly had the capacity to carry out search-and-rescue operations in the Mediterranean Sea. Indeed, it used to do so but now chooses not to. It is hard to imagine a similar line of argument where Italy would refrain from undertaking rescue operations with regard to Italian nationals or even Europeans. Thus, the territorial notion of jurisdiction indirectly leads to differential treatment without justification.

The normatively unacceptable result of applying the main rule of traditional jurisdiction has led to the adoption of the spatial and personel models, in an attempt to mitigate the effects of territoriality. By allowing for extraterritorial application in *some* cases, the spatial and personal model are better than the territorial one from the perspective of universality. However, the models do not offer a clear and predicatable rule, as we have seen in the inconsistent case law of the ECtHR, which risks rending the human rights protection ineffective. More importantly, states can indeed violate human rights without necessarily exercising jurisdiction under any of these models. Making use of drones for border management and sharing this information with third

countries where migrants face a risk of refoulement instead of carrying out search-and-rescue operations is an example of precisely this.

All the non-traditional notions of jurisdiction covered in this thesis seem to fulfill the principle of universality to a larger extent, since they allow for a broader application of the ECHR. However, as already stated in the the chapter on theory and perspective, the principle of effectiveness must also be considered.

The model proposed by Milanovic does to a larger extent meet the requirements of the principle of universality than the traditional notions, since it allows for the establishment of jurisdiction in more cases. However, with regard to Italy's use of drones, it has been concluded that jurisdiction can only be established in regard to the principle of non-refoulement, and not the right to life. This is a disadvantage of this model, in light of the principle of universality. However, the model is said to allow for a flexible approach when ruling on the merits of a case. How this would actually play out in practice is not certain. Despite the criticism raised by for example Shany, the model benefits from more clarity than the spatial and personal models. It is hard to tell whether the model would have an impact to strive for, and whether it would respect the integrity of the ECHR regime, without having seen the model being applied in practice. In relation to Italy's use of drones this is doubtful. Applying the model would as already stated result in states not being allowed to share information collected by drones with third countries where migrants might face torture. However, it would also result in states *not* being required to try to save the lives of those detected by their drones. While it seems normatively defensible to require Italy not to share coordinates of migrant vessels with Libya, it is questionable whether it is sound to not also require them to take further action on the gathered information. Applying the model risks leading to situations where Italian authorities know – and are possibly the only ones knowing – that people are drowning, without being required to do anything about it. It is unclear why it would be more okay to let someone drown than to send the person back to Libya (if one has to make such a choice in the first place).

Similar criticism can be raised in regard to the model proposed by Shany. While the model does not make a clear-cut differentiation between different types of state obligations, it could in this context lead to Italy having jurisdiction only in relation to the right to life, and not with regard to the principle of non-refoulement, as concluded in chapter three. The result is thus – in this specific context – the opposite of the result of Milanovic's suggestion. It is highly doubtful whether it would be in line with the essence of the ECHR regime to rescue migrants only to send them back to places where they face risks of torture and ill-treatment. This concern could be resolved, however, by interpreting the right to life and the obligation to carry out search-and-rescue operations as also requiring the state to allow for disembarkation within its territory (if that territory constitutes a place of safety, that is). Despite states' reluctance there is, as concluded in chapter three, good ground for such an interpretation. Since the establishment of jurisdiction under Shany's model depends on whether the state is in a position to ensure human rights, which probably would have to be decided on a case-to-case basis, it seems to contain a certain amount of flexibility. This does, however, have a negative impact on the clarity and predictability of the rule.

The model proposed by Moreno-Lax is the one which to the largest extent lives up to the principle of universality, in relation to Italy's use of drones. It is the only model under which jurisdiction could be established both in relation to the right to life and the principle of non-refoulement in this context. Similar to Shany's model, Moreno-Lax's proposals give plenty of room for flexibility, since the jurisdiction assessment must be made on a case-by-case basis and allow for many different aspects to be taken into account. As with the other models, it is hard to determine what impact the model will have on human rights and the integrity of the regime before it has been applied in practice. In comparison with Milanovic's and Shany's models, there are less apparent risks for normatively doubtful or arbitrary results when applying this model. However, the model will probably not be very foreseeable, given the many different aspects and various types of cases which could be considered under the model. It seems like the potential of covering many types of

situations is both the strength and the weakness of this approach, since it is in line with the principle of universality but in conflict with the principle of effectiveness. Nevertheless, in regard to universality and in the context of the use of drones in border management, the model suggested by Moreno-Lax is the one to prefer since it is under this model that state responsibility is most likely to be engaged. As a result, the model is the most efficient in ensuring the right to life and the principle of non-refoulement in relation to migrants subject to the use of drones in border management.

