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Meta-Borders and the Rule of Law: From Externalisation to 'Responsibilisation' in Systems of Contactless Control

By Prof. Violeta Moreno-Lax, School of Law, Queen Mary University of London &
Law Faculty, University of Barcelona

<v.moreno-lax@qmul.ac.uk> ORCID: 0000-0002-0042-7907

ABSTRACT

This article contests the strategic use of what I have called *meta*-borders. These are the array of border enforcement mechanisms implemented beyond the physical frontiers of States through different means and by different actors, for the purpose or with the effect of denying human rights protection to (unwanted) non-citizens. The ensuing 'irresponsibilisation' of States of destination, on whose behalf or for whose benefit the measures are executed, is anathema to the Rule of Law. My main contention is that prevailing understandings of jurisdiction and responsibility, as applied to externalised migration controls (the core feature of *meta*-borders), need to be revised. Currently, they allow for the emergence of a double standard, solely dependent on location, whereby the State may act abroad with impunity in relation to the human rights consequences of its conduct, exploiting geographical distance to create and legitimate ethical and legal detachment from its own wrongdoing. This article proposes an alternative model of 'responsibilisation' that tallies with the flexible spatiality of migration governance. The functional configuration of the *meta*-border is matched with an equally functional conceptualisation of jurisdiction that rejects unaccountable forms of power. The article thus problematises the localisation of the *meta*-border, mapping its multiple roles, modes, and dimensions, highlighting the significance of its legal manifestations, before exploring the impact of law on the de-territorialisation of the sovereign exercises of demarcation, delimitation, and exclusion that it implies. The *meta*-border, crafted by legal fiat, actively (re)orders space, curtailing the reach of human rights and disclaiming responsibility for related violations. To reconcile power with accountability, I advance the 'responsibilisation' model, premised on the acceptance that human rights, as fundamental components of the Rule of Law, track and constrain all exercises of State authority.

KEYWORDS: Meta-borders; Externalisation; Contactless Control; *Refoulement* by Proxy; Functional Jurisdiction; Responsibilisation; Accountability; Rule of Law.

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1. Introduction: Generating Unaccountability

The objective of this article is to contest the strategic use of what I have called *meta*-borders. These are the array of border enforcement mechanisms implemented beyond the physical frontiers of States through different means and by different actors, for the purpose or with the effect of denying human rights protection to (unwanted) non-citizens. The ensuing 'irresponsibilisation' of States of destination, on whose behalf or for whose benefit these measures are executed, typically in collaboration with or by delegation to third parties, is anathema to the Rule of Law. My point of departure is that *unaccountable* power is *arbitrary* power, which is contrary to a Rule of Law-based conception of the international legal order post World War II. A Rule of Law-based interpretation of the notion of 'jurisdiction', as applied in the human rights field, demands 'conformity with the principles of justice and international law' (Art 1(1) UN Charter); all exercises of sovereign authority, to remain legitimate, need to conform to the requirements of basic legal guarantees that should be understood to attach to all manifestations of State control (whether projected within or beyond territorial confines).

My main contention is that prevailing understandings of jurisdiction and responsibility, as applied to externalised migration controls (the core feature of *meta*-borders), need to be revised. Currently, they allow for the emergence of a double standard, whereby the State may act abroad with impunity in relation to the human rights consequences of its conduct. They 'permit a State … to perpetrate violations … on the territory of another State, which violations it could not perpetrate on its own territory', generating 'unconscionable' arbitrariness and discrimination between rights holders solely depending on their location (*López Burgos v. Uruguay*, A/36/40, 176; *Issa et al. v. Turkey*, Appl. No 31821/96, ECHR 2004, 71). The consequence is — contrary to the Rule of Law — that States may exploit geographical distance to create and legitimate ethical and legal detachment from their own wrongdoing (Moreno-Lax & Lemberg-Pedersen 2019), instrumentalising territory to selectively construe human rights liability. This allows them to arbitrarily generate gaps and vacuums that facilitate the expansion of 'raw' power; a power untrammelled by any obligations vis-à-vis those affected by States' conduct and that deprives them of basic legal coverage.

Migration controls in the European Union (EU) and elsewhere, particularly in the Global North, have been dispersed and expanded through externalisation techniques, such as visas, carrier sanctions, extraterritorial patrols, and similar methods (Moreno-Lax 2017, chapters 2-6). As a result, borders have become ubiquitous, multi-modal, and transnational systems of coercion, operationalised beyond the physical borders of the Member States. Cooperation and delegation arrangements serve to generate a (geographical and legal) distance vis-à-vis (unauthorised) migrants, effectively blocking their movement 'upstream', before they have arrived at the external frontier of the country of intended destination, while denying them legal protection. If entry occurs, surveillance continues inland, 'following' the migrant throughout her journey, tracking her movement at all times, and constructing her as a 'suspicious' category to be constantly monitored. The distance that *meta*-borders generate allows States to disclaim or reduce the applicability of their human rights obligations and restrict or negate responsibility for any infringements.

The violence implicated in these structures of de-territorialised, preventive enforcement of the border is justified for the sake of deterrence of the security threat that uncontrolled

migration presumably represents (Bigo 2002). This generates critical challenges for the law. Assigning responsibility to a principal and its agents within multi-actor constellations is rendered difficult (Gammentolf-Hansen & Hathaway 2015) because of the different State and non-State entities that collaborate in the enforcement of controls in extra-territorial settings that complicate causation and attribution lines. In externalisation systems, it is not only the border that 'moves' (Guild 2001) or 'shifts' (Shachar 2020). The geographical distance that externalisation interposes between the locus of power and the locus of surveillance is also used to 'push away' (or simply reject) responsibility (Moreno-Lax 2017, chapters 8-10), generating accountability gaps (De Coninck 2023). The entire legal apparatus is (perceived as) ill-equipped to respond to the responsibility dispersion techniques (Moreno-Lax & Lemberg-Pedersen 2019) that typically attach to offshored and outsourced means of policing (Gammeltoft-Hansen 2011; Moreno-Lax 2017). In regimes of cooperative extra-territorialised controls, while the border expands, legal protections tend to retract, causing a responsibility void — at least, at first sight.

In the following sections, I take issue with this conundrum. I problematise the localisation of the border through its multiple dimensions in Section 2, highlighting the significance of its legal and non-legal manifestations, before exploring, in Section 3, the impact of law on the meta-territorialisation of the sovereign exercises of demarcation, delimitation, and exclusion that ensues. What I mean by 'meta-territorialisation' is the process of transformation of techniques of control that ultimately alter the location, functionality, and morphology of the border. The resulting 'meta-border' constitutes a territorially transcendent (legal) construction that detaches enforcement from the physical confines of the geographical frontier. The meta-border is implemented beyond the territory it delineates. While it preserves a physical position and a cartographical representation 'on the map', retaining a residual territorial feature, externalisation mechanisms of privatisation (e.g. to commercial service providers) and delegation (e.g. to third countries) that outsource and offshore surveillance undo the fixity of the border's location. The target of these extra-territorialisation techniques are certain categories of (unwanted) non-citizens. And they are utilised for the specific purpose (or, at least, with the distinctive effect) of withdrawing important legal safeguards. Consequently, the locus of the meta-border is no longer the locus of Rule of Law protections, particularly vis-a-vis irregular migrants. The meta-border, crafted by legal fiat, actively re-orders space, determining the (non)reach of human rights and establishing the circumstances under which they may or may not apply. These externalised frontiers — *qua* mechanism of migration control — play a productive role. They become the expression of a type of sovereign power that is (supposedly) unmoored from any human rights constraints, leading to the phenomenon that I have called of 'irresponsibilisation' (Moreno-Lax & Lemberg-Pedersen 2019).

