Chapter 11 Transnational Solidarity Beyond the State: Claiming Subjectivity

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Over the past decades, the European Court of Human Rights (ECtHR) has become an increasingly important protector of the rights of people on the move at the border, enabling them to rely on human rights guarantees in order to oppose their immediate deportation, to have their claims for protection heard and to ultimately access asylum.[2] In an effort to limit the resulting human rights obligations under the European Convention on Human Rights (ECHR), European states have responded by deploying strategies aimed at avoiding scenarios that enable migrants to rely on human rights guarantees. While the states cite crisis narratives in support of their avoidance strategies, people on the move are experiencing a humanitarian crisis as a result of their rightlessness. In turn, therefore, people on the move and those supporting their struggles have been responding by fostering practices of solidarity from below across national borders with the aim of enabling said migrants to claim and rely on these rights.

In this article, I will take a closer look at these transnational practices of civil solidarity and their role in supporting the struggles of subjects on the move for legal subjectivity. In reading unauthorised border crossings as articulations of claims to legal subjectivity, I am using concepts developed by Jacques Rancière, assuming that people on the move 'have not the rights that they have and have the rights that they have not', and that they are 'putting two worlds in one and the same world':[3] in the face of *de-facto*

1 * The author wishes to thank Fabian Endemann, Pia Lotta Storf and Sebastian Benedikt for very helpful discussions and for their research assistance; additional thanks is due to Marlene Stiller for her research assistance.

2 See eg the account by Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 267–71 (on non-refoulement), 354–57 (on access to asylum).

3 Jacques Rancière, 'Who is the Subject of the Rights of Man' (2004) 103(2/3) South Atlantic Quarterly 207, 304.

and *de-jure* rightlessness,[4] they are casting themselves as rightsholders – as subjects of human rights. I will focus on three examples of practices of solidarity supporting these subjectivity claims, each addressing different forms of rightlessness: essential humanitarian support to people crossing land borders, civil search and rescue missions and cities of refuge. Costas Douzinas has pointed to the fundamental (legal) nature of this type of solidarity, which – relying on Ernst Bloch – he calls 'the ultimate norm of subjective right'.[5] I conclude with an assessment of the political nature of these practices of solidarity.

In Part 1, I will explain that, while solidarity in the EU law context is chiefly conceptualised as state solidarity, I am interested in transnational civil solidarity. I will also briefly sketch out how such practices of solidarity can be understood as strategies of legal subjectivation. In Part 2, I will present three examples of how such practices of solidarity seek to counter de-facto and de-jure rightlessness. Part 3 situates these practices in a political framework.

1 Civil Solidarity Against Rightlessness

1.1 Deflection instead of State Solidarity

European discussions over solidarity in the context of the so-called migration crisis tend to focus on solidarity between EU member states. Article 80 TFEU provides the relevant legal framework; it requires that the policies on border checks, asylum and immigration as well as their implementation 'shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'.

This understanding of solidarity – as responsibility sharing between states – has supported member states' reliance on the sovereignty clause in Dublin procedures, permitting states to unilaterally assume responsibility for cases under the Dublin Regulation.[6] It has also been cited in justifica-

4 Adel-Naim Reyhani, 'Anomaly upon Anomaly: The 1951 Convention and State Disintegration' (2021) 33(2) International Journal of Refugee Law 277.

5 Costas Douzinas, 'Philosophy and the Right to Resistance' in id and Conor Gearty (eds), *The Meaning of Rights – The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014) 105.

6 Case C-646/16 *Jafari* ECLI:EU:C:2017:586, paras 85 ff (European Court of Justice, 26 July 2017).

tion of the Council's 2015 and 2016 Relocation Decisions, obliging member states to relieve Greece and Italy from some of their responsibility for an unprecedented number of protection seekers.[7] And it is also underlying the Commission's proposals for a mandatory responsibility sharing mechanism in the New Pact for Migration and Asylum.[8]

From the beginning, it was rather unlikely that such a mandatory responsibility sharing mechanism would actually be adopted, both in light of the rocky implementation of the Relocation Decisions and given that the Commission's prior suggestions of such mechanisms – a mandatory crisis relocation mechanism for 'Dublin III'[9] and a corrective allocation mechanism as part of 'Dublin IV'[10] – have failed.[11]

On the contrary, despite repeated and urgent calls from the Southern EU member states disproportionately burdened under the Dublin system and by the strains of the 2009 financial crisis, the more affluent Northern member states as well as the 'Visegrád-4' states (the Czech Republic, Hungary, Poland and Slovakia) have been adamant in their resistance to any additional obligations to accept migrants. Indeed, as of 8 June 2023,

7 European Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (2015) OJ L 248/80; European Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (Relocation Decisions) (2016) OJ L 268/82.

8 European Parliament and Council Proposal for a Regulation COM(2020) 610 final of 23 September 2020 on asylum and migration management amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) 2021/1147 [Asylum, Migration and Integration Fund] amended by Regulation (EU) 2022/585.

9 European Parliament and Council Proposal for a Regulation COM(2015) 450 final of 9 September 2015 establishing a crisis relocation mechanism OJ L 16, which would have amended Regulation (EU) 604/2013 (Dublin III).

10 European Parliament and Council Proposal for a Regulation COM(2016) 270 final of 4 May 2016 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), (Dublin IV proposal), arts 34–43.

11 As to external solidarity, the Commission has not even proposed hard resettlement quotas in its New Pact on Migration and Asylum; Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No. 516/2014 of the European Parliament and the Council, COM(2016) 468 final, 13 July 2020.

member states will be able to opt to pay a 20,000 € sponsorship for each person they do not take.[12]

Instead, the EU member states have jointly directed their focus on deflecting migration and outsourcing border checks as well as protection to third countries, most prominently to Turkey,[13] but also to Libya[14] and other North African states.[15]

1.2 Jurisdiction Avoidance and Rightlessness

These efforts have been and continue to be part of a larger strategy of jurisdiction avoidance ever since the 2012 *Hirsi Jamaa* judgment.

In that case, the Grand Chamber of the European Court of Human Rights (ECtHR) confirmed that European countries cannot escape their human rights obligations even at high sea: they are bound by the non-refoulement guarantee and the prohibition of collective expulsion as soon as they exercise effective control over migrants at sea.[16] This means that, as soon as member state authorities physically engage with people on the move and thereby exercise jurisdiction, they must respect substantive and procedural guarantees which will usually require disembarkation on

12 Council of the EU, 'Migration policy: Council reaches agreement on key asylum and migration laws' (Council of the EU press release, 8 June 2023) https://www.consilium.europa.eu/en/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/ accessed 2 May 2024, stating: 'Member states have full discretion as to the type of solidarity they contribute. No member state will ever be obliged to carry out relocations.

