MIGRANT BOATS ON THE HIGH SEAS AND THEIR INTERCEPTION THROUGH PSYCHOLOGICALLY COERCIVE MEASURES: IS THERE A CASE TO EXTRATERRITORIALLY APPLY HUMAN RIGHTS LAW?

*** Solon Solomon**

I. Introduction

In the first two decades of this century, considerable boat migrant waves have been marked. These waves can be traced geographically mainly in the Pacific Rim and the maritime area between Australia and Indochina and in the Mediterranean[1] and they have been escorted by state attempts to curve them, by intercepting these boats on the high seas.[2] The high seas are specifically chosen as a zone lying outside the territorial

* King's College London Dickson Poon School of Law

[1] Violeta Moreno-Lax & Mariagiulia Giuffre, The Raise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows in RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW (S. Juss ed, 2017), p.2 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009331

[2] The states intercepting these boats are either the state of destination or the state from which these boats have embarked. The current article will not delve into the question of whether also in the latter case and assuming that the persons on board these boats are entitled to be acknowledged as refugees, the non-refoulement principle has been breached. On this see Violeta Moreno-Lax & Mariagiulia Giuffre, The Raise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows in RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW (S. Juss ed, 2017), p.p.13-14 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009331 See also discussion of the May 2017 incident where a boat full of migrants heading from Libya to Italy, was intercepted by the Libyan Coastguard on the high seas and was returned to Libya. Jean-Pierre Gauci, Back to Old Tricks? Italian Responsibility for Returning People to Libya, EJIL!Talk, June 6,

realms, in an effort from these states' part to relinquish their responsibilities both under human rights law as well as under refugee law as far as the non-refoulement principle is concerned. [3]

While such interceptions take place many times through actual seizure of the migrant boats and their towing to the state navy vessels, such physical control over it is rendered possible only once another non- physical control has taken place beforehand. In many cases it is only after the firing of warning shots or the pointing of a gun that migrant boats, under psychological pressure, are compelled to cease their journey, ultimately allowing the navy vessel crews to physically also control them either by boarding or towing them and leading them to the intercepting state's

---

2017 available at https://www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/#more-15300

[3] UNCHR, Advisory Opinion on the Extraterritorial Application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, Geneva, 26 January 2007, paras.17-19. For the non-refoulement principle see Kalin et als., Article 33 para1 (prohibition of expulsion and return (refoulement) in THE 1951 CONVENTION RELATING TO THE STATU OF REFUGEES AND ITS 1967 PROTOCOL-A COMMENTARY (Zimmerman et als. Eds, 2011), Oxford University Press, 2011, p.1367; Guy Goodwill-Gill, THE REFUGEE IN INTERNATIONAL LAW, Oxford University Press, 3rd ed.,2007, 246;UN High Commissioner for Refugees (UNHCR), The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, available at: http://www.refworld.org/docid/437b6db64.html; Elihu Lauterpacht & Daniel Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion in REFUGEE PROTECTION IN INTERNATIONAL LAW (Erika Feller, Volker Turk & Frances Nicholson eds., 2003, Cambridge University Press) 123-24 .

destination of will. Such firing of warning shots or the pointing of guns and canons towards migrant boats[4] constitute psychological measures to the extent that they do not target the migrants' body and limb. Contrary to the shooting of bullets directly towards the migrants or other measures which have the potential to inflict wounds on the migrants' corpse, the aforementioned pointed-guns or warning shots practice cannot by definition lead to physical injuries. Any repercussions are only psychological.[5] With states intimidating the migrants and the boats' crews, the latter

[4] For incidents of such boat interception involving countries like Australia, Thailand and Greece see Thomas Gammeltoft-Hansen, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALIZATION OF MIGRATION CONTROL, Cambridge University Press, 2011, 120; ECHR, Hirsi Jamaa et al. v. Italy, Judgment ,Feb.23, 2012, para.13; Australia turns back Asylum Seeker Boat from Indonesia, Sydney Morning Herald, Jan.15,2014 available at http://www.smh.com.au/federal-politics/political-news/australia-turns-back-asylum-seeker-boat-from-indonesia-20140115-30vds.html; Nikolaj Nielsen, Greek Special Forces Push Back Syrian Refugees, NGO Says, EU Observer, Nov.7,2013 available at http://euobserver.com/justice/122021; Greg Torode, UN concerned after Probe shows Thai troops shot at Rohingya, South China Morning Post, March 16,2013 available at http://www.scmp.com/news/asia/article/1191805/un-concerned-after-investigation-shows-thai-troops-shot-rohingya

[5] For the fact that mental harm can be caused to civilians through the experience by sight or hearing of traumatizing instigators see the case of the civilians in Yemen and Pakistan developing PTSD as a result of them being constantly exposed to U.S. drone strikes or the psychological repercussions of the Israeli sonic boom strikes on the Palestinian population in Gaza. On these see Eliav Lieblich, Beyond Life and Limb: Exploring Incidental Mental Harm under International Humanitarian Law in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS, (Derek Jinks, Jackson Maogoto & Solon Solomon eds., TMC Asser Press, 2014) 185

are compelled to conform with state directions and re-arrange their journey according to the states' will. In that sense, the migrant boats' fate is sealed not once they fall

under the physical control of state authorities, but already once, compelled by the navy vessels, these boats feel obliged to comply with the non-physical, psychologically coercive intimidation measures states exert.

The current article wants to explore whether the exercise of such non-physical but rather psychologically coercive measures in the high seas, outside the state's national territory, can give rise to the extraterritorial application of human rights law leading to the state's accountability for any policies violating the migrants' rights. Jurisprudence has linked the assertion of such extraterritorial human rights law application with the existence of effective control.[6] While in cases of physical control it is easier to demonstrate how such control directly impacts upon the persons' freedom of choice and movement and thus should be deemed as satisfying the requirement of effectiveness, leading to state accountability, psychologically coercive measures do not necessitate the existence of a physical grip, making it more difficult to prove that the exerted control was also 'effective.'

