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Border Deaths at Sea under the Right to Life in the European Convention on Human Rights

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Preface

About a year ago I planned my holidays in Iceland. As I am accustomed to, I did not need a visa. A few days before departure, however, my flight was cancelled. I was immediately offered an alternative flight taking me to my destination only six hours later than planned. Despite this minor nuisance EU consumer protection laws entitled me to a compensation payment of € 400 on a flight that had cost me only € 250.
The experience left me with a disquieting feeling. I had just spent six years working on the issue of border deaths. When I started working on my PhD one of my greatest worries was, just as for many PhD students, that by the time I would have completed my research, the topic of border deaths would no longer be relevant. Six years on, the topic is still relevant and my greatest worry is that it will continue to be so for a long time. The contradiction between the far-reaching rights I enjoy as EU citizen and the suffering inflicted on the people that are not welcomed in the EU, left me wondering whether the European Union can earnestly claim to be based on the common values it set out as its foundation:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[1]

I share the view that these norms are and should be the basis of the EU. Both the work on my thesis and my work as attorney at law representing the NGO Sea-Watch has made me doubt, however, whether it suffices to include these values in a treaty. These experiences made me realize that one of the most worrisome effects of the way we currently deal with immigration is the fact that its undesirable consequences are greatly removed from our sight. Just as with any moral dilemma, it is much easier to request harsh measures and to maintain a good conscience, if one does not confront the negative effects of these decisions.
To remove the suffering of the people not welcomed from sight, EU immigration policies are designed to sort effect ever further away. At the same time, States hold on to traditional conceptions of jurisdiction, arguing they are not responsible for human rights violations occurring outside their territories. Yet, claiming the principles of respect for human dignity, human rights, and justice as the foundation of the European Union does not allow for policies that violate the spirit of these values. It requires taking these standards into account when making rules that govern situations characterized by a conflict of interests. Political decision makers should show true leadership by upholding these values in the most difficult of circumstances. EU citizens should not accept that the foundational principles of the Union are betrayed by policies that infringe upon them. Living by the values set out requires each member of society, each Member State, and the European Union to let themselves be guided by these principles in the actions they take and in those they chose not to undertake, every single day.

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[1] Art. 2 of the Consolidated Version of the Treaty on the European Union, TEU (European Union).

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This book is dedicated to all those who have
found their final resting place at sea.

Contents

Chapter 1

Introduction

Migration towards Europe has been a persistent phenomenon. Some of the people coming are welcomed, others are unwanted. The Member States of the European Union have implemented a range of measures aimed at facilitating access to those wanted and preventing entry into the territory by those unwanted. This study focuses on the latter category of measures. The development of immigration policies has been the subject of numerous academic studies. Therein, a development towards immigration policies which include entry controls at an earlier stage of travel has been signalled. Furthermore, controls have shifted away from the State's territorial border. A couple of measures is typically included in the list of policy tools that have contributed to this shift of the border. These include the introduction of the common European visa regime and carrier sanctions to enforce visa restrictions abroad; the reliance on liaison officers who provide advice on who fulfils the proper requirements to be entitled to enter the country of destination; the improvement of travel documents, rendering it harder to use fraudulent documents; and the maintenance and intensification of border controls.[2] This list of differing means resorted to in an effort to prevent travel of those unwanted towards Europe indicates that immigration policies of the European Union (EU) and its Member States are diverse and change overtime, when new ways are explored to prevent travel of the unwanted, such as concluding agreements with countries of origin or transit for example. Given the changing nature of these policies, they are often not described individually, but rather referred to as immigration policies in general. This study does so, too. Despite the different and new means by which selective access to the territory was sought to be implemented, the EU and its Member States have not succeeded in effectively preventing entry of the unwanted. Instead, many people have chosen to travel by irregular means seeking to circumvent border controls. In doing so, many end up on unseaworthy vessels, trying to cross vast stretches of ocean to reach Europe. This – it has become evident – is a risky undertaking.

