



From Passive to Functional: The Legal Protection of People in Distress at Sea

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Abstract

The Geneva Declaration on Human Rights at Sea notes that human rights law should apply at sea to the same extent and degree they apply on land. Truly but not entirely. The precedence before the European Court of Human Rights shows a permissive loose interpretation of human rights law anent maritime enforcement operations. Rightly so, considering the exceptional circumstances at sea. In the same vein, this paper illustrates a higher standard of applying human rights law due to the law of the sea 'search and rescue' regime for persons in distress at sea. So often, these persons are described as 'boat people' or 'irregular migrants.' This higher standard causes a paradigm shift from the passive to a functional interpretation of extra-territorial positive obligation beyond the current norm.

Accordingly, this paper analyses two relevant fields of international law – i.e., human rights law and law of the sea. It focuses mainly on the concept of jurisdiction and elucidates the higher threshold of interpreting human rights law at sea using the most recent case law on persons in distress. This paper demonstrates how the integration between the law of the sea and human rights law ensures better protection of migrants at sea. However, it proposes that the relevant rules of the law of the sea constitute the jurisdictional link between States and persons in distress to prevent an interpretation of jurisdiction at sea that blurs the line between legality and morality.

Keywords

Functional jurisdiction, Law of the Sea, Human Rights, People at Sea.

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I. INTRODUCTION

On 27 January 2021, the United Nations Human Rights Committee (HRC) released its decisions in *AS and others v Malta*, and *AS and others v Italy*.¹ In these cases, the HRC applied the law of the sea (LOS) to evaluate the liability of Malta and Italy under the International Covenant for Civil and Political Rights (ICCPR) concerning the death of over 400 migrants on the Mediterranean Sea in 2013.² Based on the LOS provisions, the HRC found that the two countries exercised jurisdiction over the situation. This is the first notable incident within international human rights law (IHRL), where an adjudicatory body directly applies the LOS in interpreting the scope of IHRL jurisdiction at sea.

These decisions showcase a paradigm shift from a restrictive concept of jurisdiction under international human rights law (IHRL) to a proactive (or functional) jurisdiction. Restrictive interpretation is a choice by an adjudicatory body to limit the application of a treaty to favour State interest over the object and purpose of the treaty.³ Conversely, the functional approach widens the application of a treaty-based on the object and purpose of the treaty.⁴ Regarding jurisdiction, a functional approach bases State jurisdiction on a relational link to a violated obligation. On the other hand, a restrictive interpretation bases the application of State obligations to the establishment of jurisdiction, often narrowly interpreted.

The shift to a functional approach arises from harmonising the LOS framework and IHRL.⁵ Consequently, this paper explores these cases vis-à-vis the concept of functional jurisdiction derived from the systemic integration of LOS and IHRL. It thus helps solidify the view that LOS should inform IHRL at sea. From a maritime enforcement perspective, case law shows that the harmonisation between these two fields of law allows a loose interpretation of human rights law at sea.⁶ On the contrary, the human rights proponents argue that human rights law applies at sea to the same extent they apply on land,⁷ a seemingly right view. Yet, the situation of irregular maritime migration shows otherwise. The application of these two fields of law to irregular maritime migration reveals a 'somewhat' higher threshold for protection than on land.

¹ *AS and others v Malta*, CCPR/C/128/D/3043/2017, 27 January 2021, Human Rights Committee; see also *AS and others v Italy*, CCPR/C/130/DR/3042/2017, 27 January 2021, Human Rights Committee.

² International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171.

³ See *Wemhoff v Germany Application no 2122/64* (ECHR, 27 June 1968) para 8 (here the ECtHR implicitly describes restrictive interpretation as an interpretation which "restricts to the greatest possible degree the obligations to be undertaken by the parties" rather than align with the object and purpose of a treaty); see also Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention of Human Rights' (1999) 42 *German Yearbook of International Law* 11, 14 (where Professor Bernhardt suggests that a restrictive interpretation is done to support state sovereignty which is wrong as "every effective protection of individual freedoms restrict state sovereignty"); see also Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21(3) *European Journal of International Law* 681, 682 (Crema defines 'Restrictive interpretation' as "the interpretative choice which restricts the meaning of a text. In an original sense, it is restrictive in favour of the real intentions of the parties, as opposed to what is expressed in a text.").

⁴ Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extra-territoriality in International Human Rights Law' (2013) 7(1) *Law and Ethics of Human Rights* 47; see also *Al-Skeini and others v the United Kingdom* App no 55721/07 (ECHR, 7 July 2011) separate opinions by Lord Bonello, para 12-14; see also Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 152 (Gammeltoft-Hansen points out that the functional conception considers "the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred"); see also Tom De Boer, 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection' (2015) 28 *Journal of Refugee Studies* 118, 132 (Boer points out that the shift from a restrictive interpretation of jurisdiction to a functional approach is needed to combat the ill effect of the border control measures within the EU).

⁵ For an earlier discussion on this see 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, 417-35.

⁶ Marta Bo, 'Hassan and Others v. France; Ali Samatar and Others v. France' (2015) 30 *Int'l J Marine & Coastal L* 551.

⁷ The Geneva Declaration on Human Rights Version 1 (5 April 2019). Available: https://gdhras.com/wp-content/uploads/2019/07/HRAS_GENEVA_DECLARATION_ON_HUMAN_RIGHTS_AT_SEA_April_2019-Version1-FINAL-LOCKED.pdf. All links in this article have been accessed on 17 July 2021.

The main argument is that the LOS framework allows this higher standard because irregular migrants at sea mostly qualify as persons in distress as they face a risk of loss of life while at sea on their small boats (*aka* dinghies).⁸ Thus, this triggers the obligation to rescue under the LOS framework. The European Court of Human Rights (ECtHR) in *Hirsi Jamaa and Others v Italy, Sharifi and others v Italy and Greece* established that human rights obligations extend to irregular migrants at sea.⁹ In these cases, the ECtHR recognised that Italy's interception and repatriation of irregular migrants at sea violated the prohibition of collective expulsion requirement under Article 4 Protocol 4 of the European Convention of Human Rights (ECHR).¹⁰

In 2020, the ECtHR in *ND and NT v Spain*¹¹ seemed to have reversed its stance in upholding the rights of irregular migrants. This case is different from the above two because it happened on land. The Spanish law enforcement officials intercepted the two applicants who tried to jump over the wall demarcating Morocco and Spain.¹² As soon as they reached the ground, they alleged that the *Guardia Civil* officials handcuffed them, and took them back to Morocco and handed them over to the Moroccan authorities. The ECtHR held in favour of the Spanish authorities and found no violation of ECHR. Interestingly, the ECtHR referenced *Hirsi Jamaa* and *Sharifi* cases as the precedents but differentiated them from *ND and NT*, noting that the applicants in the former are asylum seekers who were not allowed to make their claim.¹³ Arguably, this decision should not overturn the already established jurisprudence at sea; from a LOS viewpoint, considering the duty to assist persons in distress.

Therefore, this paper evaluates how the LOS framework positively influences the human rights framework by reinforcing the duty to protect lives at sea. More concretely, LOS 'functionalises' the interpretation of jurisdiction, an approach the ECtHR has the discretion to adopt. This arguably deals with the gap in human protection created by the existence of maritime legal black holes.¹⁴ One of which is the unintended consequences of the restrictive interpretation of jurisdiction. Consequently, the rights-based framework shifts the obligation to rescue persons in distress at sea from being merely an obligation of conduct, *i.e.*, it guarantees the prescription of such duty, into an "obligation of result"¹⁵ to ensure the protection of persons in distress. Thus, a positive step towards reducing the deaths of migrants at sea.

This article first sets out the notion of jurisdiction under LOS and IHRL with a specific focus on the ECtHR to highlight the protection gap created by a passive interpretation of jurisdiction which can also affect the protection framework of migrants in the Mediterranean Sea. The following section engages with the LOS provisions relevant to irregular migration to set the stage for the argument that the LOS provides a jurisdictional link between States and distressed migrants at sea. This argument is expanded upon in the subsequent section, highlighting how the interpretation of the LOS jurisdictional link within IHRL operationalises the obligation to rescue persons in distress and human rights obligations by creating a factual relationship between States and migrants at sea (on the high seas). This is called 'functional

⁸ Yoshifumi Tanaka, 'Key Elements in International Law Governing Places of Refuge for Ships: Protection of Human Life, State Interests, And Marine Environment' (2014) 45 *Journal of Maritime Law and Commerce* 157, 160.