Along these lines, the current article will explore the issue by examining how it can enter the effective control framework primarily established by the European Court of Human Rights (ECtHR) jurisprudence. In these realms, the term 'migrants' will be used to describe the people on board these boats without excluding the possibility that some or most of them are also entitled to a refugee status. Moreover,

[6] See infra the analysis of the ECtHR jurisprudence

the impact psychologically coercive means can have on the assertion of the effective control requirement will be presumed based on the actions undertaken by the people on board the migrant boats, namely the non-continuation of their journey as a result of the state measures, such as the firing of warning shots or the command for these boats to sail back. Since the existence of state control will be examined on account of whether as required by international bodies, the state could exert a power or have a 'grasp' over the fate of the particular people,[7] the question of whether such a control can be asserted in absence of physical measures, will be examined on a result-basis mode based on the fact that these boats head back and do not continue their journey to the country of destination.

The article will proceed as follows: the next section will first place the exercising of psychologically coercive measures against migrant boats inside a wider policy exerted often by states against prospective refugees and their will to settle in a country. Understanding the motives and policy implications of the phenomenon, I will further proceed to discuss whether human rights law can apply on the high seas in the first place and whether such state interceptions can give rise to effective control claims.

II. Psychologically coercive measures against migrant boats as part of the wider refugee deterrent policy framework

[7] Human Rights Committee, General Comment No.31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev1/Add.13 (May 26, 2004) para.10. See also infra section II

The question of whether psychologically coercive measures can establish effective control must be seen as part of a wider framework of policies states undertake to deter potential migrants or refugees from reaching their shores. These measures include for example the seizure or confiscation of these boats. Yet, such seizure is not universally endorsed in legal texts and raises certain issues regarding violations of other rights, such as for example the right to property.[8] Moreover, as noted,[9] states in Europe increasingly resort to 'contactless policies' of dealing with the migrant boats in the Mediterranean, promoting measures such as offshore patrolling and transfer of these people to third countries with the ultimate aim of avoiding to come in contact with them on European soil. In that sense, to the extent that no physical contact with the intercepted boats is a priori established, states- based on the scarce analysis that exists so far on the legal repercussions of psychologically inducing measures- aspire to evade altogether any claims of human rights law extraterritorial application, claiming that the effective control requirement cannot be established. Along these lines, unless explicitly addressed as an autonomous

[8] On this account see Marta Bo, Repressing Migrant Smuggling by the UN Security Council and EU Naval Military Operation Sophia: Some Reflections on Jurisdiction and Human Rights, EJIL!Talk, 3 November 2017 available at https://www.ejiltalk.org/repressing-migrant-smuggling-by-the-un-security-council-and-eu-naval-military-operation-sophia-some-reflections-on-jurisdiction-and-human-rights/

[9] Violeta Moreno-Lax & Mariagiulia Giuffre, The Raise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows in RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW (S. Juss ed, 2017), p.4 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009331

parameter and not just as the first stage of the ultimate establishment of physical control over these boats, states may feel more tempted in the future to see non-physical, psychologically coercive measures as 'contactless' and rely more and more on them in order to conduct interceptions on the high seas on the assumption that such practice does not violate international law.

Moreover, and given that an important part of the persons aboard these migrant boats may be eligible also to a refugee status, the question of the impact any psychologically coercive measures can have, must be seen as part of the wider question of how psychologically deterrent policies are implemented against refugees. In refugee law, much has been written about the psychological pressure exerted not so much on refugees not to enter national territory, but to leave it once they have entered in its realms. Nevertheless, this literature and jurisprudence can serve mutatis mutandis in the legal development also of the first scenario. Prominent scholars have denounced the practice of 'constructive expulsion' which while deemed 'voluntary', is being achieved through threats and coercion.[10] Domestic courts and international bodies have taken a similar stance.[11] Thus, U.S. courts have criticized the fact that substantial numbers of Salvadoran asylum seekers were signing 'voluntary departure'

[10] Guy S. Goodwin-Gill, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES, Oxford, Clarendon Press, 1978, 218

[11] Memorandum by the Secretariat, International Law Commission: Expulsion of Aliens, UNGA A/CN.4/565, July 10,2006, p.65

documents under coercion and threats[12] ruling that coercion could stem also from subtle effects of atmosphere and setting.[13] In Israel, the country's Supreme Court equally emphasized that any deterrent policies meant to make refugees/illegal immigrants return back to their countries of origin irrespective of the dangers lurking there, were unlawful[14] and that the absence of free will in the decision of a refugee/immigrant to return to his country of origin, is not demonstrated only in cases formal state instructions are in place but also when the State undertakes measures aimed to exert pressure on these individuals, in order for the latter to take such a decision.[15] The International Law Association has equally endorsed a Declaration, stating that expulsion may be asserted also in cases where authorities create a climate of fear resulting in panic flight or obstruct return of these people who have accordingly fled.[16]

It could be argued that these non-physical contact measures states undertake on the high seas to divert migrant boats from their journey, could be likened to the signs and signals police often uses on land in order to divert traffic or re-direct

[12] Orantes-Hernandez v. Meese, (1988) 685 F Supp. 1488 (US DCCa, Apr.29, 1988). The U.S. Supreme Court has stressed that coercion can be also mental. On this see Miranda v. Arizona 384 US 436, 448 (1966)

[13] Norman Zucker & Naomi Flink Zucker, DESPERATE CROSSINGS: SEEKING REFUGE IN AMERICA, M.E. Sharpe Inc., 1996, 91

[14] HCJ 7146/12, para.86; HCJ 7385/13, para.52

[15] HCJ 7385/13, para.110

[16] Declaration of Principles of International Law on Mass Expulsion, 62nd Conference of ILA, Seoul, 24-30 August 1986, Conference Report 1986, 13

individuals, prohibiting them to approach a cordoned area. Whereas in the first case these signals are not interpreted as intimidating by the recipient cars or pedestrians, they are do received as such by the migrant boats. The comparison seems luring, yet it is faulty. The reason is not only because on land police does not fire warning shots or points guns to make this diversion of traffic possible, but also the reasons such action is undertaken, are different in the two scenarios. In the case of the police, there is a legal ground most often resting on legitimate security premises on why the public's access to a public site should be restricted in a particular moment. On the other hand, in the case of the migrant boats, the call for them to alter their journey route means that the possibility is denied from these migrants to reach the shores of a developed, democratic country and file their asylum requests there, as ordained by international law. Put more plainly, whereas the police diversion or restriction measures help enforce law and public order, the state high seas interceptions do not come to enforce but negate the rule of law and thus cannot be seen as enforcement measures. Once psychological pressure is exerted, the state is equally deemed to be shaping the refugees' fate and thus exercising effective control over them through psychologically coercive means. This point is important for the continuation of the discussion undertaken in this article.