1 Underlying Premises: Do European Immigration Policies Cause Border Deaths?

Over the last two decades, thousands of people have died while trying to reach Europe.[3] Daily news programmes have regularly reported on migrants and asylum seekers dying, sometimes culminating into a public outcry.[4] It occurs regularly that the same news programmes also devote an item to yet another European plan on how to stop migration to Europe. Be it that

[2] T. Spijkerboer, 'The Human Costs of Border Control' (2007) 9 European Journal of Migration and Law 127 131–134 accessed 16 September 2015; T. Spijkerboer, 'Moving Migrants, States, and Rights: Human Rights and Border Deaths' (2013) 7(2) Law and Ethics of Human Rights 213 216–217 accessed 11 April 2017.

[3] For estimates of the number of deaths see United Against Racism, 'List of Deaths' (5 May 2018) <http://unitedagainstrefugeedeaths.eu/about-the-campaign/about-the-united-list-of-deaths/> accessed 14 October 2018; Grande, del, G. 'Fortress Europe' <http://fortresseurope.blogspot.nl/> accessed 25 April 2017; and IOM, 'Missing Migrants: Tracking Deaths Along Migratory Routes' <https://missingmigrants.iom.int/> accessed 14 October 2018.

[4] BBC News, 'Migrant Crisis: Photo of drowned boy sparks outcry' (3 September 2015) <http://www.bbc.com/news/world-europe-34133210> accessed 7 April 2017; BBC News, 'Italy boat sinking: Hundreds feared dead off Lampedusa' (3 October 2013) <http://www.bbc.com/news/world-europe-24380247> accessed 7 April 2017; BBC News (n 4).

fences are erected or enforced along the land routes,[5] that a deal is struck with Turkey[6] or Libya,[7] or that the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Frontex, is equipped with a wider mandate and a new name, the European Border and Coast Guard Agency.[8] Sometimes, such items are presented independently from one another, as if the fate of those trying to reach Europe is not connected with the immigration policies of the EU and its Member States. Increasingly, however, the link between the two is discussed and such measures are critiqued for contributing to the harsh and sometimes even lethal conditions faced by migrants and asylum seekers.[9] Numerous non-governmental organizations have subsequently called upon the EU to open safe means of passage to the European Union to prevent further loss of life.[10]

Indeed, the connection between European immigration policies, irregular migration and the plight of migrants and refugees trying to reach Europe has been subject to numerous academic studies, as well as political debate.[11] Instead of undertaking a review of academic studies and

[5] Reuters, 'Hungary builds new high-tech border fence - with few migrants in sight' (2 March 2017) <http://www.reuters.com/article/us-europe-migrants-hungary-fence-idUSKBN1692MH> accessed 7 April 2017.

[6] Al Jazeera, 'Refugee Crisis: EU and Turkey reach 'breakthrough' deal' (8 March 2016) <http://www.aljazeera.com/news/2016/03/refugee-crisis-eu-turkey-agree-proposal-160308021149403.html> accessed 7 April 2017.

[7] See Council of the European Union, 'Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route' (3 February 2017) <http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/> accessed 7 April 2017.

[8] See Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EC) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC 14 September 2016, Regulation of the European Border and Coast Guard (European Parliament and the Council); and European Public Affairs, 'Frontex's new mandate, a controversial EU approach to the refugee crisis' (26 October 2016) <http://www.europeanpublicaffairs.eu/frontexs-new-mandate-a-controversial-eu-approach-to-the-refugee-crisis/> accessed 7 April 2017.

[9] See for example Reuters, 'How Europe built fences to keep people out' (4 April 2016) <http://www.reuters.com/article/us-europe-migrants-fences-insight-idUSKCN0X10U7> accessed 7 April 2017; Human Rights Watch, 'Q&A: Why the EU-Turkey Migration Deal is No Blueprint' (14 November 2016) <https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint> accessed 7 April 2017; and Al Jazeera, 'EU leaders ink deal to stem refugee flow from Libya: Aids groups warn against curbing migrant influx before providing safe passage to those fleeing war and persecution' (4 February 2017) <http://www.aljazeera.com/news/2017/02/eu-leaders-ink-deal-stem-refugee-flow-libya-170203151643286.html> accessed 7 April 2017.