What is more, the legal process of meta-territorialisation of the border is selective (if not entirely discriminatory) and allows for the tailoring of responses and their adjustment to the characteristics of certain categories of people on the move whose movement is regarded as undesirable and illegal(ised). The same line, the same border, has, as a consequence, different implications for different groups of persons. It assumes different functions, becoming a site of discrimination and exclusion for some, while not for others. The examination of the various techniques of 'contactless control' (Moreno-Lax & Giuffré 2019) through which this is achieved, emerged especially in the aftermath of the 'refugee crisis' in the Mediterranean

context, is undertaken in Section 4. Their effect, as mechanisms that ultimately disown responsibility for any resulting violations, is appraised in Section 5, where I critique the prevailing conceptualisations of jurisdiction in relation to the extraterritorial application of human rights norms, drawing on my previous work (Moreno-Lax 2020). In Section 6, I seek to reconcile power with accountability, proposing a 'functional' approach. To counter the impact of the 'irresponsibilisation' phenomenon, I advance a model based on a parallel meta-territorialisation of responsibility notions, premised on the acceptance that human rights, as fundamental components of systems grounded in the Rule of Law, track and constrain all exercises of sovereign power. I recount the advantages of the 'responsibilisation' model in Section 7, which also concludes and closes these reflections.

2. Locating the Border: From Territory to Functionality

Borders, in the social sciences, have been described as more than simple enclosures demarcating geographical location and sovereign territoriality (Mezzadra & Neilson 2013). They are understood as spatially disaggregated and conceptually complex projects of governance and belonging (Newman 2006). Instead of static boundaries, they constitute a fluid and shifting policy assemblage, delivered through bureaucratic practices and their continuous enactment and contestation by multiple actors, according to competing rationalities (Shapiro 1996). They generate differential power-relations as well as hierarchies of inclusion and exclusion, becoming sites of ordering and policing (Van Houtum, Kramsch & Zierhofer 2005), rather than merely 'lines on a map'. Today's de-localised borders are more than 'space makers', they have become convoluted 'borderlands' (Balibar 2009) or 'borderscapes', continuously traversed by a plethora of practices, discourses, and imaginaries that constantly (re)produce changing notions of inside/outside, self/other (Brambilla 2015, p. 19).

Depending on the vantage point, borders have different functions. They are deemed as historically contingent, multi-dimensional constructs that configure/re-configure space and social relations depending on place-specific experiences and our engagements with them (Rumford 2008). They are considered cultural artifacts constituted by the everyday uses that different social agents make of them. Marxist theorists, for instance, view borders as a function of capitalism, as a tool in the economic extraction arsenal that facilitates the accumulation of wealth and the perpetuation of material hierarchies across space. They are critical of the (selective) fixity of borders as an aspect that generates dependency and inequality, since they constrain and limit access to resources on a differential (if not, arbitrary) basis according to a logic that is detrimental to labour and favours capital (McGlinchey, Walters & Scheinpflug 2023). A post-colonial perspective, by contrast, sees borders as the remnants of empire, as the vehicle through which its legacies and continuities are entrenched in today's political order. Scholars of this tradition highlight the discriminatory character of borders, as the products of history-become-present, signalling persistent forms of political domination working along racial/racist lines (Achiume 2022).

Borders indeed have several dimensions. As locational markers of here/there, they 'contain' and 'territorialise' geographical space (Taylor, 1994) through processes that have cultural, social, political, and economic relevance in the configuration of us/them divisions (Van Houtum & Van Naerssen 2002). But borders also have a symbolic character, because they

contribute to building/unbuilding national identities, shaping (cross-border) conflict/cooperation systems, and embedding as well as disrupting structural injustices. Borders are, therefore, multifaceted, and co-implicated in the production of meanings and understandings of reality beyond their cartographical representations.

Legally speaking, borders play a constitutional role, functioning as a polity-building device that designates the place of the *demos* in relation to a specific, spatially-situated political community (Sack 1986). In fact, the border is a chief element of State sovereignty. It represents the State's cartographical power in relation to its 'own' territory and population, since (in principle) it designates the outer confines of its authority and jurisdiction. Drawing from the Westphalian order, in international law, sovereignty is indeed defined as 'supreme authority within a territory' (Besson 2011, para. 1). The basilar principles of exclusive jurisdiction and non-intervention, for instance, articulated in the UN Charter (Arts 2(4) and (7) UN Charter), considered key attributes of Statehood, pivot around the notion of (bordered) territory. 'Territorial supremacy' (Besson 2011, paras 79 and 118-119) or plenary power and control over all things and persons within that territory (*Customs Regime between Germany and Austria*, Advisory Opinion, PCIJ 1931, Individual Opinion of Judge Anzilotti, 57) is what constitutes State sovereignty and, thus, plenary subjecthood in international law.

Borders, therefore, are fundamental delimitators of in/out in many different respects; they are signifiers that distinguish, filter, and classify spaces, objects, and populations in relation to a designated location that they contribute to define in a geographical, socio-political, and legal sense. They have State-making significance as designating both the place and power dimensions whereby the State (its territory and population) is made. Within this framework, the migrant *qua* non-citizen, to which the next section turns, is constituted by *exclusion*, produced by the effect of the very (b)ordering processes that render the border visible and meaningful in its different facets.

3. The Meta-territoriality of Borders: Governing Movement, Making the Non-Citizen

Globalisation, as a system of (supposed) 'erasure' of territorial distance and demarcations (Sassen 1999), has contributed to the constant (re)negotiation of borders, (re)structuring ideas of space, time, and being across the world. Yet the intervention of security concerns, particularly since 9/11, has redirected the focus of sovereign control exerted through (b)ordering processes — processes of social *ordering* through *bordering* interventions — to encompass not only territories, but also populations, especially as and when they move (Huxley 2007). In this context, border technologies (re)emerge as technologies of biopolitical power that target mobility and trans-national circulation as a form of government (Bigo 2002). The main function of borders is now to govern movement, rather than simply demarcate territory. As a result, border 'policing', within and beyond borders, has 'open[ed] up an entirely different spatial configuration of security' in its relationship to territory and territorial conceptualisations of place (Dillon 2007, p. 11) that have become 'flexible' (Novak 2011) or 'elastic' (Ayata 2020). Border enforcement mechanisms now track the trajectories of non-citizens throughout their mobility course, from within their countries of origin, even before they start their journeys, up until they reach their destination, and even *after* they have crossed the geographical frontier of the State concerned, far beyond (and within) the actual borders of the countries of (intended or

presumed) destination (Moreno-Lax 2017, Introduction). This is not to say that territorial borders have disappeared or lost relevance. In fact, they have become fortified and militarised as 'zones of exception' (González Morales 2021, 71). High-security walls, barbed wire fences, sensor motion and radar detection technologies have become commonplace markers of today's physical frontiers (*N.D. & N.T. v. Spain*, Appl. Nos 8675/15 and 8697/15, ECHR 2020; Paz 2016). But the focus is less on delimiting space than on precluding unauthorised access.

The shift to focusing on populations and their movement as the subjects of control has consolidated biopolitical means of discipline that categorise individuals at different points along the border continuum. The connection of crime and the terrorist threat with cross-border movement (at least at the rhetorical level) has hailed borders as the prime mechanism to prevent the security risks associated with disorderly and unauthorised transborder mobility, so that border control has risen (discursively and in practice) as the main instrument of 'migration management' (Elden 2007). The securitisation of mobility has led to (b)ordering processes that transform the corporeal bodies of people on the move into a site of surveillance (Pallister-Wilkins 2017), relying on new (typically unsettled and diffuse) oversight techniques that outsource and offshore sovereign power. These range from measures of *non-entrée* that impede unauthorised arrivals (Moreno-Lax 2017), to techniques of 'dataveillance' that digitalise border controls through algorithms and AI to triage and exclude 'risky' migrants (Amoore 2006), to strategies of 'crimmigration' that utilise the means of the criminal justice system for the purposes of deterrence and prevention of irregular movement (Stumpf 2006). This transition has given rise to a 'border overall' phenomenon that diffuses (the importance of) physical frontiers and instead 'follows' the steps of non-citizens across international boundaries in a continuous and lasting mode (Moreno-Lax 2017, p. 33). But the 'border overall', or the *meta*-border generated through these processes, does not simply 'shift' (*cf*. Shachar 2020) with the movement of the migrant. What happens is more pervasive and more fundamental.