13 Resettlement Regulation proposal (n 10).

14 See eg Odysseus Network, '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' (*EU Migration Law Blog* 2017) https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf accessed 2 April 2024; Martino Reviglio, 'Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy' (2020) 20 Global Jurist 1–12.

15 Thomas Gammeltoft-Hansen and Nikolas Feith-Tan, 'Extraterritorial Migration Control and Deterrence' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 502.

16 *Hirsi Jamaa and ors v Italy* (2012) 55 EHRR 21, para 70.

the acting member state's territory.[17] Rather than preventing the arrival of people on the move in Europe, they would be obliged to facilitate it.

In the aftermath of *Hirsi*, EU member states have been working hard to avoid such scenarios, devising ways to control migration at a distance instead.[18] Such efforts include long established instruments like visa requirements and carrier sanctions, but also the involvement of third countries in the immobilisation of migrants through detention, pull-backs and rings of deflection reaching far into the African continent. They also include the failure to expand search and rescue (SAR) units – despite the fact that the Mediterranean is a hyper-surveilled water[19] – and the refusal to grant permission to enter port for boats bearing rescued migrants.[20] By thus avoiding direct, physical interactions, EU member states seek to sidestep the very human rights guarantees that the exercise of jurisdiction would

17 See Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27(3) European Journal of International Law 591, 592.

18 See Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) 21(3) German Law Journal 385. This is not to say that pushbacks 'in person' are no longer happening; to the contrary, member states have been resorting to such practices more and more openly. The pushbacks at the Spanish enclaves of Ceuta and Melilla in Morocco, at the Aegean sea border between Greece and Turkey and at the land border between Belarus, Poland and Lithuania are the most prominent recent examples; member states appear emboldened by the ECtHR's refusal to find such practices illegal under the prohibition of collective expulsions, as well as the EU Commission's willingness to devise an exception clause. See Sergio Carrera, 'The Strasbourg Court Judgment "N.D. and N.T. v Spain": a Carte Blanche to Push Backs at EU External Borders?' (2020) European University Institute RSCAS Working Paper 2020/21, https://hdl.handle.net/1814/66629 accessed 2 April 2024.

19 See eg Petra Molnar, 'Technological Testing Grounds: Migration Management Experiments and Reflections from the Ground Up' (EDRi 2020) 17–19 https://edri.org/wp-content/uploads/2020/11/Technological-Testing-Grounds.pdf accessed 2 April 2024; Frontex, 'Eyes in the sky: Monitoring the Mediterranean' (*Frontex*, 20 October 2023) https://www.frontex.europa.eu/media-centre/news/news-release/eyes-in-the-sky-monitoring-the-mediterranean-17Gg1W accessed 2 April 2024; OHCHR, '"Lethal Disregard": Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea' (*OHCHR*, May 2021) 21–22 https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf accessed 2 April 2024.

20 Nora Markard et al, 'Support for Civil Search and Rescue Activities: Options for the German Government' (Heinrich Böll Stiftung European Union 2023) 13–14 https://eu.boell.org/en/support-civil-search-rescue accessed 2 April 2024.

trigger; their avoidance strategy is designed to render people on the move effectively rightless: without a duty bearer, human rights do not apply.

So far, the ECtHR has upheld its *Hirsi* jurisprudence.[21] But it has recently, beginning with *ND and NT*, started reinterpreting the substantive guarantees – non-refoulement and the prohibition of collective expulsion – in land border scenarios, namely by adding an exception to the prohibition of collective expulsion when that expulsion is the result of the migrants' own 'culpable conduct'.[22] This newly minted exception is supposed to apply when a group of persons uses irregular entry points instead of genuine and effective regular admission points to state territory.[23] So far, these cases were all set on land and not at sea, a distinction that the Court relied on in *ND and NT*.[24] They also did not concern the (absolute) non-refoulement guarantee in article 3 ECHR, but merely the prohibition of collective expulsion; nor, of course, can this jurisprudence affect the obligations under the 1951 Refugee Convention and under EU law, namely under the Asylum Procedures Directive.[25] Nonetheless, EU member states continue to invoke

21 See eg *N.D. and N.T. v. Spain* (2020) ECHR 142, paras 110, 185–87.

22 ibid, para 208.

23 ibid, para 210. On the Court's misleading use of its prior caselaw see eg Hanaa Hakiki, 'N.D and N.T. v. Spain: Defining Strasbourg's Position on Push Backs at Land Borders?' (*Strasbourg Observers*, 26 March 2020) https://strasbourgobservers.com/2020/03/26/n-d-and-n-t-v-spain-defining-strasbourgs-position-on-push-backs-at-land-borders/ accessed 2 April 2024; on the unclear scope of the exception, see Nora Markard, 'A Hole of Unclear Dimensions: Reading ND and NT v. Spain' (*EU Migration Law Blog*, 1 April 2020) https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/ accessed 2 April 2024. Subsequent case law includes *Asady and ors. v. Slovakia* (2020) ECHR 243; *Shahzad v. Hungary* (2021) ECHR 613; *A.A. v. North Macedonia* (2022) ECHR 300; *M.A. v. Lithuania* (2018) ECHR 1005.

24 See the partly dissenting opinion of Judge Pauliine Koskelo, *ND and NT* (n 20) para 38.

25 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33; European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (2013) OJ L180/60 (Asylum Procedures Directive). See Markard, 'A Hole of Unclear Dimensions' (n 22); Constantin Hruschka, 'Hot Returns Remain Contrary to the ECHR: ND & NT before the ECHR' (*EU Migration Law Blog*, 28 February 2020 https://eumigrationlawblog.eu/hot-returns-remain-contrary-to-the-echr-nd-nt-before-the-echr/ accessed 2 April 2024.

the 'culpable conduct' exception to avoid jurisdiction and to circumvent their non-refoulement obligation.[26]

In this, European states have purposely created or taken advantage of a situation in which, on the one hand, the movement of refugees is *de facto* prevented and, on the other hand, the rights that would allow such movement are *de jure* unavailable to people on the move.[27] In order to avoid a proclaimed crisis in Europe as a result of a 'mass influx' of 'illegal migrants', a humanitarian crisis of rightlessness and lawlessness is thus created for people on the move at Europe's external borders.

1.3 Transnational Solidarity in the Struggle for Legal Subjectivation[28]

In response to these efforts, people on the move have deployed strategies to both avoid migration control regimes and to bring themselves within the scope of regimes conveying rights. These efforts are usually not individual but collective. This is not just because migrants often travel together and share information in networks.[29] It is also because they receive support from family or religious groups, supporters and regular citizens along their way. As the examples below (in Part 2) will show, this support ranges from simple acts like providing food or shelter to professionally run private search and rescue operations and transnational political campaigns.