[10] See for example UNHCR, 'UNHCR urges countries to enable safe passage, keep borders open for Syrian refugees' (18 October 2013) <http://www.unhcr.org/news/briefing/2013/10/526108d89/unhcr-urges-countries-enable-safe-passage-keep-borders-open-syrian-refugees.html> accessed 7 April 2017; Oxfam, 'The migrants' winter walk: Oxfam calls for safe passage of refugees to Europe' <https://www.oxfamireland.org/blog/migrants-winter-walk> accessed 7 April 2017; K. H Sunde, 'What can Europe do to welcome refugees?' (11 September 2015) <https://www.amnesty.org/en/latest/campaigns/2015/09/what-can-europe-do-to-welcome-refugees/> accessed 7 April 2017; Medicins Sans Frontieres, 'EU: your fences kill. Provide safe and legal passage' (Mediterranean Migration: Open letter to European leaders; Copies sent to Switzerland, Norway, FYROM, Serbia and the President of the European Commission 11 September 2015) <http://www.msf.org/en/article/eu-your-fences-kill-provide-safe-and-legal-passage> accessed 7 April 2017.

[11] For a few examples of academic contributions discussing border deaths at EU borders, see D. Lutterbeck, 'Policing Migration in the Mediterranean' (2006) 11(1) Mediterranean Politics 59 accessed 11 August 2015; J. Carling, 'Migration Control and Migrant Fatalities at the Spanish-African Borders' (2007) 41(2) International Migration Review 316 accessed 11 April 2017; Spijkerboer, 'Human Costs of Border Control' (n 2); L. Weber, 'Knowing-and-yet-not-knowing about European Border Deaths' (2010) 15(2) Australian Journal of Human Rights 35 accessed 22 February 2020; and Houtum, van, H. and X. Ferrer-Gallardo, 'The Not so Collateral Damage

political debate on this matter, this study will rely on a comprehensive review of these contributions conducted by Last.[12] Her study as well as this study have been conducted as part of a research project headed by Spijkerboer, entitled *The Human Costs of Border Control*.[13] A central theme in this project are border deaths, understood as the deaths of people who have died attempting to migrate irregularly to Europe by crossing southern external borders of the EU without authorization. Within this project, Last's study was designed to collect empirical data on border deaths and subsequently analyse this data so as to demonstrate whether immigration policies cause border deaths. Last conducted the empirical study, counting migrants and refugees registered within the death registries of Southern European States. However, comparing the data she collected and accumulated in the Deaths at the Borders Database to existing data sets on border deaths, led her to conclude that none of these data sets were of sufficient quality to realise a reliable qualitative analysis of the relation between immigration policies and border deaths.[14] Alternatively, Last conducted a comprehensive literature study of academic contributions developing theories about how immigration policies and border deaths are connected, as well as a study of how border deaths and immigration policies are related in the eyes of EU policymakers.[15] For exploring how immigration policies are perceived to be related to border deaths, this study will therefore rely on the comprehensive literature review conducted by Last.

1.1 Views of Academics and Policy Makers

Last selected and reviewed thirty-nine out of eighty academic works that were discovered by her comprehensive review to analyse the relationship between irregular travel and border deaths. One third of the works reviewed come to the conclusion that it is the policies regulating entry and their enforcement that give rise to the phenomenon of irregular travel and/or the existence of a smuggling economy in the first place. Even more, namely half of all academic studies reviewed, conclude more broadly that there is a connection between the immigration policies of the EU and its Member States and border deaths.[16] This is generally assumed to be the case, because immigration policies prohibit the use of regular travel opportunities for certain people and technological advancements have subsequently also closed off clandestine use of regular means of travel.[17]

A second relevant observation made in academia is that irregular migration appears to become increasingly dangerous.[18] The explanations as to why this is the case vary. Firstly, measures

Politics of Deadly EU Border Control' (2014) 13(2) ACME: An International E-Journal for Critical Geographies 295 accessed 22 February 2020.

[12] T. Last, 'Deaths Along Southern EU Borders' (PhD, VU University 2018) 75–95.

[13] See http://www.borderdeaths.org/ for more information.

[14] T. Last, 'Death at the Borders: Database for the Southern EU' (2015) <http://www.borderdeaths.org/?page_id=425> accessed 22 February 2020; Last, 'Deaths Along Southern EU Borders' (n 12) 57–74.

[15] Last, 'Deaths Along Southern EU Borders' (n 12) 75–95.

