Beyond Progress: Interrogating the Limits of Jurisdiction and Migrant Rights Through Negative Dialectics

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'Progress occurs where it ends'.

Theodor W. Adorno, 'Progress', in: Theodor W. Adorno, *Critical Models: Interventions and Catchwords* (Columbia University Press 1998), 150.

Abstract

Received knowledge about the protection of migrants in international law tells a story of progress. A story of expanded refugee definitions, complementary protection, and extraterritorial obligations. Yet a counternarrative has also emerged, one of backlash, containment, and deterrence. As the scope of migrants' rights has expanded, states have also adopted policies that evade concomitant obligations through externalised border controls.

While progressive legal struggles, particularly concerning jurisdiction in externalised migration control, are crucial, this essay problematises the notion of jurisdiction as a means to achieve progress. Instead, it challenges the ostensible neutrality of jurisdiction, which often perpetuates systems of exclusion that concomitantly absolve states of their responsibility.

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Drawing on Theodor Adorno's concept of negative dialectic, the paper illuminates the limitations of progress narratives and unravels the complexities inherent in international migration law. While unearthing the failed promise of universality, reading the struggles for migrant rights in terms of a negative dialectic can catalyse reflexivity and new possibilities of resistance.

Keywords

Extraterritorial Jurisdiction – Human Rights – Migration – Border Controls – Adorno – Negative Dialectics

I. Introduction

Received knowledge about the protection of migrants in international law tells a story of progress, a story of expanded refugee definitions, complementary protection, and extraterritorial obligations. Yet a counter-narrative has also emerged, one of backlash and deterrence. As the scope of migrants' rights has expanded, states have also adopted policies aimed at evading concomitant obligations with externalised and outsourced border controls. The dialectic between these two normatively opposite and chronologically overlapping logics underlies the development of international migration law.

Over the years, the jurisprudence of the European Court of Human Rights (ECtHR) has, in many ways, challenged the false premise according to which states can insulate their responsibility by shifting migration controls beyond their borders. This has resulted in states turning to cooperative containment policies aimed at further externalising border controls while eclipsing the applicability of human rights obligations. Cooperative containment policies pivot around the reciprocal commitments of participating actors. Destination states offer political, financial, and technical support in exchange for preventive border control measures directly performed by third states within their territories. In the face of policies that continue to spread and morph into various forms of migration governance, aimed at limiting or circumventing states' international obligations, scholars, Non-Governmental Organisations (NGOs), and human rights lawyers have put forward an integrated litigation strategy across various legal regimes.

Yet, in contrast to other regional and international fora, given the political sensitivity of immigration decisions, the ECtHR has adopted a rather defer-

ential attitude. This paper will explore the ECtHR's most recent decisions on European migration management to trace the interlaced stories of protection and deterrence. Cooperative policies, it will be argued, reflect the neo-colonial and neoliberal logic that still pervades both positive international law and the practice of migration control, in projecting political and economic power beyond the territorial borders of the power-wielding state.

International (refugee and human rights) law will remain a blunt weapon so long as it is interpreted according to this genealogy. Thus, advancing a progressive reading of migrants' human rights, particularly through the European Convention on Human Right's (ECHR) expanded jurisdiction, may ultimately be counterproductive. Such efforts risk reinforcing the very power structures they aim to dismantle by fostering state practices that externalise border controls and shift responsibility in increasingly obscure ways. Rather than solely focusing on (legal) progress, this paper calls for a shift in focus toward the migrants themselves and their acts of resistance, which challenge containment policies from within. This essay examines the interlaced stories of protection and deterrence in recent ECtHR decisions to highlight the limits of a unidirectional teleological reading of migrant rights. Drawing on Theodor Adorno's concept of *negative dialectics*, it seeks to show how acknowledging the law's contradictions and limitations can reveal new avenues for resistance and transformative change. Without denying the relevance and necessity of strategic litigation, this paper proposes the exercise of self-reflexivity to foster a more coherent human rights practice.

The essay is organised as follows: after a brief discussion of the relevant notions of extraterritorial border control and jurisdiction (section II.), it will outline some salient recent developments in the ECtHR's jurisprudence on jurisdiction over border control measures performed extraterritorially and examine how state practice subsequently evolved (section III. 1.). The paper will then analyse the various interpretations of the emerging challenges of cooperative containment practices (section III. 2.), highlighting the need for a coherent approach to the ECHR jurisdiction (III. 3.) and the shortfalls of strategic litigation (III. 4.). Against this background, the essay will present the limits and potential of a far-reaching yet principled understanding of jurisdiction under the ECHR. It will investigate the merits of enhancing strategic litigation efforts within a wider mobilisation for migrant rights, and cultivating resistance in non-institutional battlegrounds where migrant rights can be upheld beyond and against territorial constraints (IV.). The paper will conclude by reassessing the very notion of progress and its dialectical (historical and legal) advancement, with the intention of illustrating that acknowledging migration law and policy complexities can catalyse reflexivity and new possibilities of resistance, both before and beyond courts (V.).

II. Defining Borders, Delimiting Jurisdiction

Borders, as jurisdiction, have a polysemic nature: they do not mean the same thing to everyone. Borders and their inherently created divisions have been the subject of intense study in various disciplines and from a wide range of perspectives.[1] Borders can be seen as physical lines dividing territories and people and tracing the perimeter of bounded communities. As such, borders are sites where sovereignty is imagined and performed.[2] At the same time, borders are functions of jurisdiction as an administrative tool to enact sovereignty.[3] Accordingly, general international law conceives jurisdiction as 'one of the most obvious forms of the exercise of sovereign power'.[4] Concerning the power of a state to regulate or otherwise impact people, activities, and legal interests,[5] it delimits the powers of a plurality of sovereigns.[6]

The general rationale for establishing jurisdiction is a territorial or personal connection, with the state exercising its authority over a certain situa-

1 A complete account of all these different perspectives would require another paper. It suffices to mention some of the works that geographers, philosophers, social scientists, and lawyers devoted to the study of borders. Paul de Geouffre de La Pradelle, *La Frontière: Étude de Droit International* (Les Editions Internationales 1928); Charles De Visscher, 'Problèmes de Confins en droit international public', Bulletins de l'Académie Royale de Belgique 56 (1970), 70-72; JR Victor Prescott, *Boundaries and Frontiers* (Taylor & Francis 1978); David Miller and Sohail H. Hashmi, *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton University Press 2001); Seyla Benhabib, 'Borders, Boundaries, and Citizenship', PS 38 (2005), 673-677; Daniel-Erasmus Khan, 'Territory and Boundaries' in: Anne Peters and Bardo Fassbender (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012), 225-249; Giuseppe Nesi, 'Boundaries' in: Marcelo G. Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar 2018), 193-233; Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue* (Manchester University Press 2020). Beyond the academic keyword, border studies emerged as a field in the social sciences which is now the object of interdisciplinary courses and a number of scientific journals. See Olivier J Walther and others, 'Border Studies at 45', Political Geography 104 (2023), 102909, <https://doi.org/10.1016/j.polgeo.2023.102909>, last access 30 December 2024.

2 Anssi Paasi, 'Bounded Spaces in a "Borderless World": Border Studies, Power and the Anatomy of Territory', Journal of Power 2 (2009), 213-234.

3 Paulina Ochoa Espejo, *On Borders: Territories, Legitimacy, and the Rights of Place* (Oxford University Press 2020).

4 PCIJ, *Legal Status of Eastern Greenland* (Denmark v. Norway), judgment of 5 September 1933, Ser. A/B, No. 53.

5 Among the vast literature on the topic, see: Frederick A Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', RdC 186 (1984), 9-116; Bruno Simma and Andreas Müller, 'Exercise and Limits of Jurisdiction' in: James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012), 134-157; Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2015).

6 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995), 56.

tion.[7] The validity of a claim then hinges on the quality and strength of the connection.[8] Yet, traditionally, this connection is presumed to be territorial.[9] Even if the pressures of an increasingly globalised and liberalised world have led some to seriously question the territorial foundation of the idea of jurisdiction,[10] that principle still dominates most of the accounts of jurisdiction in contemporary general international law.[11] The border is the conceptual limit of state jurisdiction: it is a set of practices that make the abstract lines drawn on a map significant.[12] In this sense, jurisdiction, just like borders, represents a form of cartographic power, mapping the limits of state sovereignty.