The end result is that the border *inheres* within the migrant. It becomes a constant feature of her foreignness, part and parcel of her migrant status. The border thereby 'makes' the migrant and renders her (legally) visible and cognisable to the processes of control. It is this configuration of the meta-border that constructs and regulates non-citizens — through their exclusion from citizenship and the full freedom of movement package attached to it. It is this configuration of the meta-border that enables their objectification as a risk and potential threat to be managed through (ubiquitous, status-sensitive) border enforcement. A 'constant border' (Moreno-Lax 2017, p. 14) thus materialises, latching on to migration status and distinguishing between authorised/unauthorised, wanted/unwanted sorts of mobility. Thereafter, the (meta-)border infiltrates and defines the legal position of non-nationals, conditioning their possibilities of movement and settlement, and also their claims as rights-holders within the legal order of receiving States. It translates the unceasing 'otherness' of the migrant and her permanent differentiation/discrimination from 'us'. The (meta-)border thus becomes status related, perceptive to nationality, security, and personal circumstances. It is no longer (or, at least, not only) territory based. It becomes individualised, tailor-made to the specific migrant, her background, and the potential risk she may represent in irregular migration terms. In a sense, it is the migrant herself who embodies the (meta-)border and carries it with her.

In relation to these meta-borders, law plays a paradoxical, dual role that tends to be under-appreciated in legal literature (*cf*. Moreno-Lax & Vavoula 2022), as the tool through

which certain conceptualisations of the border are institutionalised (and de-territorialised), demarcating legal(ised) from illegal(ised) transgressions. While law defines and legitimises borders (and the different modalities for their control), it can also undo them 'from within', providing the means to challenge the violence and exclusion implicated in border-making, appealing to dignity, human rights, and the Rule of Law. Simultaneously, therefore, the law constitutes a means of subordination and a tool of emancipation. The law is, at the same time, the maker and marker of borders, and the potential de-stabiliser and unraveller of the (b)ordering and othering constructs that envision, maintain, and may erase borders. The law promotes and sustains certain technologies, shapes operational responses, and justifies prevailing approaches to control articulated in the multiple sites and scales in which (meta-)borders manifest.

Legally-mediated and legally-constituted borders (and the means of their enforcement) consolidate in mechanisms of control that provide differential access to systems of belonging, mobility and wellbeing, fracturing and diversifying their impact by discriminating citizens from (certain categories of) non-citizens, with deep repercussions for the manner in which borders are 'lived' and experienced by people on the move (Spijkerboer 2018). In this sense, it is the law that renders the border meta-territorial and that legitimises the multifarious processes of control that constitute the resulting meta-border. It is the law that bans or allows certain forms of violence. It is the law that extends or retracts legal safeguards to/from certain locations, including or excluding individuals (or entire populations) from the scope of human rights and fundamental guarantees, stratifying dignity and access to legal protection. The extra-territorialisation of borders with which this Special Issue is concerned happens *through* the law. As the next sections examine, it is the law that configures (de-)territorialised understandings of jurisdiction and that permits or forbids certain mechanisms of 'remote control' of migrant populations (Zolberg 1997; FitzGerald 2020) — typically on a selective, if not self-serving, basis.

4. The (Functional) Meta-Border: Extending Power through 'Contactless Control'

Techniques of 'contactless control' (Moreno-Lax & Giuffré 2019), as 'movable legal barriers' (Shachar 2020, p. 11), entail the enhancement of the State's regulatory and operational reach, enabled by a malleable conceptualisation of legal spatiality (Volpp 2012) that expands sovereign power, but without a correlative extension of sovereign responsibilities. These techniques seek not only to deter, but to also preclude the movement of those identified or perceived as unwanted migrants — to whom the law has left only irregular mobility options through unsafe, unauthorised routes that typically engage smugglers or traffickers as facilitators. These techniques aim to *proactively* impede arrivals — and strive to also impede the engagement of human rights obligations, by outsourcing border management to third parties, including partner States or private contractors. They are typically designed as strategies of collaborative containment that enlist the authorities or (semi-official) agents of countries of origin and/or transit, including paramilitaries, commercial carriers, transport companies, private security personnel and others, to cooperate in the implementation of controls, acting as surrogate enforcers of the border measures of the State(s) of destination. In this way, the (meta-)border is projected *outwards* to meet unwanted migrants at the point of movement with a view

to blocking it before it takes place — or, in any case, before the person concerned succeeds in reaching the physical frontiers of her country of destination. At the same time, however, Rule of Law safeguards are given a strictly territorial construction, as applying solely within the geographical limits of the State concerned. The meta-border selectively and simultaneously expands and retracts to maximise power while minimising responsibility, manufacturing unaccountable spaces and mechanisms of control.

The control machinery of (b)ordering processes (mediated and constituted through law) is thus deployed vis-à-vis the (presumed) unwanted migrant already from *within* the country of departure or as close as possible to its territorial confines (on behalf and for the benefit of the country of destination). 'Pullbacks' (Markard 2016), offshore detention/interdiction measures, or pre-emptive 'rescue' at sea convert (pre)entry into (pre)exit controls, with the result of *de facto* neutralising the (effectiveness of the) rights to leave any country including one's own (Art 2(2) Protocol 4 ECHR) and to seek asylum (Art 18 EU Charter of Fundamental Rights) to which non-citizens are entitled under international and EU law (Moreno-Lax 2017, chapter 9). Execution is delegated and effected by proxy, but in accordance with the desires and instructions of the delegating State (for a recent example, involving Malta and Libya, see Brito 2023). There are different iterations, but all these practices, in the words of the UN Special Rapporteur on the Human Rights of Migrants, 'manifest an entrenched prejudice against migrants and demonstrate a denial of States' international obligations to protect [their] human rights' (González Morales 2021, summary). Characterised by an absence of an individualised assessment of their personal situations, no procedurals safeguards or due process guarantees, they result in the summary expulsion to or violent containment within territories where the risks of harm, persecution, or ill treatment are paramount (*ibid*., 34 *et seq*.).

Dedicated financial and technical support to third countries by countries of destination in exchange for foreclosing (unwanted) departures is one of the main techniques of 'contactless control' deployed by the Global North, including particularly the EU Member States (European Council, Malta Declaration 2017). Development aid and humanitarian assistance, visa facilitation and similar enticements are generally offered in return for the deputised enforcement of border exclusions. The objective is not to prevent *entry* but to impede *exit* at the very beginning of the migratory journey. These measures are all oriented towards curbing human trafficking and combating migrant smuggling and are (discursively) justified as based in a humanitarian concern for dignity and safety. Policy makers tend, indeed, to deviate attention towards ethically desirable goals (Cusumano 2019), like the saving of lives of those in distress at sea and the prevention of injury during dangerous journeys where unwanted migrants are at risk — especially of abuse by unscrupulous mafias portrayed as the main source of harm. The structural forces underpinning the (b)ordering processes at play and that put people on the move in danger — which Grundler has called the 'route causes' of displacement (2024) — are not normally identified as constituting or compounding the threats and risks they face. The meta-border assemblage is portrayed as 'neutral', as a given, as part of the normative landscape sitting in the background that enables transboundary movement in the first place (supposedly through legitimate means and for legitimate ends). The thwarting of movement that 'contactless control' techniques entail is hence presented as a benevolent tool for the preservation of the integrity and security of those concerned, their broader human rights

implications, beyond an immediate preoccupation with people's (bodily) survival, are however normally neglected (Moreno-Lax 2018).

Recent modalities of 'contactless control' measures that have become routine (González Morales 2022, 70) include mechanisms like 'aerial *refoulement*' (Zandonini 2020), consisting in *refoulement* practices assisted by aerial assets of destination States that detect migrant boats and relay location information to third country authorities for their intervention. This results in the interception and return of the persons concerned back to the point of (supposed) departure. The intermediation of the organ of an international organisation, such as the external frontiers agency of the EU (Frontex), functioning as *refoulement* broker, offers yet another possibility of (unlawful) contactless control. According to the European Commission (2019), Frontex has long been transmitting relevant details of shipwrecks and unseaworthy vessels carrying migrants to what they consider 'the responsible RCC [Rescue Coordination Centre]' in Libya, thus facilitating pullbacks by Libyan actors. The agency has, in fact, been found to have overstepped the limits of its powers, pursuing activities of dubious legality, being recently condemned by several entities for its failure to process non-citizens data in accordance with EU law and comply with 'its own mandate' (OLAF 2021; Vasques 2023, referring to the findings of the European Data Protection Supervisor; González Morales 2022, 66 *et seq*., referring to the conclusions of the European Parliament Frontex Scrutiny Working Group and the European Ombudsman). Other variants of this practice rely on merchant or fishing vessels to carry out 'privatised' pushbacks, following guidelines provided by the authorities of the country of intended destination, carried out in collaboration with a country of origin/transit to which the migrants are forced back (Heller 2019). Scenarios implicating Italy, Malta, and Libya have been denounced by multiple observers (see e.g. Kingsley & Willis 2020). In all cases 'impunity … is prevalent' (González Morales 2021, 103).