The mutual support that people on the move lend each other can be thought of as a form of solidarity. In this article, I will use the term 'practices of solidarity' more narrowly, to refer to the support provided

26 Vera Wriedt, 'Expanding Exceptions? AA and Others v North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways' (*Strasbourg Observers*, 30 May 2022) https://strasbourgobservers.com/2022/05/30/expanding-exceptions-aa-and-others-v-north-macedonia-systematic-pushbacks-and-the-fiction-of-legal-pathways/ accessed 2 April 2024; Dana Schmalz, 'Rights that are not Illusory: The ECtHR Rules on Pushbacks from Hungary' (*Verfassungsblog*, 9 July 2021) https://verfassungsblog.de/rights-that-are-not-illusory/ accessed 2 April 2024.

27 For this typology, see Reyhani (n 3) 285; Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29(2) European Journal of International Law 347, 364; Ayten Gündoğdu, *Rightlessness in an Age of Rights* (Oxford University Press 2014) 96.

28 This section draws on a research agenda developed with Fabian Endemann and Pia Lotta Storf in the context of the project 'People on the Move Navigating Human Rights Borders (NAVIG)'.

29 See eg Elisabeth Eide, 'Mobile Flight: Refugees and the Importance of Cell Phones' (2020) 10(2) Nordic Journal of Migration Research 67.

to people on the move by others in joint action, in the aim of overcoming the situation of rightlessness and the resulting humanitarian crisis created by state policies. These forms of transnational solidarity do not rely on any shared interests, experiences or kinship. Instead, they take humanity as their starting point to support people on the move in claiming the promise of the universality of human rights – both *de facto*, enabling them to use their rights, and by bringing them within the scope of rights regimes *de jure*, enabling them to claim legal subjectivity. As such, they create new, transnational political communities.[30]

With their migratory practices, people on the move have been acting, as Rancière would have it, 'as subjects that did not have the rights that they had and had the rights that they had not'.[31] This phrase originally refers to an argument put forward by the French women's rights activist Olympe de Gouges. She demonstrated both only that women were denied the political rights in the 1789 Déclaration des droits de l'homme et du citoyen, but also that, by being led to the guillotine for political reasons, their life was just as political as that of men, and that therefore they 'had the rights they had not', namely the very rights denied to them.[32] A similar case can be made for people on the move crossing the Mediterranean. In their case, the right both denied and performatively exercised can be conceived narrowly, as the freedom to seek protection from persecution and severe human rights abuses, or more broadly, as the right to freedom of movement on the face of the Earth.[33]

For his explanation of the political moment of this type of claim, Rancière refers back to the difference between man (or human) and citizen in Hannah Arendt's description of the situation of stateless people who had

30 On such an interactive and transnational understanding of solidarity see in more detail Marius Hildebrand, Anuscheh Farahat and Teresa Violante, 'Transnational Solidarity in Crisis', on this volume.

31 Jacques Rancière, 'Who is the Subject of the Rights of Man' (2004) 103(2/3) South Atlantic Quarterly 207.

32 ibid 303–4. De Gouges drafted a 'Déclaration des droits de la femme et de la citoyenne' in 1791 and was executed in 1793 as an enemy of the Jacobins.

33 Roger Nett, 'The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth' (1971) 81(3) Ethics 212. For examples of such claims, see eg Bino Byansi Byakuleka, 'We are born free Manifesto' (2015) https://mikrotext.de/wp-content/uploads/2015/01/manifesto-wearebornfree.pdf accessed 2 April 2024, or the initiative formed at Berlin's Oranienplatz, OPlatz, 'About' (*Oplatz.net*, 2024) https://oplatz.net/about/ accessed 2 April 2024.

to discover that, in the very situation where all they had left were human rights, those rights were quite worthless:

> The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human.[34]

This was, she explains, because it turned out that in a world of states, rights actually only accrued to citizens; in this world, stateless people, finding themselves outside of all political communities, were effectively rightless:

> The calamity of the rightless is not that they are deprived of life, liberty and the pursuit of happiness, or of equality before the law and freedom of opinion—formulas which were designed to solve problems given *within* communities—but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them. Only in the last stage of a rather lengthy process is their right to live threatened; only if they remain perfectly 'superfluous,' if nobody can be found to 'claim' them, may their lives be in danger.[35]

In light of this finding, Rancière calls efforts to rely on rights 'they had not' the creation of a 'dissensus: putting two worlds in one and the same world'.[36] He explains that differentiating between the (effectively rightless) human and the (rightsholding) citizen does not mean that the rights of man (ie, human rights) are 'either void or tautological' (in the Burkean sense), rather: 'It is the opening of an interval for political subjectivization.'[37] The *political subject* that thus creates a dissensus is the demos; 'the part of those who have no part'.[38]

I will be relying on this idea in a slightly broader sense, reading the practices of migrants as an effort of turning themselves from mere humans into *legal subjects,* in particular, into subjects of human rights. It is by

34 Hannah Arendt, *The Origins of Totalitarianism* [1951] (Harvest 1968) 299.
35 ibid 295–6.
36 Rancière (n 2) 304.
37 ibid.
38 ibid 305.

casting themselves as rightsholders, and thus as legal subjects, that people on the move 'not only confront the inscriptions of rights to situations of denial; they put together the world where those rights are valid and the world where they are not'.[39] As Part 2 will show (and as I already indicated above), without such subjectivity, there are no rights, and therefore no obligations, and no accountability. I will come back to the political aspect of this subjectivation in Part 3.

2 Practices of Solidarity

The following three sections examine different practices of solidarity to support the legal subjectivation efforts of subjects on the move, as well as the response. The first practice, focusing on immediate solidarity at land borders, seeks to address *de-facto* rightlessness, ie the inability to exercise 'the rights that they have' in the host state's territory. The second, providing civil search and rescue services at sea, seeks to tackle *de-jure* rightlessness by bringing people on the move within the jurisdiction of European states, in an effort to claim 'the rights they have not'. The third, civil resettlement and relocation initiatives by 'cities of refuge', is aimed at overcoming the combination of *de-facto* and *de-jure* rightlessness that the European states' immobilisation strategies produce.