Yet, while borders and jurisdiction are traditionally perceived as signifiers that distinguish people and territories (based on lines drawn on a map), both notions have evolved to trespass beyond their traditional territorial understanding. On the one hand, under human rights law, jurisdiction has assumed a specific connotation. It determines the applicability of human rights treaties irrespective of territorial boundaries. While human rights are presumed to apply within states' territory,[13] scholarship and practice – albeit with different interpretations and to varying extents – have long acknowledged their extraterritorial applicability.[14] On the other hand, borders change over time and situations, and can be constructed as historically contingent social artefacts.[15] Borders shape collective identities but also categorise individuals – as either citizens or foreigners, which become both objects and agents of surveillance within and beyond national fronteirs.[16] Today, border controls are performed

7 Jan Klabbers, *International Law* (3rd edn, Cambridge University Press 2021), 100-107.

8 Vaughan Lowe, *International Law* (Oxford University Press 2007), 171.

9 Alex Mills, 'Rethinking Jurisdiction in International Law', BYIL 84 (2014), 187-239.

10 See most notably: Mann, 'Doctrine of International Jurisdiction' (n. 5); Bhupinder S. Chimni, 'The International Law of Jurisdiction: A TWAIL Perspective', LJIL 35 (2021), 29-54; Nico Krisch, 'Jurisdiction Unbound: (Extra)Territorial Regulation as Global Governance', EJIL 33 (2022), 481-514.

11 Ryngaert (n. 5), 29.

12 Richard T. Ford, 'Law's Territory (A History of Jurisdiction)', Mich. L. Rev. 97 (1999), 843-930.

13 ECtHR (Grand Chamber), *Banković et al. v. Belgium et al.*, judgment of 12 December 2001, no. 52207/99, para. 70; ECtHR, *Ilaşçu et al. v. Moldova and Russia,* judgment of 8 July 2004, no. 48787/99, paras 314-316.

14 Philipp Janig, 'Extraterritorial Application of Human Rights' in: Christina Binder, Manfred Nowak, Jane A. Hofbauer and Philipp Janig (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing 2022), 180-191.

15 Michael Collyer and Russell King, 'Producing Transnational Space: International Migration and the Extra-Territorial Reach of State Power', Progress in Human Geography 39 (2015), 185-204.

16 Nick Vaughan-Williams, 'Borderwork Beyond Inside/Outside? Frontex, the Citizen-Detective and the War on Terror', Space and Polity 12 (2008), 63-79.

away from states' physical frontiers via digitalised, offshored, and outsourced controls over people's movements.[17] Trespassing states' territorial limits, they extend state power beyond frontier lines. No longer stable and delineated, borders now shift in location and meaning – and how they are experienced.[18] This does not imply that territorial borders are no longer relevant, rather it signals another shift: from the control of space to that of people and their unauthorised access.[19]

Physical frontiers are demarcated by fences and walls; diverse private and third-state entities equipped with new technologies[20] and legal innovations[21] have contributed to the multiplication of border controls within and beyond national frontiers.[22] This dense and multilevel network of controls displaces the border, both inward and outward, surveilling people's movements and predicting future migratory paths.[23] Border controls have thus become liquid – that is, they are characterised by non-linear (externalised, outsourced, and dematerialised) enforcement infrastructures.[24] In this sense, 'borders are everywhere',[25] shifting, multiplying their functions and effects across different groups of people.[26] The shifting border is polysemic and heterogeneous; it is a device both of inclusion and exclusion filtering and selecting people,[27] unequally distributing the freedom to move.[28]

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17 Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017), 13-46.

18 Alison Kesby, 'The Shifting and Multiple Border and International Law', Oxford J. Legal Stud. 27 (2007), 101-119.

19 Violeta Moreno-Lax, 'Meta-Borders and the Rule of Law: From Externalisation to "Responsibilisation" in Systems of Contactless Control', NILR 71 (2024), 21-57.

20 Philip Hanke and Daniela Vitiello, 'High-Tech Migration Control in the EU and Beyond: The Legal Challenges of "Enhanced Interoperability"' in: Elena Carpanelli and Nicole Lazzerini (eds), *Use and Misuse of New Technologies: Contemporary Challenges in International and European Law* (Springer 2019), 3-35.

21 Daniel Ghezelbash, 'Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees', Am. J. Comp. L. 68 (2020), 479-516.

22 Albert Kraler, Maegan Hendow and Ferruccio Pastore Introduction: 'Multiplication and Multiplicity – Transformations of Border Control', Journal of Borderlands Studies 31 (2016), 145-149.

23 Moreno-Lax, *Accessing Asylum in Europe* (n. 17).

24 Daria Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"', EJIL 29 (2018), 1173-1196.

25 Étienne Balibar, *We, the People of Europe?* (Princeton University Press 2004).

26 Shachar (n. 1).

27 Sandro Mezzadra and Brett Neilson, *Border as Method, or, the Multiplication of Labor* (Duke University Press 2013), 7.

28 Shreya Atrey, Catherine Briddick and Michelle Foster, 'Guest Editor Introduction: Contesting and Undoing Discriminatory Borders', International Journal of Discrimination and the Law 22 (2022), 210-223.

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III. Jurisdiction, Extraterritorial Border Controls, and the European Court of Human Rights: A Dialectic of Progress and Regress

Border controls often entail human rights violations.[29] This becomes especially evident when they are performed extraterritorially.[30] Yet, the responsibility deriving from such violations largely depends on the reading of jurisdiction applied in individual situations. As the readers of this journal know all too well, the application of human rights treaties requires state jurisdiction, [31] which is presumed to be exercised within the territory of a state and is only exceptionally exercised extraterritorially.[32] The ECtHR regards jurisdiction as the *sine qua non* for the applicability of ECHR obligations in specific situations.[33]

Hence, the relevance of ascertaining the elements through which jurisdiction should be determined. Academics and practitioners have suggested various approaches and techniques to establish jurisdiction beyond territorial borders. Some, like Milanović, have suggested that jurisdiction depends on the nature and content of obligations.[34] Besson, on the other hand, considers jurisdiction as a relationship between rights holders and duty bearers, one that activates human rights obligations and provides the practical conditions for them to be feasible.[35] Others, like Raible, base jurisdiction on public institutions' political power to affect individuals irrespective of their physical location.[36] Overall, there is a common thread running through all these discussions: the tension between the universality of human rights and their effective (territorial) manifestations.

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29 Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations', GLJ 21 (2020), 311-334 (312).

30 Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011); Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012); Moreno-Lax, *Accessing Asylum in Europe* (n. 17).

31 E. gg. Article 1, ECtHR; Article 2, ECtHR.

32 ECtHR, *Banković* (n. 13), para. 70; ECtHR, *Ilaşçu* (n. 13), paras 314-316.

33 ECtHR (Grand Chamber), *N. D. and N. T. v. Spain,* judgment of 13 February 2020, nos 8675/15 and 8697/15, para. 102.

34 Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

35 Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To', LJIL 25 (2012), 857-884.

36 Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (Oxford University Press 2020).

The jurisprudence of the ECtHR, whose troubled development on the matter has often been criticised as confused and fragmentary, reflects this dialectic.[37] Whereas in some junctures the Strasbourg Court has expanded the scope of the ECHR to situations beyond the territory of contracting states (but over which they have authority or effective control), in other instances it has taken a restrictive approach over extraterritorial migration control measures. The extraterritorial application of the ECHR has generally been asserted based on the spatial or personal model of jurisdiction.[38] The first view requires effective control over foreign territory,[39] while the second involves the exercise of power and authority over an individual abroad.[40] Nonetheless, the ECtHR jurisprudence has not always promoted coherent and principled interpretation, and it has generated confusion as to what amounts to jurisdiction.[41] Matters become even more complicated when the borders that define the authority and effective control from which jurisdiction is generally derived extend beyond states' territorial frontiers.

At first glance, border externalisation efforts seem to rest on the traditional understanding of borders as territorial markers. Under this assumption, human rights obligations, including respect for the prohibition of *refoulement*, begin and end at the border of the state concerned.[42] This implies that while migration control practices can operate extraterritorially, protection obligations arise only when their beneficiaries present themselves at the physical frontier of a state.[43] This position has been contested in theory and practice. The ECtHR has confirmed this orientation with particular regard to the prohibition of *refoulement*.[44] The scope of this obligation extends so far as

37 ECtHR, *Al-Skeini and Others v. the United Kingdom*, judgment of 7 July 2011, no. 55721/07, Concurring opinion of Judge Bonello, para. 4; ECtHR, *Georgia v. Russia [II],* judgment of 21 January 2021, no. 38263/08, Partly dissenting opinion of Judge Pinto De Albuquerque. For a detailed reconstruction: Conall Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?', Quest. Int'l. L. QDI 82 (2021), 31-51 (51).