While the findings of this thesis are specific for the cooperation between Italy, Leonardo S.p.A. and Libya, they may apply to many other contexts as well. Firstly, there are many other countries besides Italy taking part in similar settings on the Mediterranean Sea, either independently or through international organisations. Naturally, there are also many other companies besides Leonardo S.p.A. that have been awarded similar contracts. In addition, other rights than the right to life and the principle of non-refoulement could also be considered in relation to the use of drones. This could for example be the case in the Balkans, where drones are currently put to use, but might not result in loss of life. Moving forward, it should therefore be considered whether also international organisations and/or the companies involved could be held responsible for human rights violations caused by the contracts they have entered into.

Bibliography

INTERNATIONAL LEGAL INSTRUMENTS

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (opened for signature 4 November 1950, entered into force 3 September 1953) (ECHR).

International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 2 (SOLAS).

International Convention on maritime search and rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR).

Statute of the International Court of Justice (1946) United Nations (ICJ Statute).

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

Vienna Convention on the Law of Treaties (with annex) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

LEGAL DOCTRINE

Books

Buzan B et al., Security: a new framework for analysis (Boulder: Lynne Rienner, 1998).

Council of Europe, Collected edition of the "Travaux préparatoires" of the European Convention on Human Rights (Vol. 3 Committee of experts 2 February - 10 March 1950, Nijhoff 1976).

Mallory C, Human rights imperialists: the extraterritorial application of the European Convention on Human Rights (Oxford: Hart, 2020).

Milanovic M, Extraterritorial application of human rights treaties: law, principles and policy (Oxford: Oxford University Press, 2011).

Papanicolopulu I, International law and the protection of people at sea (Oxford: Oxford University Press, 2018).

Contributions to edited works

Giuffré M and Moreno-Lax V, ‘The rise of consensual containment: from ‘contactless control’ to ‘contactless responsibility’ for migratory flows’ in Satvinder Singh Juss (ed), Research handbook on international refugee law (Edward Elgar, 2019).

Hutchinson T, ‘Doctrinal research: Researching the jury’ in Dawn Watkins and Mandy Burton (eds), Research Methods in Law (2nd edn, Routledge 2018).

Klein N, ‘A Maritime Security Framework for the Legal Dimensions of Irregular Migration by Sea’ in Violeta Moreno-Lax and Efthymios

Papastavridis (eds), Boat refugees and migrants at sea: a comprehensive approach: integrating maritime security with human rights (International refugee law series: volume 7, Brill 2016).

Milanovic M, 'Extraterritoriality and human rights: prospects and challenges' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control (Routledge Studies in Human Rights 2017).

Moreno-Lax V, 'Protection at Sea and the Denial of Asylum' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), The Oxford Handbook of International Refugee Law (Oxford: Oxford University Press, forthcoming).

Nollkaemper A, 'Shared responsibility for human rights violations: a relational account' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control (Routledge Studies in Human Rights 2017).

Academic articles

Csernatoni R, 'Constructing the EU's high-tech borders: FRONTEX and dual- use drones for border management' (2018) 27 European Security 175.

Davitti D, 'The Rise of Private Military and Security Companies in European Union Migration Policies: Implications under the UNGPs' (2019) 4:1 Business and Human Rights Journal 33.

Klein N, 'Maritime autonomous vehicles and international laws on boat migration: Lessons from the use of drones in the Mediterranean' (2021) 127 Marine Policy.

Léonard S and Kaunert C, 'The securitisation of migration in the European Union: Frontex and its evolving security practices' [2020] Journal of Ethnic and Migration Studies.

Molnar P, 'Technology on the margins: AI and global migration management from a human rights perspective' (2019) 8 Cambridge International Law Journal 305.

Moreno-Lax V, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) 21 German Law Journal 385.

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

Shany Y, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 Law & Ethics of Human Rights 47.

Stoyanova V, 'Introductory note to Ilias and Ahmed v. Hungary (EUR. CT. H.R.)' (2020) 59 The American Society of International Law 495 (note).

OFFICIAL DOCUMENTS

United Nations Documents

Office of the United Nations High Commissioner for Human Rights (OHCHR) in cooperation with the United Nations Support Mission in Libya (UNSMIL), Abuse Behind Bars: Arbitrary and unlawful detention in Libya (April 2018).

United Nations General Assembly (UNGA) Unlawful death of refugees and migrants: Note by the Secretary-General (15 August 2017) A/72/335.

United Nations General Assembly (UNGA) Contemporary forms of racism, racial discrimination, xenophobia and related intolerance: Note by the Secretary-General (10 November 2020) A/75/590.