2.1 Immediate Solidarity at the Land Border

In the years following the large-scale arrivals of migrants by sea at the European shores in 2015, especially on the Italian islands of Lampedusa and Sicily, many of the migrants sought to leave Italy and travel onwards to other member states, including France. This movement was not only motivated by family networks and stronger economies offering better chances of integration, but also by seeking to escape the squalid and often inhumane reception conditions in Italy.[40] It increased when Italy abolished humanit-

39 Rancière (n 2) 304.

40 See eg Maryellen Fullerton, 'Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law' (2016) 29 Harvard Human Rights Journal 57, 82–95.

arian protection status and excluded asylum-seekers from the network of reception facilities operated by the local authorities.[41]

One of the routes led to the French town of Briançon, via the Alps – a dangerous path, especially in the winter. Amnesty International reports that '[v]olunteers on both sides of the Alpine border, with support from some representatives of local authorities, started to assist refugees and migrants determined to cross in 2017.' On the French side, activists opened shelters and offered food to those arriving from Italy; in so-called *maraudes* or outings, volunteers went into the French side of the border area on ski or on foot to offer assistance, equipment, food and hot drinks.[42] In this, they were supported by the mayor of Briançon, who provided space for the shelter and paid the electricity bills, commenting that the volunteer efforts show 'a willingness of the inhabitants to express their solidarity, humanity and fraternity. I am proud to see the way they took up these issues: by providing food, shelter and medical help.'[43]

While the Italian authorities showed little interest in holding back migrants, the French authorities were not only conducting pushbacks at the border,[44] but also subjecting supporters on the French side to criminal investigations. In doing so, they relied on a provision that dates back to 1938, criminalizing support for irregular migrants who are already in the country.[45] Specifically, this provision makes it a crime to 'directly or indirectly facilitate or attempt to facilitate the entry, movement, or irregular

41 Amnesty International, 'Punishing Compassion: Solidarity on Trial in Fortress Europe' (2020) 34 https://www.amnesty.be/IMG/pdf/2020_punishing_compassion_solidarity_on_trial_in_fortress_europe.pdf accessed 17 April 2024.

42 ibid 36. The term *maraude* is also used for outreach activities of streetworkers, eg looking for homeless people in need of support.

43 Interview of 4 April 2019, cited ibid.

44 Forum réfugiés and Cosi, 'Les obstacles à l'accès à la procédure d'asile dans le département des Alpes-Maritimes pour les étrangers en provenance d'Italie: Constats et recommandations' (April 2017) http://asylumineurope.org/wp-content/uploads/2017/04/resources_laccesalasileaupresdesautoritesfrancaisespourlespersonnesenprovenanceditalie_forumrefugies-cosi_avril2017.pdf accessed 17 April 2024. The practice continues: Médecins sans frontières, 'Denied Passage: The Continuous Struggle of people on the move pushed-back and stranded at the Italian-French Border' (*Médecins sans frontières*, 4 August 2023) https://www.msf.org/denied-passage-struggle-people-stranded-italian-french-border accessed 17 April 2024.

45 It is now contained in the 2005 Code of Entry and Residence of Aliens and the Law of Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*) (FR) (CESEDA), namely in art L. 823–1 para 1; until 2021, this provision was contained in art L. 622–1 para 1.

residence of an alien in France', punishable by five years in prison or a 30,000 € fine.[46] Exceptions applied to family members and spouses as well as to the uncompensated provision of legal advice, food, accommodation or medical care aimed at preserving the dignity or physical integrity of the alien; however, these exceptions were limited to assistance in providing illegal residence, excluding both entry and movement.[47]

The term *'crime de solidarité'* appears to have been coined by the French NGO GISTI (Groupe d'information et de soutien des immigrés) in the context of protests by undocumented immigrants or *sans-papiers*, in the mid-1990s. These protests drew a large solidarity movement after the police broke down the doors of the church of St Bernard in Paris to expel *sans-papiers* in 1996; notably, the protesting *sans-papiers* insisted that those offering solidarity would not speak *for* them, which would only reproduce their rightlessness.[48] Meanwhile, the government had consecutively increased the sanctions for supporting undocumented immigrants,[49] prompting the philosopher Étienne Balibar to call this effort 'attack on fundamental rights by trying to institute forms of individual denunciation that recall the darkest periods of collapse of public freedom'.[50]

46 CESEDA art L. 622–1 para 1 provided: 'Subject to the exemptions established in Article L. 622–4, any person who has, by direct or indirect action, facilitated or attempted to *facilitate the illegal entry, movement, or residence* of a foreign national in France is liable to five years' imprisonment and a 30,000 euro fine.' (Emphasis added.).

47 CESEDA art L. 622–4 provided: '[T]here cannot be criminal prosecution on the basis of Articles L. 622–1 to L. 622–3 for *assisting in providing the illegal residence* of a foreign national when it relates to: […] 3° Any natural or legal person, when the offending act did not give rise to any direct or indirect compensation and consisted of providing legal advice or providing food, shelter or medical care *intended to ensure humane and decent living conditions for the foreign national*, or any other assistance *aimed at preserving the dignity or physical integrity of this individual.*' (Emphases added.) A revised version of this provision is now contained in art 823–9 (see n 53 below).

48 Gündoğdu (n 26) 194, relying on Encarnación Gutiérrez Rodríguez, '"We Need Your Support, but the Struggle Is Primarily Ours": On Representation, Migration and the Sans Papiers Movement, ESF Paris, 12th-15th November 2003' (2004) 77 Feminist Review 152.

49 This legislative development and the first convictions are documented by GISTI, 'Les délits de la solidarité' (*Gisti.org*) section VII.A www.gisti.org/delits-de-solidarite accessed 17 April 2024.

50 Étienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton University Press 2004) 49.

In the mid-2010s, in the context of so-called secondary migration from Italy, among those prosecuted under this law were the activists Cédric Herrou and Pierre-Alain Mannoni. They had been convicted in 2017 for facilitating the irregular circulation, stay and entry of refugees and migrants in Roya valley, at the French-Italian border; many similar cases have been documented.[51] Seized with a constitutionality question during their appeal, the French Conseil constitutionnel found the 'crime of solidarity' partially unconstitutional in 2018.[52] The court relied on the constitutional principle of *fraternité*.[53] This principle, it explained, implied the 'freedom to help others, for a humanitarian purpose, without considering the legality of their residence on the national territory'; it was therefore unconstitutional to limit exceptions for humanitarian support to support aimed at protecting the dignity and physical integrity of the irregular migrant.[54] The exceptions clause was subsequently amended to include any form of 'support with a purely humanitarian aim', and it was extended to the support of irregular movement or stay (but not of irregular entry).[55]

More recently, similar support efforts have been made in the Polish and Lithuanian woods near the Belarussian border. In 2021, apparently facilitated by Belarus, about 8,000 mostly Iraqi, Afghan and Syrian migrants

51 See the list compiled by GISTI, 'B. Condamnations' (*Gisti.org*) http://www.gisti.org/spip.php?article1621 accessed 17 April 2024; see also Amnesty International (n 39) 38; Oriana Philippe, 'Legal Weapons in Action at the French-Italian border' (2020) 36(1) Revue européenne des migrations internationales http://journals.openedition.org/remi/14782 accessed 2 April 2024.

52 Conseil constitutionnel, decision n° 2018–717/718 QPC, 6 July 2018 – *M. Cédric H. et autre* [Délit d'aide à l'entrée, à la circulation ou au séjour irréguliers d'un étranger]. The Council was seized with a preliminary question (*Question Prioritaire de Constitutionnalité – QPC*) by the Cour de cassation.