38 ECtHR, *Al-Skeini and Others* (n. 37), para. 130.

39 ECommHR, *Cyprus v. Turkey*, judgment of 28 May 1975, nos 6780/74 6 and 6950/75, para. 76; ECtHR (Grand Chamber), *Loizidou v. Turkey*, preliminary objections of 23 March 1995, no. 40/1993/435/514, para. 62; *Ilaşcu* (n. 13), paras 331-335.

40 ECtHR, *Al-Skeini* (n. 37) paras 131-140; ECtHR (Grand Chamber), *Öcalan v. Turkey,* judgment 12 May 2005, no. 46221/99, para. 91; ECtHR, *Ukraine and the Netherlands v. Russia*, judgment of 25 January 2023, nos 8019/16, 43800/14 and 28525/20, para. 571.

41 Mallory (n. 37).

42 Kay Hailbronner, 'Comments On: The Right to Leave, the Right to Return and the Question of a Right to Remain' in: Vera Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1996), 109-118.

43 Moreno-Lax, *Accessing Asylum in Europe* (n. 17), 247.

44 ECtHR (Grand Chamber), *Hirsi Jamaa and Others v. Italy*, judgment of 23 February 2012, no. 27765/09.

contracting states exercise their legal or factual control over a given situation, within or beyond their borders.[45]

As the next sections will show, however, state practice has evolved in line with the progressive development of human rights law in the context of extraterritorial jurisdiction.[46] New deterrence practices are less clearly extraterritorial, as they are delegated much more to third countries or private actors. This allows states to keep up appearances while escaping their international obligations, as it is more difficult to establish jurisdiction over externalised and delegated border control practices with no physical connection to the victims. As the move to this model of vicarious containment gains traction in many parts of the world, it may be argued that international law is part of the problem – because it reproduces the fundamental inequality that structures the externalisation and outsourcing of border controls, creating a system of regional containment.[47] This dysfunction rests on the problematic assumption that where there is no direct physical contact, there is no jurisdiction and, therefore, no responsibility.

1. Progress and the Heterogony of Ends

Many readers will be familiar with the *Sale* and *Hirsi Jamaa* decisions.[48] In *Sale*, in the wake of the Haitian refugee crisis, the United States (US) Supreme Court interpreted the Refugee Convention as inoperative in the context of maritime interdiction on the high seas.[49] Years later, the European Court of Human Rights took a strong position regarding maritime interceptions. In its leading case, *Hirsi Jamaa v. Italy*,[50] the Court found that the Italian practice of intercepting migrants on the high seas and returning them

45 ECtHR, *Hirsi Jamaa* (n. 44), para. 81.

46 Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', Columbia Journal of Transnational Law 53 (2015), 235-284; Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law', European Journal of Migration and Law 20 (2018), 373-395; Annick Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?', HRLR 20 (2020), 306-332.

47 E. Tendayi Achiume, 'Governing Xenophobia', Vand. J. Transnat' l L. 51 (2018), 333-398; Loren B. Landau, 'Crisis and Containment: Risks of Enhanced Global Migration Governance', *Global Shifts Colloquium* (Perry World House University of Pennsylvania 2018), 1-6; Bhupinder S. Chimni, 'Aid, Relief, and Containment: The First Asylum Country and Beyond', International Migration 40 (2002), 75-92.

48 *Sale v. Haitian Centres Council*, 113 S. Ct. 2549, 509 US 155, 21 June 1993; ECtHR, *Hirsi Jamaa* (n. 44).

49 *Sale* (n. 48).

50 ECtHR, *Hirsi Jamaa* (n. 44).

to Libya was in breach of the principle of *non-refoulement*, which has a broader scope of application under human rights law than the Refugee Convention.[51]

Generally, we are told that the (bad) precedent set in *Sale* has been corrected by human rights bodies. *Sale* was but a waystation in the 'complex enforcement process triggered by transnational public law litigation'.[52] Indeed, the Inter-American Commission of Human Rights found that US interception practices violated the state's international obligations and affirmed the extraterritorial application of the principle of *non-refoulement*.[53] In Europe, *Hirsi Jamaa* prompted a sense that the promise of human rights could be vindicated transnationally through strategic litigation. The narrative is one of progressive development emerging as the synthesis of a dialectic of a continuous legal struggle.[54] Following *Hirsi Jamaa*, Italy launched Operation *Mare Nostrum*, rescuing migrants in distress in the Italian, Maltese, and Libyan Maritime Rescue Regions. Strategic litigation has since been used in various contexts to hold states accountable for human rights violations at the borders of Europe and to shape legal and policy frameworks to protect migrant rights better.

Yet, state practice has adapted to these new legal challenges and morphed to evade the expanding notion of human rights jurisdiction and concomitant responsibility.[55] *Mare Nostrum* was increasingly criticised as an 'unintended pull factor' for irregular migration, encouraging more migrants to attempt the dangerous journeys; it was eventually discontinued and replaced by more limited European Union (EU)-led operations.[56] At the same time, Italy established a new and less transparent cooperation with Libya,[57] despite the

51 ECtHR, *Hirsi Jamaa* (n. 44), para. 81.

52 Harold Hongju Koh, 'The "Haiti Paradigm" in United States Human Rights Policy', Yale L. J. 103 (1994), 2391-2435 (2406).

53 IAmCommHR, *The Haitian Centre for Human Rights et al. v. United States,* Case No 10.675, 13 March 1997, para. 157.

54 Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013', Harv. Int'l. L. J. 54 (2013), 315-391.

55 Gammeltoft-Hansen and Hathaway (n. 46); Thomas Gammeltoft-Hansen, 'Extraterritorial Human Rights Obligations in Regard to Refugees and Migrants' in: M Gibney, Krajewski and W Vandenhole (eds), *Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021), 153-168.

56 Eugenio Cusumano and Matteo Villa, 'Over Troubled Waters: Maritime Rescue Operations in the Central Mediterranean' in: Philippe Fargues and Marzia Rango (eds), *Migration in West and North Africa and Across the Mediterranean: Trends, Risks, Development and Governance* (International Organization for Migration 2020), 202-214.

57 Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017.

egregious human rights violations (possibly constituting crimes against humanity) reported in the country.[58]Accordingly, Italy trains, equips, and assists the Libyan Coast Guard (LCG) in its border control operations, often resulting in violent interceptions and pullbacks.[59] Similarly, the Italian government has strengthened its already existing cooperation with the Tunisian authorities to stem departures.[60]

In the aftermath of *Hirsi Jamaa,* Mann cogently noted that a dialectic of progress underlies these transnational legal actions, yet this process can also be self-defeating.[61] Indeed, by establishing jurisdiction based on *de iure* or *de facto* control over a boat carrying refugees, the ECtHR is implicitly inviting what was later labelled as 'contactless control' policies.[62] Such policies aim to sever the jurisdictional link to states sponsoring containment measures in third countries, thereby eclipsing their responsibility under international human rights and refugee law. While a clear-cut causality link might be challenged,[63] Wilde has warned us that progressive moves towards a truly universal protection of migrant rights might have serious side effects on those very rights.[64]

Twelve years after the *Hirsi Jamaa* decision, state practice is characterised by a move towards preventive and elusive border control policies in cooperation with third countries.[65] European states have increased cooperation with countries of origin and transit to outsource asylum responsibilities and stem migratory movements before departure. The EU-Turkey Deal is a significant case in point.[66] It has been followed by some similar policies, including ongoing plans to outsource asylum procedures (such as the recent Italian

58 See most recently: OHCHR, Report of the Independent Fact-Finding Mission on Libya, A/HRC/52/83, 3 March 2023. For further discussion see Giulia Raimondo, 'Invisible Crimes: Accountability for Crimes against Migrants in Libya', European Journal of Migration and Law 25 (2023), 328-357.

59 Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?', European Journal of Migration and Law 20 (2018), 396-426.

60 Fatma Raach, Hiba Sha'ath and Thomas Spijkerboer, *Country Report Tunisia* (ASILE Project 2022).

61 Mann, 'Dialectic of Transnationalism' (n. 54).

62 Mariagiulia Giuffré and Violeta Moreno Lax, 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in: Satvinder S. Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar 2019), 82-108.

63 Anuscheh Farahat, 'Human Rights and the Political: Assessing the Allegation of Human Rights Overreach in Migration Matters', NQHR 40 (2022), 180-201.

64 Ralph Wilde, 'The Unintended Consequences of Expanding Migrant Rights Protections', AJIL Unbound 111 (2017), 487-491.

65 Ermioni Xanthopoulou, 'Mapping EU Externalisation Devices Through a Critical Eye', European Journal of Migration and Law 26 (2024), 108-135.