[16] ibid 80.

[17] ibid 81.

[18] ibid 81–82.

aimed at enforcing the European immigration policies resort to more militarised tactics, which are pointed out as a reason for the increasingly dangerous nature of travelling irregularly.[19] Many identify a diversion of irregular migration from one route to another as a result of increased enforcement on a particular route. Often, new routes are longer, more covert, require the crossing of more difficult terrain or crossing in less favourable circumstances, rendering irregular travel more dangerous.[20] Secondly, policies aimed at disrupting the smuggling business and punishing smugglers are made out as a factor that further increases the danger of irregular travel. To avoid detection, smugglers force migrants out of the boat before reaching the shore, travel at night or in poor weather conditions, no longer steer the boats themselves, but leave this task to migrants not trained or experienced in manoeuvring a boat, using disposable boats of poor quality as they are generally confiscated or discarded, and use increasingly small boats to avoid detection. In addition, the smugglers greed for profit results in overcrowding and underequipping the boats, also rendering the passage increasingly unsafe. Sometimes, the boats are deliberately damaged by their passengers to provoke rescue when another vessel is in sight.[21] It is clear that these circumstances increase the risk of deadly accidents occurring.

Policymakers acknowledge the dangerous nature of trying to enter Europe irregularly by crossing the Mediterranean Sea. Both migrants engaging in illegal behaviour by travelling irregularly and the ruthless means of human smugglers are blamed for the loss of life at sea.[22] As a consequence, policy efforts are focused on preventing irregular migration as such and on suppressing smuggling services. This – it is reasoned – is in fact to the benefit of those travelling irregularly. There are numerous examples in which policy measures are presented as serving both the goal of preventing irregular migration as well as protecting the fundamental rights of migrants and asylum seekers and contributing to the prevention or reduction of border deaths.[23] Over the past two decades, this has resulted in ever more and ever stricter immigration policies with the aim to bring irregular migration by sea to an end. So far – it is clear – this has not been successful. The legitimacy of the logic of prescribing ever more of the same medicine is discussed in light of the State's duties to protect life in the fourth chapter of this study. For now,

[19] ibid.

[20] ibid 82.

[21] ibid 84.

[22] ibid 90.

[23] See the preamble of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 15 November 2000, Migrant Smuggling Protocol (United Nations); the preamble of Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 15 May 2014, EU Sea Borders Regulation (European Union) para 1; the preamble of Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EC) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (n 8) para 2; see also European Commission (COM), 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration' (13 May 2015) 2 <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf> accessed 23 November 2016; See also Last, 'Deaths Along Southern EU Borders' (n 12) 87.

the most important conclusion that may be drawn from Last's analysis is that it is generally accepted that there is a connection between irregular travel and border deaths.[24]

1.2 The Availability of Data

There is one significant shortcoming in relation to both the assumptions made by policymakers as well as by academics, namely that relevant and reliable data on the issue is greatly absent, meaning that the connections made are mostly hypothetical. Until 2017, the data available on border deaths was compiled in the list of deaths established by United Against Racism and based on various sources, including media reports and information provided by persons and organizations active in the field.[25] Furthermore, Del Grande kept track of media reports on border deaths on his *Fortress Europe* blog.[26] More recently IOM has established a database compiling information on migratory movements as well as deaths. IOM started collecting data in 2014 and uses a variety of sources, including information relayed by authorities involved in handling arrivals and media sources.[27]

The availability and reliability of relevant data is an issue focused on by Spijkerboer.[28] The data initially available already suggested that over the same period of time in which European immigration policies and their enforcement intensified, the number of deaths at sea rose.[29] Yet, Spijkerboer points out that this data was vulnerable to the attention paid to border deaths by the press, as it relied on media reporting on the issue.[30] In order to overcome some of the vulnerabilities, he undertook to document border deaths based on the registration of migrant deaths in the local death registries in communities along the southern European coast.[31]

1.2.1 Data and Estimates on Border Deaths in Europe

This endeavour culminated in the deaths at the borders database created by Last.[32] The database shows that 3,188 persons were found dead and registered by local authorities in Greece, Italy, Gibraltar, Malta, and Spain from 1990 until the end of 2013.[33] The total number of bodies registered is significantly lower than the estimated number of deaths which flow from databases