53 The preamble and arts 2 and 72–3 of the 1958 French Constitution affirm this principle as a maxim and a common ideal (the latter in relation to the 'overseas populations').

54 Conseil constitutionnel, decision n° 2018–717/718 QPC (n 50), paras 8–10, 14–15.

55 CESEDA art L. 823–9, which replaced art L. 622–4 in 2021, now provides: 'L'aide *à la circulation ou* au séjour irréguliers d'un étranger ne peut donner lieu à des poursuites pénales sur le fondement des articles L. 823–1 ou L. 823–2 lorsqu'elle est le fait: […] 3° De toute personne physique ou morale lorsque l'acte reproché n'a donné lieu à aucune contrepartie directe ou indirecte et a consisté à fournir des conseils ou accompagnements juridiques, linguistiques ou sociaux, *ou toute autre aide apportée dans un but exclusivement humanitaire*. […]' The court explained that 'assistance given to a foreign national for his/her movement does not necessarily create an illegal situation, unlike the assistance given at entry.' Conseil constitutionnel, decision n° 2018–717/718 QPC (n 50), para 12.

crossed the border into the EU.[56] Seeking to avoid violent pushbacks (as well as violent abuse by Belarussian authorities pushing them over the border), many of them had to hide in the forests in sub-zero temperatures. Both Lithuania and Poland put in place a state of emergency. In Poland, this included a 'no-go area' along the border covering 183 villages and towns.[57] Humanitarian organizations, the media, activists and medical personnel were banned from entering the border area. Volunteers supporting migrants in this area were arrested and prosecuted.[58] Even outside the militarized border zone, volunteers fear reprisals.[59] As of December 2021, at least 17 persons have died in the forests a result of this situation of sanctioned neglect.[60] The entry ban lasted from September 2021 until the end of June 2022, while Poland erected a wall along the border with Belarus.[61]

56 See Frontex, 'Eastern Borders Route' (*Frontex*, 28 December 2023) https://www.frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/eastern-borders-route/ accessed 17 April 2024.

57 This entry ban was originally in place from 2 September until 2 December 2021; since an extension beyond 60 days was not constitutionally possible, new legal provisions were adopted covering the same area. They were then renewed until 30 June 2022, despite the fact that the Polish Supreme Court had declared such no-go areas unconstitutional; Polish Supreme Court judgment of 18 January 2022, I KK 171/21. See Medico International, 'Situation on the Polish-Belarussian Border' (*Medico International*, 9 March 2022) https://www.medico.de/en/situation-on-the-polish-belarusian-border-18520 accessed 17 April 2024; see further Ewa Łętowska, 'Defending the Judiciary: Strategies of Resistance in Poland's Judiciary' (*Verfassungsblog*, 27 September 2022) https://verfassungsblog.de/defending-the-judiciary/ accessed 17 April 2024.

58 Lydia Gall, 'Polish Activists Arrested for Saving Lives: Authorities Should Stop Harassment at Belarus Border' (*Human Rights Watch*, 1 April 2022) https://www.hrw.org/news/2022/04/01/polish-activists-arrested-saving-lives accessed 17 April 2024.

59 Lorenzo Tondo, 'Poland-Belarus crisis volunteers: "Border police can be very aggressive"' (*The Guardian*, 10 November 2021) https://www.theguardian.com/world/2021/nov/10/poland-belarus-crisis-volunteers-border-police-aggressive accessed 17 April 2024.

60 Mohannad al-Najjar et al, 'A Chronicle of Refugee Deaths along the Border Between Poland and Belarus' (*Der Spiegel*, 22 December 2021) https://www.spiegel.de/international/world/a-chronicle-of-refugee-deaths-along-the-border-between-poland-and-belarus-a-de0d7ace-3322-4ac9-9826-9f2774a540ee accessed 17 April 2024.

61 See Agnieszka Bielecka, 'Poland Finally Lifts State of Emergency at Belarus Border: Polish Authorities Should Halt Summary Pushbacks of Migrants, Allow Access to Asylum Procedures' (*Human Rights Watch*, 6 July 2022) https://www.hrw.org/news/2022/07/06/poland-finally-lifts-state-emergency-belarus-border accessed 17 April 2024.

It was an almost cynical contrast when, following the February 2022 invasion of Ukraine by Russia, Poland was welcoming the Ukrainian war refugees with open arms. In August 2022, the Council of Europe reported:

> Since the start of the aggression against Ukraine on 24 February 2022, Polish state and non-state actors, governmental and local authorities, civil society, private companies and individual people have mobilised and joined forces in an unprecedented way to facilitate border crossings and directing refugees to their first accommodation places or to help them to continue their journey to other countries. Free trains and bus transfers from the borders within Polish territory and public transport in the numerous cities was made available. At the border, in order to facilitate contact with the arrivals and to make phone communication in Poland cheaper, refugees, if they requested, were given a Polish mobile phone operator sim card. […] Considering these unprecedented large-scale arrivals in this short period of time, the efforts of the Polish authorities at all levels, civil society, volunteers and individuals are highly commendable. The Polish local authorities and individuals had provided generous support within their limited resources and deployed continuous efforts in securing basic services to all those in need.[62]

In both scenarios, civil society actors have been seeking to provide basic humanitarian support, including clothes, food, accommodation and equipment. This support should have been provided by the states themselves, as the ECtHR emphasized in an interim ruling under Rule 39 in August 2021.[63] The underlying cases concern 32 Afghan nationals denied entry at the border between Poland and Belarus and 41 Kurdish-ethnic Iraqi nationals at the border between Latvia and Belarus. While noting that it was not making a finding on an obligation to let the applicants enter and emphasizing that states have the right 'to control the entry, residence and expulsion of aliens,' it required that Poland and Latvia 'provide all the applicants with food, water, clothing, adequate medical care and, if

62 Council of Europe, 'Report of the fact-finding mission to Poland by Ms Leyla Kayacik, Special Representative of the Secretary General on Migration and Refugees, 30 May – 3 June 2022', SG/Inf(2022)30 of 18 August 2022, paras 20, 23.

63 ECtHR, 'Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland' (ECtHR press release, 25 August 2021) ECHR 244 (2021) on the cases of *R.A. and Ors. v. Poland* (App no 42120/21) and *H.M.M. and Others v. Latvia* (App no 42165/21).

possible, temporary shelter'.[64] The Court has since issued similar interim measures in over 60 other applications.[65]

As the interim orders affirm, the practices of solidarity enacted by citizens and civil society organizations thus aim at countering de-facto rightlessness. Migrants who come under the jurisdiction of states bound by human rights are technically rights holders, and therefore legal subjects. *De facto*, however, they cannot access the rights that they have.[66] Stepping in for the state, solidarity networks are both making up for this *de-facto* rightlessness and refuse to deny the migrants recognition as equals, treating them instead as the rights holders that they are, as persons whose actions and opinions matter.[67]

2.2 Search and Rescue at Sea

Alongside these efforts, volunteers have also taken up search and rescue (SAR) activities at sea. Many NGOs that offer SAR services were founded in the years following the Arab Spring and the mass drownings that were reported as a result of state failures to rescue. This includes the 'left-to-die boat' off the Libyan coast in 2011,[68] the October 2013 catastrophe off

64 ibid.