66 Statement of the EU Heads of State or Government of 7 March 2016 on Joint Action Plan of the EU-Turkey.

cooperation with Albania[67]). Most recently, the Union signed a Memorandum of Understanding (MoU) with Tunisia that provides financial support to prevent people from reaching Europe and increasing returns, followed by a strategic and comprehensive partnership with Egypt and a more specific migration partnership with Mauritania.[68] The logic behind these policies is that they take place exclusively under the jurisdiction of third countries, and therefore, they imply their exclusive responsibility.

Meanwhile, unilateral state policies underpinned by an emergency discourse have become more violent and obstructive. After the short-lived *Mare Nostrum*, Italy has reduced State-sponsored maritime surveillance missions while hindering non-governmental Search and Rescue (SAR) operations. Since 2019, it has closed its ports to numerous private vessels that had continued SAR operations in the central Mediterranean.[69] Several EU member states, including Hungary, Poland, and Greece, have built border fences to impede irregular border crossing. Illegal push-back practices have been 'legalised' through emergency measures,[70] suspending *non-refoulement* obligations and limiting access to human rights and refugee law protection.[71]

67 Ratifica ed esecuzione del Protocollo tra il Governo della Repubblica italiana e il Consiglio dei ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria, 6 November 2023.

68 Mémorandum d'entente sur un partenariat stratégique et global entre l'Union européenne et la Tunisie (16 July 2023) available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887?insEmail=1&insNltCmpId=398&insNltSldt=10080&insPnName=euronewsfr&isIns=1&isInsNltCmp=1&utm_campaign=briefing_en&utm_content=&utm_medium=en&utm_source=newsletter&utm_status=true&utm_term=>, last access 9 December 2024; Commission, Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Republic Of Egypt and the European Union (17 March 2024) available at: <https://neighbourhood-enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en>, last access 9 December 2024; Commission, The European Commission launches new migration partnership with Mauritania (7 March 2024) available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1335>, last access 9 December 2024.

69 Eugenio Cusumano and Kristof Gombeer, 'In Deep Waters: The Legal, Humanitarian and Political Implications of Closing Italian Ports to Migrant Rescuers', Mediterranean Politics 25 (2020), 245-253; Eugenio Cusumano and Matteo Villa, 'From "Angels" to "Vice Smugglers": The Criminalization of Sea Rescue NGOs in Italy', European Journal on Criminal Policy and Research 27 (2021), 23-40.

70 Special Rapporteur on the human rights of migrants, Felipe González Morales, Report on means to address the human rights impact of pushbacks of migrants on land and at sea, A/HRC/47/30, 12 May 2021, para. 80.

71 Special Rapporteur on the human rights of migrants, Felipe González Morales, Human rights violations at international borders: trends, prevention and accountability, A/HRC/50/31, 26 April 2022, paras 33-39. See also: Sarah Ganty, Alexandra Jolkina, Aleksandra and Dimitry Kochenov, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"', University of Copenhagen, MOBILE Working Paper Series, no. 18, 2023.

Excluding undesirable migrants via strategic emergency measures has not only become the permissible new norm – it is even presented as a necessary exercise of the sovereign right to exclude, often resulting in violent and racist border controls.[72]

Further regressive developments may already be underway, as evidenced by the role of international organisations and private actors in the development and implementation of border management programs between the EU and third countries.[73] For example, with the support of the EU Emergency Trust Fund for Africa, the International Centre for Migration Policy Development (ICMPD), an international organisation based in Vienna, has been supplying surveillance equipment and training to police and coast guards in Tunisia and Morocco.[74] Similar projects are ongoing in Libya.[75] Likewise, Frontex is collecting information regarding the location of individuals trying to reach Europe in the Mediterranean through unmanned drones managed by private companies. The information collected is shared with third-state authorities, including the LCG.[76]

By dispersing the responsibility of the beneficiary state among multiple actors, many of whom are not bound by the ECHR – or by simply denying responsibility by attributing any violation to the direct executor[77] – these orchestrated border management strategies entrench states behind a deep accountability gap.[78] Migrants find themselves in a Catch-22 situation.[79] In the words of Besson, '[w]ithout jurisdiction, there are no human rights applicable and hence no duties, and there can be no acts or omissions that would violate those duties that can be attributed to a state and a fortiori no

72 John Reynolds, 'Emergency and Migration, Race and the Nation', UCLA L. Rev. 67 (2020), 1768-1798; E. Tendayi Achiume, 'Racial Borders', Geo. L. J. 110 (2022), 445-508.

73 Zach Campbell and Lorenzo D'Agostino, 'How an EU-Funded Agency Is Working to Keep Migrants from Reaching Europe', *Coda Story*, 31 May 2023, available at: <https://www.codastory.com/authoritarian-tech/icmpd-eu-refugee-policy/>, last access 9 December 2024.

74 ICMPD, BMP Maghreb: Border Management Programme for the Maghreb Region (2018-2024), available at: <https://www.icmpd.org/our-work/projects/border-management-programme-for-the-maghreb-region-bmp-maghreb>, last access 9 December 2024.

75 ICMPD, EU Training Support to Libya's Border Security and Management Institutions (2023-2025), available at: <https://www.icmpd.org/our-work/projects/eu-training-support-to-libya-s-border-security-and-management-institutions>, last access 9 December 2024.

76 Judith Sunderland and Lorenzo Pezzani, 'Airborne Complicity: Frontex Aerial Surveillance Enables Abuse', HRW, Border Forensics, 2022, available at: <https://www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse>, last access 9 December 2024.

77 Moreno-Lax, 'Meta-Borders' (n. 19).

78 Joyce De Coninck, 'Relational Human Rights Responsibility', University of Pennsylvania Journal of International Law 45 (2024), 109-179.

79 Joyce de Coninck, The EU's Human Rights Responsibility. Deconstructing Human Rights Impunity of International Organisations Gap (Hart 2024).

potential responsibility of the state for violating those duties later on'.[80] Yet, migrants are trapped in detention camps or die at sea as a result of those jurisdictional rules, which render them rightless.[81]

2. Responding to the Unintended Consequences of Progress

Externalisation policies, although not new,[82] have recently experienced a significant surge, proliferating in Europe and the Global North more generally while diversifying their legal and technical infrastructure.[83] Often presented as an efficient form of border management, these policies can result in serious human rights violations.[84] States keep paying lip service to their protection obligations even as they develop new tactics to hinder access to those very protections[85] – by building on the inherent limitations of legal frameworks and cooperating with transit countries.

Scholarship questioning the paradigm of extraterritorial jurisdiction as a procedural construction that undermines human rights remains rare.[86] Yet some have worked within this paradigm to address its shortcomings. One line of argument emphasises the extraterritorial effects of destination states' actions, such as instructing or funding border authorities in transit countries.[87] This perspective aligns with the Court's recognition that states' acts 'performed, or *producing effects*, outside their territories can constitute an

80 Besson (n. 35), 867.

81 Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law', EJIL 29 (2018), 347-372.

82 Aristide R. Zolberg, 'The Archeology of "Remote Control"' in: Andreas Fahrmeir, Olivier Faron and Patrick Weil (eds), *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (Berghahn Books 2003), 195-222.

83 David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press 2019).

84 Moreno-Lax, *Accessing Asylum in Europe* (n. 17), 272 ff.; David Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law', IJRL 34 (2022), 120-156.

85 Ghezelbash (n. 21). On the relevance of the right to leave as a precondition of the right to seek asylum see: Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', EJIL 27 (2016), 591-616.

86 Sara Seck, 'Moving Beyond the E-Word in the Anthropocene' in: Daniel S. Margolies, Umut Özsu, Maïa Pal, Ntina Tzouvala (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019), 49-66; E. Tendayi Achiume, 'Race, Borders, and Jurisdiction', HJIL 82 (2022), 465-482.