III. The applicability of human rights law on the high seas

The applicability of human rights law on the high seas is a question which largely resembles the debate that took place particularly in the past decade over legal black holes and the applicability of human rights law in places like Guantanamo Bay

which, situated in Cuba, lied outside the territorial realms of the U.S. and at the same time, was not also under Cuban control. To the U.S. administration's arguments that human rights law should not apply in the case of the Guantanamo inmates, the U.S. Supreme Court denied to accept the existence of a legal back hole.[17]

Boat interceptions on the high seas constitute cases where states attempt to extraterritorially enforce law as they perceive it rather than sharing-power operations even if these operations involve many times the naval forces of more than one state. While as noted,[18] sharing -power operations like rescue operations can lead to structural maritime black holes, the exercise of non-physical coercive means on the high seas should be seen as a question of extraterritorial human rights law application. Thus, although domestic courts have taken in the past the stance that human rights law should not be seen as applying in these cases, international courts in more recent judgments have taken a different view.

For example, in the Sale judgment, concerning Haitian refugees trying to reach the U.S. coastline and intercepted by the U.S. navy on the high seas, the U.S.

[17] See for example the stance of the U.S. Supreme Court in the case of Hamdan and the status of Guantanamo Bay in Cuba. For instances of state responsibility where the rule de facto over a particular territory is frail see infra the discussion of the Al Skeini case regarding the responsibility of the United Kingdom in Basra

[18] Itamar Mann, Maritime Legal Black Holes: Migration and Rightlessness in International Law, 29 EJIL 15 (2018)

Supreme Court held that human rights law does not apply extraterritorially.[19] Yet, the Sale judgment has been criticized and refuted both by international bodies as well as scholars.[20] Such criticism was rendered more explicit in the Hirsi Jamaa ECtHR judgment. In the particular case, Italy was found accountable for the interception on the high seas of migrant boats which had embarked from Libya and attempted to reach the Italian coast. The Court refused to accept that human rights law did not apply on the high seas, holding that 'the special nature of the maritime environment cannot justify an area outside the law.'[21]

The holding that human rights law applies on the high seas, brings further the question under which circumstances. This on account of the fact that such extraterritorial application can be sustained once the state exercises effective control. Such control can be further divided to de facto and de jure. The question thus becomes to which type of control we should put non-physical, psychologically coercive measures. The next section will focus on this question, discussing first in

[19] On this see the Sale judgment of the US Supreme Court at Sale v. Haitian Centers Council 509 US 155, 177 (1993)

[20] UNCHR, Advisory Opinion on the Extraterritorial Application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, Geneva, 26 January 2007, para.24;European Roma Rights Centre et al. v. Home Secretary et al. [2003] EWCA Civ. 666, para.34 (deeming Sale as 'wrongly decided' and as offending 'one's sense of fairness.'); Harold Hongju Koh, The "Haiti Paradigm" in United States Human Rights Policy, 103 Yale L. J. 2391 (1994); Douglas Guilfoyle, SHIPPING INTERDICTION AND THE LAW OF THE SEA, Cambridge University Press, 2011, 343; Efthymios Papastavridis, THE INTERCEPTION OF VESSELS ON THE HIGH SEAS: CONTEMPORARY CHALLENGES TO THE LEGAL ORDER OF THE OCEANS, Hart Publishing, 2013,73

[21] ECtHR, Jamaa, para.178; ECtHR, Medvedyev et al. v. France, para.81

detail the de jure and de facto effective control components as they have been coined by the ECtHR jurisprudence. Along these lines, we will return also later again to the discussion of the Hirsi Jamaa judgment on the issue.

IV. The effective control requirement in human rights extra-territorial application: The de facto/de jure, persons/territories dichotomy and its challenging in cases of control over a spatial area

International human rights law instruments define their application range in cases an individual resides in a state's territory or is subject to that state's jurisdiction.[22] On these grounds, judicial and quasi-judicial bodies have held that state jurisdiction extends to all cases where a state has effective control over certain individuals or over a certain area.[23] In that essence, jurisdiction entails a type of control which can be either actual or normative.[24] Actual control can be termed also

[22] See for example art.2 of the ICCPR; art. 1 of the ECHR; art.1 of the American Convention on Human Rights

[23] On this see Human Rights Committee, General Comment No.31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev1/Add.13 (May 26, 2004) para.10. For the ECtHR see Samantha Miko, Al Skeini v. United Kingdom and Extraterritorial Jurisdiction under the European Convention for Human Rights, 35 Boston College Int'l. & Comp. L. Rev. E. Supp.63,70 (2013)

[24] Samantha Besson, The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and what Jurisdiction Amounts to, 25 Leiden J. Int'l. L. 857,873-874 (2012)

as de facto control, whereas the normative exercise of authority over a territory is seen as a case of de jure control.

The ECtHR, the human rights court which has developed mostly the effective control criterion through its judgments, has largely held that extraterritorial application of human rights can be relevant in two cases. The first involves 'effective control of an area.'[25] The second, named also the 'state-agent model' crowns the effective control over an individual as the decisive parameter impacting on the assertion or not of extraterritorial jurisdiction.[26] Human intuition would have for de facto control to be ascribed to control over persons where cases of actual physical grip are involved and de jure control to cases of control of areas over which authority is being exercised. The ECtHR has seen the issue this way, but still, important cases demonstrate that the Court has moved towards the insertion of the de facto criterion even in cases concerning state presence and control over a particular space.