65 ECtHR, 'Update on interim decisions concerning member States' borders with Belarus' (ECtHR press release, 21 February 2022) ECHR 051 (2022).

66 See also Sonja Buckel, 'The Rights of the Irregularized: Constitutional Struggles at the Southern Border of the European Union' in Yolande Jansen, Robin Celikates and Joost de Bloois (eds), *The Irregularization of Migration in Contemporary Europe: Detention, Deportation, Drowning* (Rowman & Littlefield 2015) 144.

67 Cf Arendt (n 32) 296: 'The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective.'

68 See Council of Europe, 'Lives lost in the Mediterranean Sea: Who is responsible? Report by Ms Tineke Strik, Committee on Migration, Refugees and Displaced Persons', Doc. 12895 of 5 April 2012; see also the online documentation by Forensic Architecture, 'The Left-to-Die Boat' (*Forensic Architecture*) https://forensic-architecture.org/investigation/the-left-to-die-boat accessed 18 April 2024.

Lampedusa killing an estimated 360 migrants,[69] and the shipwrecks in April 2015 that left over 1,300 migrants dead or missing in a single month.[70]

These incidents and many others, which have made the Mediterranean the deadliest strait in the world,[71] are the result of the EU's non-arrival policies that force migrants onto deadly journeys in order to access asylum in the EU, and of a deliberate failure to rescue.[72] This is most glaringly obvious when looking at Italy's operation Mare Nostrum: Between October 2013 and October 2014, this operation was a singular effort to actively provide adequate SAR services following the deaths near Lampedusa in October 2013.[73] When it ended, Frontex launched Operation Triton and later Operation Sophia, neither of which had a SAR mandate; the number of deaths rose immediately,[74] as experts had warned they would.[75] In addition to the deliberate failure to rescue, these deaths are a result of jurisdiction avoidance in what Itamar Mann has aptly called a 'legal black hole'.[76]

In February 2012, the ECtHR passed its ground-breaking *Hirsi* decision, which I already mentioned.[77] It clarified that, wherever state authorities exercise effective control over a person, this brings that person under the jurisdiction of that state in the sense of article 1 ECHR – even at high sea,

69 BBC News, 'Lampedusa boat tragedy: Migrants "raped and tortured"' (*BBC News*, 8 November 2013) https://www.bbc.com/news/world-europe-24866338 accessed 18 April 2024.

70 UNHCR, 'Mediterranean Crisis 2015 at six months: refugee and migrant numbers highest on record' (*UNHCR*, 1 July 2015) https://www.unhcr.org/news/press/2015/7/5592b9b36/mediterranean-crisis-2015-six-months-refugee-migrant-numbers-highest-record.html accessed 18 April 2024.

71 Melissa Fleming, Crossings of Mediterranean Sea exceed 300,000, including 200,000 to Greece (*UNHCR*, 28 August 2015) https://www.unhcr.org/news/latest/2015/8/55e06a5b6/crossings-mediterranean-sea-exceed-300000-including-200000-greece.html accessed 18 April 2024.

72 See eg Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53(2) Columbia Journal of Transnational Law 235, 241–57; OHCHR (n 18) 7–13.

73 The operation saved over 150,000 lives; see IOM UN Migration, 'IOM Applauds Italy's Life-Saving Mare Nostrum Operation: "Not a Migrant Pull Factor"' (*IOM*, 31 October 2014) https://www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor accessed 18 April 2024.

74 See Charles Heller and Lorenzo Pezzani, 'Death by Rescue: The Lethal Effects of the EU's Policies of Non-assistance' (*Forensic Oceanography*, June 2016) https://content.forensic-architecture.org/wp-content/uploads/2023/04/2016_Report_Death-By-Rescue.pdf accessed 18 April 2024.

75 See the description in Mann (n 26) 354–5.

76 ibid.

77 *Hirsi Jamaa and Ors. v. Italy* (2012) ECHR 1845.

an area that no state has jurisdiction over. As suggested above, this meant that push-back operations at sea, designed to keep migrants away from European shores, triggered the non-refoulement guarantee and the prohibition of collective expulsion – meaning that border patrols were forbidden from disembarking the intercepted migrants elsewhere. The same applies in cases of state-led search and rescue operations, where rescuers also exercise effective control over rescued migrants.

On the other hand, no such obligations under the ECHR have been established yet in situations where state authorities remain at a distance, sharing information on movements, making phone calls or sending radio signals. Avoiding direct contact with migrants thus appears to allow states to skirt their human rights obligations: without a state bearing corresponding obligations, there are no human rights to rely on.[78] States have exploited this 'legal black hole' by relying on third-country authorities (with an often questionable degree of legitimacy[79]) to substitute pushbacks with pullback operations,[80] increasingly under the guise of search and rescue.[81] The pending case of *SS v Italy* is a case in point.[82] They are also relying on private actors for under-cover pushbacks[83] and have resorted to abandoning migrants on life rafts at sea.[84]

78 See Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25(4) Leiden Journal of International Law 857.

79 On the situation for migrants in Libya, see eg the short account in Anuscheh Farahat and Nora Markard, 'Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility' (Heinrich Böll Foundation European Union 2020) 22–27.

80 Markard, 'The Right to Leave by Sea' (n 16).

81 Moreno-Lax (n 17) 388–90.

82 *S.S. and Others v. Italy* Appl. No. 21660/18 (ECtHR, pending), communicated on 26 June 2019. This case raises the question whether Italy is responsible for the actions of Libyan coast guards if those were called to the scene and instructed by the Italian authorities, against the background of an intense Italian-Libyan cooperation. See Moreno-Lax (n 17) 388–90 (on the facts), 404–13 (on functional jurisdiction).

83 Anuscheh Farahat and Nora Markard, 'Closed Ports Dubious Partners: The European Policy of Outsourcing Responsibility – Study Update' (Heinrich Böll Foundation European Union 2020) https://eu.boell.org/en/2020/05/25/closed-ports-dubious-partners accessed 2 April 2024. See also Giorgos Christides et al, '"We Were Slaves"' (*Lighthouse Reports*, June 28 2022) https://www.lighthousereports.nl/investigation/we-were-slaves/ accessed 18 April 2024.