The most dangerous type of these techniques, falling within the family of measures of so-called neo-*refoulement* that instrumentalise geography to restrict access to territory and legal protection (Hyndman & Mountz 2008), is accomplished 'by omission' (Moreno-Lax 2021). They typically involve a constellation of active and passive behaviours coalescing in 'composite' conduct that, 'in aggregate' (Art 15 ARSIWA), generates harm — if not, outright loss of life. These practices have flourished and acquired new proportions, particularly in the Mediterranean in the aftermath of the 'refugee crisis'. They could be defined as a sort of necro-policy (*cf*. Mbembé 2003) that integrates mechanisms 'based on deterrence, militarisation and extraterritoriality', which deliberately incorporate or, at least, tolerate 'the risk of migrant deaths as part of an effective control of entry' (Callamard 2017, 10). This modality is based on the *negation* of rescue (and the associated increased probability of dying), including through the outright abandonment at sea of persons in distress (Heller & Pezzani 2016), the removal of naval assets from naval missions, or the restriction of operational areas covered by maritime operations to avoid direct encounters with potential 'boat migrants' that require the provision of assistance (Heller & Pezzani 2018).

While 'pushbacks' are typically performed by the authorities or agents of a country of destination to impede arrivals, 'pullbacks' — in any of their manifestations — are undertaken by the authorities or agents of a third country of origin or transit to counter departures at the behest of the authorities of the country of destination. By transferring the coercive management of border checks to third countries there is a legally prominent effect that 'contactless control'

techniques achieve: they eliminate any direct physical contact between the third-country nationals concerned and the authorities of the countries of intended destination. Ultimately, if not completely severed, the jurisdictional link that would normally give rise to human rights obligations (and responsibility in case of any violations) gets blurred and difficult to determine (*cf*. Melzer 2018, 58). The advantage of 'contactless control' mechanisms for EU countries (and other Global North States with similar concerns and resources to implement them) is that they allow them to not perform any containment directly or by themselves. It is the organs or agents of partner countries that carry out the maritime interceptions, exit denials, and migration detentions that keep unwanted third-country nationals at bay within *their* territorial domains or close by — in any event, far away from the territorial jurisdiction of the delegating State.

When Turkey, under the EU-Turkey Statement (2016), or the Libyan Coastguard, under the Italy-Libya MoU (2017), prevent departures or undertake pullbacks at sea, they are the ones directly performing the relevant acts that may involve international legal responsibility (Art 2 ARSIWA). The point, however, is to elucidate whether their interventions may be characterised as proxy actions/omissions of the EU countries with which they collaborate, and on whose behalf, or for whose benefit, they undertake them. This requires an evaluation of the prevailing (border-tight, territorially bounded) conceptions of 'jurisdiction' in relation to (extraterritorial) human rights obligations, which I undertake in the next section. This sets the ground, as a preliminary step to explore the alternative Rule of Law-based 'functional' model proposed to avoid 'irresponsibilisation'.

5. Retracting Obligations: Territorial(ised) Jurisdiction and 'Effective Control'

Collaborative (meta-)border control infrastructures are vested with the capability to (violently) coerce at a distance. As already mentioned, externalised mechanisms of 'contactless control' negate access to territory and protection regimes in countries of destination at an early stage, *before* any physical contact has been made with the authorities of the State concerned. They are, indeed, matched with responsibility dispersion mechanisms that either diffuse or negate legal accountability (Moreno-Lax & Lemberg-Pedersen 2019, p. 19). 'Responsibility diffusion' relates to the relational trait of externalisation mechanisms and the multi-actor constellations they tend to involve, which obfuscate attribution of conduct and causation determinations in the legal liability chain, impeding the establishment of responsibility, given the multiplicity of agents and organs of different States and organisations intervening in 'contactless control' collaborations. Conversely, 'responsibility denial' refers to situations in which the main beneficiary of 'contactless control' ventures openly disclaims any responsibility for any potential/occurrent violations, submitting that it lies instead with the executing actor(s) — to which it has delegated the remote enforcement of its border measures. The ultimate effect in both scenarios is the 'irresponsibilisation' of the State(s) of destination (*ibid*.; *cf.* De Coninck 2023).

Irresponsibilisation, as a legal phenomenon, is facilitated by the reconfiguration of the relationship between law and territory that meta-borders entail. It is allowed by the disjuncture that exists (or is actively interposed) between understandings of sovereign power, which is routinely projected abroad in various forms and fashions — including through legal means of 'remote' and/or 'contactless' control — and conceptualisations of 'jurisdiction' for the specific

purposes of human rights compliance, which typically remain bounded to territorial conceptions of State authority and responsibility. Prevailing international human rights law interpretations propound an understanding of 'jurisdiction' as 'primarily territorial', while extraterritorial manifestations are considered 'exceptional and requiring special justification' (*Banković et al. v. Belgium et al.*, Appl. No. 52207/99, ECHR 2001, 59, 61; *cf. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, 109). This is especially the case of the European Court of Human Rights (ECtHR/Strasbourg Court), which has the most detailed and influential body of caselaw on the extraterritorial reach of human rights obligations under the European Convention on Human Rights (ECHR). The Court has elaborated a case-by-case piecemeal approach, which does not always seem to tally with the Rule of Law foundation underpinning the system of international (human rights) law. Overall, it has embraced a narrow construction of the circumstances that may trigger the extraterritorial applicability of the ECHR and the determination of responsibility for any related violations of Convention obligations. The two steps — the ascertainment of the existence of an exercise of jurisdiction, followed by the establishment of responsibility for any infringements — are not systematically differentiated. The Court has recently admitted that 'there may be areas of overlap' that render the two steps undistinguishable 'in so far as the Court is invited to examine whether any acts of the perpetrators are to be attributed to the State in the context of its jurisdiction assessment' (*Ukraine and The Netherlands v. Russia*, Appl. Nos 8019/16, 43800/14 and 28525/20, ECHR 2023, 551). In these situations, the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), codifying customary international law on the matter, are said to be 'clearly relevant' and to provide a source of inspiration (*ibid*.).

However, the Court's adherence to ARSIWA has not been fully consistent. While the ARSIWA's provisions could lead one to believe that State conduct of any sort should *per se* be considered a manifestation of State jurisdiction, whether taking the form of 'legislative, executive, judicial or any other functions' (Art 4 ARSIWA), whatever the character or position of the State organ or agent concerned (Arts 5-11 ARSIWA), and regardless of its exercise inland or abroad, the Strasbourg Court recognises only two main models where the necessary threshold may be attained for the triggering of ECHR obligations in extraterritorial settings: the 'State agent authority' or personal model and the 'control over an area' or territorial model (see, generally, Milanović 2011). An incipient third model, which can be denominated of 'due diligence' jurisdiction, is progressively taking hold in situations regarding the procedural obligation under the right to life, whereby a 'jurisdictional link' may be established 'between the respondent State and the victim's relatives' (*Ukraine and The Netherlands v. Russia*, Appl. Nos 8019/16, 43800/14 and 28525/20, ECHR 2023, 559).