Traditionally thus, in cases like that of Ocalan, the ECtHR has related to the de facto, physical grip over a person criterion in order to assert state accountability for the violation of the Convention's provisions on an extraterritorial basis. In Ocalan, the Court found Turkey accountable for violating Ocalan's rights, because Turkish agents exerted physical control over him during his arrest in Kenya and his subsequent transfer to Turkey.[27] The U.N. Human Rights Committee similarly stressed the

[25] Marko Milanovic, Al Skeini and Al-Jedda in Strasbourg, 23 EJIL 121, 122 (2012)

[26] Marko Milanovic, Al Skeini and Al-Jedda in Strasbourg, 23 EJIL 121, 122 (2012)

[27] ECHR, Ocalan v. Turkey, Judgment, May 12, 2005, para.91

physical control component. In the case of Burgos, where Uruguayan agents acted extraterritorially and abducted him, the International Covenant on Civil and Political Rights was found to apply.[28]

At the same time, when it comes to control over territory, in the Ilascu case the ECtHR held that Russia should be held accountable for human rights violations in Transdniestria, formally a part of Moldova, because of the decisive control it exerted over the region.[29] Similarly, the International Court of Justice held in its Wall Opinion, that both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) applied in the West Bank and Gaza, irrespective of Israel's control over the everyday life of the Palestinians residing in these areas and its ability to fulfil part of these rights.[30]

Yet, the de facto control-persons/de jure control-territory classification is not decisive. As noted by Barbara Miltner, the relevance of the jurisdiction ratione loci, meaning jurisdiction based on the space criterion that would equal a de jure control, is diminishing and augmenting importance is being given to jurisdiction ratione personi,[31] which means that it is not just the physical presence of a state in an area that

[28] Human Rights Committee, Sergio Euben Lopez Burgos v. Urugay, Communication Number R.12/52, UN Doc. Supp.No.40 (A/36/40) at 176 (1981), para.12.1

[29] llascu v. Moldova, (No. 48787/99), 2004-VII Eur. Ct. H.R. 179, para. 392

[30] Legal Consequences from the Construction of a Wall in the Occupied Palestinian Territory, ICJ Rep. 2004 136, para.106

[31] Barbara Miltner, Revisiting Extraterritoriality after Al Skeini: The ECtHR and its Lessons, 33 Michigan J. Int'l. L. 693, 738 (2012)

is critical to the question of whether jurisdiction can be asserted but the influence such state presence exerts upon the lives of the individuals residing within, 'the intensity of control state agents exercise over individuals' as has been characteristically put.[32] This influence is expressed by a type of control that is actual, de facto, rather than a mere de jure one.

This attempt of inserting the de facto, personal control criterion in the extraterritorial human rights application discussion,[33] is palpably seen in the Bankovic case.[34] In the particular case concerning the NATO aerial strikes against former Yugoslavia, the ECtHR held that the NATO Allied Powers could not be held accountable for any human rights violations incurred as a result of their bombing due to the fact that no physical connection could be established between the aircrafts and

[32] Cedric Ryngaert, Clarifying the Extraterritorial Application of the European Convention on Human Rights, 28 Utrecht J. Int'l. & European L. 57, 58 (2012)

[33] For the fact that there are instances where the personal bond between a state and an individual is not needed in order for the former to be held responsible for the individual's fate see the interesting note by Tzevelekos that there are instances where a state is obliged to extraterritorially extend its human rights protection due to the duty of due diligence even with no threshold or level of control over certain individuals, in cases where such state intervention is needed for the saving of human lives like the case of the saving of refugees drowning on the high seas. Vassilis Tzevelekos, Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence and Concurrent Responsibility, 36 Michigan J. Int'l. L. 129,173 (2014)

[34] Erik Roxstrom, Mark Gibney & Terje Einarsen, The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection, 23 Boston U. Int'l. L. J. 55, 69 (2005)

the victims.[35] Interestingly, in Bankovic, the Court held that the mere presence of a state in an area beyond its own borders did not give rise to human rights accountability-something that the de jure criterion would presume-but that in order for such accountability to be triggered, the state in question must exercise public authority over a territory either as a result of military occupation or through the consent, invitation or acquiesce of the territory's legitimate government.[36] This consent, invitation or acquiesce parameter has been rightfully criticized by scholars,[37] but in all cases it demonstrates how according to the Court in Bankovic, the mere de jure criterion is not enough for the establishment of effective control unless the more personal state interaction, de facto one, is stressed.

The Al Skeini case is the further major case where the ECtHR attempted as noted 'to square Bankovic with the personal model of jurisdiction.'[38] In the particular case, the Court held that the United Kingdom should be held accountable for the deaths of six Iraqi citizens, five of whom in streets or houses in Basra.[39] The Court reached the particular conclusion based on the fact that the United Kingdom exercised

[35] ECHR, Bankovic v. Belgium, Judgment, Dec. 12, 2001, paras. 31-53

[36] ECHR, Bankovic v. Belgium, Judgment, Dec. 12, 2001, para.71

[37] Kerem Altiparmak, Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq? 9 J. Conflict & Security L. 213,229 (2004)

[38] Cedric Ryngaert, Clarifying the Extraterritorial Application of the European Convention on Human Rights, 28 Utrecht J. Int'l. & European L. 57, 60 (2012)

[39] Craig Barker, Current Developments: Decisions of International Courts and Tribunals: European Court of Human Rights Al Skeini and Others v. United Kingdom (Application No. 55721/07), Judgment of 7 July 2011, 61 Int'l. & Comp. L. Quarterly 301, 302 (2012)

in Basra public powers normally exercised by sovereign governments-what could be termed a de jure control approach based on control over a territory-but continued also to note that such control was exercised also over the individuals killed,[40] adding a tone of the actual, de facto control that the United Kingdom exercised in abstracto over a specific area but in concreto on the deceased people's lives. In that sense, as scholars have noted, the particular case is an attempt to enter the de facto criterion to the discussion even in cases of state presence over a territory where only the de jure approach would be expected to apply.[41]