⁹ *Hirsi Jamaa and others v Italy* Application no 27765/09 (ECHR, 23 February 2012); see also *Sharifi and others v Italy and Greece* Application no 16643/09 (ECHR, 21 October 2014).

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950 and entered into force 3 September 1953) 213 UNTS 231.

¹¹ *ND and NT v Spain* Application nos 8675/15 and 8697/15 (ECHR, 13 February 2020).

¹² *Ibid.*

¹³ *Ibid.*, para 196.

¹⁴ Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29(2) *The European Journal of International Law* 347, 366 (Mann coined the term 'maritime legal black holes' to describe unintended legal gaps in protection flowing from international law itself).

¹⁵ Efthymios Papastavridis, "Is there a right to be rescued at Sea? A Skeptical view" (2014) 4 *Questions of International Law* 17, 21-2.

jurisdiction at sea,' which goes beyond the scope of the currently existing definition or description of the functional approach. However, the final section of this article uses the recent HRC case law to analyse the scope of functional jurisdiction at sea. Finally, this paper concludes by recapping the paradigm shifts ushered in by these recent cases but warns that the interpretation of functional jurisdiction at sea should be within the confines of the LOS.

II. BACKGROUND: JURISDICTION

State obligations under both the LOS and IHRL framework operate within the concept of jurisdiction.¹⁶ The United Nations Convention on Law of the Sea (UNCLOS),¹⁷ 'the constitution of the oceans,' ties State jurisdiction to the various maritime zones exercised through the flag, port and coastal States' prescriptive, enforcement and adjudicatory powers.¹⁸ Each form a State takes at sea (either flag, port or coastal) involves obligations it enjoys or owes to other States.¹⁹ These obligations cover all maritime zones, including areas outside national jurisdiction (high seas). However, in the case of migrant's death at sea, Mann notes that such deaths are consequentially linked to an area outside State jurisdiction where State obligations are non-functional.²⁰ If the LOS framework is built to be functional, how then can there be an area where it is not?

Mann further accurately argues that the LOS framework contains obligations relevant to migrants at sea but devoid of rights.²¹ For example, the obligation to rescue persons in distress is devoid of the right to be rescued. Hence, Papastavridis observes the obligation is one of conduct and not of result (protecting people in distress).²² Yet, all hope is not lost, Papanicolopulu argues that the systemic integration of LOS and IHRL ensures better protection of people at sea.²³ This possibility is without a doubt because the LOS is "a living, breathing instrument, fully adjustable and adjusted to emerging needs and conditions."²⁴ Thus, the predominant view is that the functionality of the LOS framework to protect lives at sea is embedded in the application of human rights at sea.²⁵ Others argue it also requires the application of LOS to human rights.²⁶ All these views are unarguably plausible.

¹⁶ Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 Human Rights Law Review 521, 521.

¹⁷ United Nations Convention on the Law of the Sea (opened for Signature 10 December 1982 and entered into force on 16 November 1994) 1833 UNTS [hereinafter referred to as "UNCLOS"].

¹⁸ For more on this see Maria Gavouneli, *Function Jurisdiction in the Law of the Sea* ((Martinus Nijhoff Publishers, 2007).

¹⁹ Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 281 (here Port State Jurisdiction is defined as "the State's power to regulate activities and standards in the port, maritime zones of another coastal state including the zones in which their port is located and areas beyond the national jurisdiction," i.e., high seas and the "Area" (the seabed of the high seas)); see also Robin R Churchill and Alan V Lowe, *The Law of the Sea* (3rd edn, Manchester University Press, 1999) 165-7 (Coastal State Jurisdiction is jurisdiction over the maritime zones, i.e., the internal waters, territorial sea, archipelagic waters, EEZ, contiguous zone and continental shelf. These maritime zones are areas within national jurisdiction, that is areas in which the State exerts territorial sovereignty (internal waters and territorial seas) and sovereign rights (EEZ and contiguous zone); Flag State Jurisdiction is a state's jurisdiction over vessels flying its flag. This jurisdiction applies wherever a ship sails, and on the high seas, the flag State generally exercises exclusive jurisdiction (UNCLOS (n17) Art.92). The high sea is a maritime zone beyond national jurisdiction: it is not owned by any State. Yet, it is subject to the flag State jurisdiction, which means the ship, everything on it, and every person involved or interested in its operation is an entity linked to the flag State).

²⁰ Itamar Mann (n14) 366-7.

²¹ *Ibid.*

²² Efthymios Papastavridis (n15).

²³ Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press, 2018) 6.

²⁴ Maria Gavouneli (n18) 59.

²⁵ See Tafsir, Malick Ndiaye, 'Human Rights at Sea and Law of the Sea' (2019) 10 Beijing Law Review 261, 261-77; see Anna Petrig and Marta Bo, 'The International Tribunal of the Law of the Sea and Human Rights' In Martin Scheinin (ed) *Human Rights Norms in 'Other' International Courts* (Cambridge University Press, 2019); Anna Petrig, *Human Rights and Law Enforcement at Sea* (Brill Nijhoff, 2014); see Brian Wilson, 'Human Rights and Maritime Law Enforcement' (2016) 52 Stanford Journal of International Law 243; see also Papanicolopulu (n23).

²⁶ 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; see also Efthymios Papastavridis (2020) (n5).

To protect the lives of persons in distress, the redefinition of extra-territorial jurisdiction from passive to functional by the ECtHR is necessary. Compared to other human rights courts,²⁷ only the ECtHR has a restrictive interpretation of jurisdiction concerning obligations under the ECHR.²⁸ Arguably, this is to protect the interest of the State parties by reducing the extra-territorial scope of State obligations under the ECHR.²⁹ However, this is a problem because the ECHR is often the "legal instrument that the 'boat refugees' or 'boat migrants' and their respective lawyers would turn to seek redress in cases of loss of life or *refoulement* practices arising from interception or rescue operations at sea."³⁰

Therefore, the section below analyses the ECtHR's interpretation of jurisdiction concerning law enforcement operations to show how this interpretation could impact the security operations towards protecting people at sea.

III. THE PROTECTION GAP

The concept of jurisdiction under IHRL extends to the maritime environment. IHRL Courts have divided their application into territorial jurisdiction and extra-territorial jurisdiction. Territorial jurisdiction means that the State exercises jurisdiction (prescriptive and enforcement jurisdiction) regarding its human rights obligation within the State's territory.³¹ The extra-territorial application of human rights principles covers areas beyond national jurisdiction: the Exclusive Economic Zone (EEZ) and the high seas. This extra-territorial application extends to a State's national human rights obligation to acts carried out by a State agent outside its territory.³² The basis of such application rests on the concepts of effective control or power/authority as termed by HRC and the Inter-American Commission on Human Rights.³³

Similarly, the ECtHR determines extra-territorial jurisdiction based on *de facto* or *de jure* principles.³⁴ *De facto* jurisdiction involves control over a territory (including the installations/platforms or the vessel) or control over the person itself. On the other hand, *de jure* jurisdiction rests upon the existence of rules of international law that attribute jurisdiction to a State. *De jure* jurisdiction is conferred on States by UNCLOS, treaty-based provisions, and customary international law in the maritime context.³⁵ Article 94 UNCLOS summarises the extent of flag State jurisdiction, which comprises the obligation to effectively exercise jurisdiction in conformity to generally accepted international regulations, procedures, and

²⁷ These are Inter-American Court of Human Rights, United Nations Human Rights Committee, African Commission on Human Rights.

²⁸ Alexander Orakhelashvili, 'Restrictive interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *European Journal of International Law* 529.

²⁹ Rudolf Bernhardt (n3).

³⁰ Efthymios Papastavridis (2020) (n5) 418.

³¹ For example, see the cases *Soering v the United Kingdom*, 7 July 1989, para 86, Series A no 161; see also *Banković and others v Belgium and 16 other States* App No 52207/99 (ECHR, 12 December 2001) para 66 (where the ECtHR points out that Article 1 of the Convention on ECHR sets a limit notably territorial on the reach of the convention).

³² See *Al-Skeini and others v the United Kingdom* (n4) paras 136- 50; see also *Al-Sadoon and Mufdhi v the United Kingdom* App no 61498/08 (ECHR, 30 July 2009) para 86-89; see also *United States v Flores*, 289 U.S. 137 (1933); see also *Lauritzen v Larsen*, 345 U.S. 571, 585 (1953).