5.1 The territorial, personal and due diligence models

The territorial model (*Cyprus v. Turkey*, Appl. No 25781/94, ECHR 2001; *Chiragov et al. v. Armenia*, Appl. No 13216/05, ECHR 2015; *Ukraine v. Russia (re Crimea)*, Appl. Nos 20958/14 and 38334/18, ECHR 2020; *Georgia v. Russia (II)*, Appl. No 38263/08, ECHR 2021) refers to scenarios in which jurisdiction takes the form of State military action abroad — whether with or without legal title (*Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, 138

et seq.) Human rights duties derive in these situations from 'the fact of such control' as the State may exert over foreign territory, either directly or via a subordinate local administration (*ibid*.). Establishing whether jurisdiction has been exercised in a human rights-relevant way is seen as a 'question of fact', depending on the strength of the military deployment of the State concerned or the level of 'decisive influence' wielded over the proxy actor through which control is maintained (*ibid*., 139; *Ukraine and The Netherlands v. Russia*, Appl. Nos 8019/16, 43800/14 and 28525/20, ECHR 2023, 695). There is an equation between extraterritorial jurisdiction and the notion of 'effective control' — shaped by *de jure* and/or *de facto* elements — which also applies in the context of the personal model.

There are at least three variants of the personal model that the Strasbourg Court has accepted in its jurisprudence. The first relates to the acts of diplomatic and consular agents 'present on foreign territory in accordance with provisions of international law' whenever they 'exert authority and control over others', thus potentially emphasising aspects of *de jure* jurisdiction (*Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, 134). However, in later jurisprudence, the Court seems to have limited the relevance of *de jure* factors to situations where State representatives, when acting 'in their official capacity', 'exercise abroad their authority in respect of that State's [own] nationals or their property' (*Ukraine and The Netherlands v. Russia*, Appl. Nos 8019/16, 43800/14 and 28525/20, ECHR 2023, 566; *M.N. et al. v. Belgium*, Appl. No 3599/18, ECHR 2020, 106 and 117-19). In relation to non-citizens these same agents require to 'exercise physical power and control' for the establishment of State jurisdiction, *de jure* authority alone does not suffice (*ibid*.).

The second situation relates to State acts that amount to an exercise of 'public powers normally to be exercised by [the domestic] Government [of the foreign country concerned]', if this is underpinned by 'the consent, invitation or acquiescence' of the territorial sovereign, and provided that 'the acts in question are attributable to it [i.e. the ECHR party] rather than to the territorial State' (*Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, 135; *Jaloud v. The Netherlands*, Appl. No 47708/08, ECHR 2014, 139, 149 and 152).

However, what tends to be 'decisive' in the determination of extraterritorial jurisdiction under the personal model (necessary for the triggering of Convention obligations, without which the ECHR is not deemed to apply) is 'the exercise of physical power' over individuals abroad (*Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, 136; *Georgia v. Russia (II)*, Appl. No 38263/08, ECHR 2021, 130; *Carter v. Russia*, Appl. No 20914/07, ECHR 2021, 126-30, 150 and 158-61). This constitutes the third and most frequent variant of the personal model, underscoring the importance attached to *de facto* elements of control by the Strasbourg Court. This variant has indeed been accepted in cases concerning the arrest/detention (*Medvedyev v. France*, Appl. No 3394/03, ECHR 2010), abduction (*Öcalan v. Turkey*, Appl. No 46221/99, ECHR 2005) or extradition/surrender of persons abroad (*Al-Saadon and Mufdhi v. United Kingdom*, Appl. No 61498/08, ECHR 2010). In exceptional situations entailing what Strasbourg denominates 'an element of proximity' — without clarifying whether this is to be understood in geographical or causal terms — 'isolated and specific acts of violence' have also been construed as being covered under the personal model (*Ukraine and The Netherlands v. Russia*, Appl. Nos 8019/16, 43800/14 and 28525/20, ECHR 2023, 570). This means that 'beating or shooting by State agents of individuals outside that State's territory' (*ibid*., citing: *Isaak et al. v. Turkey*, Appl. No 44587/98, ECHR 2006 and

Andreou v. Turkey, Appl. No 45653/99, ECHR 2009) as well as 'the extrajudicial targeted killing of an individual by State agents' may qualify as an exercise of jurisdiction (*ibid*., citing: *Carter v. Russia*, Appl. No 20914/07, ECHR 2021, 129-130). Yet the Court appears to accept this only in situations where the killing takes place 'in the territory of another contracting State' (*ibid*.), which generates an arbitrary distinction between extrajudicial targeted killings perpetrated in a fellow ECHR party vis-à-vis extrajudicial targeted killings executed in a non-ECHR party. The rationale for this discrepancy has not been stated, which in any event is hard to reconcile with the Rule of Law.

A third emergent model of extraterritorial jurisdiction arises from the investigative obligations attaching to the right to life, when 'a death occurs outside the territory of the Contracting State in respect of which the procedural obligations under Article 2 [ECHR]' apply (*ibid*., 573, citing: *Güzelyurtlu et al. v. Cyprus and Turkey*, Appl. No 36925/07, ECHR 2017; *Hanan v. Germany*, Appl. No 4871/16, ECHR 2021). According to the Court, 'the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous obligation that can be considered to be a detachable obligation arising out of Article 2 and capable of binding the State even when the death occurred outside its jurisdiction' (*ibid*.). In such situations — and in a somewhat circular reasoning — 'if the … authorities of a Contracting State institute … their own criminal investigation or proceedings concerning a death', whether of their own free will or possibly out of a sense of obligation 'by virtue of their domestic law', then 'this *may* in itself be sufficient to establish a jurisdictional link' (ibid., emphasis added). When 'no such investigation or proceedings have been instituted … *special features* [that the Court has not defined] *may* [still] trigger the existence of a jurisdictional link' (*ibid*., 574, emphasis added). Whether such 'special features' exist or not 'will necessarily depend on the particular circumstances of each case' (*ibid*.), which inhibits predictability. Why such special jurisdictional link and autonomous obligation should exist only for the purposes of investigating death, rather than to protect life when still possible also remains unexplained.

5.2 Missing definitions

Silences and inconsistences constitute a main limitation of the Strasbourg jurisprudence. The exact impact of *de jure* and *de facto* power for the establishment of extraterritorial jurisdiction remains unclear, as does the degree of directness of the control to be exerted and whether physical contact is ever/always essential, especially when non-citizens are concerned. There are some examples involving maritime blockades (*Women on Waves v. Portugal*, Appl. No 31276/05, ECHR 2009) or the forcible rerouting of a foreign ship (*Medvedyev v. France*, Appl. No 3394/03, ECHR 2010) where the jurisdictional link was not contested, even if no direct physical contact had been made between the State and the individuals affected (or their vessel). Yet, in other situations, of (targeted) killing from a distance, including through a pre-planned, NATO-sanctioned bombing operation (*Banković et al. v. Belgium et al.*, Appl. No. 52207/99, ECHR 2001), the link has not been deemed established, so the Convention was said not to apply and no responsibility could be determined.

In truth, the Court has never provided a detailed definition of 'jurisdiction' or 'effective control'. Neither has it specified the criteria on which they depend on a general basis or explained the principles that sustain these doctrines — a position which has attracted criticism,

even from within the Court itself (e.g. *Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, Concurring Opinion of Judge Bonello, 8), especially on account of the role these notions have been made to play as a 'threshold' without which the Convention is considered not 'activated' (*ibid.*, 130). Indeed, without jurisdiction — understood as 'effective control' in extraterritorial scenarios — ECHR obligations are regarded as not being triggered at all and as not binding the conduct of State parties, whichever their consequences on the ground. The Court has recently asserted in this connection that 'Article 1 of the Convention [does] not accommodate the theory that anyone adversely affected by an act imputable to a Contracting State, wherever in the world …, is thereby "brought within" the "jurisdiction" of that State' (*Georgia v. Russia (II)*, Appl. No 38263/08, ECHR 2021, 134). Such an understanding — in the eyes of the Court — would be 'tantamount to equating the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim' under the Convention (*ibid*.).

This is why, amid this ambiguity and to counter related risks of arbitrariness, my proposal is to embrace a 'functional' approach to jurisdiction that matches the equally functional nature of (meta-)borders and their mechanisms of control, giving rise to the applicability of human rights obligations whenever State power is exercised. This interpretation, as expounded in the next section, is supported by elements of extant interpretation by other international Courts and Treaty bodies, and even by parts of the Strasbourg's own jurisprudence. A rationalisation of these components in light of the basic tenets of a Rule of Law-based construction of 'jurisdiction' motivates this effort.