The de facto rather than the de jure criterion has been applied by the ECtHR also in cases the Strasbourg judges have been called to rule on issues concerning the accountability of Turkey for violations of the Convention during Turkish operations outside the country's borders. In the Issa case, the question of the extraterritorial jurisdiction was seen as involving de facto control.[42] In the Pad case, based on the de

[40] ECHR, Al Skeini v. United Kingdom, Judgment, July 7, 2011, para.149

[41] Noam Lubell, Human Rights Obligations in Military Occupation, 94 Int'l. Rev. Red Cross 317, 321 (2012). For the fact that also the UK courts favoured more a de facto effective control approach see The Queen ex parte Al-Skeini et al v. Secretary of State for Defence, England and Wales Court of Appeal [2005] EWCA Civ 1609, 21 December 2005; Opinions of The Lords of Appeal for Judgment in the Case Al-Skeini et al (Respondents) v. Secretary of State for Defence (Appellant) Al-Skeini et al (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals), 13 June 2007, [2007] UKHL 26. See also Sarah Miller, Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention, 20 EJIL 1223, 1224 n.2 (2009)

[42] Issa v. Turkey, Judgment, Nov.16, 2004. On this and the stressing of the fact that in the particular case the ECHR looked for 'effective territorial control' see Marco Sassoli, The Role of Human Rights

facto criterion, the ECtHR held that Turkey should be held accountable for the death of seven Iranian men that took place during a military operation in the Iranian territory, about 500 meters from the Turkish border.[43] In the Pad case, the death of these men occurred through helicopter strikes, whereas in the case of Issa the victims were shot. In both instances, the de facto jurisdiction was asserted for modes of killing that presumed the existence of a distance and not physical contact between the victims and the shooter. In all these cases, the extraterritorial background against which the Convention violations take places serves not as a legal precept able to immediately give rise to de jure judicial claims but rather as a factual, circumstantial background which cannot give rise ipso facto to legal claims against any human rights' violators but only to the extent that a linkage is proved between the acts of the assumed violators and the damage inflicted to their victims.

This stance has been expressly held in Issa where the ECtHR judges found that there was insufficient evidence to link between the presence of the Turkish troops in Iraq and the applicants' deaths and has led scholars to argue that in coming to establish state accountability for actions taking place outside state borders on territory of non-signatory states to the Convention, the ECtHR requires state responsibility to

---

and International Humanitarian Law in New Types of Armed Conflicts in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: PAS DE DEUX, (Orna Ben Naftali, ed., 2011, Oxford University Press) 64

[43] Pad et al. v. Turkey, Judgment, June 28, 2007, para. 53; Raffaella Nigro, The Notion of 'Jurisdiction' in Article 1: Future Scenarios for the Extra-territorial Application of the European Convention on Human Rights, 20 Italian Ybk Int'l. L. 11,14-15 (2010)

be firmly proved.[44] Along this line of thought, this is the reason why the Court in Bankovic declined to assert jurisdiction while it did so in Pad. In the first case, the case was not firmly established that it was the individual states participating in the bombing that bore responsibility for the operation's planning and execution, rather than NATO, while in the Pad case, Turkey admitted that Turkish helicopters had fired against the victims.[45]

No matter whether this particular line of thought can be condoned due to the leeway it affords to states an ECtHR presumably sanctioned method of easily evading responsibility for attacks taking place in the realms of armed conflicts by arguing that it is not them but an international organization or another state that has performed the attack,[46] it nevertheless justifiably explains approaches the Court has undertaken in

[44] Raffaella Nigro, The Notion of 'Jurisdiction' in Article 1: Future Scenarios for the Extra-territorial Application of the European Convention on Human Rights, 20 Italian Ybk Int'l. L. 11,20-21 (2010). For the fact that this has been the case also with the Court's approach in the case of Ocalan's arrest by Turkish agents in Kenya-a non ECHR-signatory third state-see Erik Roxstrom, Mark Gibney & Terje Einarsen, The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection, 23 Boston U. Int'l. L. J. 55, 89-90 (2005)

[45] Raffaella Nigro, The Notion of 'Jurisdiction' in Article 1: Future Scenarios for the Extra-territorial Application of the European Convention on Human Rights, 20 Italian Ybk Int'l. L. 11,21 (2010)

[46] See for example the case of the Kunduz strike in Afghanistan where the German Federal Supreme Court, the Bundesgerichtshof, ruled that Germany was not liable for the attack that had caused civilian victims, due to the fact that the strike had been carried out by U.S. air support despite the fact that the U.S. and German forces acted under the NATO umbrella and it was a German colonel who had given the order for the strike. On this see German State not Liable to Pay Compensation to Victims of 2009

Bankovic and Issa which have been viewed as conflicting.[47] Furthermore, the position according to which the de facto control of a territory needs some ability of the state to shape the concerned individuals' fate and course of action, is further demonstrated in the stance undertaken also by human rights quasi-judicial bodies, like the UN Human Rights Committee.