87 Pijnenburg (n. 59), 422-424; Kristof Gombeer and Stefaan Smis, 'The Establishment of ETOs in the Context of Externalised Migration Control', *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021), 169-181 (177-178).

exercise of jurisdiction'.[88] Another approach relies on rules of attribution of indirect responsibility to sidestep jurisdictional bars or override them with an expansive interpretation of jurisdiction in cases of extraterritorial complicity.[89]

In conceptualising 'contactless control' practices such as the Italian-Libyan cooperation, Giuffré and Moreno-Lax rely on the notion of 'decisive influence', as developed by the ECtHR.[90] They argue that conditioning, funding, training, and equipping the Libyan authorities for the purposes of 'managing' migratory flows and impeding departures towards Europe can be regarded as a form of decisive influence. Although this influence cannot be compared to direct control, it is decisive enough to determine the material course of events: the LCG would be virtually inoperable if not for European states' support.[91] Other scholars advocate a radical way forward, including the EU accession to the ECHR and the consequent recognition of concurrent jurisdiction and responsibility. De Coninck underscores the functionally different nature of transnational actors engaged in border management and distinguishes their differentiated obligations, including those applicable extraterritorially.[92]

Over the years, the ECtHR has become more cautious, if not ambiguous, in its findings of jurisdiction related to migration and border control measures. An example of this approach is the case of *M. N. and Others v. Belgium*, which concerned a Syrian family with two young children who were denied a humanitarian visa at the Belgian consulate in Lebanon.[93] Three years earlier, in a similar situation, the Court of Justice of the European Union (CJEU) found the EU Charter of Fundamental Rights inapplicable to the situation of a Syrian family.[94] Yet, things could have been different for the applicants in Strasbourg. According to the applicants, the Belgian authorities'

88 *Banković* (n. 13) para. 67; *Al-Skeini* (n. 37) para. 131; *Hirsi Jamaa* (n. 44), para. 72.

89 Gammeltoft-Hansen and Hathaway (n. 46); Izabella Majcher, 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?', Silesian Journal of Legal Studies 7 (2015), 45-78; Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction', EJIL 27 (2016), 817-830.

90 See eg: ECtHR, *Ilaşcu* (n. 13); ECtHR (Grand Chamber), *Catan and Others v. the Republic of Moldova and Russia*, judgment of 19 October 2012, nos 43370/04, 8252/05 and 18454/06; ECtHR (Grand Chamber), *Mozer v. the Republic of Moldova and Russia*, judgment 23 February 2016, no. 11138/10; ECtHR (Second Section), *Panteleiciuc v. the Republic of Moldova and Russia,* judgment of 2 July 2019 no. 57468/08.

91 Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered', European Yearbook on Human Rights (2018), 373-394 (373).

92 De Coninck (n. 79).

93 ECtHR (Grand Chamber), *M. N. et al. v. Belgium,* judgment of 5 May 2020, no. 3599/18.

94 CJEU, *X and X,* Case C-638/16 PPU, 7 March 2017, ECLI:EU:C:2017:173.

decisions on their visa applications produced effects beyond the national territory; moreover, those decisions were made in the exercise of an official state function, that of border control. This, they argued, was a manifestation of state jurisdiction, regardless of where it was exercised. The Court confirmed that acts of diplomatic and consular agents abroad could amount to an exceptional exercise of extraterritorial jurisdiction.[95] But it also introduced an important qualification. The actions or omissions of diplomatic or consular agents in a foreign territory may trigger jurisdiction where they exercise their authority in respect of their state's 'nationals or their property', or where they exercise 'physical power and control over certain persons'.[96] Neither of these two alternative conditions was met in the applicants' case.[97] Hence, the Court found no jurisdictional link.

Where a recalibration of its jurisdiction is not possible, the Court has sought the specific features of the case to rely on new exceptions to the applicability of absolute rights. The most notable example is *N. D. and N. T.*

In dealing with the arbitrary return of a group of Sub-Saharan migrants climbing the border fences of the Spanish enclave of Melilla, the Court's Third Chamber found that the applicants were under Spanish jurisdiction and recognised that, absent any examination of their individual situation, their refusals of entry amounted to a collective expulsion.[98] Reversing the previous Chamber judgment, the Court's Grand Chamber could not but confirm this stance regarding jurisdiction;[99] but it affirmed that the lack of individual removal decisions was due to the applicants' culpable conduct and, therefore, found no violation of their rights under the Convention.[100]A series of similar chamber rulings has confirmed this exception to the applicability of the prohibition of collective expulsions.[101]

In *Hirsi Jamaa*, as in *N. D. and N. T.*, the ECtHR was satisfied that the migrants came under state jurisdiction as a result of the combined exercise of

95 ECtHR, *M. N. et al. v. Belgium* (n. 93), para. 106. See ECommHR, *X v. the Federal Republic of Germany*, judgment 25 September 1965, no. 1611/62, para. 5; ECtHR, *Al-Skeini* (n. 37), para. 134.

96 ECtHR, *M. N. et al. v. Belgium* (n. 93), para. 106.

97 ECtHR, *M. N. et al. v. Belgium* (n. 93), paras 118-119.

98 ECtHR (Third Section), *N. D. and N. T. v. Spain,* judgment of 3 October 2017, nos 8675/15 and 8697/15, para. 107.

99 ECtHR, *N. D. and N. T. v. Spain,* (n. 33), paras 104-111.

100 ECtHR, *N. D. and N. T. v. Spain* (n. 33), paras 208 and 231.

101 ECtHR, *M. H. and Others v. Croatia,* judgment of 18 November 2021, no. 15670/18 and 43115/18, paras 293-294; ECtHR, *Shahzad v. Hungary*, judgment of 8 July 2021, no. 12625/17, para. 59; ECtHR, *A. A. and Others v. North Macedonia*, judgment of 5 April 2022, no. 55798/16 et al., para.112.

de iure and *de facto* control. The precise impact of the *de iure* and *de facto* exercise of state power, as well as the relationship between the two, remains undefined. Ultimately, vagueness and inconsistencies may continue to plague the jurisprudence of the Court. Failure may just be part of the dialectic process toward a bright-line rule to define the Convention's scope of application.[102] However, the dual reading of jurisdiction, as extraterritorial and territorial, might also hinder any clarity and perpetuate controversies.

Rather than advancing toward the universality and indivisibility of human rights through a dialectic of progress, recent developments show that migrant rights are being increasingly constrained by neocolonial containment policies often rooted in racial considerations.[103] The story of progress in international refugee and migration law we are generally told (or are telling ourselves and others) will remain just that – a story – unless the very notion of jurisdiction is not problematised, contextualised, and contested (also) within a broad human rights strategy.

3. Looking Ahead: A Principled Approach to Jurisdiction?

The backlash of the European states against the expansion of the ECHR extraterritorial jurisdiction resulted in a turn to indirect and informal cooperation aimed at further externalising border controls. Shifting from direct to orchestrated involvement in externalised border controls is more cost-effective and faster than formal and direct involvement in *non-entrée* policies.[104] Most importantly, it also allows a reversal of the practical significance of the ECHR extraterritorial jurisdiction.[105] Human rights obligations might apply extraterritorially, but they remain abstract declarations of intent when states do not have direct contact with their (potential) beneficiaries.

This is one of the principal issues the ECtHR will face in deciding cases concerning Italian cooperation with Libyan actors.[106] The most notable – and most awaited – of these cases is *S. S. and Others v. Italy*, concerning the rescue operation of a migrant boat carrying over 100 migrants off the

102 Mallory (n. 37).

103 E. Tendayi Achiume, 'Migration as Decolonization', Stanford L. Rev. 71 (2019), 1509-1574.

104 Patrick Müller and Peter Slominski, 'Breaking the Legal Link but Not the Law? The Externalization of EU Migration Control Through Orchestration in the Central Mediterranean', Journal of European Public Policy 28 (2021), 801-820.

105 Wilde (n. 64).

106 ECtHR (First Chamber), *S. S. v. Italy,* communicated to the Italian Government on 26 June 2019, no. 21660/18.

Libyan coast.[107] The operation was carried out by the NGO Sea Watch and the LCG, using one of the four boats Italy donated to the Libyan authorities under the 2017 MoU. The Italian authorities informed both Sea Watch and the LCG about the presence of a vessel in distress. The Libyan authorities then assumed operational command. Yet they did not provide immediate assistance to the sinking boat; instead, they executed dangerous manoeuvres jeopardising people's safety and obstructing the work of Sea Watch. More than 20 people lost their lives during the shipwreck; 59 were rescued by Sea Watch, while the LCG returned the others to Libya, where 'their fate of detention and violence […] was clear to all actors involved in the events'.[108] This incident, far from being isolated, illustrates *Hirsi Jamaa's* heterogony of ends. While *Hirsi* forcefully recognised that extraterritoriality does not preclude the application of human rights obligations, it also gave European policymakers a tutorial on how to evade those very obligations.[109]

As discussed above, the scholarship is proposing various ways to push forward an interpretation of jurisdiction more coherent with the current interconnected reality. At the same time, some recent decisions by human rights monitoring bodies suggest that the lack of physical and direct control over victims of human rights violations does not *ipso facto* preclude the exercise of jurisdiction by supporting states.[110] Beyond the *Hirsi Jamaa* 'exclusive *de jure* and *de facto* control' formula,[111] the ECtHR has also made clear that jurisdiction can be triggered by forms of control that do not imply direct physical contact with state authorities. For example, in a case involving a maritime blockade impeding access to territorial waters, the jurisdictional link was uncontested.[112] However, as mentioned above, in later decisions, concerning the repatriation of nationals or the issuance of humanitarian visas

107 For a detailed reconstruction see: Forensic Oceanography, *Mare Clausum* (Goldsmiths, University of London, 2018), 87-101, available at: <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, last access 9 December 2024.