United Nations Human Rights Council (UN HRC), Impact of the use of private military and security services in immigration and border management on the protection of the rights of all migrants: Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (9 July 2020) A/HRC/45/9.

United Nations Human Rights Council (UN HRC), Report on means to address the human rights impact of pushbacks of migrants on land and at sea: Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales (12 May 2021) A/HRC/47/30.

United Nations High Commissioner for Refugees (UNHCR), UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea (September 2020).

United Nations High Commissioner for Refugees (UNHCR), Global Trends: Forced Displacement in 2020 (2021).

United Nations Support Mission in Libya (UNSMIL) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya (20 December 2018).

Council of Europe

Council of Europe/European Court of Human Rights, ‘Guide on Article 1 of the European Convention on Human Rights: Obligation to respect human rights – Concepts of “jurisdiction” and imputability’ (Council of Europe/European Court of Human Rights, 2021).

Council of Europe/European Court of Human Rights, ‘Guide on Article 2 of the European Convention on Human Rights: Right to life’ (Council of Europe/European Court of Human Rights, 2021).

Council of Europe/European Court of Human Rights, ‘Guide on the case-law of the European Convention on Human Rights: Immigration’ (Council of Europe/European Court of Human Rights, 2021).

Other international organisations

Commissioner for Human Rights, 'A distress call for human rights: The widening gap in migrant protection in the Mediterranean' (Follow-up report to the 2019 Recommendation, Council of Europe 2021).

European Union Agency for Fundamental Rights, Scope of the principle of non-refoulement in contemporary border management: evolving areas of law (European Union Agency for Fundamental Rights, 2016).

International Maritime Organisation (IMO), 'Guidelines on the Treatment of Persons Rescued at Sea' Res MSC.167(78) (International Maritime Organisation 2004) IMO Doc MSC 78/26/Add.2 (IMO Guidelines).

International Maritime Organisation (IMO), 'Principles relating to administrative procedures for disembarking persons rescued at sea' (International Maritime Organisation 2009) FAL.3/Circ.194.

OTHER SOURCES

Non-governmental organisations

Akkerman M, 'Border Wars: The arms dealers profiting from Europe's refugee tragedy' (Transnational Institute and Stop Wapenhandel 2016).

Akkerman M, 'Financing Border Wars: The border industry, its financiers and human rights' (Transnational Institute and Stop Wapenhandel 2021).

News articles

Jolly J, 'Airbus to operate drones searching for migrants crossing the Mediterranean' The Guardian (20 October 2020) <https://www.theguardian.com/business/2020/oct/20/airbus-to-operate-drones-searching-for-migrants-crossing-the-mediterranean> accessed 10 July 2021.

Popoviciu A, ''They can see us in the dark': migrants grapple with hi-tech fortress EU' The Guardian (26 March 2021) <https://www.theguardian.com/global-development/2021/mar/26/eu-borders-migrants-hitech-surveillance-asylum-seekers> accessed 10 July 2021.

Howden D, Fotiadis A and Loewenstein A, 'Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over' The Guardian (4 August 2019) <https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu> accessed 10 July 2021.

McDuff P, 'Using drones to watch refugees drown exposes the inhumanity of border enforcement' The Guardian (6 August 2019) <https://www.theguardian.com/commentisfree/2019/aug/06/drones-refugees-drown-inhumanity-border-enforcement> accessed 23 November 2021.

Kingsley P, 'Privatized Pushbacks: How Merchant Ships Guard Europe' The New York Times (20 March 2020)

<https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html> accessed 27 November 2021.

Websites

Cordis 'Search And Rescue Aid and Surveillance using High EGNSS Accuracy: Drone plays lookout for sea rescue' (European Commission, 4 December 2020) <https://cordis.europa.eu/article/id/428504-drone-plays-lookout-for-sea-rescue> accessed 12 July 2021.

European Union Agency for Fundamental Rights, 'Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations - 2018' (European Union Agency for Fundamental Rights, 1 October 2018) <https://fra.europa.eu/en/publication/2019/fundamental-rights-considerations-ngo-ships-involved-search-and-rescue> accessed 12 July 2021.

European Union Agency for Fundamental Rights, 'June 2021 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights' (European Union Agency for Fundamental Rights, 18 June 2021) <https://fra.europa.eu/en/publication/2021/june-2021-update-ngo-ships-sar-activities> accessed 12 July 2021.

European Union Agency for Fundamental Rights, 'June 2020 update – NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them' (European Union Agency for Fundamental Rights, 19 June 2020) <https://fra.europa.eu/en/publication/2020/2020-update-ngos-sar-activities> accessed 27 November 2021.