6. 'Functional' Jurisdiction: Towards a Responsibilisation Model

I understand 'functional' jurisdiction as stemming from the governmental 'functions' through which the use and deployment of State sovereignty manifests itself in individual cases. What the Strasbourg Court calls 'public powers' (*Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, 135) — which can be discharged via legislative, executive, judicial activity, or a combination thereof — are recognised vehicles of State authority. A 'functional' approach to jurisdiction, therefore, builds from that and takes into account the underlying sovereign-authority nexus that connects the ECHR State Party to those within its power — irrespective of the manner in which and the place from which that (public/State) power may be exercised (Moreno-Lax 2020, 396 *et seq*.). The basic premise is that human rights obligations — as Rule of Law-based guarantees against arbitrariness — track State jurisdiction and require that any exercises thereof be performed in conformity with them, regardless of location. This requires that 'human rights be [placed] at the centre of [State] efforts to address migration in all its phases', accepting their applicability in 'any operations [by States] where they exercise effective control or authority over an area, place, individual(s) or transaction' in whatever way this may take place (González Morales 2021, 39 and 37).

From an international legal perspective, domestic legislative action 'express[es] the will and constitute[s] the activities of States, *in the same manner* as do legal decisions or administrative measures' (*Certain German Interests in Polish Upper Silesia* (Germany v. Poland), Judgment, PCIJ 1926, 19, emphasis added). Adjudicative, administrative, and legislative measures amount to an expression of State jurisdiction, denoting a concrete

implementation of State sovereignty, which should, accordingly, be understood to equally trigger State responsibility in case of a violation of pre-contracted obligations (*cf*. Arts 4 *et seq*. ARSIWA).

What determines responsibility in this framework is an instantiation of effective control understood not solely on the basis of the intensity or directness of any physical force that may be applied. Grounded in a construction of jurisdiction as 'functional', what makes control effective is its material impact to determine the course of events unlocked by its exercise, even when the relevant activity of the State is carried out from a distance and applying 'minimal' coercion (*cf. Hirsi Jamaa et al. v. Italy*, Appl. No 27765/09, ECHR 2012, 79 and 180). In this context, the effectiveness of control is to be judged against its influence on the ensuing situation and the (legal/factual) position in which those affected by it are left as a consequence of that control. This means that both *de facto* elements (like force) and *de jure* factors (like legal title) should be considered in tandem as the conduits of expression of 'public powers' by the State that it may deploy via legislative, executive, or adjudicative activity (including *ultra vires*). Whenever that activity — once undertaken and *actually* carried out in the real world — interferes with the enjoyment of the rights that '[ECHR] Parties shall secure to everyone within their jurisdiction' (Art 1 ECHR), the relevant obligations should be considered applicable and constrain State conduct.

6.1 Drawing inspiration from the law of the sea

Several international Courts and Tribunals dealing with different branches of international law embrace an analogous position on jurisdiction and its 'functional' reading. They understand it (often implicitly) as a threshold criterion that determines the applicability of the relevant Treaty obligations, with any concomitant violations leading to the establishment of legal responsibility. For example, the *Norstar* ruling by the International Law of the Sea Tribunal (ITLOS) follows this interpretation (*M/V Norstar* (Panama v. Italy) Case No 25, ITLOS 2019), when judging on a case engaging the UN Convention on the Law of the Sea (UNCLOS). The issuance of a decree of seizure by Italy vis-à-vis a foreign ship on the high seas suspected of illegal activity was taken as an exercise of jurisdiction sufficient to engage Italy's responsibility for the resulting outcome (i.e. the unlawful arrest that followed, which was subsequently enforced by a partner country within Italy's territorial waters), not because it produced physical control by itself, but because it generated the conditions for its actual (wrongful) enforcement (*ibid*., 222 *et seq*.). It was the combined force of the decree issued by Italy, coupled with its subsequent enforcement, that was performed by Spain on its behalf, alongside the actual seizure of the vessel by the Spanish authorities, that engaged Italy's jurisdiction and determined its responsibility in the eyes of the Tribunal (*ibid*., 126). It was not Spain, but Italy who was considered responsible for the final outcome — Spain had acted at Italy's request, by Italy's delegation and as its proxy, in this case. The sovereign-authority nexus that the action had generated was vis-à-vis Italy, as the ordering State for whose benefit the arrest was to be effectuated (even if unlawfully, as ITLOS concluded in the end). The ensuing breaches of the freedom of navigation principle and related UNCLOS provisions were attributable to Italy on account of the 'contactless control' it had deployed and exercised via Spain in relation to the ship concerned.

The Tribunal specifically considered whether direct 'physical interference or enforcement [action]' impinging on the freedom of navigation applicable on the high seas was necessary for an exercise of jurisdiction to be identified (*ibid*., 222-3). It concluded that those elements were not essential and that '*any act* which subjects activities of a foreign ship on the high seas to the [authority] of States other than the flag State' not only amounts to an exercise of jurisdiction but also 'constitutes a breach of the freedom of navigation' (*ibid*., 224, emphasis added). In the Tribunal's view, the principle of exclusive flag State jurisdiction governing the high seas (Art 92 UNCLOS) 'prohibits not only the exercise of *enforcement* jurisdiction on the high seas by States other than the flag State but also the extension of their *prescriptive* jurisdiction to lawful activities conducted by foreign ships on the high seas' (*ibid*., 225, emphasis added). For the Tribunal, 'if a State applies its criminal and customs laws to the high seas and criminalises activities carried out by foreign ships thereon', it not only (unduly) exercises its jurisdiction, but the action 'would [equally] constitute a breach of article 87 of the [UN Law of the Sea] Convention, unless justified by the Convention or other international treaties' (*ibid*.). And this remains the case 'even if the State refrained from enforcing those laws on the high seas' and did so only subsequently and within territorial waters (*ibid*., 225-6). While the locus of enforcement may be relevant in the determination of the existence of a violation, according to the Tribunal, this does not constitute the 'sole criterion' (*ibid*., 226), nor is it always decisive to establish the (separate, though related, question of the) applicability of the Convention in the first place. Accordingly, the Tribunal considered that the 'Convention [i.e. UNCLOS] [was] applicable in the present case' and, in addition, concluded that 'Italy, by extending its criminal and customs laws to the high seas, by issuing the Decree of Seizure, and by requesting the Spanish authorities to execute it — which they subsequently did — breached the freedom of navigation [provision in Art 87 UNCLOS]' (*ibid*., 226).

6.2 Examples within the human rights domain

In the human rights field, many have adopted a similar, arguably equally 'functional', approach — in the sense I posit. The Inter-American Commission on Human Rights, for instance, has espoused a 'causal link' model. In the *Alejandre* case, Cuba was deemed to have exerted sufficient control (and thus jurisdiction) through the shooting down of two aircrafts flying beyond its domestic aerial space because 'the victims died *as a consequence* of direct actions of agents of the Cuban State' (*Alejandre v. Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II 106, IACHR (1999), 24-25, emphasis added). The Inter-American Court on Human Rights has endorsed and generalised this understanding, concluding that 'a person is under the jurisdiction of the State … 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' (*Environment and Human Rights*, Advisory Opinion OC-23/17, IACtHR (ser. A) No. 23, 74, emphasis added). The Committee Against Torture has adopted this model too in a case concerning the interdiction of a migrant at sea by the Spanish authorities and his subsequent abandonment close to the Moroccan shore. Having asked him to jump overboard, disregarding pleas that he could not swim and letting him drown, the Committee concluded that the 'undeniable *cause-effect relationship* … between Mr Sonko's death and the actions [and arguably also the omissions] of the … officers' established the jurisdictional link that triggered

the applicability of the Convention against Torture and determined its violation (*Sonko v. Spain*, Comm. No 368/2008, CAT/C/47/D/368/2008, CAT 2011, 10.1, emphasis added).