108 Forensic Oceanography (n. 107), 97.

109 Mann, 'Dialectic of Transnationalism' (n. 54); Pijnenburg (n. 59).

110 See CAT, Concluding observations on the fourth and fifth periodic reports of Australia, 26 November 2014, CAT/C/AUS/CO/4-5, para. 17; HRC, Concluding observations on the sixth periodic report of Australia, 9 November 2017, CCPR/C/AUS/CO/6, para. 35; HRC, *A. S., D. I., O. I. and G. D. v. Italy*, CCPR/C/130/D/3042/2017 4 November 2020, para. 7.8; CRC, *L. H., L. H., D.A, C. D. and A.F v. France*, CRC/C/85/D/79/2019–CRC/C/85/D/109/2019, 2 November 2020, para. 9.7.

111 ECtHR, *Hirsi Jamaa* (n. 44).

112 ECtHR (Second Section), *Women on Waves v. Portugal,* judgment of 3 February 2009, no. 31276/05.

abroad, it also suggested that the absence of physical power and control precludes jurisdiction.[113]

The Court has thus been called to articulate a coherent construction of jurisdiction 'that is principled and applicable across the board, within and beyond territorial borders'.[114] Along these lines, in relation to *S. S. and Others v. Italy*, Moreno-Lax – one of the leading counsels on the case – appraised jurisdiction paying specific attention to 'the entire constellation of all the relevant channels through which factual and/or legal state functions are exercised'.[115] Accordingly, the Italian implication with the operational capacity of the LCG should be considered against the background of its legal and factual context. This cooperation entails both direct technical and material participation, as well as an indirect yet decisive influence on the 'contactless containment' policy across the Central Mediterranean[116] – a policy that has a foreseeable impact on the human rights of migrants in distress at sea.[117]

Moreno-Lax's reading of jurisdiction points to the functions of state sovereignty,[118] and reveals how contactless containment policies impose European prerogatives on the borders of sovereign other countries.[119] It also illustrates how the very notion of jurisdiction challenges the operation of the sovereignty doctrine, according to which every country enjoys independence from and equality with all other states.[120]

At the same time, however, international law has traditionally been rather agnostic or at least ambiguous about what constitutes a sovereign function.[121] Hence, rather than being the expression of a state's sovereign functions, jurisdiction serves a *relational* function.[122] It requires a nexus between state authorities and those concerned by their decisions through factual or legal

113 ECtHR, *M. N. et al v. Belgium* (n. 93), para. 112; ECtHR, *HF and others v. France,* judgment of 14 November 2022, nos. 24384/19 and 44234/20, para. 186.

114 Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S. S. and Others v. Italy, and the "Operational Model"', GLJ 21 (2020), 385-416.

115 Moreno-Lax, 'Architecture of Functional Jurisdiction' (n. 114), 414.

116 *ECtHR, Ilaşcu* (n. 13), para. 392.

117 Moreno-Lax, 'Architecture of Functional Jurisdiction' (n. 114), 403-413.

118 Moreno-Lax, 'Architecture of Functional Jurisdiction' (n. 114), 403.

119 Chantal Thomas, 'What Does the Emerging International Law of Migration Mean for Sovereignty?', Melbourne Journal of International Law 14 (2013), 392-450; Achiume, 'Migration as Decolonization' (n. 103).

120 Achiume, 'Race, Borders, and Jurisdiction' (n. 86), 465-482.

121 Frédéric Mégret, 'Are There "Inherently Sovereign Functions" in International Law?', AJIL 115 (2021), 452-492; Samantha Besson, 'The International Public: A Farewell to Functions in International Law', AJIL 115 (2021), 307-311.

122 Giulia Raimondo, *The European Integrated Border Management: Frontex, Human Rights, and International Responsibility* (Hart 2024), chapter 4.

means or a combination of both. What matters is the relationship between the state and the affected person's rights.[123] As long as they represent a manifestation of state sovereign power, the legal and factual means that a state uses to change the situation of individuals within or beyond its borders reveal a jurisdictional connection.[124]

Yet again, one could question the use of confusing terminology (such as 'power') or the conflation of the factual 'capacity' to harm or protect with the duty to do so. This emerged, for example, in the case *A. S. et al. v. Italy*, where the Human Rights Committee established jurisdiction based on the 'special relationship of dependence' between a sinking migrant boat and the Italian authorities whom the people on board contacted.[125] It is, however, not clear which factors are relevant to ascertain the relationship of dependency. If ascertained via unclear – if progressive – concepts, this relationship runs the risk of further obfuscating the notion of jurisdiction and ultimately rendering its enforceability meaningless.

Ultimately, the very notion of extraterritorial jurisdiction posited as an exception to the territorial rule reinforces a misconception: that human rights that are applicable extraterritorially differ in nature and scope from those applicable territorially.[126] This misconception is often presented as a pure technicality, a corollary of the technical rule of territorial jurisdiction under general international law.[127] Instead, the language of relationality should speak to the objective legal nature of the obligations at stake, as well as to the interconnection of the right holders and duty bearers. Human rights jurisdiction, understood in this relational sense, results in a normative and factual relationship between a duty-bearing state and a right-holding individual.[128] Jurisdiction understood in relational terms, draws attention to the nature of the relationship between rights holders and duty bearers, and whether this relationship gives rise to legal obligations. Put differently, rather than focusing on the question of where to draw the line between territorial and extraterritorial obligations, this approach shifts the focus to the substantive relationship between the state and the individual, asking whether the state's

123 HRC, General Comment No. 36 on Article 6, on the Right to Life, CCPR/C/GC/36, 3 September 2019, para. 63.

124 Raimondo, *European Integrated Border Management* (n. 122); See also, extensively, Moreno-Lax, 'Meta-Borders' (n. 19).

125 *A. S., D. I., O. I. and G. D. v. Italy* (n. 110).

126 Samantha Besson, 'Extraterritoriality in International Human Rights Law: Back to the Jurisdictional Drawing Board' in: A. Parrish and C. Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (E Elgar 2023), 269-291.

127 For a critical analysis see: Daniel S. Margolies, Umut Özsu, Maïa Pal, Ntina Tzouvala, *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019).

128 Besson (n. 35).

actions or authority give rise to human rights obligations, regardless of geographical locations.

4. Jurisdiction and Strategic Human Rights Litigation

Even if a clear and principled notion of extraterritorial jurisdiction were to be articulated by the ECtHR, the Court would still need to deal with pressure from states. And the latter could continue concealing illegal actions behind depoliticised policies and infrastructures enveloped in sanitised language.[129]

In the face of these regressive tendencies, scholars and practitioners have been advocating a 'topographical' or holistic approach to accountability in migration control.[130] It includes the possibility of establishing responsibility for extraterritorial migration control across different legal regimes, as well as beyond the human rights framework.[131] Among these regimes are international criminal law,[132] the law of the sea,[133] and EU (public procurement and liability) law.[134] Some experts have explored the potential of litigating migrant rights before regional courts;[135] others have looked at the domestic remedies available in (sponsoring) destination states[136] and countries of transit and

129 Niamh Keady-Tabbal and Itamar Mann, 'Weaponizing Rescue: Law and the Materiality of Migration Management in the Aegean', LJIL 36 (2023), 61-82.

130 Nikolas Feith Tan and Thomas Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control', GLJ 21 (2020), 335-354.

131 Gammeltoft-Hansen, 'Extraterritorial Human Rights Obligations in Regard to Refugees and Migrants' (n. 55); Annick Pijnenburg and Kris van der Pas, 'Strategic Litigation Against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route', European Journal of Migration and Law 24 (2022), 401-429.

132 Ioannis Kalpouzos, 'International Criminal Law and the Violence Against Migrants', GLJ 21 (2020), 571-597; Itamar Mann, 'Border Crimes as Crimes Against Humanity' in: Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021), 1174-1190.

133 Efthymios Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm', GLJ 21 (2020), 417-435; Violeta Moreno-Lax, 'Protection at Sea and the Denial of Asylum' in: Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021), 483-501.

134 Thomas Spijkerboer and Elies Steyger, 'European External Migration Funds and Public Procurement Law', European Papers 4 (2019), 493-521; Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable', GLJ 21 (2020), 532-548.