In 2014, the Committee drafted its comments on account of Israel's periodical report regarding the state's post-disengagement Gaza obligations. Israel argued that since it had disengaged from Gaza in 2005 it did not have effective control over the region and thus human rights law did not apply.[48] While in its Final Report, the Committee reiterated its position that international human rights instruments applied also in the areas occupied by Israel,[49] the Committee did not explicitly elaborate on the legal situation that has been created in post-disengagement Gaza, with Israel retaining some responsibilities and competencies vis-à-vis the Strip, yet not controlling things inside Gaza where Hamas rules. Thus Gaza forms a case where any

---

Kunduz Airstrike, Deutsche Welle, Oct. 6,2016 available at https://www.dw.com/en/german-state-not-liable-to-pay-compensation-to-victims-of-2009-kunduz-airstrike/a-35978028

[47] See for the example the UK Judges noting in Al Skeini that 'it may well be that there is more than one school of thought at Strasbourg' at Al Skeini v. Secretary of State for Defence [2004] EWHC 2911 (Admin), para.265

[48] Human Rights Committee, 112th Sess., Summary Record of the 3115th mtg, Geneva, Oct.20, 2014, CCPR/C/SR.3115, para.21 available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/190/33/PDF/G1419033.pdf?OpenElement

[49] Human Rights Committee: Concluding Observations on the Fourth Periodic Report of Israel, CCPR/C/ISR/CO/4, Nov. 21st 2014, para.5 available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/225/55/PDF/G1422555.pdf?OpenElement

Israeli control-if acquiesced that exists and renders the Strip still occupied-[50] is a de jure one, the question being whether such de jure control is enough on its own to incur state liability.

Although the Report does not provide a clear answer, it does note that the Covenant shall apply with regard to all conduct by the State affecting the enjoyment of rights "by persons under its jurisdiction regardless of the location".[51] The words "regardless of the location" seem superfluous. The Covenant stipulates explicitly that the rights contained therein are to be protected either in the state's territory or vis a vis individuals who are under the state's jurisdiction, meaning subject to the state's jurisdiction, irrespective of the question of whether the territory in which they reside falls also in the state's effective control and thus in the state's jurisdiction. Not surprisingly, the phrase did not exist in the Committee's previous periodic report on Israel, issued back in 2010.[52]

With the addition of the phrase "regardless of the location", it seems that the Committee wants to exactly cover such cases, where the state does not exercise

[50] On the question whether Gaza is still occupied after the Israeli disengagement see Solon Solomon, Occupied or Not: The Question of Gaza's Legal Status after the Israeli Disengagement, 19 Cardozo J. Int'l. & Comp. L. 59 (2011)

[51] Human Rights Committee: Concluding Observations on the Fourth Periodic Report of Israel, CCPR/C/ISR/CO/4, Nov. 21st 2014, para.5 available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/225/55/PDF/G1422555.pdf?OpenElement

[52] Concluding Observations of the Human Rights Committee: Israel, CCPR/C/ISR/CO/3, Sep. 3, 2010, para.5

effective control over the territory, but does exercise such control over persons inside that territory.[53] In this context, the effective control required is not a de jure, but a de facto control.[54] The Committee seems to be saying that although there may be locations that fall outside the state's territory and its de jure jurisdiction, because effective control is not exercised over them, still even these "locations', outside the state's sphere, render the state accountable for human rights violations to the extent that the state exerts de facto control, subjugating in practice persons residing in these "locations" to its jurisdiction.

This approach is further elucidated by the remarks of the Committee's Chairman, who hailed to clarify that as far as Gaza is concerned, Israel should be held accountable for human rights violations to the extent that it has control over the

[53] For the fact that the Committee against Torture in light of allegations that the CIA had interrogation centres in countries outside the United States, stated in its report that the United States should be held accountable for all cases where they exercised effective control, wherever in the world see Conclusions and Recommendations of the Committee against Torture, United States of America, UN Doc CAT/C/USA/C/2 (2006), para. 15 available at http://www1.umn.edu/humanrts/cat/observations/usa2006.html

[54] For the fact that also other quasi-judicial examining human rights mechanisms such as the UN Committee against Torture have referred to places where the applicant state exercises de facto control, see the report of the Committee on the United States. (Conclusions and Recommendations of the Committee against Torture, United States of America, UN Doc CAT/C/USA/C/2 (2006), para. 15 available at http://www1.umn.edu/humanrts/cat/observations/usa2006.html)

persons and the incidents under scrutiny.[55] This stance is in harmony also with recent jurisprudence of bodies like the ECHR, which tend to demand that an individual is subject to a state's jurisdiction in order for the latter to be asserted, even in cases where the relevant human rights instruments, such as the European Convention on Human Rights uses the phraseology "within the jurisdiction" instead of "subject to the jurisdiction".[56]

The fact that any effective control issues in the case of Gaza, whose legal status after the Israeli disengagement lies in a grey zone and does not form a state nor lies clearly under the jurisdiction of Israel, should be seen through a de facto prism, is further buttressed by the way the ECtHR has come to relate to the effective control criterion on de facto rather than de jure grounds, in cases alleged violations have taken place inside territories not clearly belonging to a particular state, like the buffer zone between the Republic of Cyprus and the island's northern part which is under Turkish occupation. In coming to seize jurisdiction on shooting incidents against Greek Cypriots in the buffer zone, the Court did not render importance to a de jure criterion based on the fact that the buffer zone was part of the contracting party's territory, but rather stressed the de facto criterion which related to the short distance between the shooter and his victim.

[55] Tovah Lazaroff & Yonah Jeremy Bob, UN: Israel Must Uphold Human Rights Law in its Treatment of Palestinians, Jerusalem Post, Oct.21, 2014 available at http://www.jpost.com/Arab-Israeli-Conflict/UN-Israel-must-uphold-human-rights-law-in-its-treatment-of-Palestinians-379354

[56] European Convention on Human Rights, art.1

Spanning from the case of Andreou[57] till these of Solomou[58] and Isaak[59], all involving the injuring or killings of Greek Cypriots by Turkish Cypriot forces in the UN buffer zone in Cyprus, the ECHR has favoured a 'state agent authority' approach, holding in some of these cases such as that of Andreou, that although the injury occurred inside the territory of the State of Cyprus and the Court had formally jurisdiction, still even this was not the case and Andreou was shot in no man's land, Turkish effective control would be asserted due to the short distance between the victim and her shooter at the time Andreou was shot.[60] The Court's particular jurisprudential line renders clear that what matters for the assertion of jurisdiction is not the de jure but the de facto control.