The Human Rights Committee has an elaborate stance in this regard, expanding on the causal-link approach to construct an impact-based conception of jurisdiction. The Committee considers that Parties to the International Covenant on Civil and Political Rights (ICCPR) are subject to 'respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction', understood to encompass 'anyone within the *power or effective control* of that State Party, even if not situated within the territory of the State Party' (General Comment No 31, CCPR/C/21/Re1/Add13, CCPR 2004, 10, emphasis added). In this context, both 'power' and 'effective control' count towards the determination of jurisdiction, as equivalent manifestations of the exercise of State sovereignty with relevance to human rights adjudication. The Committee has built on this general premise, in relation to the right to life, to specify that 'subject to its jurisdiction' should be construed to include 'all persons *over whose enjoyment* of the right to life [the State Party] exercises *power or effective control*' (General Comment No 36, CCPR/C/GC/36, CCPR 2018, 63, emphasis added). As a result, '[t]his includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless *impacted* by its … activities *in a direct and reasonably foreseeable manner*' (*ibid*., emphasis added). Such 'activities' — performed whether as actions or omissions of a legislative, executive, or adjudicative character — constitute expressions of the State's 'functions' and, therefore, of its 'jurisdiction' for the purposes of establishing the applicability of the ICCPR and its potential violation.

This 'impact model' draws from pronouncements in previous decisions, where the Committee considered the ICCPR applicable and the State Party concerned responsible when its conduct constituted 'a *link in the causal chain* that would make possible violations in another jurisdiction' (*Munaf v. Romania*, Comm No. 1539/2006, CCPR/C/96/D/1539/2006, CCPR 2009, 14.2, emphasis added). The mere 'risk of an extra-territorial violation' was deemed to trigger the action of the Covenant and to possibly lead to a violation if it could be considered 'a necessary and foreseeable consequence … judged on the knowledge the State party had at the time' of the events (*ibid*.). So, knowledge and predictability of the potential impact of State conduct of whatever kind not only activates Covenant obligations but must also be taken into consideration in both the jurisdictional and responsibility assessments.

This is why failing to adequately respond to a distress call by individuals in danger of being lost at sea was determined to amount to an exercise of jurisdiction that violated the Covenant. In *S.A. v. Italy*, 'negligent acts and omissions in the rescue activities' of the defendant 'directly affected' the situation of the individuals concerned 'in a manner that was reasonably foreseeable', especially considering Italy's duties under the rescue Conventions (*S.A. et al. v. Italy*, Comm No. 3042/2017, CCPR/C/130/D/3042/2017, CCPR 2021, 8.2 and 7.8). The subjection of the individuals affected to Italy's jurisdiction was through this 'impact', which ensued from a combination of *de jure* and *de facto* elements, including 'the initial contact made by the vessel in distress with the [Rome] MRCC, the close proximity of [the Italian warship] ITS Libra to the vessel in distress, and the ongoing involvement of the [Italian authorities] in the rescue operation as well as relevant legal obligations incurred by Italy under the international law of the sea' (*ibid*., 7.8). All these elements combined generated 'a special

relationship of dependency' between the victims and the Italian State. Such a holistic understanding of Italy's jurisdiction is what led to the establishment of its responsibility.

Duties under the Search and Rescue (SAR) and Safety of Life at Sea (SOLAS) Conventions were crucial *de jure* components to determine the jurisdictional nexus vis-à-vis the persons in distress. These Conventions conceptualise the jurisdictional link in a capability-based manner, requiring '[t]he master of a ship at sea which is *in a position to be able to provide assistance* … to proceed with all speed to their assistance' (SOLAS Convention, ch v, reg 33, emphasis added). The duty starts to apply 'on receiving information *from any source* that persons are in distress at sea' (*ibid*., emphasis added), whether a distress call, data from radar detection, or a visual of the vessel in peril. This replicates the terms of the customary rescue obligation codified in Article 98 UNCLOS, according to which '[e]very 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 to render assistance to any person found at sea in danger of being lost [and] to proceed with all possible speed to the rescue of persons in distress …' (emphasis added). Such an understanding may well amount to 'collapsing the ability to engage in … search and rescue … with the notion of jurisdiction' in this domain (*S.A. et al. v. Italy*, Comm No. 3042/2017, CCPR/C/130/D/3042/2017, CCPR 2021, Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting), 6), but it is what the maritime Conventions explicitly require to preserve human life at sea and maintain the effectiveness of the rescue regime (*cf*. IMO Guidelines).

This capability-based approach to jurisdiction (as a threshold criterion activating international obligations and determining their possible violation) is not unheard of in other areas of international law where vital interests are at stake. The Committee on the Rights of the Child has recently 'broadened' the concept to consider France's 'capacity' and 'power' to protect the rights of several children detained in Syria with their parents as akin to 'jurisdiction'. Failure to offer effective consular assistance and to repatriate them as a means to avoid the risk of harm was considered an expression of France's jurisdiction by omission that also established its responsibility under the Children Rights Convention (*L.H. et al. v. France*, Comm Nos 79/2019 and 109/2019, CRC/C/85/D/79/2019−CRC/C/85/D/109/2019, CRC 2020, 9; General Comment No 23, CRC/C/GC/23, CRC 2017).

Also the International Court of Justice seems to have developed a somewhat flexible construction of human rights jurisdiction in extraterritorial situations, without attaching paramount importance to 'effective control'. In the *Wall* Opinion, concerning the applicability of the ICCPR in the Occupied Palestinian Territories, the Court ascertained that 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory' (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, 109). Adopting a teleological approach, '[c]onsidering the object and purpose of the [Covenant]', it concluded that '*it would seem natural* that, even when such is the case, State parties [such as Israel in this case] … should be bound to comply with its provisions' (*ibid*., emphasis added). While this flexibility may well be attributed to the fact that adjudication occurred against the background of military occupation, in a situation not reaching that threshold, the Court has also displayed an openness to determining the applicability of human rights obligations in a different context. In *Georgia v. Russia*, it found that the provisions of the Convention on the Elimination of Racial

Discrimination (CERD) '*generally appear to apply* … to the actions of a State Party when it acts beyond its territory', without further caveats (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures (Order), [2008] ICJ Rep 353, 109). While in this case the finding may have been facilitated by the absence of a jurisdictional clause akin to Article 1 ECHR in the body of the CERD, the wording employed denotes a general appreciation that States remain bound by their international human rights obligations when acting abroad, which they cannot arbitrarily undo through a tactical use of their powers.

6.3 Lessons from (some of) the Strasbourg jurisprudence

A similar perspective adopted in the migration/border control realm would lead to mechanisms of 'contactless control' being deemed human rights-relevant and possibly trigger responsibility in cases of a violation, even if perpetrated by any proxy actors with whom destination countries might collaborate. A functional jurisdiction-based reading of the ECHR and similar instruments of human rights protection would take account of the 'sufficiently proximate repercussions' of State (enforcement and/or prescriptive) action 'on rights guaranteed by the [European] Convention [on Human Rights]' and related human rights and refugee law safeguards, 'even if those repercussions occur[red] outside' national territory (*Ilaşcu et al. v. Moldova and Russia*, Appl. No 48787/99, ECHR 2004, 317). The predictable consequences of an exercise of 'public powers', including when undertaken beyond national territory, would entail an exercise of jurisdiction thus engaging the State's responsibility for any resulting infringements. This would apply also when the State acted through a third actor that came under its 'decisive influence', be it 'by virtue of the military, economic, financial [or] political support given to it' (*ibid*., 392-4; *Catan et al. v. Moldova and Russia,* Appl. Nos 43370/04, 8252/05 and 18454/06, ECHR 2012; *Ukraine and The Netherlands v. Russia*, Appl. Nos 8019/16, 43800/14, 28525/20 and 11055/22, ECHR 2023).

In fact, the Strasbourg jurisprudence, though unsystematically, has already embraced elements of this paradigm in cases involving multiple States/actors whose joint action was considered to amount to an exercise of jurisdiction (in the form of 'effective control') in breach of ECHR obligations, engaging a mix of its own territorial and personal models, applying in extraterritorial scenarios, whether in the context of the actions/omissions of military operations in Iraq by the UK (*Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, and subsequent case law) or in relation to cooperation between Russia and the local separatist movement controlling the Transnistria region in Moldova (*Ilaşcu et al. v. Moldova and Russia*, Appl. No 48787/99, ECHR 2004, and subsequent case law).