³³ Human Rights Committee, General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add 13, adopted on 29 March 2004 (2.187th meeting) para 10; see also *Coard et Al v United States*, Report N. 109/99 - Case 10.951 (IACTHR, 29 September 1999) para 37.

³⁴ Anna Petrig, 'Human Rights in Counter-piracy operations: No Legal Vacuum but Legal Uncertainty' In Maximo Q Mejia Jr et al, *Piracy at Sea* WMU studies in Maritime Affairs (Springer, 2013) 39-42; see also (*United Kingdom*), *R (on the Application of Mazin Jumaa Gatteh Al-Skeini and others) v Secretary of State for Defence* (2004) EWHC 2911, para 48 (in this case Lord Brooke distinguishes between *de jure* and *de facto* jurisdiction as the two grounds that the ECHR can be applied extra-territorially).

³⁵ *Banković case* (n31) para 73 (the court pointed out that the other "recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on-board craft and vessels registered in, or flying the flag of, that State, in these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State").

practices and to take steps necessary to secure their observance. Regarding human rights obligations, this means ensuring that the activities onboard a vessel conforms to International Human Rights Law.

Consequently, this involves fulfilling State's human rights obligation to persons on board a ship flying its flag³⁶ but not to the extent that renders the ship as an extension of the flag State's territory for asylum-seeking procedures.³⁷ International practice recognises the flag State principle as an extra-territorial ground for applying human rights principles at sea.³⁸ In sum, jurisdiction is either territorial or extra-territorial. However, the IHRL Courts interpret the criteria for jurisdiction differently. The International Court of Justice (ICJ), the Inter-American Court of Human Rights (IACtHR), HRC and the African Commission,³⁹ except for the ECtHR, support the attribution of State responsibility as sufficient to invoke jurisdiction.⁴⁰ These Courts interpret jurisdiction as dependent on the extent an individual has been affected by the direct act or omission of a State; this is a cause-and-effect notion of jurisdiction. However, the IACtHR takes it a step further by admitting a causal link as a standalone criterion for jurisdiction. In an advisory opinion, the IACtHR notes that "a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory."⁴¹

The ECtHR does not equate jurisdiction to attribution (cause-effect) but rather based on the scope of the State's obligation; limited to effective control or a legal rule.⁴² Therefore, no jurisdiction means no obligation, which creates a gap in the protection of people. The effect of such interpretation is visible in *Banković & others v Belgium and 16 others*.⁴³ In this case, the defendants (NATO European States) launched a missile destroying the RTS facilities in Belgrade, which killed sixteen persons, with others who were seriously injured. The applicants representing their deceased family petitioned the ECtHR after failed attempts before other international courts. They claimed the bombing constituted a violation of Article 2 (the right to life), Article 10 (freedom of expression) and Article 13 (the right to an effective remedy). The Governments argued that the ECHR Article 1 does not permit a cause-effect notion of extra-territorial jurisdiction. In their defence, such a notion misrepresents the purpose of the ECHR and international military collective action.⁴⁴ The ECtHR observed that the exercise of extra-territorial jurisdiction in another territory is subject to the relevant States' sovereign territorial rights.⁴⁵ Relying on this "ordinary and essentially territorial notion of jurisdiction,"⁴⁶ ECtHR

³⁶ Irini Papanicolopulu, 'A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea,' in Moon-Sang Kwon, Clive Schofield, and Seokwoo Lee (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff, 2013).

³⁷ Paul Ames Fairall "Asylum-Seekers and People Smuggling - From St Louis to the Tampa" 8 JCULR 21. Available: <http://www5.austlii.edu.au/au/journals/JCULawRw/2001/2.pdf>.

³⁸ *Banković case* (n31) para 59; See also *Markovic and Others v Italy* Application no 1398/03 (ECHR, 14 December 2006) para 49; see also *Assanidze v Georgia*, Application no 71503/03 (ECHR, 8 April 2004) para 137.

³⁹ The African Commission on Human and People Right interprets a cause and effect notion of jurisdiction as part of the criteria to establish a jurisdictional link, see the General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) (PULP, 2015) 10; similarly, the International Court of Justice basis jurisdiction on cause and effect see, *Sergio Euben Lopez Burgos v Uruguay*, Communication No R 12/52 (6 June 1979), UN Doc. Supp. No. 40 (A/36/40) (Final views of 29 July 1981) paras 12.2 and 12.3.

⁴⁰ Olivier De Schutter, *International Human Rights Law: Cases Materials, Commentary* (2nd edn, Cambridge University Press, 2014) 168; see also Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 Human Rights Law Review 411, 441-2.

⁴¹ Advisory Opinion (OC-23/17) Inter-American Court of Human Rights (15 November 2017) para 104(h).

⁴² Olivier De Schutter (n40)168.

⁴³ *Banković case* (n31).

⁴⁴ *Ibid*, para 43.

⁴⁵ *Ibid*, para 59.

⁴⁶ *Ibid*, para 61.

concluded that the impugned action of the respondent States does not engage their Convention responsibility.⁴⁷

Louicades rightly observes that the issue with *Banković* is that the Court's interpretation of jurisdiction is based on state-centric international law without considering the object and purpose of the Convention.⁴⁸ An otherwise teleological interpretation of the ECHR upholds the object and purpose of the Convention, which is "securing the universal and effective recognition and observance of the Rights therein."⁴⁹ In *Issa and others v Turkey*,⁵⁰ the ECtHR implicitly overruled aspects of the *Banković* case⁵¹ by recognising that the ECHR disallows a State party to perpetrate violations on the territory of another State, which it could not commit on its territory.⁵² From this, other case law involving military intervention held exceptions to *Banković* based on effective overall control (total and exclusive control by the suspecting State).⁵³ However, in 2021, the ECtHR repeated the *Banković* approach even more restrictively in *Georgia v Russia*⁵⁴ and *Hanan v Germany*.⁵⁵

The first case was about the atrocities committed by Russia during the 2008 conflict between Russia and Georgia. Georgia petitioned the ECtHR claiming Russia violated Articles 2,3,5,8, and 13 of the ECHR.⁵⁶ The ECtHR excluded events that occurred during the active phase of the hostilities (international armed conflict) from the evaluation of jurisdiction.⁵⁷ However, the events after the armed conflict fell within Russia's jurisdiction.⁵⁸ Judge Albuquerque's partly dissenting opinion expresses this authors' thoughts that this case is a "pernicious progeny"⁵⁹ of *Banković*, which is "promoting fragmentation in international law and pushing the Court to an extremely isolated position worldwide and thus discrediting its role as a human rights guarantor in Europe."⁶⁰

In *Hanan*,⁶¹ Colonel K, a German contingent of the International Security Assistance Force (ISAF) commanded by NATO, ordered an airstrike in Kunduz, Afghanistan. The Colonel ordered the airstrike because of two fuel tankers thought to have been hijacked and surrounded by insurgents but surrounded by civilians. The airstrike killed 91 civilians, including the applicant's two sons, and injured 11 civilians. The applicant complained under the procedural limb of Article 2 of the Convention that the investigation into the airstrike that killed his two sons had not been effective. The Grand Chamber found that Article 1 had been triggered, but Germany had duly fulfilled its obligation to investigate under Article 2. To the Court, the jurisdictional link was created by obligations under international humanitarian law, a bilateral

⁴⁷ *Ibid*, para 84.

⁴⁸ Loukis G Loucaides 'Determining the extra-territorial effect of the European Convention: Facts Jurisprudence and the *Banković* Case' in Loukis G Loucaides (ed), *The European Convention on Human Rights: Collected Essays* (Brill, 2007) 76.

⁴⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950 and entered into force 3 September 1953) 213 UNTS 231 [ECHR] preamble, recital 2.

⁵⁰ *Issa and others v Turkey* App no 31821 (ECHR, 16 November 2004).

⁵¹ Olivier de Schutter (n40) 176 (points out that the *Issa and other v Turkey* case indirectly overrules the *Banković* case insofar as this "latter decision seemed to imply that a State party to the Convention could not be held responsible for the consequences of acts going beyond the jurisdiction it might legitimately exercise under public international law, unless it occupies foreign territory where it exercises de facto governmental powers").

⁵² *Issa and others v Turkey* (n50) 629.

⁵³ See *Al-Sekini and others v UK* (n25); see *Al-Jedda v UK* Application no 27021/08 (ECHR, 7 July 2011); see *Hassan v UK* Application no 29750/09 (ECHR, 16 September 2014); *Jaloud v The Netherlands*, Application no 47708/08 (ECHR, 20 November 2014).