135 ASGI, 'Ecowas Court of Justice called to judge the legality of Niger Law No. 36/2015' (22 September 2022), available at: <https://en.asgi.it/ecowas-court-of-justice-called-to-judge-the-legality-of-niger-law-no-36-2015/>, last access 9 December 2024.

136 See most notably: *R (on the application of AAA (Syria) and others)* [2023] UKSC 42, 15 November 2023.

destination.[137] There have been suggestions of turning to 'soft courts', whose decisions in cases involving the interpretation of extraterritorial jurisdiction are generally expansive.[138]

Nevertheless, the decisions of domestic courts often remain anchored to traditional or confusing understandings of jurisdiction.[139] And the effects of 'soft courts' decisions are difficult to observe, particularly remedies granted to victims and broader policy changes. In the groundbreaking case of *A. S. and others v. Italy*, for instance, the government has yet to take any steps to redress the victims and correct its policies.[140] More generally, these efforts would still be exposed to the paradoxes of the dialectic of progress.[141]

The long-anticipated backlash against progressive developments, with its strategic accountability gaps, has in fact been occurring for some time – in the absence of judicial decisions and, possibly, in violation of international law.[142] While a clear-cut causality link might be difficult to defend, from the perspective of universal human rights protection, progressive litigation strategies may well result in dangerous side effects when not conceived within a larger human rights strategy.[143] This is not to dismiss the relevance and necessity of strategic litigation, but only to take a step back and invite an exercise of self-reflexivity.

This backlash against progressive developments may not just limit the extraterritorial reach or effectiveness of progressive developments – it could in fact reverse gains made in migrant rights protection. In this context,

137 Majd Achour and Thomas Spijkerboer, 'The Libyan Litigation About the 2017 Memorandum of Understanding Between Italy and Libya', EU Immigration and Asylum Law Blog, 2 June 2020.

138 Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection Through Soft Courts? Non-Refoulement Before the United Nations Treaty Bodies', GLJ 21 (2020), 355-384.

139 For instance, the Italian Consiglio di Stato rejected a complaint against the use of the EU Africa Fund to reinforce the Libyan authorities involved in maritime border surveillance. The decision compounds the question of attribution with that of jurisdiction and dismisses the claim of complicity by simply referring to the lack of (territorial) jurisdiction. Consiglio di Stato, Sentenza No. 4569/2020, 15 July 2020.

140 Andrea Saccucci and Roberta Greco, *L'Italia non adempie alla decisione ONU sul naufragio del 2013*, Saccucci&Partners, 2023, available at: <https://www.saccuccipartners.com/2023/02/17/il-governo-italiano-non-adempie-alla-decisione-onu-sul-naufragio-del-2013/>, last access 9 December 2024.

141 For example, the UK Supreme Court held that the state's policy to remove protection seekers to Rwanda was unlawful, and the new government has abandoned this idea. Yet, it also seeks to emulate Italy's bilateral cooperation with Albania. 'Starmer Seeks Lessons from Italy as Eight more Channel Migrants Die', The Times, 16 September 2024.

142 Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-"Refoulement" and the Externalization of Asylum by Australia and Europe', Government and Opposition 43 (2008), 249-269.

143 Farahat (n. 63), 185-86.

strategic litigation is a fundamental component of a comprehensive human rights strategy to address the root causes of potential backlash, including socio-economic inequalities and related racial and xenophobic calibrations of the border policies of the Global North.

All in all, while the push for progressive interpretations of human rights jurisdiction often backfires, an overemphasis on strategic litigation may risk downplaying the significance of a more comprehensive human rights practice. The following section explores the potential of adopting a broader perspective on jurisdiction and the role of strategic human rights litigation. Rather than offering a radically different or refined approach, it – more modestly, I hope – proposes reading jurisdiction from a different angle that may inspire alternative strategies to mitigate the risk of backlash against migrant (human) rights.

IV. Negative Dialectic and The Possibilities of a Failed Promise

Every step forward, that is, every step taken towards a more protective legal and political management of migration in Europe (and globally), seems inherently to imply two steps back towards states' right to exclude. As long as territory is perceived as the defining feature of the enjoyment of human rights, and as long as material control determines any exception to the territorial applicability of human rights, their promise of universality will remain unfulfilled.[144]

The inadequacy of the dialectic of progress in transnational litigation for migrant rights cannot be overcome or bypassed without the risk of turning its narrative into romantic hyperbole. Nonetheless, the disillusion and loss of meaning generated by the failures of migrant (human) rights can lead to reflexivity and, one might hope, to new possibilities of resistance. The vertigo that any believer in the dogma of universality might feel should perhaps be embraced as an antidote to an obfuscating magnification.[145] A negative dialectics reading of the story of migrant rights protection promises this kind of lucidity.

The concept of negative dialectic, developed by Theodor Adorno, proves to be an essential resource in confronting the dangers of narratives of histor-

144 Moria Paz, 'Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls', Berkeley J. Int' l L. 34 (2016), 1-43.

145 Martti Koskenniemi, 'What Should International Lawyers Learn from Karl Marx?', LJIL 17 (2004), 229-246.

ical progress and emancipation. In *Negative Dialectics*, Adorno proposed a critical method that opposes the Hegelian view according to which, through tension and contradiction, opposites are sublated into a progressive synthesis.[146] Instead, negative dialectic embraces contradiction and seeks to unravel the inherent tensions within concepts and systems without resolving them into a progressive synthesis.

History for Hegel represents the unfolding of the absolute; for Marx, this absolute takes the form of human liberation.[147] And even for many critical theorists, society has followed a certain moral and political learning process culminating in European modernity.[148] For Adorno, however, history is not a unidirectional process towards progress and redemption. This means that we move from necessity to contingency, with all the possibilities this can bring. Drawing on Adorno's work, Amy Allen has shown how the notion of 'historical progress' articulates forms of oppression deployed in past and ongoing forms of coloniality and capitalism.[149] Without rejecting the idea of progress, these thinkers seek to disentangle it from a historical narrative that conceives it as the necessary result of dialectical processes.This approach stands in opposition to an inherently eurocentric idea of historical progress, it also allows one to imagine alleviating injustice without requiring a narrative of historical advancement.[150] By highlighting the limitations and contradictions present in any given concept or system, negative dialectics reveal the complexities and injustices embedded within them.

What does this mean for the present state of border control? The progressive expansion of the ECHR's applicability to extraterritorial border controls is often thought of as a necessary response to states' policies aimed at deflecting migrants elsewhere. Yet the legal category of jurisdiction has been instrumental to those very policies. This highlights the challenges of disentangling

146 Theodor W. Adorno, *Negative Dialectics* (Continuum 1981).

147 Karl R. Popper, 'What Is Dialectic?', Mind 49 (1940), 403-426.

148 In the End of Progress, Amy Allen refers to Habermas's theory of social evolution. Amy Allen, *The End of Progress: Decolonizing the Normative Foundations of Critical Theory* (Columbia University Press 2016), 79. See also most notably: Edward Said, *Culture and Imperialism* (Vintage 1993); Thomas McCarthy, *Race, Empire, and the Idea of Human Development* (Cambridge University Press 2009). Edward Said, *Culture and Imperialism* (Vintage 1993); Thomas McCarthy, *Race, Empire, and the Idea of Human Development* (Cambridge University Press 2009).

149 Amy Allen, *The End of Progress: Decolonizing the Normative Foundations of Critical Theory* (Columbia University Press 2016).

150 Adorno evokes Walter Benjamin's ninth thesis on the philosophy of history where progress is famously depicted as a storm blowing from Paradise and irresistibly propels the angel of history into the future. With his back to the future, the angel faces the past as a pile of debris that keeps growing before him. Walter Benjamin, *Illuminations: Essays and Reflections* (Hannah Arendt ed., Harry Zohn tr., Schocken Books 1969).

the law and its meaning in context. In this sense, '[t]hinking through law's contingency – the possibility of paths not taken – brings out those difficulties and helps to respond to them'.[151] Can there be a different understanding of jurisdiction in the context of EU border management under the prevailing power structures? This is not a rhetorical question to suggest that progressive judicial developments to bring accountability to the externalisation of migration control are flawed, nor that strategic litigation efforts to advance them are misled. Instead, this paper suggests that progress should not be considered the mere product of a dialectical litigation process. Rather, it can be achieved, with twists and turns, by problematising the notion of jurisdiction and broadening the mobilisation for change. Looking at jurisdiction from this perspective allows us to break the spell of a notion that, despite its ostensible neutrality, constructs a system of exclusion while disclaiming any responsibility for it.