For example, in *Al-Skeini*, the Court found that the UK had exercised 'authority and control' (i.e. jurisdiction) over individuals *accidentally* killed during an exchange of fire with a local armed group in Basra during a security operation. Although 'it [was] not known which side fired the fatal bullet' (*Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, 150), the death of the spouse of one of the applicants was considered attributable to the UK and to trigger the action of the Convention. This was because the death had occurred 'in the course of a United Kingdom security operation' which was deemed to establish a 'jurisdictional link between the United Kingdom and this deceased also' (*ibid*.). What counted was the

'functional' connection established between the deceased and the British forces via their security operation, regardless of whether they had exercised any direct, physical coercion. The operation itself constituted an exercise of 'public powers' of those 'normally … exercised by a sovereign government' (*Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, 149). In this case, British presence in Basra had been authorised by a series of UN Security Council Resolutions, which lent a de *jure* basis to the exercise of those 'public powers', which presumably had to be discharged in line with human rights obligations. The combination of *de jure* and *de facto* elements of State authority served to holistically determine the applicability of the Convention and to establish the responsibility of the UK for the resulting violations in the particular case, against a 'functional' understanding of jurisdiction.

In the *Ilaşcu* line of cases, by contrast, the Strasbourg Court held Russia and Moldova jointly responsible for the human rights violations perpetrated in the region of Transdniestria. The passivity of Moldova vis-à-vis the human rights violations endured by the applicants living in the region was judged to engage its responsibility by omission, on consideration that, even if not *de facto*, *de jure* it still retained territorial jurisdiction over Transdniestria, involving positive due diligence obligations to 'ensure' human rights in all parts of the country (Art 1 ECHR). Moldova's responsibility *qua* territorial State notwithstanding, Russia's indirect intervention, through the separatist local administration *de facto* controlling the region, was considered sufficient to activate its liability under the Convention. The actions and omissions of the local administration, albeit a third actor with which Russia had no 'direct involvement' (*Mozer v. Moldova and Russia*, Appl. No 11138/10, ECHR 2016, 101), were considered to come under the 'decisive influence' of the Russian government (*Ilaşcu et al. v. Moldova and Russia*, Appl. No 48787/99, ECHR 2004, 392 *et seq*.). Such an influence was decisive on account of the level of dependency on Russian support of the separatist local administration, which operated 'by virtue of the military, economic, financial and political support given to it' by Russia (*Ibid*.). As a result, Russia bore responsibility for the third actor's conduct, given the 'continuous and uninterrupted link of responsibility … for the applicants' fate' (*ibid*.) that its support involved. In reality, the local separatist government acted as a proxy — as a vehicle of 'contactless control' — allowing Russia to indirectly exercise 'functional' jurisdiction over Transnistria from a distance, triggering its ECHR obligations, and determining its responsibility for any concomitant breaches of the Convention.

Such an understanding of jurisdiction — as I envision it — inspired by the jurisprudence of the various international Courts, Tribunals and Treaty bodies explored above, but also based on existing pronouncements of the Strasbourg Court in different subject areas, serves to counter the 'irresponsibilisation' phenomenon referred to above with a principled and sustainable approach. A 'functional jurisdiction' model, like the one I propose, is adapted to today's globalised world of meta-borders and its mechanisms of 'contactless control'. It is based not on wishful legal thinking, but on a systematisation of *existing* ECHR rulings, other relevant international jurisprudence, and (already) accepted bases of extraterritorial jurisdiction and legal responsibility. What it does is to rationalise these precedents to re-connect law with power and responsibility, re-establishing the foundational premise against arbitrariness underpinning the Rule of Law, whatever the spatial location of the conduct (actions/omissions) concerned.

7. Conclusion: Rejecting Unaccountable Power

The externalisation of migration management highlights the need to consider composite notions of agency and responsibility de-coupled from territory and territorially anchored definitions of border policing in order to avoid accountability gaps. Physical distance-creation through techniques of 'contactless control' should not translate into the negation of legal obligations. Mechanisms that (purposively) offshore and outsource border enforcement constitute self-serving effectuations that (by themselves) should not be taken to alter the applicable standards or negate their effectiveness. The proposed 'functional' approach to the definition of jurisdiction in international and European human rights law constitutes a step towards a 'responsibilisation' model that reconciles law, space, and power in a principled manner.

As the previous Sections have shown, borders in today's globalised world assume different forms and functions. They are complex products of the socio-cultural, economic, and legal processes that constitute them. The law's implication in the construction of what I have called the meta-border and the inclusion/exclusion effects it produces is paramount to the understanding of how mechanisms of externalisation through strategies of 'contactless control' work. It is *through* the law that the space that separates geography from the exercise of power is produced and legitimised. It is *through* the law that the migrant as a subject of policing and control is 'made'. And it is *through* the law that State sovereignty extends beyond territorial jurisdiction, while concomitant Rule of Law constraints are (tactically) restricted and disapplied. However, this situation, whereby State authority is implemented outside national territory, but with no human rights accountability, needs to be contested. Unaccountable power is incompatible with a Rule of Law-based international system. Arbitrariness is incompatible with international law (Art 1 UN Charter).

Therefore, my main line of argument herein has been that human rights guarantees, in their function as checks on State power, should be deemed to restrain exercises of public authority *anywhere* they may take place. So, in a situation where sovereign power strategically extends beyond territorial dominion, the State cannot free itself from the legal constraints that would apply in the absence of such a tactical extension — the State's prerogative to govern migration remains subordinate to its international law commitments (González Morales 2021, 104; Melzer 2018, 58). The opposite would be tantamount to awarding States the freedom to select, at will, those worthy/unworthy of being included in the Rule of Law framework, unilaterally undoing the universality, inalienability, and *erga omnes* character of human rights (UDHR, Preamble).

Instead, a 'responsibilisation' model that is principled and predictable, aligned with the basic safeguards pertaining to the Rule of Law, should be adopted. A 'functional' conceptualisation of jurisdiction that allows for the attribution of responsibility for 'contactless control' measures, based on an understanding of State functions pursuant to international law, preserves the role of Article 1 ECHR as a 'threshold' criterion, but giving it a coherent interpretation across territorial divisions. If/when jurisdiction is construed in this functional sense, as an expression of the 'public powers' of the State (*Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, 135), there is no longer a need for arbitrary distinctions of in/out, territorial/extraterritorial, personal/spatial manifestations of sovereignty. The functional

approach engages with the sovereign-authority nexus that connects individuals to the State, whether via an exercise of legislative, executive, or judicial 'functions', as the main trigger of human rights duties. All *de jure* and *de facto* applications of State power, whether ascertained through physical force or indirect forms of control, are considered holistically, to evaluate their aggregate impact on the situation of those concerned. What makes control effective in this context is its ability to effectuate a change in the legal/material position of the individuals affected with human rights-relevant repercussions.

Cooperation with third States/actors, including through techniques of 'contactless control', do not become *a priori* prohibited by the 'responsibilisation' model. What the responsibilisation model precludes is recourse to bi-/multi-lateral agreements in tactical fashion, 'to bypass human rights obligations' (González Morales 2021, 63). (Genuine) collaboration can still be pursued but remains subject to human rights compliance (*Al-Skeini et al. v. United Kingdom*, Appl. No. 55721/07, ECHR 2011, 138). However, if the continued abidance by human rights standards is not possible or cannot be guaranteed, ECHR parties cannot consider themselves exempted from their obligations. On the contrary, they cannot 'enter into an agreement with another State which conflicts with [their] obligations under the Convention' (*Al-Saadon and Mufdhi v. United Kingdom*, Appl. No 61498/08, ECHR 2010, 138; *Hirsi Jamaa et al. v. Italy*, Appl. No 27765/09, ECHR 2012, 129). These need to be taken into account when designing and executing any form of collaborative remote/contactless controls.

Such a conceptualisation matches the flexible spatiality of migration governance and tallies with the contemporary design of (meta-)borders and their processes of enforcement by rejecting unaccountable power. It thereby closes the 'unconscionable' accountability gap (*López Burgos v. Uruguay*, A/36/40, 176; *Issa et al. v. Turkey*, Appl. No 31821/96, ECHR 2004, 71) that alternative notions leave unaddressed, bringing people on the move (back) within the Rule of Law framework.

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