84 Giorgos Christides and Steffen Lüdke, 'Greece Suspected of Abandoning Refugees at Sea' (*Der Spiegel*, 16 June 2020), https://www.spiegel.de/international/europe/videos-and-eyewitness-accounts-greece-apparently-abandoning-refugees-at-sea-a-84c06c61-7f11-4e83-ae70-3905017b49d5 accessed 18 April 2024. See also Niamh Keady-Tabbal

The law of the sea requires coastal states to establish and maintain adequate SAR services and to effectively respond to distress calls.[85] However, since Italy ended its Mare Nostrum operation in October 2014, no EU member state has moved in to systematically and actively provide search and rescue services to migrants crossing the Mediterranean – nor has Frontex.[86] As a result, migrants in distress at sea often fail to receive assistance. State authorities delay their response, play pass-the-buck or call third-country responders to the scene that will disembark the migrants in places not covered by the ECHR, under conditions that would trigger non-refoulement obligations for European actors. Since the law of the sea creates state obligations to rescue, but no individual right to be rescued, people on the move are unable to rely on this regime in such situations. So far, only the UN Human Rights Committee has affirmed that a delayed response to a distress call can constitute a human rights violation under the ICCPR;[87] no such findings have been made by the ECtHR yet.

Private actors have therefore started to address this situation by mounting their own rescue efforts. Among the organizations founded in response to the events mentioned are Watch the Med Alarm Phone (2014), Sea-Watch, SOS Méditerranée, Proactiva Open Arms, Jugend Rettet (all 2015) and Sea-Eye (2016), as well as many others. Operating off the Italian and Greek coasts up to the Northern African coasts, these organizations are based in Spain, France, Germany and other countries, and their ships are also registered in different countries.

These solidarity efforts have likewise been met with obstruction and criminalization. Thus, under Interior Minister Salvini, Italy sought to ham-

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and Itamar Mann, 'Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations' (*Just Security*, 22 May 2020) https://www.justsecurity.org/70309/tents-at-sea-how-greek-officials-use-rescue-equipment-for-illegal-deportations/ accessed 18 April 2024.

85 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), art 98; International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS); International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR Convention), modified by Resolution MSC.155(78), 20 May 2004.

86 See above, text accompanying n 72, for Operations Triton and Sophia.

87 *A.S. and ors. v. Malta* Comm No. 3043/2017 (2021), UN Doc CCPR/C/128/D/3043/2017, para 6.7 (affirming exercise of effective control); the communication was declared inadmissible for non-exhaustion of remedies. Several members of the Committee dissented.

string SAR NGOs by making them sign a 'Code of Conduct'[88] and by subjecting them to smuggling prosecution;[89] a revival of this type of policy was launched under Prime Minister Meloni in January 2023.[90] Greece is adopting similar tactics.[91] Following her visit to Greece in June 2022, the UN Special Rapporteur on Human Rights Defenders, Mary Lawlor, stated: 'At the tip of the spear are prosecutions, where acts of solidarity are reinterpreted as criminal activity, specifically the crime of people smuggling', adding: 'The negative impact of such cases is multiplied by smear campaigns perpetuating this false image of defenders.' She warned that this was having a 'suffocating effect' on civil society in Greece.[92]

These rescue efforts constitute a transnational effort of solidarity with migrants at sea. Unlike the efforts on land, these operations seek to address a situation of de-jure rightlessness. At sea, migrants are no longer part of a political community, instead they are reduced to their 'mere existence' as humans – as Hannah Arendt observes, while they should therefore, 'according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided', the opposite is the case: 'It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man.'[93]

88 See eg Kristof Gombeer and Melanie Fink, 'Non-Governmental Organisations and Search and Rescue at Sea' (2018) 4 Maritime Safety and Security Law Journal 1; Eugenio Cusumano, 'Straightjacketing Migrant Rescuers? The Code of Conduct on Maritime NGOs' (2019) 24 Mediterranean Politics 106; Charles Heller and Lorenzo Pezzani, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration Across the Mediterranean' (Forensic Oceanography 2018).

89 See the cases mentioned in Markard et al (n 19) 22–24.

90 Decreto-Legge 1/2023, Disposizioni urgenti per la gestione dei flussi migratori (2 January 2023) https://www.gazzettaufficiale.it/eli/id/2023/01/02/23G00001/sg accessed 18 April 2024. See Markard et al (n 19) 20–21.

91 UN Special Rapporteur on Human Rights Defenders, 'Greece: Migration Policy Having "Suffocating Effect" on Human Rights Defenders says UN Expert' (UN Special Rapporteur On Human Rights Defenders, 22 June 2022) https://srdefenders.org/greece-migration-policy-having-suffocating-effect-on-human-rights-defenders-says-un-expert-press-release/ accessed 18 April 2024. See also Border Violence Monitoring Network, 'Islets, Interim Measures and Illegal Pushbacks: The Erosion of the Rule of Law in Greece' (*Border Violence Monitoring Network*, 1 July 2022) 19–20 https://www.borderviolence.eu/20548-2/ accessed 18 April 2024.

92 UN Special Rapporteur on Human Rights Defenders (n 89).

93 Arendt (n 32) 300.

Migrants at sea do not even hold human rights, because they lack a state to oppose them to. The aim of providing search and rescue services as a form of solidarity is therefore not only to provide refugees and other migrants with *de-facto* access to rights they already have. Instead, their operations are supporting them in their efforts to come under the jurisdiction of states party to the ECHR by reaching the coastal waters and ports of those states, thereby activating rights that otherwise do not exist *de jure*.[94] The law of the sea, for all the SAR obligations it contains, does not confer any rights on those in distress; if states fail to respond to their distress call (in breach of SAR obligations), their rights are not violated, and they have no remedy.

2.3 Cities of Refuge

The third form of solidarity addresses a combination of *de-jure* and *de-facto* rightlessness, which results from the absence of rights and the inability to access territories where rights could be claimed.

International law on migration is dominated by the sovereignty paradigm, according to which, in the words of the ECtHR, 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory'.[95] As this formula highlights, this sovereign power is only subject to specific treaty obligations, namely including non-refoulement – that limitation upon the power to exclude, however, can only be relied on at the border or in the territory,[96] or (as in the *Hirsi* case) in situations where state authorities exercise effective control over persons extraterritorially.[97] The Court found, in *MN and others v Belgium,* that visa decisions do not constitute such an exercise of jurisdiction in the sense of article 1 ECHR, and therefore do not enable individuals to rely on Convention rights such as non-refoulement.[98] It affirmed that:

94 On triggering the ECHR at sea by political action, see Itamar Mann, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning' (2020) 21(3) German Law Journal 598.

95 *Abdulaziz, Cabales and Balkandali v. The United Kingdom* (1985) ECHR 7, para 67.

96 James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed. Cambridge University Press 2021) 161.

97 Cf *Al-Skeini and ors. v. The United Kingdom* (2011) ECHR 1093, paras 130–37.

98 *M.N. and ors. v. Belgium* (2020) ECHR 930, paras 110–26.