This essay seeks to animate a critical reflection on the underlying assumptions and contradictions of the very notion of jurisdiction. In addition, it advocates for a broader perspective on the human rights agenda that informs strategic litigation efforts. Viewed through the lens of negative dialectics, this strategy is situated within a more comprehensive human rights process. Negative dialectics not only recognises the contradictory and potentially counterproductive outcomes of progressive developments, but also offers a way to reimagine the human rights agenda, (re)centring the voices of those most affected by it.

Reflecting on the role that jurisdiction plays as a form of racial technology, Achiume has cautioned that progress in the doctrine of jurisdiction risks remaining anchored in a liberal, neocolonial agenda.[152] Efforts to articulate a comprehensive litigation strategy should take into account the broader context in which a backlash against it could unfold.[153] However, such effort should be informed by a coherent interpretation of jurisdiction where all *de iure* and *de facto* applications of power are 'considered holistically, to evaluate their aggregate impact on the situation of those concerned'.[154] A relational reading of human rights jurisdiction contests the dichotomy between their territorial and extraterritorial scope; instead, it draws attention to the interconnection between rights holders and duty bearers, and whether and how this relationship gives rise to legal obligations.

151 Ingo Venzke, 'The Path not Taken: On Legal Change and Its Context' in: Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford University Press 2023), 309-332.

152 Achiume, 'Race, Borders, and Jurisdiction' (n. 86), 481-482.

153 Wilde (n. 64).

154 Moreno-Lax, 'Meta-Borders and the Rule of Law' (n. 19).

More radically, Chimni has advanced a reform proposal for the doctrine of jurisdiction that calls for the adoption of a declaration or a convention on jurisdiction to clarify its meaning and scope.[155] This would avoid the dangers of a case law patchwork undermining legal certainty and the rule of law. Such a reform project would allow civil society organisations to voice the concerns of groups significantly affected by (elusive) exercises of extraterritorial jurisdiction.[156] As they become more and more interconnected, migrants' networks and refugee-led organisations are demanding to be regarded as actors in migration policy decisions.[157] Broader mobilisation process often fosters firmer and more systemic change, involving legislative, institutional, and policy reforms.[158]

Looking beyond legal and strategic considerations, it is necessary to widen the scope of human rights practice and consider the voices of migrants and refugees challenging border externalisation policies. Media coverage mostly focuses on the 'spectacle of the border'.[159] Yet, through a variety of means, from graffiti to songs to books, migrants often denounce the socio-economic barriers preventing their mobility and the political structures underpinning those barriers.[160]

Concretely, a meaningful way forward would be advocating greater participation of civil society organisations representing migrants in human rights proceedings by expanding the standing of the actors that could bring claims to the Court.[161] Further, the direct involvement of affected groups in political and social action – such as advocacy, protests and human rights campaigns – could bolster litigation strategies. In this sense, strategic litiga-

155 Chimni, 'International Law of Jurisdiction' (n. 10); Bhupinder S. Chimni, 'The Limits of the All Affected Principle: Attending to Deep Structures', Third World Thematics: A TWQ Journal 3 (2018), 807-812.

156 Chimni, 'International Law of Jurisdiction' (n. 10).

157 Stefan Rother and Elias Steinhilper, 'Tokens or Stakeholders in Global Migration Governance? The Role of Affected Communities and Civil Society in the Global Compacts on Migration and Refugees', International Migration 57 (2019), 243-257.

158 Gráinne de Búrca, *Reframing Human Rights in a Turbulent Era* (Oxford University Press 2021).

159 Katja Franko, 'The Two-Sided Spectacle at the Border: Frontex, NGOs and the Theatres of Sovereignty', Theoretical Criminology 25 (2021), 379-399.

160 See Océane Uzureau and others, '"NO MORE WALLS IN THE SEAS": Migration Graffscapes and Migrants' Messages While En Route to and in Europe', Journal of Refugee Studies 2024, feae014, 1-20; Karina Horsti, 'Temporality in Cosmopolitan Solidarity: Archival Activism and Participatory Documentary Film as Mediated Witnessing of Suffering at Europe's Borders', European Journal of Cultural Studies 22 (2019), 231-244.

161 See, in a different context, Helen Keller and Viktoriya Gurash, "Expanding NGOs' Standing: Climate Justice Through Access to the European Court of Human Rights", Journal of Human Rights and the Environment 14 (2023), 194-218.

tion should be accompanied by a wider and more inclusive mobilisation process. This approach aligns with experimentalist thinking, which suggests that social and political change is not linear, but follows an iterative process of contestation, learning from on-the-ground experiences, and ongoing collective reflection and institutional response.[162] Over time, this interaction among various actors and institutions at different levels can foster more dynamic and sustainable change.

Broadening the scope of human rights practice in this context would also involve, for example, harnessing the potential of new technologies to raise public awareness and counter the obfuscation tactics used by governments to avoid accountability.[163] Consider the efforts of some NGOs operating in the Mediterranean to rescue people in distress at sea while documenting illegal interceptions. Sea-Watch documented and publicised an interception and return case operated by the Libyan authorities and involving Italian and European assistance.[164] Sea-Watch also asked Frontex to disclose relevant information, a request that was denied and only partially annulled by a recent judgment of the CJEU.[165]

Documenting and – most of all – proving European involvement in 'contactless migration control operations' is difficult, not least because of the lack of access to relevant information. However, rather than contributing to and normalising the EU border surveillance regime, this form of 'human rights countersurveillance' contests and publicises it.[166] Most importantly, it challenges the orthodoxy of jurisdiction by shedding light on the relationships between the various public actors exercising their legal and political authority over the situation of individuals attempting to cross European borders, independently of any physical contact. Technology enables migrants to undercut borders and jurisdictional constraints to expose the violence that states carefully obscure when they orchestrate border controls in distant places; in doing so, they can claim rights to which they are not yet entitled. While states violently oppose this development,[167] the discursive shift that migrants shape might have a meaningful impact on the rightless predicament designed by

162 de Búrca (n. 158), 38.

163 Daniel Ghezelbash, 'Technology and Countersurveillance: Holding Governments Accountable for Refugee Externalization Policies', Globalizations (2022), 1-15.

164 For a reconstruction of the case, see Sunderland and Pezzani (n. 76).

165 CJEU, case T-205/22, *Naass and Sea Watch v. Frontex,* 24 April 2024.

166 On the ambivalent role of technology in the politics of migration, see Lorenzo Pezzani and Charles Heller, 'AIS Politics: The Contested Use of Vessel Tracking at the EU's Maritime Frontier', Science, Technology, & Human Values, 44 (2019), 881-899.

167 The confiscation of smartphones for example is a documented practice of European border authorities. See e. g.: CJEU, case T-136/22, *Hamoudi*, 13 December 2023, ECLI:EU:T:2023:821, para. 36.

jurisdictional rules. If technology has enabled the shifting border phenomenon, it can also contribute to contesting its violence.[168]

Reading strategic litigation efforts in the field of migrant rights through the prism of negative dialectics does not imply that we should all despair and move on, or that the struggle for migrant rights needs new tools or strategies.[169] It means that strategic litigation should be read into a broader human rights practice, one that takes place before courts but also in more mundane places, including in our streets and on our screens. Strategic litigation is an important dimension of the human rights movement in general and of the struggle for migrant rights specifically. It provides crucial impetus and support for wider processes of (progressive) change. It should, however, be read into a larger mobilisation process encompassing for example, advocacy, information and awareness campaigns, lobbying, or protests, which can, in turn, lead to institutional, social and political dialogue and reform. There is no guarantee that these struggles will lead to any meaningful change, let alone progress, 'but without them, we cannot even begin to consider this possibility'.[170]

V. Conclusion

The story of refugee and migration law is often told as a story of progress. Yet, a regressive counternarrative must also be acknowledged, one of faded commitment to *non-refoulement* obligations and migrant rights more generally. The existence of a straightforward causal relationship between these two developments may be challenging to prove, but border practices do reveal a dialectic process whereby restrictive measures are often contingent on expansive interpretations of extraterritorial human rights obligations. This unceasing dialectic invites us to acknowledge the complexity of migration processes and narratives and avoid reading them within a historically linear discourse. While unearthing the failed promise of universality, we can read the struggles for migrant rights as a negative dialectic, and this can catalyse reflexivity and new possibilities of resistance.

168 Sanja Milivojevic, 'Driving Social Change from Below: Exploring the Role of Counter-Security Technologies in Constructing Mobile Noncitizens', Citizenship Studies 24 (2020), 680-695.

169 Philip Alston, 'The Populist Challenge to Human Rights', Journal of Human Rights Practice 9 (2017), 1-15.

170 Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford University Press 2015).