⁵⁴ *Georgia v Russia* (II), Application no 38263/08 (ECHR, 21 January 2021).

⁵⁵ *Hanan v Germany*, Application no 4871/16 (ECHR, 16 February 2021).

⁵⁶ Article 2 (right to life), Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy).

⁵⁷ *Georgia v Russia* (n54) para 140.

⁵⁸ *Ibid*, para 175.

⁵⁹ *Ibid*, partly dissenting opinion of Judge Pinto De Albuquerque, pp 201-202.

⁶⁰ *Ibid*.

⁶¹ *Hanan v Germany* (n55).

agreement between Germany and Afghanistan and Germany's domestic legislation; not the Colonel's actions.⁶² Here, in trying to escape a cause-and-effect interpretation of jurisdiction, the ECtHR implicitly recognises an even broader scope: a relevant law can provide a jurisdictional link (in this case, it was the international humanitarian law). However, in its pursuit to restrict the interpretation of jurisdiction, the ECtHR emphasised that the mere establishment of a jurisdictional link to the procedural obligation under Article 2 does not mean that the substantive act falls within Germany's jurisdiction or responsibility.⁶³

This recent jurisprudence reiterates the *Banković* position that a State agent's extra-territorial actions and effect do not necessitate jurisdiction. In *Hanan*, although the Government argued that the airstrike did not lead to an accountability gap,⁶⁴ but surely it led to a protection gap. In *Georgia*,⁶⁵ the Court further restricted IHRL obligation to applying only in time of peace and showing the passive interpretation of jurisdiction as a limitation to people's protection. Indeed, as Roxstorm *et al* observe, this *Banković* approach "has resulted in the divide between enforcement and protection."⁶⁶ Nonetheless, the *Hanan* case shows a ray of hope at sea because it recognises that the law can provide a jurisdictional link.

Accordingly, the argument in this article is that the LOS framework provides a jurisdictional link between the 'State and boat people,' reinforcing the extra-territorial applicability of positive obligations within the human rights framework. This changes the interpretation of jurisdiction from 'passive,' *i.e.*, State's power to refrain from human rights violations into functional, *i.e.*, State's ability to protect persons in distress. Through this, the LOS obligation to rescue changes from merely that 'of conduct,' to that 'of result.'

IV. LAW OF THE SEA FRAMEWORK

Article 33 of UNCLOS gives States the ability to exercise the control necessary to prevent the infringement of their immigration laws within their territorial sea.⁶⁷ This authority exists in the territorial sea based on Article 19(g) of UNCLOS, which qualifies loading/unloading of persons contrary to State immigration law and falls within non-innocent passage under Article 25 of UNCLOS and States take measures to prevent.⁶⁸ The two maritime security challenges that fit into Article 19(g) of UNCLOS description are people smuggling and trafficking in human persons who are both forms of irregular migration.⁶⁹ States respect Article 18(2) of UNCLOS in exercising such criminal jurisdiction over their maritime borders, which gives an exception to persons in distress to stop and anchor at a port and Article 98 of UNCLOS, which imposes the

⁶² *Ibid*, paras 137-39.

⁶³ *Ibid*, para 143.

⁶⁴ *Ibid*, para 107.

⁶⁵ *Georgia v Russia* (n54).

⁶⁶ Erik Roxstrom, Mark Gibney, and Terje Einarsen, 'The Nato Bombing Case (*Banković Et Al. V. Belgium Et Al.*) and the Limits of Western Human Rights Protection' (2005) 23 Boston University International Law Journal 55, 139.

⁶⁷ UNCLOS (n17) Article 33.

⁶⁸ Dale Stephens, 'Comparative Approaches to Security and Maritime Border Control' (2006) 81 Int'l L Stud Ser US Naval War Col 19, 23.

⁶⁹ For definition see, The United Nations Convention Against Transnational Organized Crime and the supplementing Protocols (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209. Annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 3(a) defines "trafficking in persons" to mean "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation". Annex III, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime Article 3(a) defines "smuggling of migrants" to mean "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."

duty to assist persons in distress. Hence, border control measures to combat trafficking and people smuggling should include the search and rescue obligation.

State's sovereign right to protect their borders recognised by UNCLOS does not extend to the high seas, as it is an area beyond national jurisdiction where no State has sovereign rights.⁷⁰ However, the current EU practice of externalisation of border control measures is a bid for the EU States to control the high seas to curb irregular migration indirectly.⁷¹ These policies influence the nature of the EU's security operations in the Mediterranean Sea. Before such policies, the security operations had a search and rescue mandate,⁷² but currently, the EU follows a hardened security approach with no search and rescue task.⁷³ Some EU States even criminalise NGOs that assist persons in distress for illegal entry or peoples smuggling.⁷⁴ Critics conclude this hardened security model is causing the increased rate of migrant deaths in the Mediterranean,⁷⁵ meaning the reoccurring violation of the right to life.

Nonetheless, Article 98 UNCLOS extends the positive obligation to assist persons in distress to all maritime zones, including the high seas.⁷⁶ Article 98 UNCLOS is a two-limb provision relevant to irregular maritime migration. The first limb provides that States shall require the master of a ship flying its flag "to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him."⁷⁷ This first limb shows that the requirement for establishing jurisdiction is 'if informed', *i.e.*, a distress call. There is no need for physical contact, as only knowledge of the fact suffices to trigger the obligation to rescue.

The second limb is that coastal States "shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring states for this purpose."⁷⁸ To fulfil this, States adopted the 1979 International Convention on Maritime Search and Rescue (SAR Convention)⁷⁹ and the 1974 International Convention for the Safety of Life at Sea (SOLAS).⁸⁰ These maritime conventions provide specific arrangements concerning the provision and coordination of search and rescue (SAR) services from different States by their regional coordination centre.⁸¹ The SAR Convention divides the high seas into search and rescue regions assigned to particular States.

⁷⁰ UNCLOS (n17) Article 89 provides that "no State may validly purport to subject any part of the high seas to its sovereignty."

⁷¹ Isabella Lloyd-Damjanovic, 'Criminalization of Search-and-Rescue Operations in the Mediterranean Has Been Accompanied by Rising Migrant Death Rate' October 9, 2020. Available: <https://www.migrationpolicy.org/article/criminalization-rescue-operations-mediterranean-rising-deaths>.

⁷² *Ibid.*

⁷³ The current operations is EU NAVFOR Med Irini. Available: <https://www.operationirini.eu/about-us/>.

⁷⁴ Isabella Lloyd-Damjanovic, (n71).

⁷⁵ *Ibid.*

⁷⁶ UNCLOS (n17) Article 98 provides that "1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call. 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose."

⁷⁷ *Ibid.*, Article 98(1)(b).

⁷⁸ *Ibid.*, Article 98(2).

⁷⁹ International Convention on Maritime Search and Rescue (SAR) 1403 UNTS (adopted 27 April 1979, entered into force 22 June 1985).

⁸⁰ International Convention for the Safety of Life at Sea (SOLAS) (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 3.

⁸¹ SOLAS (n80) chapter V, Regulation 33; see also, SAR (n79) Chapter 4.6; see also International Convention on Salvage (Salvage Convention) 1953 UNTS 165 (adopted 28 April 1989, entered into force 14 July 1996).

The State responsible for each such region is to ensure that the rescued persons are disembarked from the rescuing ship and delivered to a place of safety.⁸²

The implication of these other conventions within the second limb of Article 98 UNCLOS is that apart from a distress call being a jurisdictional link, the SAR regions constitute another link for coastal States. Even though no physical contact is made, the presence of persons in distress on a State's SAR region triggers the obligation to rescue. This does not take away from the first limb requirement but complements it. Thus, the distress call and the SAR region under the LOS framework creates a link between States (flag and coastal) and persons in distress. It is safe to say, the LOS framework itself establishes grounds for a 'contactless' jurisdictional link. The question then is how this influences the human rights framework concerning irregular migrants at sea.