> to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction. If the fact that a State Party rules on an immigration application is sufficient to bring the individual making the application under its jurisdiction, precisely such an obligation would be created. The individual in question could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist.[99]

That, the Court argued, would have the effect of negating the power to exclude.[100]

At the same time, the strategies mentioned at the outset – visa regimes, carrier sanctions, immobilization measures implemented by countries of origin and transit, failure to provide active SAR services – work to keep people on the move at exactly the distance that prevents them from relying on human rights in relation to European states *de-jure*, and that also makes it extremely difficult *de-facto* to access such rights by making the dangerous journey on land or by sea. Their situation is compounded by the fact that they are often also unable to claim rights where they are, especially in ungoverned territories in places like Libya.[101]

It is this anomalous[102] situation of rightlessness that resettlement movements seek to address.[103] Civil society groups, cities and smaller municipalities have formed a transnational movement that offers protection in their communities to refugees stuck abroad, in a bid to increase the spots their

99 ibid, para 123 (references omitted).
100 ibid, para 124.
101 Reyhani (n 3) 285–7 calls this 'absolute de-jure rightlessness'.
102 ibid 280–85.
103 The term resettlement is usually applied to refugees who are – as the 1951 Convention definition requires – already outside of their country of origin, but who are not receiving adequate protection in their current host country. It is considered one of the three 'durable solutions' for refugees, next to voluntary return and integration into the host society; see Executive Committee Conclusion No 56 (XL) 'Durable Solutions and Refugee Protection' (1989).

respective states are prepared to pledge for resettlement schemes.[104] As Helene Heuser has shown,[105] these 'cities of refuge' can rely on an ethics of hospitality, as laid out by Jacques Derrida in a speech to the International Parliament of Writers in Strasbourg in 1996.[106] Such initiatives can aim relocating protection seekers from Southern European member states – such as the German city of Osnabrück's initiative to take in 50 protection seekers stuck in Idomeni[107] – but also at extending protection to individuals not yet in Europe.

Balibar, writing in the context of the 1990s *sans-papiers* movement, has highlighted the role of cities in promoting the type of citizenship that generates solidarity – the kind of citizenship that cities of refuge rely on. An abstract, formal concept of citizenship, which separates the nation-state from society, he argued, had nothing to oppose to the criminalisation of solidarity. By contrast, a *cité* was inconceivable without a concept of active citizenship that also implies the possibility of solidarity; one that:

> attempts to form a concrete articulation of the rights of man and the rights of the citizen, of responsibility and militant commitment. It knows that the historical advances of citizenship, which have never stopped making its concept more precise, have always passed by way of struggles, that in the past it has not only been necessary to make 'a part of those who have no part,' but truly to force open the gates of the city, and thus to redefine it in a dialectic of conflicts and solidarities.[108]

104 The Global Compact for Refugees has created the Global Refugee Forum, where states regularly exchange pledges, including on resettlement. On the proposed EU framework, see above n 10.

105 Helene Heuser, *Städte der Zuflucht: Kommunen und Länder im Mehrebenensystem der Aufnahme von Schutzsuchenden* (Nomos 2023).

106 Later published as: Jacques Derrida, 'On Cosmopolitanism' [1977] in id, *On Cosmopolitanism and Forgiveness* (Routledge 2001). In French, the title – which draws on Marx and Engels' communist manifesto – is rather more compelling: 'Cosmopolites de tous les pays, encore un effort!'.

107 '50ausIdomeni'; see eg Helene Heuser, 'Sanctuary Cities sind in Deutschland nicht utopisch' (*Luxemburg*, April 2017) https://zeitschrift-luxemburg.de/artikel/sanctuary-cities-sind-in-deutschland-nicht-utopisch/ accessed 18 April 2024.

108 Balibar (n 48) 49–50, quoting Rancière (n 2) 305; he then continues: 'We must set the idea of a "community of citizens" back into motion, in such a way that it should be the result of the contribution of all those who are present and active in the social space. *Français, encore un effort si vous voulez être républicains!*' ibid 50 (emphasis in the original).

In this way, cities of refuge seek not only to overcome the situation of *de-jure* and *de-facto* rightlessness that the immobilisation of people on the move in countries of origin and of transit is designed to perpetuate. They also invite these people to become part of their community, offering them a way to belong. In this sense, they are extending the right to have rights – and that means, in Arendt's terms, being able to live 'in a framework where one is judged by one's actions and opinions'; it is a 'right to belong to some kind of organized community.'[109] Enabling them to not only come into the territory of the nation state, but also to become members of a political community offers them a way to turn themselves from utterly rightless individuals into legal subjects.

3 Transnational Negotiations of Subjectivity

These three different forms of solidarity thus address different forms of rightlessness, and they all aim at affirming or activating legal subjectivity. They are transnational in nature, in that they rely on civil society networks across borders, challenging the limitations of the nation state. Most importantly, however, they are not a form of humanitarian compassion or pity, 'marked by the capacity to feel the suffering of those who are not one's equals'.[110] Instead, they constitute a form of politicisation, a *dissensus,* in which those who don't have a part are participants: By recognizing people on the move as rights holders, even where they are *de jure* rightless, these solidarity practices – alongside the collective practices of the migrants themselves – are claiming and at the same time performing a subjectivity that doesn't technically exist yet. In claiming equal participation and rights and acting as though they exist, they performatively call into existence a state of equality among those involved – and thus the right to have rights.[111]

As Stefania Maffeis explains, this is not a unilateral act of recognition, but a collective undertaking among those who recognise each other as equals. Building on Rancière's concept of *dissensus* as a project of the *demos*, she writes:

109 Arendt (n 32) 177.
110 Gündoğdu (n 26) 72.
111 See Stefania Maffeis, 'Das Subjekt der Menschenrechte: Praktiken und Subjektivierung in Kämpfen der Migration' (2018) 12 Zeitschrift für Kulturphilosophie 245, 252.

> Subjectivation must be understood as a collective practice, in which different actors participate from different positions and perspectives, who keep one another in check and depend on one another, and who reflect, activate, or deactivate positions as well as categories that the actors are caught up in. Subjectivation therefore does not presuppose an awareness nor an activation of marginalized subjects. It rather constitutes a capability that only comes into existence in political situations, as a result of which experiences, affects, insights, and intentions can be articulated that had not been identifiable before.[112]

In the words of Ayten Gündoğdu, human rights can thus 'become political if and when they are invoked to create public spaces where those who are rendered rightless can appear and act in solidarity with others, translate their problems into common concerns, and participate in practices of founding and refounding equality and freedom.'[113] In this way, transnational practices of solidarity beyond and within the state open up political spaces to negotiate what human rights really mean.

112 ibid (my translation).
113 Gündoğdu (n 26) 67.