[24] Last, 'Deaths Along Southern EU Borders' (n 12) 94.
[25] United Against Racism (n 3).
[26] Grande, del, G. (n 3).
[27] IOM (n 3).
[28] Spijkerboer, 'Human Costs of Border Control' (n 2); Spijkerboer, 'Moving Migrants, States, and Rights' (n 2).
[29] Spijkerboer, 'Human Costs of Border Control' (n 2) 136; Spijkerboer, 'Moving Migrants, States, and Rights' (n 2) 219.
[30] Spijkerboer, 'Moving Migrants, States, and Rights' (n 2) 219.
[31] ibid 220–222.
[32] T. Last and others, 'Deaths at the Borders Database: evidence of deceased migrants' bodies found along the southern external borders of the European Union' (2017) 43(5) Journal of Ethnic and Migration Studies 693 <https://doi.org/10.1080/1369183X.2016.1276825> accessed 15 August 2018.
[33] T. Last, T. Spijkerboer and O. Ulusoy, 'Deaths at the Borders: Evidence from the Southern External Borders of the EU' (2016) 1 HIJRA La Revue Marocaine de Droit d'Asile et Migration 5 9 <http://thomasspijkerboer.eu/wp-content/uploads/2016/05/Revue-Hijra-Nr-1-Avril-2016__English.pdf> accessed 20 September 2016.

based on media reports such as the databases of United Against Racism and Fortress Europe.[34] The former counted 34,361 border deaths between 1993 and 2018[35] and the latter documented 27,382 border deaths in the period 1988 until the beginning of 2016.[36] UNHCR estimates that between 2014 and October 2018 17,322 have died or gone missing.[37] Finally, IOM counts 26,130 deaths in the period 2014 until October 2018.[38] The comparatively low number of border deaths documented by Last can be explained on the one hand by a narrower definition of border deaths and by the fact that the database compiled by Last only includes those bodies that have been found and documented by European authorities, whereas the other databases also include deaths of persons whose bodies have not been handled and registered in European deaths records.[39] Despite the diverging estimates, one thing is clear: border deaths in the Mediterranean Sea are a problem of a significant scale that has been persisting for more than two decades already. The persistent nature of border deaths between the early 1990 until today justifies treating them as a structural problem, rather than as individual accidents unconnected to one another.

1.2.2 Trends in Border Deaths in Europe

Furthermore, the trends visible in the data indicate that there may indeed be a connection between increased efforts to supress regular migration and subsequently also irregular migration and border deaths. In a review of the data collected, Last, Spijkerboer and Ulusoy conclude that the border deaths database shows a gradual increase in the number of bodies found in the period recorded, just as the media based data shows as well.[40] Furthermore, they conclude that the trends of border deaths along the different routes may be interpreted as supporting the hypothesis that the blocking of a particular route merely reroutes the migrants and asylum seekers to another one, rather than reducing the overall number of persons attempting to reach Europe irregularly.[41] Finally, they conclude that the continued occurrence of border deaths over the period 1990-2013 may be taken as an indication that the aim to prevent border deaths by preventing irregular migration altogether does not appear realistic, as the number of border deaths has increased in this period, despite the significant developments that have taken place in migration policies and control.[42]

[34] United Against Racism (n 3); Grande, del, G. (n 3).
[35] United Against Racism (n 3).
[36] Grande, del, G. (n 3).
[37] UNHCR, 'Operational Portal - Refugee Situations: Medtierranean Situation' <https://data2.unhcr.org/en/situations/mediterranean> accessed 14 October 2018, last updated 12 October 2018.
[38] IOM (n 3), last updated 8 October 2018.
[39] Last, Spijkerboer and Ulusoy (n 33), 12.
[40] ibid 13.
[41] ibid 17.
[42] ibid.