V. 'BOAT PEOPLE': LAW OF THE SEA AND HUMAN RIGHTS LAW

The LOS framework protects migrants through the duty to protect persons in distress at sea. Although no legal framework recognises a corresponding right to be rescued, the IHRL framework offers other rights. The Office of the UN High Commissioner for Human Rights highlights the core international instruments that refer to the rights migrants are entitled to irrespective of their status.⁸³ These are:

- (i) The right to life, liberty and security, freedom from arbitrary arrest or detention, and the right to seek and enjoy asylum from persecution.
- (ii) The right to non-discrimination.
- (iii) The prohibition of torture, cruel, inhuman, or degrading treatment or punishment, the right to be protected from abuse and exploitation, the right to be free from slavery and involuntary servitude.
- (iv) The right to a fair trial and legal redress.
- (v) And the right to protection of economic, social, and cultural rights, including the right to health, an adequate standard of living, social security, adequate housing, education, and just and favourable conditions of work.⁸⁴

Nonetheless, the above rights are only enforceable if there is a jurisdictional link. It is well established that an interception operation at sea suffices as a jurisdictional link.⁸⁵ From a LOS perspective, provisions involving persons in distress creates a contactless basis for jurisdiction.⁸⁶ Meaning, a situation where there is no physical contact, yet the law itself recognises a link sufficient for establishing State jurisdiction. However, from an IHRL view, it is inconclusive whether a distress call or SAR region can establish *de facto* jurisdiction?

⁸² SAR Convention (n79) paragraph 3.1.9; see also SOLAS Convention (n80) Regulation 33 (as amended), paragraph 1-1.

⁸³ François Crépeau and Bethany Hastie, 'The Case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights' (2015) 17 European Journal of Migration 157, 161; see also United Nations Human Rights, Office of the High Commissioner, 'Migration and Human Rights: Improving Human rights-based governance of international migration' (2012); available https://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf; see also the International Justice Resource centre (IJRC), 'Immigration and migrants' rights,' for a more detailed analysis of these rights. Available: <https://ijrcenter.org/thematic-research-guides/immigration-migrants-rights/>.

⁸⁴ *Ibid.*

⁸⁵ See ECHR case law: *Hirsi Jamaa and Others v Italy* (n9); see also in *Sharifi and others v Italy and Greece* (n9); see also UN Committee Against Torture (CAT) cases: *Sonko (On Behalf of Sonko) v Spain*, U.N. Doc. CAT/C/47/D/368/2008 (25 November 2011); *JHA v Spain*, U.N. Doc.CAT/C/41/D/323/2007 (21 November 2008).

⁸⁶ For more of this, see Violeta Moreno-Lax (n26).

Trevisanult argues that a distress call creates a jurisdictional link because it informs the State of the persons in distress even if they are not within the States SAR zone.⁸⁷ In *Hirsi Jamaa*, the Italian Government submitted that there was no jurisdictional link since the operation was a rescue operation.⁸⁸ On the other hand, the applicants argued that as soon as the rescued persons boarded the Italian ship, they came under the exclusive control of Italy. In supporting the applicant's submission, the Court opined that despite the nature of the operation "in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities."⁸⁹ Here, the Court considers the interception, *i.e.*, boarding of the vessel, a jurisdictional link. Furthermore, the Court referenced cases to show that the presence of jurisdiction, *i.e.*, the exercise of control and authority over an individual or area, induces a State's obligation under the ECHR.⁹⁰

Jurisdiction involves State control which should be effective, overall, and normative.⁹¹ Besson points out that State control cannot merely be claimed but must be effective and established.⁹² Relating this to the above discussion on whether a distress call can establish a jurisdictional link, it is dependent on the State's response to it. Two questions are necessary here. First, does the response to a distress call constitute an interception? The International Organization for Migration (IOM) simply notes that interception is a means of enforcing domestic laws extraterritorially.⁹³ Meanwhile, noting that there is no general definition of interception, the UN High Commissioner for Refugees (UNHCR) has defined it as encompassing "all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination."⁹⁴ Therefore, the response to the distress call is arguably an external measure if the response prevents, interrupts, or stops the movement of persons.

Second, does the measure have to be physical to establish jurisdiction? Physical contact through boarding a vessel is the norm and has been prevalently acknowledged by the courts as sufficient in establishing jurisdiction.⁹⁵ For instance, case law already established that interception involving boarding constitutes effective overall control.⁹⁶ However, the normative dimension of jurisdiction shows that direct physical contact through boarding is not

⁸⁷ Seline Trevisanult, 'Is there a right to be rescued at sea? A constructive view' (2014) 4 QIL 3,12-14.

⁸⁸ *Hirsi Jamaa* case (n9) para 65.

⁸⁹ *Ibid*, para 81.

⁹⁰ *Ibid*, paras 71-75.

⁹¹ Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857, 872 (here Besson defines effective to mean that "the state's power should be effective and exercised, and not merely claimed," overall means "it should be exercised over a large number of interdependent stakes, and not one time only and over a single matter only," and normative means "it should be exercised in a normative fashion so as to give reasons for action, and not as mere coercion").

⁹² *Ibid*.

⁹³ International Organisation for migration (IOM), 'Protection of migrants at sea' (IOM, 2018) 47. Available: https://publications.iom.int/system/files/pdf/protection_of_migrants_at_sea.pdf.

⁹⁴ UNHCR, Executive Committee of The High Commissioner's Programme 'Interception Of Asylum-Seekers And Refugees: The International Framework And Recommendations For A Comprehensive Approach' (9 June 2000) EC/50/SC/CRP.17 para 10. Available: <https://www.unhcr.org/excom/standcom/3ae68d144/interception-asylum-seekers-refugees-international-framework-recommendations.html>.

⁹⁵ For example, see *Rigopoulos v Spain* Application no 37388/97 (ECHR, 12 January 1999); see also *Medvedyev v France* Application no 3394/03 (ECHR, 29 March 2010); see also *Vassiss and others v France* Application no 62736/09 (ECHR, 27 June 2013). In these cases, the ECtHR ruled that there was a jurisdictional link (*de facto*) between the States and the applicants because of the physical control over the ships and the crew members. For more the interaction between human rights law and enforcement operations at sea, see Anna Petrig, 'Human Rights in Counter-piracy operations: No Legal Vacuum but Legal Uncertainty,' in Maximo Q Mejia Jr, Chie Kojima, Mark Sawyer (eds), *Piracy at Sea WMU studies in Maritime Affairs* (Springer, 2013) 39-42; see also Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspect* (Brill Nijhoff, 2014); Brian Wilson, 'Human Rights and Maritime Law Enforcement' (2016) 52 Stanford Journal of International Law 243.

⁹⁶ *Hirsi Jamaa* case (n9) para 75.

quintessential to interception operations.⁹⁷ For example, in the *Women on Waves* case, the ECtHR acknowledged the presence of the Portuguese naval ship blocking the entrance of the *Borndiep* ship carrying the NGO, Women on Waves members (even without boarding, and only providing a mere request to stay away) as a breach of Article 10 of the ECHR (the right to freedom of expression and information).⁹⁸ This developing case law made Gammeltoft-Hansen conclude that:

“A strong presumption prevails that any interdiction measure, even if not amounting to effective control over individuals or a geographical area, through the act itself would entail jurisdiction and thus an obligation on behalf of the acting State to respect basic rights under international refugee and human rights law.”⁹⁹

Furthermore, in January 2019, the chamber of the ECtHR decided, by a majority, to grant an interim measure concerning the vessel *Sea Watch 3*, which had 47 migrants on board and was refused disembarkation by the Italian Government.¹⁰⁰ The applicants filed a complaint that the rescued migrants were detained onboard without a legal basis, suffering inhuman and degrading treatment, with the risk of returning to Libya. In its decision, the Court did not grant the applicants’ requests on disembarkation but requested the Italian Government to provide necessary assistance to the rescued migrants. At the same time, they anchored outside their territory. Here, without dealing with the substantial issue, the Court implicitly acknowledges Italy’s refusal to allow entry as a sufficient jurisdiction link to demand the performance of an obligation towards those in distress on board the vessel. Nevertheless, looking at the ECtHR’s jurisprudence, it is inconclusive whether a distress call is sufficient to establish a jurisdictional link.¹⁰¹

Although the ECtHR stance is not clear on this concept of ‘contactless control,’ other adjudicatory bodies have recently upheld it. For example, the responses to the ECtHR’s pending case of *SS and others v Italy* are relevant.¹⁰² The Global Legal Action Network (GLAN), in May 2018, brought this case before the ECtHR. It concerns the alleged connivance of Italy with the Libyan Coast Guard’s (LYCG) to intercept a sinking migrant dinghy on the high seas, prevent rescue attempts by an NGO vessel and the LYCGs subsequent degrading treatments of the rescued migrants.¹⁰³ The United Nations High Commission for Refugees (UNHCR), in its submission concerning the case, notes that:

“Where a State’s coordination or involvement in a SAR operation, in view of all the relevant facts, is likely to determine the course of events, UNHCR’s view is that the concerned State’s negative and positive obligations under applicable international refugee and human rights law, including non-refoulement, are likely to be engaged.”¹⁰⁴

⁹⁷ Samantha Beeson (n91) 865.