V. Control over migrant boats on the high seas through psychologically-coercive measures: Practical ramifications of a de facto control case

Once the differences between the de facto and the de jure control, the question is to which category any exertion of non-physical, psychological measures over migrant boats on the high seas should fall. The question has practical ramifications. If control is de jure, any legal consequences stemming for the intercepting state cannot be attributed to the psychologically-coercive measures. The mere presence of the state

[57] ECHR, Andreou v. Turkey, App. No. 45653/99, June 3, 2008

[58] ECHR, Solomou et al. v. Turkey, Judgment, June 24,2008, paras. 48-51

[59] ECHR, Isaak v. Turkey, Judgment, June 24, 2008

[60] ECHR, Andreou v. Turkey, App. No. 45653/99, June 3, 2008

navy on the high seas opposite these boats is a form of control over them without the state vessels having to undertake any further action. If on the other hand, in the particular cases the articles focuses upon, state control should be seen as a de facto one, then the question of whether such control is exerted or not depends on whether these psychologically-inducing measures can be deemed as having on their own such gravity in order to give rise to legal consequences.

A first reading would lead to the assumption that state control over these boats should be deemed to be a de jure one. This is the case for two reasons. First, such control refers to a spatial area, the high seas. Secondly, the fact that no physical grip of these boats is involved seems to underline recourse to the de jure control model. The current section would like to address these two points and demonstrate how they are not decisive in leading to the conclusion that control on the high seas should be seen as a form of de jure control.

When it comes to the first argument, questions of extraterritorial effective control on the high seas involve indeed questions of state control over an area outside the national borders. Yet, contrary to examples discussed above like these of Al Skeini or even of Gaza, where such state dominion over an area outside its territory was branded as military occupation, the high seas is open to all states and cannot be occupied.[61] In that sense, the de jure control criterion cannot apply on the high seas per se as jurisdiction over the waters to the extent that the particular maritime zone is

[61] See article 87 of the UN Convention on the Law of the Sea

res communes and no state may exercise sovereignty over it.[62] Any de jure application examples that do pertain to the exercise of jurisdiction refer to jurisdiction *on* the high seas but not *over* the high seas. The high seas are merely the location where state jurisdiction happens to apply rather than the constitutive ground giving rise to such an application. For example, article 110 of UNCLOS refers to the right of every state vessel to visit other state vessels suspected for a number of offences, even if the latter vessels are on the high seas.[63]

Along these lines, the provision does not extend de jure state jurisdiction because the high seas are deemed as a space where such jurisdiction can apply ab initio; on the contrary, the fact that state jurisdiction does not apply in principle on the high seas, compels the international lawmaker to extend such jurisdiction in the specific circumstances described in the particular provision in order to make sure that the high seas-exactly because of their non-jurisdiction status-will not end up being an impunity space. The same logic of preventing the high seas from becoming a legal black hole, pervades also the fact that states undertake search and rescue operations on the high seas exercising acts of control over the rescued migrants. These search and rescue operations as a manifestation of state control do not stem from the ability of the state to expand de jure its prescriptive and enforcement jurisdiction on the high

[62] John Noyes, The Common Heritage of Mankind: Past, Present and Future, 40 Denver J. Int'l. & Policy 447, 451 (2012); Rudolph Preston Arnold, The Common Heritage of Mankind, 9 The Int'l. Lawyer 153,155 (1975)

[63] UNCLOS, art.110

seas[64] but rather from a due diligence obligation that binds states to act for the saving of human lives irrespectively of whether the humans under the state's control happen to be also inside the state's borders.[65]

This whole nexus of the high seas as the locus of extraterritorial human rights application and the tension between the de jure and the de facto aspects, is palpably demonstrated through the Hirsi Jamaa case. In the particular case, concerning the interception on the high seas of migrants who had embarked from Libya and were trying to reach the Italian shores, the ECtHR ruled that national vessels on the high seas should be seen as an extension of the state to the extent that they fly the state's flag and thus jurisdiction on the high seas should be seen as established on a de jure basis.[66] On this account, the Court asserted jurisdiction on a de jure basis because the

[64] For more details on what exactly the notions of the prescriptive and enforcement jurisdictions comprise see Arron Honniball, The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?, 31 Marine & Coastal L. 499, 501 (2016)

[65] For the due diligence paradigm and its connection with the rescue of migrants on the high seas see Guy Goodwin-Gill, Setting the Scene: Refugees, Asylum Seekers and Migrants at Sea-the Need for Long-term Protection-Centred Vision in 'BOAT REFUGEES' AND MIGRANTS AT SEA: A COMPREHENSIVE APPROACH, Nijhoff Publishers (2016) 25-26; Vassilis Tzevelekos & Elena Katselli Proukaki, Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)? 86 Nordic J. Int'l. L. 427,431-433 (2017)

[66] Hirsi Jamaa et als v. Italy, Application No.27765/09, Judgment (Grand Chamber),23 February 2012, paras.76-77

intercepted migrants on the high seas were boarded on the Italian navy vessels, which were considered an extension of the Italian territory.[67]

In the scenario that the current article focuses upon, such boarding does not come at all into question and the interception is assumed to take place in essence only through the exertion of psychological pressure on the migrant boats' crew. As a result, effective control does not exist by definition but rather such effective control is linked to the question of whether in essence the migrant boats' crew will abide by the dictates of the state and cease their journey. Along these lines, based on this criterion, effective control should be seen as a de facto rather than a de jure one.

On similar grounds, the Hirsi judgment does not seem to cover the scenario in question of non-physical coercive measures, requiring like the standard ECtHR jurisprudence discussed above for de facto control to be established through an actual, physical grasp over a person or object.[68] Yet, the Pad case demonstrates that the de facto criterion can be pertinent even in scenarios involving non-physical contact

[67] Hirsi Jamaa et als v. Italy, Application No.27765/09, Judgment (Grand Chamber),23 February 2012, para.76

[68] ECHR, Bankovic v. Belgium, Judgment, Dec.12, 2001, para.70; Noam Lubell, Challenges in Applying Human Rights Law to Armed Conflict, 87 Int'l. Rev. Red Cross 737, 741 (2005). Note also that Italy tried to argue in the Hirsi Jamaa case that "exclusive, absolute control" was not established over the refugees intercepted on the high seas, because although boarded on Italian naval ships, they were merely "escorted" to Libya, the choice of the word "escorted" denoting a supervision role. (ECHR Hirsi Jamaa et al. v. Italy, Judgment, Feb. 23, 2012, para.13)

between the state forces and the victims. In that sense, the scenarios under which navy vessels approach migrant boats on the high seas and firing warning shots or through gun-pointing threats oblige the migrant boats' crew to obey their commands, can be likened to the Andreou, Solomou and Isaak precedents discussed above. The high seas zone over which no state has sovereignty can be equated to the buffer zone. The interception of migrant boats through navy vessels just approaching them and exerting psychological pressure can be equated to the vicinity element between the shooter and the Cypriot victims which was deemed crucial in order to be held that Turkey could be held accountable for the particular incidents.