1.3 Conclusion on the Underlying Premises

While there is no certainty on the relationship between the immigration policies of the EU and its Member States and border deaths, this study proceeds, insofar needed, on the hypothesis that there is a relationship between such policies and border deaths. Given the above considerations, this is considered acceptable. After all, both policymakers and academics assume there to be a relationship between irregular travel and border deaths. While policymakers do not generally identify immigration restrictions themselves as greatly contributing to the phenomenon and the increasing danger of travel, the fact that opportunities for regular travel must form part of a solution to the problem of border deaths is increasingly acknowledged.[43] In academic studies, there are numerous explanations as to how restrictive immigration policies increase border deaths, but they generally concur that there is a relationship between the two. Furthermore, the outcome of the count of registered border deaths undertaken by Last, showing a correlation between an increasing trend in the number of border deaths between 1993 and 2013 and the introduction and development of immigration policies aimed at preventing irregular migration, is taken to support the choice to proceed the study on the presumption that restrictive immigration policies do contribute to border deaths. Asides, this relationship is only of limited relevance when reviewing the responsibility of States for border deaths under the ECHR. After all, many duties under the ECHR rest upon States independently of whether an act of the State caused an event or not. Examples are duties of care aimed to prevent the loss of life, and duties of due diligence if life is lost. In both cases, it is not relevant whether any State action actually caused the threat to or the loss of life. Only in relation to the question whether the ECHR obliges States to amend their policies, is it relevant whether these contribute to the loss of life at sea or not. Overall, therefore, it is deemed acceptable to proceed on the basis of the hypothesis that immigration policies contribute to border deaths, despite the limited data available.

2 Central Research Question

The study does not question the right of States to control entry to their territory as such.[44] However, the study is based on the belief that – just as any other regulatory system implemented by European States – immigration policies must comply with fundamental rights, as laid down in the European Convention on Human Rights (ECHR, the Convention). This leads to the central question of this research: relying on the hypothesis that European immigration policies lead to the loss of life at sea, does this entail responsibility of the destination States for the

[43] Last, 'Deaths Along Southern EU Borders' (n 12) 89.
[44] For contributions arguing against the legitimacy of immigration control as such, see for example J. H Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49(2) Review of Politics 251 accessed 3 February 2015; T. Hayter, *Open Borders: The Case Against Immigration Controls* (second edition, Pluto Press 2004); and C. Kukathas, 'Why Open Borders?' (2012) 19(4) Ethical Perspectives 649 accessed 3 February 2015; For the opposite position, see for example P. C Meilaender, *Toward A Theory of Immigration* (Palgrave MacMillan 2001); and D. Miller, 'Immigration: The Case for Limits' in A. I Cohen and C. H Wellman (eds), *Contemporary Debates in Applied Ethics* (Blackwell Publishing 2005).

violation of the right to life under the ECHR? The question is answered by dividing it into two sub-questions.

2.1 Does the ECHR Apply to Border Deaths?

The first of these questions is whether the ECHR applies to border deaths at sea. This question is relevant, as in many cases border deaths at sea occur outside the territories of the States party to the ECHR. Furthermore, the deaths do not necessarily occur in a direct confrontation between State agents and persons travelling irregularly at sea. Put in other words, based on the presumption that immigration restrictions cause or contribute to border deaths at sea, border deaths at sea may be considered an extraterritorial effect of immigration policies. Principally, the ECHR applies to the territory of its Member States only. It would therefore not apply to those persons losing their life before reaching the Member State's territory. The European Court of Human Rights (ECtHR, the Court) has however developed case law allowing for the extraterritorial application of the Convention. The first sub-question therefore studies the case law of the ECtHR on this issue to conclude on whether the Convention applies at all to border deaths at sea.

2.2 What are the Relevant Requirements under Article 2 ECHR?

The second sub-question concerns the material requirements under the right to life and the question whether the immigration policies of the EU and its Member States comply with these. The reason why the study focusses on the right to life is that the central issue of the study is the loss of life at sea. This is not to say, however, that other rights enshrined in the Convention are not relevant to the issue. To the contrary, the prohibition of torture and inhumane treatment has been invoked in cases concerning irregular travel by sea in the past.[45] Nevertheless, the study focusses on the requirements under the right to life. Besides the fact that the central theme of the study is the loss of life, the right to life provides an adequate framework for analysing State responsibility with respect to the loss of life at sea, as it encompasses a positive dimension, requiring States to prevent the loss of life. Furthermore, the right to life stipulates what States are required to do in case life is lost. As such, the right to life is considered most relevant to this study.