⁹⁸ *Women on Waves and Others v Portugal* Application no 31276/05 (ECHR, 3 February 2009).

⁹⁹ Thomas Gammeltoft-Hansen (n4) 125.

¹⁰⁰ Council of Europe ‘ECHR grants an interim measure in case concerning the *Sea Watch 3* vessel’ (February 2019). Available: https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/newsletter-february-2019/-/asset_publisher/cVKOAoroB0tI/content/echr-grants-an-interim-measure-in-case-concerning-the-seawatch-3-vessel?inheritRedirect=false.

¹⁰¹ Samantha Beeson (n91) 877.

¹⁰² *SS and others v Italy* Application no 21660/18 (ECHR, communicated on 26 June 2019).

¹⁰³ Andreina De Leo ‘SS and others v Italy Application No. 21660/18’ (6 January 2020) Public International Law and Policy Group Available: <https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya>.

¹⁰⁴ UN High Commissioner for Refugees (UNHCR), *Submission by the UNHCR in the case of S.S. and Others. v. Italy* Application no 21660/18 before the European Court of Human Rights (14 November 2019) para 6.1.

Thus, to the UNHCR, Italy's involvement, even if not physical, in the operation can trigger a jurisdictional link. This submission integrates the LOS SAR provisions and human rights obligations. Papastavridis and Moreno-Lax argue that the LOS model of jurisdiction should find expression in the ECtHR's interpretation of jurisdiction.¹⁰⁵ Such an approach allows for functional jurisdiction beyond the *Banković* model. Judge Bonello in *Al-Skeini & others v The United Kingdom* enunciated the idea of functional jurisdiction in these words:

"Jurisdiction [...] ought to be functional - in the sense that when it is within a State's authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction."¹⁰⁶

Accordingly, Judge Bonello views functional jurisdiction as one that holds States liable for breaches within their authority and control. To Hugh and Lawson, this includes a factual relation promoting a cause-and-effect notion of jurisdiction, where States are responsible for the consequences of their conduct wherever performed.¹⁰⁷ Before the *Banković* approach, the ECtHR admitted the factual idea of jurisdiction in *Drozd and Janousek v France and Spain*. Here, the ECtHR recognised that:

"The term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory."¹⁰⁸

In the same light, Shany argues that functionalism should serve as the basis for the extra-territorial application of IHRL; this requires States to protect human rights when they can do so.¹⁰⁹ Consequently, Shany proposes a more proactive positive obligation. State practice shows that States accept factual relations in interpreting the extra-territorial application of human rights.¹¹⁰ However, such perception tends to be limited to only negative obligation, *i.e.*, States should refrain from actions that affect the enjoyment of human rights. Conversely, States reject the idea that extra-territorial positive obligations extend within factual relations between the State (through its agents) and individuals in other territories.¹¹¹ Thus, Shany's view is an unpopular opinion in State practice.

Nevertheless, more recently, the HRC has made progress in cementing Shany's functional approach in IHRL discourse. In 2018, the HRC adopted General Comment No 36¹¹² concerning the right to life under Article 6 of the International Covenant on Civil and Political Rights Covenant (ICCPR). According to para 63, persons are subject to the jurisdiction of a State when that State "exercises power or effective control"¹¹³ over their "enjoyment of the right to

¹⁰⁵ Violeta Moreno-Lax (n26).

¹⁰⁶ *Al-Skeini and Others v The United Kingdom* (n4).

¹⁰⁷ Rick Lawson, 'Life after *Banković*: On the Extraterritorial Application of the European Convention on Human Rights', in Fons Coomans & Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 83; see also Hugh King (n19) 521.

¹⁰⁸ *Drozd and Janousek v France and Spain* Application no 12747/87 (ECHR, 26 June 1992) para 91.

¹⁰⁹ Yuval Shany (n4) 47.

¹¹⁰ Monika Heupel 'How do States Perceive Extraterritorial Human Rights Obligations? Insights from the Universal Periodic Review' (2018) 40(3) *Human Rights Quarterly* 521, 521-46.

¹¹¹ *Ibid.*

¹¹² UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35.

¹¹³ *Ibid.*

life.”¹¹⁴ To the Committee, this brings under the State’s jurisdiction persons located outside any territory effectively controlled by the State, whose right to life is impacted by its military or other activities in a direct and reasonably foreseeable manner. Hence, General Comment No. 36 is an articulation of the ‘functional approach’ to jurisdiction: every time that a State has the power to exercise functions that have an impact on human rights of individuals in a direct and reasonably foreseeable manner, those individuals are within the jurisdiction of the State. To simplify, States must protect human rights in situations where they can do so.

Roxstrom, Gibney and Einarson, highlight the problem with Shany’s approach. They recognise that an obligation on States to ensure/protect human rights obligations in a territory that they lack the competence to violates the norm of non-intervention.¹¹⁵ Then again, the *de facto* principle applies in a situation where the defaulting State exercises effective control over persons and territories outside its territory. Thus, a truly functional extra-territorial jurisdiction includes factual relations complementary to the traditional (*de facto* and *de jure*) concept.

Notwithstanding, at sea, the obligation to render assistance to persons in distress (Article 98 UNCLOS) gives the competence to protect anywhere at sea, even areas beyond State jurisdiction. With this in mind, functional jurisdiction to Moreno-Lax involves more than cause and effect.¹¹⁶ Moreno-Lax draws from Gavouneli’s illustration of functional jurisdiction under the LOS framework and argues that the human rights framework should recognise the same. She holds that:

“[...] under the functional approach, the elimination of direct physical contact with the individuals concerned no longer amounts to the severance of a possible jurisdictional link that may trigger human rights obligations. On the contrary, the functional understanding maintains that operational power projected and actioned abroad, like other methods of territorial and/or personal control, amounts to an exercise of jurisdiction.”¹¹⁷

Therefore, Moreno-lax supports Hugh and Lawson’s factual relation concept but takes it a step further by holding that such relations can be contactless. So far, there is an externalisation of power, jurisdiction is established.¹¹⁸ At sea, the inclusion of LOS provisions to the conceptualisation of extra-territorial jurisdiction towards not just irregular migrants but ‘people at sea’ facilitates a ‘contactless’ factual relation towards protecting persons in distress. The HRC cases discussed below illustrates this view but goes even further. Accordingly, the following section expands on these cases. It examines the scope of the HRC’s interpretation of functional jurisdiction at sea by evaluating the ‘good’ and ‘bad’ sides of this emerging jurisprudence.

VI. AS & OTHERS V ITALY AND AS & OTHERS V MALTA¹¹⁹

On 11 October 2013, a vessel reported to be carrying over 400 migrants that set off from the coasts of Libya was later shot at by a boat flying a Berber flag. Large quantities of water entered the vessel, and it found itself in distress on an area of the high seas within the Maltese search

¹¹⁴ *Ibid.*

¹¹⁵ Erik Roxstrom, Mark Gibney, and Terje Einarsen (n66) 88.

¹¹⁶ Violeta Moreno-Lax (n26).

¹¹⁷ *Ibid.*, 388.

¹¹⁸ Maria Gavouneli (n18) 6.