European Union Agency for Fundamental Rights, 'December 2020 update – NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them' (European Union Agency for Fundamental Rights, 18 December 2020) <https://fra.europa.eu/en/publication/2020/december-2020-update-ngo-ships-involved-search-and-rescue-mediterranean-and-legal> accessed 27 November 2021.

Leonardo S.p.a., 'Falco Evo UAV System' (Electronics Division, 2019) <https://www.leonardocompany.com/documents/20142/3149033/Falco+EVO+UAV+%28mm07818%29.pdf?t=1605279126547> accessed 12 July 2021.

Leonardo S.p.a., 'Leonardo's Falco EVO drone is used to monitor irregular migration during Frontex operation' (Leonardo S.p.a. Press Release, 12 July 2019) <https://www.leonardocompany.com/en/press-release-detail/-/detail/12-07-2019-leonardo-s-falco-evo-drone-is-used-to-monitor-irregular-migration-during-frontex-operation> accessed 12 July 2021.

Mazzeo A, 'Border surveillance, drones and militarisation of the Mediterranean' (Statewatch, 6 May 2021) <https://www.statewatch.org/analyses/2021/border-surveillance-drones-and-militarisation-of-the-mediterranean/> accessed 12 July 2021.

Migration and Home Affairs, 'Eurosur' (European Commission) <https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/border-crossing/eurosur_en> accessed 12 July 2021.

Missing Migrants Project, '45,194 Missing Migrants since 2014' (Missing Migrants Project, 15 November 2021) <https://missingmigrants.iom.int/> accessed 23 November 2021.

Missing Migrants Project, '1,644 Missing Migrants Recorded in Mediterranean (2021)' (Missing Migrants Project, 18 November 2021) <https://missingmigrants.iom.int/region/mediterranean?region_incident=All&route=All&year%5B%5D=2500&month=All> accessed 23 November 2021.

Monroy M, 'Drones for Frontex: unmanned migration control at Europe's borders' (Statewatch, 27 February 2020) <https://www.statewatch.org/analyses/2020/drones-for-frontex-unmanned-migration-control-at-europe-s-borders/> accessed 12 July 2021.

Gutierrez P, 'UAS Secure the Mediterranean' (Inside Unmanned Systems, 21 April 2021) <https://insideunmannedsystems.com/uas-secure-the-mediterranean/> accessed 12 July 2021.

Statewatch, '€67 million for maritime surveillance drones' (Statewatch, 13 October 2016) <https://www.statewatch.org/news/2016/october/67-million-for-maritime-surveillance-drones/> accessed 12 July 2021.

Statewatch, 'Romania, Poland and Czech Republic acquiring drones for border surveillance, military purposes' (Statewatch, 10 August 2020) <https://www.statewatch.org/news/2020/august/romania-poland-and-czech-republic-acquiring-drones-for-border-surveillance-military-purposes/> accessed 12 July 2021.

Statewatch, 'Italy and Frontex now monitor the Mediterranean Sea with large drones' (Statewatch, 27 October 2020) <https://www.statewatch.org/news/2020/october/italy-and-frontex-now-monitor-the-mediterranean-sea-with-large-drones/> accessed 12 July 2021.

Table of Cases

ECHR

Osman v. The United Kingdom [GC] App no 23452/94 (ECHR 28 October 1998).

Othman (Abu Qatada) v. the United Kingdom App no 8139/09 (ECHR 17 January 2012).

Pad and others v. Turkey App no 60167/00 (ECHR, 28 June 2007).

Saadi v. Italy [GC] App no 37201/06 (ECHR 28 February 2008) ECHR 2008-II.

Smiljanić v. Croatia App no 35983/14 (ECHR 25 March 2021).

Soering v. the United Kingdom (1989) Series A no 161.

Solomou and Others v. Turkey State App no 36832/97 (ECHR, 24 June 2008).

W. v. Ireland App no 9360/81 (Commission decision 28 February 1983) Decisions and Reports 32.

W. v. the United Kingdom App no 9348/81 (Commission decision 28 February 1983) Decisions and Reports 32.

X v. the United Kingdom App no 7547/76 (Commission decision, 15 December 1977) Decisions and Reports 12.

Öcalan v. Turkey App no 46221/99 (ECHR, 12 May 2005) ECHR 2005-IV.

ICJ

Corfu Channel Case (United Kingdom v. Albania) (Judgment) [1949] ICJ Rep 244.

UN Human Rights Committee

UN Human Rights Committee, *Sergio Ruben Lopez-Burgos v Uruguay* Communication No 52/1979 (29 July 1981) UN Doc CCPR/C/13/D/52/1979.