Navy vessels do not establish in the first place a physical contact with the intercepted migrant boats but by being so close to them and addressing them through warning shots or calls, states manage through means of psychological coercion, to de facto effectively control the people's onboard volition to continue with their journey. While generally the firing of warning shots is a means of stressing to the recipient the need to comply with the authorities' orders and requests in order not for his life to be put in danger,[69] in the particular circumstances, such shots are not undertaken as means of life-saving but as an intimidation quest. Along these lines, they can be seen as a form of psychological abuse or coercion, exercised in various contexts by persons

[69] For the fact that this is the case with warning shots undertaken by soldiers as part of the rules of engagement practice, see indicatively the Sanremo Handbook on Rules of Engagement Handbook, November 2009 available at http://www.jag.navy.mil/distrib/instructions/San-Remo-ROE-Handbook.pdf

exerting power and authority over weaker people who are being deemed to be in a subordinate position. [70]

In that sense, the particular ECtHR jurisprudence, coupled with the approach of other international human rights law bodies, like the U.N. Human Rights Committee in the case of Gaza, demonstrate how application of the de facto extraterritorial human rights law criterion is possible in the case of migrant boat interceptions on the high seas even if the decisive stages for such interception to take place, occur without physical contact between these boats and the intercepting state

[70] For the fact that intimidation and psychological/emotional abuse can constitute forms of violence see Franklyn Dunford, The San Diego Navy Experiment: An Assessment of Interventions for Men who Assault their Wives, 68(3) J. Consulting & Clinical Psychology, 468,469 (2000). Psychological abuse has been defined as the manipulation of a person's psychological health, an attempt to negate an adult's independent choices and to create over-dependence, leading the abuser to direct the abused to unwanted choices. On this see Mark Silver, The Evaluation of and Legal Standards in Forensic Social Work Immigration Practice: Spousal Abuse, Asylum, Criminal and Other "Hardship" Immigration Cases, 3 J. Immigrant & Refugee Services 43,48 (2005); Lucy Williams, Refugees and Asylum Seekers as a Group at Risk of Adult Abuse, 6(4) J. Adult Protection 4,8 (2004). In starker terms, reminiscent more of the war rhetoric, sometimes psychological abuse is referred as 'psychological aggression,' defined as 'a communication, either verbal or non-verbal, intended to cause psychological pain to another person or perceived as having that intent.' On this see MA Strauss & S. Sweet, Verbal/Symbolic Aggression in Couples: Incidence rates and Relationships to Personal Characteristics, 54(2) J. Marriage & Family 346,347 (1992). For the application of these feelings in the case of refugees see Mia Flores-Borques, Refugee Voices: A Journey to Regain my Identity, 8 J. Refugee Studies 95 (1995).

forces. Along these lines, the de facto control criterion does provide an adequate framework for addressing a situation which the Court in Hirsi left out of discussion.

Viewing migrant boat interception through psychologically coercive means as a form of de facto control attributes to these undertaken psychologically-inducing state measures a catalyst, legal significance for the fact that migrant boats cannot continue their journey as planned and the persons on board to claim unhindered the right to asylum according to the international law precepts. To the extent that these psychologically-coercive measures have a unique legal significance and cannot be seen as just preparatory stages of later state acts that involve physical contact with the migrant boats such as their towing or the boarding of the vessel crew and persons on board the navy ships, they can be seen as separate human rights' violations establishing an equal state accountability the way cases entailing physical contact would do. This raises the question which has to be addressed among international scholars of whether the state policy of aborting the migrant boats through the creation of panic and fear to the persons on board these boats could constitute a case of psychological torture or cruel and inhumane treatment.[71]

VI. Conclusion

[71] For the fact that the legal notion of torture can include the infliction of severe also mental pain and suffering see Hernan Reyes, The Worst Scars are in the Mind: Psychological Torture, 89 Int'l. Rev. Red Cross 591-596 (2007)

The migrant boats phenomenon has been in the epicentre of state policy, NGOs' action and legal discussions over the last few years. While discussions have focused on the physical seizure of these boats by navy vessels, the current note aspired to analyse whether states could be found to violate human rights law even by intercepting these boats through non-physical means. In this sense, the question that fell in the epicentre of this article is whether psychologically coercive measures on the high seas can lead to the extraterritorial application of human rights. Along these lines, due to the linkage that such extraterritorial application enjoys in international jurisprudence with the concept of effective control, the article examined whether such coercive measures can indeed be considered as a form of a de jure or a de facto control. The affirmative answer to the second option granted in turn an independent stance to the psychological factor as one able to lead to cases of effective control and meriting a separate analysis from any physical aspects such control can entail.

Albeit non-physical, it should not be forgotten that psychologically coercive measures such as warning shots impact many times on the migrant's psycheand violently interrupt his aspirations for a better and more peaceful future. With the question of whether they can be termed as cruel and inhumane treatment-if not torture-being left open for future research endeavours, the severity of the particular practice has been underlined. This is important on account of the fact that interceptions of migrant boats on the high seas are likely to continue. Along these lines, the current article wished to place an ‘anchor’ to any state perceptions that ultimately human rights law can be circumvented on the high seas when it comes to migrant boats and the state’s international law obligations towards the people on board.