¹¹⁹ *AS & others v Italy; AS & Others v Malta* (n1) paras 2.1-2.4.

and rescue zone. A person on the vessel called the Italian number for emergencies at sea around 11.00 a.m., giving their geographical coordinates while explaining that the vessel was going to sink and informing the emergency operator that there were children on board the vessel. The first call was followed by several others, and as nothing happened, they called the Italian number for emergencies at sea again at 1.17 p.m. This time, the operator explained that their vessel was in the Maltese search and rescue zone and gave them the phone number of the Rescue Coordination Centre of Malta (RCC Malta).¹²⁰

When they managed to contact Maltese authorities, they were informed that their vessel had been identified and that rescue units would arrive in minutes. Unfortunately, it took hours, and the ship had capsized when the Armed Forces of Malta patrol boat arrived, subsequently followed by the Italian navy ship. The authors of the petition claimed that the Italian naval ship did not receive any instructions to assist the persons on board the vessel until after it had capsized and that it was in fact initially ordered to move away from the ship, as otherwise it was believed that the Maltese authorities would not have taken responsibility for the rescue efforts. The petitioners note that, although the exact number of persons who died in the shipwreck has not been established, it has been estimated that over 200 people on board the vessel died, including 60 children.¹²¹

The authors of the petition allege that Malta and Italy failed to take appropriate measures to render assistance to their relatives, who were in distress at sea, in violation of their relatives' rights under article 6 (right to life) of ICCPR. Thus, they claimed a breach of the LOS framework led to a violation under the ICCPR right to life. The petitioners further claim that these State authorities failed to carry out an effective investigation into the events of the shipwreck, in violation of their relatives' rights under article 6, read in conjunction with article 2(3) (right to an effective remedy). They also claim a violation of their rights under article 7,¹²² read in conjunction with article 2(3) of the Covenant.¹²³

a. *Decision regarding Malta*

The decision that the authors of the petition were subject to Malta's jurisdiction was nearly unanimous (13 votes to 1).¹²⁴ The HRC held that Malta had effective control over the rescue operation because of the existence of the shipwrecked vessel in their search and rescue (SAR) region and their response to the distress call.¹²⁵ The HRC's reasoning implies that the LOS framework on SAR creates a jurisdictional link, *ipso facto* triggering obligations under IHRL (in this case, ICCPR).

To Tigroudja, a committee member, this decision is a breakthrough in dealing with the effect of maritime legal black holes.¹²⁶ Yet, Zimmermann, the only dissenting opinion, raises interesting opposing points.¹²⁷ Zimmerman does not dispute the existence of a positive obligation to protect persons in distress under the law of the sea, but that such obligation cannot be triggered by a decision not to protect them.¹²⁸ On the contrary, Zyberi, Bulkan and

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Article 7 of the ICCPR provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

¹²³ *AS & others v Italy; AS & Others v Malta* (n1) para 1.2.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, *AS and others v Malta* (n1) paras 6.7 and 6.8.

¹²⁶ *AS and others v Italy* (n1), individual opinion of Hélène Tigroudja, Annex 7, pp 22-3.

¹²⁷ *AS and others v Malta* (n1) Individual Opinion of Andreas Zimmermann (dissenting) pp 10-12.

¹²⁸ *Ibid.*

Muhumuza hold that such a positive obligation involves ‘due diligence,’ which requires taking reasonable, positive measures that do not impose disproportionate burdens on States parties in response to reasonably foreseeable threats to life.¹²⁹ This view aligns with Morena-Lax’s postulation on functional jurisdiction.¹³⁰ To her, the trigger is not “random, off haphazard encounters between a state and its potential subjects.”¹³¹ Instead, the complex mechanism of governance of such operations, *i.e.*, the planning, roll-out, and post-implementation phases, count as well.¹³² Arguably so, considering the detrimental effect of the current externalisation of border control policies within the EU can serve as a predetermined basis for the unwillingness to fulfil the obligation to rescue.¹³³

Notwithstanding, the mere potential of a violation should not *ipso facto* constitute one.¹³⁴ Rather, as contemplated by UNCLOS, a decisive factor for jurisdiction should be knowledge of the distress situation and the control over the persons concerned.¹³⁵ Zimmermann believes that an obligation under the ICCPR should not arise due to a violation of a duty under a different legal framework, *i.e.*, UNCLOS.¹³⁶ Going by Zimmermann’s argument, the solution to prevent this expansive interpretation of jurisdiction is the separate application of IHRL and LOS. That is, to respect and accept the current fragmentation within international law,¹³⁷ which Papanicolopulu rightly observes as detrimental to the protection of people at sea.¹³⁸ Perhaps, this is a price to pay to keep sovereignty as a right and responsibility; even though most States might be reluctant to take on any further obligation under LOS with the fear of getting caught under ICCPR.¹³⁹

Despite this seemingly positive step, the HRC found the petition against Malta inadmissible, as the applicants did not exhaust local remedies.¹⁴⁰ Against this, three dissenting opinions rightly expressed that Malta’s lack of due diligence in their efforts to rescue the people in distress should suffice to find them liable under article 6(1), in conjunction with article 2 of the ICCPR.¹⁴¹

b. Decision regarding Italy

The decision that the petitioners were also concurrently within Italy’s jurisdiction was 9 votes to 6.¹⁴² Thus, the HRC held that the incident fell within Italy’s jurisdiction because Italian authorities were aware of the distress call and closer to the distressed vessel but did nothing

¹²⁹ *AS and others v Malta* (n1), individual opinion of Committee members Gentian Zyberi, Arif Bulkan and Duncan Muhumuza (dissenting), Annex 2, para 4, p 12.

¹³⁰ Violeta Moreno-Lax, (n26) 387 (functional approach requires that the Court considers “the role of knowledge and the extent of due diligence owed to avoid prospective harm ... in view of conduct occurred “during the course of, or contiguous to, security operations” performed under state direction”).

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Ramat Tobi Abudu, ‘How the law itself is killing migrants at Sea’ (RTE Brainstorm, 11 December 2019). Available: <https://www.rte.ie/brainstorm/2019/12/11/1098424-how-the-law-itself-is-killing-migrants-at-sea/>.

¹³⁴ Paolo Busco, ‘Not All that Glitters Is Gold: The Human Rights Committee’s Test for the Extraterritorial Application of the ICCPR in the Context of Search and Rescue Operations’ (2 March 2021). Available: <https://opiniojuris.org/2021/03/02/not-all-that-glitters-is-gold-the-human-rights-committees-test-for-the-extraterritorial-application-of-the-iccpr-in-the-context-of-search-and-rescue-operations/>.

¹³⁵ Efthymios Papanicolopulu (2020) (n5) 435.

¹³⁶ *AS and others v Malta* (n1) individual Opinion of Andreas Zimmermann (dissenting) para 5, p 11.

¹³⁷ See Martti Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70(1) *Modern Law Review* 1, 4-5.

¹³⁸ Irini Papanicolopulu (n19).

¹³⁹ *AS and others v Malta* (n1) individual Opinion of Andreas Zimmermann (dissenting) para 9.

¹⁴⁰ *Ibid.*, paras 6.9 and 7.

¹⁴¹ *Ibid.*, individual opinion of Committee members Gentian Zyberi, Arif Bulkan and Duncan Muhumuza (dissenting) p 13.

¹⁴² *AS and others v Italy* (n1).

to respond.¹⁴³ In addition, the HRC found that Italy violated the right to life of those involved under Article 6 of the ICCPR because Italy failed to discharge its positive obligation to protect the lives of persons in distress at sea.¹⁴⁴

The above view shows that the first limb of Article 98 UNCLOS (the 'if informed' or distress call requirement) is not a recognised standalone basis for establishing jurisdiction. There needs to be some form of control (even though contactless). However, the HRC took it a step forward by basing their rationale on "a special relationship of dependency"¹⁴⁵ established between the victims found on the vessel in distress and Italy. The rationale is that Italy's omission (failure to act) triggered a violation under the LOS and under ICCPR. Meaning a solely factual 'contactless' relationship between Italy and persons in distress suffices to establish jurisdiction.

This approach goes beyond the existing scope of functional jurisdiction on land, as expressed in the dissenting opinion of Shany, Heyns and Pazartzis. They argue that actual control (actions) places persons within a State's jurisdiction, not potential control (omissions), which the decision showcases.¹⁴⁶ Also, in their view, since Malta had both *de jure* and *de facto* jurisdiction, then Italy should not.¹⁴⁷ In contrast, Zyberi rightly observes that the jurisdictional link results from the relevant legal framework at sea. He follows that "the concepts of "power and control" commonly used regarding extra-territorial jurisdiction have to be construed and interpreted in light of the specific circumstances at sea."¹⁴⁸ Even the restrictive ECtHR interpretation recognises the wholly exceptional circumstances at sea in interpreting the ECHR.¹⁴⁹ Shany's opposition is understandable, considering his functional jurisdiction view does not consider the location as a factor.¹⁵⁰ Nonetheless, as highlighted by Milanovic, this concept of 'special relationship of dependency' needs more clarity under international law to prevent abuse.¹⁵¹ It is necessary to prevent the broadening of positive obligations to an equivocal point of morality over legality.¹⁵²

c. Analysis

The evaluation of the above cases (*AS and others v Malta*; and *AS and others v Italy*) supports the propositions of this article that the interpretation of LOS as an applicable law within the human rights system creates a higher threshold of protection for people in distress sea. It

¹⁴³ *AS and others v Italy* (n1) para 7.8. In the wordings of the Committee: "The Committee considers that in the particular circumstances of the case, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy. This relationship comprised of factual elements – in particular, the initial contact made by the vessel in distress with the MRCC, the close proximity of ITS Libra to the vessel in distress and the ongoing involvement of the MRCC in the rescue operation and – as well as relevant legal obligations incurred by Italy under the international law of the sea, including a duty to respond in a reasonable manner to calls of distress pursuant to SOLAS Regulations and a duty to appropriately cooperate with other states undertaking rescue operations pursuant to the International Convention on Maritime Search and Rescue. As a result, the Committee considers that the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and that they were thus subject to Italy's jurisdiction for the purposes of the Covenant, notwithstanding the fact that they were within the Maltese search and rescue region and thus also subject concurrently to the jurisdiction of Malta."

¹⁴⁴ *Ibid*, para 8.7. Following the HRC's findings, Italy was requested to provide effective remedy to the petitioners and details of such remedy should be relayed to the HRC within 180 days (*ibid*, paras 10 and 11).

¹⁴⁵ *Ibid*, para 7.8

¹⁴⁶ *Ibid*, individual opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting) Annex 1 paras 1-7 pp 16-17.

¹⁴⁷ *Ibid*, para 5.

¹⁴⁸ *Ibid*, individual opinion of Gentian Zyberi (concurring) Annex 4 Para 3 pp 19-20.

¹⁴⁹ See, Marta Bo (n6) 556.

¹⁵⁰ Yuval Shany (n4) 71.

¹⁵¹ Marko Milanovic, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations' (2021) EJIL: Talk! Available: <https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/>.

¹⁵² *Ibid*.

operationalises the duty to rescue persons in distress under the law of the sea and brings about a somewhat functional interpretation of jurisdiction within IHRL. The understanding from *AS and others v Malta* is that the search and rescue legal framework creates an extra-territorial jurisdictional link between coastal States and persons in distress in their search and rescue region.¹⁵³ Such jurisdictional link is 'contactless' as suggested by Morena-Lax,¹⁵⁴ which means the coastal State has effective control over the area, in this case, 'the high seas,' even without any physical contact. This is similar to the concept of *de jure* jurisdiction at sea, where the law creates a jurisdictional link between a flag State and its flagship.¹⁵⁵ The ECtHR can apply the HRC's interpretation within the scope of *de jure* jurisdiction, as they accept such notion of jurisdiction.¹⁵⁶ The recent case *Hanan v Germany* also shows the ECtHR accepts that the law can constitute a jurisdictional link.¹⁵⁷ Indeed, the acceptance of such interpretation by ECtHR will be more beneficial to the protection of migrants on the Mediterranean Sea because of the Court's ability to ensure just satisfaction to the injured party.¹⁵⁸

However, the HRC's decision in *AS and others v Italy* shows the need for a definitional scope to the functional approach at sea. The interpretation of jurisdiction appears to be far stretched compared to the scope in *AS and others v Malta*. In this case, the jurisdictional link is not based solely on the law (*de jure*) rather on factual elements (distress call and proximity), which resulted in a special relationship of dependency between the individuals on the vessel in distress and Italy.¹⁵⁹ This goes beyond the popular definition of functional jurisdiction based on factual elements which links a cause (an action of a State) to an effect (a breach of their responsibility). Instead, this functional interpretation links the inactions of a State to a breach of responsibility in an area outside their territorial jurisdiction. This shows that the human rights system integrated with the LOS (the search and rescue framework) allows for better protection of 'boat people' or migrants at sea. States can no longer escape their responsibility which might reduce the rate of migrants' death at sea. Yet, the scope of this interpretation is questionable because it appears to go beyond the legal requirement.

If a limitational scope is not put in place, it could blur the line between moral and legal obligations. No part of the LOS instructs States to act based on a "special relationship of dependency,"¹⁶⁰ which made Italy liable for violating the rights claimed by the petitioners. Therefore, it is not a legal requirement but seemingly constitutes a moral basis.¹⁶¹ Instead, HRC should have read the inactions of Italy within the confines of the law. The duty to render assistance is not absolute. Art 98(1) UNCLOS provides that the only occasion the master of a ship can refuse to assist persons in distress is when such assistance will create danger for the rescuing ship, its crew or its passengers.¹⁶² Regulation 33.1 of the SOLAS Convention has other grounds for an exception which provides that:

"If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the

¹⁵³ *AS and others v Malta* (n1).

¹⁵⁴ Violeta Morena-Lax (n26).

¹⁵⁵ See, UNCLOS (n17) Art 91(1).

¹⁵⁶ *Hirsi Jamaa v Italy* (n9); see also *Medvedyev and Others v France* Application no 3394/03 (ECHR, 29 March 2010).

¹⁵⁷ *Hanan v Germany* (n55) paras 137-39.

¹⁵⁸ ECHR (n10) Article 41.

¹⁵⁹ *AS and others v Italy* (n1) para 7.8.

¹⁶⁰ *Ibid.*

¹⁶¹ Marko Milanovic (n151).

¹⁶² See also Art 10(1) of the Salvage Convention (n81) which contains that same exception.

master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress."¹⁶³

Here, it highlights three other criteria for failing to render assistance which is that it is 'unable,' 'unreasonable,' and 'unnecessary' to do.¹⁶⁴ Papanicolopulu points out that 'unable' has to do with the weather conditions or the condition of the vessel, while 'unreasonable' has to do with it being unreasonable to expect the master to proceed to render assistance due to impediments such as the weather.¹⁶⁵ The last one, which is 'unnecessary,' means that it is unnecessary to proceed to rescue either because of the distance or another closer vessel has started the rescue operation.¹⁶⁶ Yet, the HRC did not consider any of the exceptions in the case of Italy. The case with Italy could easily come within the 'unnecessary' criterion because Malta was well in charge of the operation before the Italian authorities came on the scene.

VII. CONCLUSION

This paper challenges the understanding that human rights law should apply at sea to the exact extent they are interpreted on land. Although it agrees that human rights law should apply at sea, the interpretation of its obligations varies at sea. It shows that the LOS framework influences the human rights framework to the extent that it allows a higher standard for protecting persons in distress at sea. A view that arguably deals with the ill effects of maritime legal black holes affecting migrants at sea, particularly the Mediterranean Sea. The synergy between LOS and IHRL promotes a functional approach to interpreting extra-territorial jurisdiction not so applicable on land because of the right to non-intervention flowing from state sovereignty.

The analysis of the recent HRC cases (*AS and others v Malta*; and *AS and others v Italy*) is fundamental to this paper because it highlights this higher threshold for protecting migrants at sea. These cases illuminate two paradigm shifts. First, LOS promotes a somewhat *de jure* jurisdictional link which Morena-Lax calls a "contactless link"¹⁶⁷ between States and persons in distress. Thus, it shifts the understanding of *de jure* jurisdiction at sea from merely flag State and flagship relationship to coastal State and persons in distress. Second, it unveils the shift from passive to a functional interpretation of jurisdiction. The concept of functional jurisdiction at sea holds States liable for human rights violations arising from the consequences of their inactions towards their duty to rescue persons in distress. A view presently only explored by the HRC in interpreting the ICCPR but more beneficial to migrants in the Mediterranean Sea if courts with more binding force like the ECtHR follows a similar path. For the ECtHR, this will constitute a shift from a restrictive to a functional interpretation of jurisdiction.

Despite the paradigm shifts, these cases also highlight the disadvantage of the undefined interpretation of functional jurisdiction at sea. The interpretation in *AS and others v Italy* shows that if the scope of functional jurisdiction at sea is not confined within the parameters of the law, there is a possibility of blurring the line between morality and legality. In this case, the HRC held Italy liable for their inactions towards the distressed persons at sea without the due consideration of the exceptions to the duty to render assistance at sea, which

¹⁶³ Regulation 33.1 of the SOLAS Convention (n80).

¹⁶⁴ Irini Papanicolopulu, 'The duty to Rescue at Sea, in Peacetime and in War: A General Overview' (2016) 98(2) *International Review of the Red Cross* 491, 497.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ Violeta Morena-Lax (n26).

might have vindicated Italy from their legal obligation. As such, the jurisdictional link might be based on solely their inactions from a moral perspective rather than a legal standpoint. Accordingly, this article proposes that the LOS should be the jurisdictional link that requires a functional approach based on the dictates of the law.