3 Limitations of the Study

The formulation of these two sub-questions does not only set out what aspects of State responsibility for human rights violations are addressed in the present research, it also sets out what is not addressed. As already mentioned, this study does not look into the question of causality, but proceeds on the basis of the hypothesis set out above.

[45] *Hirsi Jamaa and others v. Italy* (2012) 27765/09 (European Court of Human Rights).

3.1 The Study Focusses on Border Deaths at Sea in Europe

An additional limitation concerns the geographic location where border deaths occur. Migrants and asylum seekers die both at the land and at the sea border. The current research however only looks at the phenomenon of border deaths at sea. The reason to do so is the fact that in many situations at sea a territorial link to a specific State does not exist, due to the special legal regime applicable at sea. While those dying at the land border necessarily die within the territory of a particular State, this is not the case for all migrants and asylum seekers perishing at sea. This means that the question which obligations States bear beyond their land territory becomes especially relevant, as at times no one State can be pointed towards as being potentially responsible by virtue of the relevant events taking place on its territory. While the sea is certainly not a zone entirely free of sovereign territorial claims by States, it is this special legal regime applicable at sea that justifies focussing on deaths at sea only, as it affects the questions considered relevant or not.

Another geographical limitation is that the study only looks at those border deaths at sea occurring when people are trying to enter the European Union by crossing the Mediterranean or the Adriatic Sea. Border deaths at sea do not only occur in this context, but in many other places around the world. Admittedly, this therefore renders the study Eurocentric. However, for reasons of scope it is not feasible to study all of these situations, also because very different legal regimes are at play. In any event, the ECHR is not relevant in those contexts. It thus makes sense to limit the study to border deaths at sea occurring immediately *en route* to the EU.

Furthermore, the study focusses on the obligations born by the countries of destination. In most cases the countries from which the persons travelling irregularly originate or depart are generally not party to the ECHR, with the exception of Turkey. This is not to say that the countries of origin or transit have no role to play in preventing border deaths, nor that they do not bear responsibility. However, for reasons of clarity and scope, the study will not look into State responsibility of the countries of origin or departure. For the purpose of this study, Turkey has a somewhat particular position. While it is party to the ECHR and is a country of destination for many migrants and asylum seekers, it is not member of the European Union. At the same time, Turkey contributes to some of the EU and its Member States' immigration policies presumed to contribute to border deaths at sea, by entering agreements with the latter. As the various policy measures are not discussed in detail, it is also unnecessary to discuss Turkey's role and position in regard to the various policy measures in detail. However, at this point it may be noted that Turkey's particular position in this context may lead to some inaccuracy with respect to the terms employed in this study. This is the case, for example, when referring to the 'immigration policies of the EU and its Member States' or to 'European immigration policies' without detailing the role of Turkey. For the sake of readability and in light of this explanation, however, this is deemed acceptable.

3.2 The Study Does Not Address the Question of Attribution

Another aspect left unexplored is the question of attribution. Attribution relates to the process by which international law establishes whether the conduct of a particular actor can be

considered an 'act of State' for which the State potentially bears responsibility. The principle rules governing attribution are laid down in the Articles on the Responsibility of States for Internationally Wrongful Acts.[46]

In the context of European immigration policies, various actors come to play. Some policy measures are the result of EU legislative activity, others the result of national laws. Likewise, implementing measures are carried out by EU agencies such as the European Border and Coast Guard Agency (Frontex) or by Member States of the EU unilaterally or in cooperation with other EU and third countries. In light of this, the question, to whom the effects of European immigration policies implemented at different levels must be attributed, is relevant and complex and merits research by and of itself. This was done by Fink, who analysed State responsibility under the ECHR and the EU Charter in multi-actor situations, with a special focus on Frontex operations.[47] For reasons of scope this question is therefore not addressed in the current research. It is possible to leave this issue undiscussed, because the question whether certain extraterritorial State actions fall within the scope of application of the ECHR and what is materially required under Article 2 ECHR are not substantively affected by the answer to the question whom a breach of obligation may be attributed to. The manner in which the review of the disputed action is conducted may well differ, depending on the question whether the disputed acts were conducted in order to implement EU law or national laws. This is the result of the *Bosphorus* doctrine developed by the ECtHR.[48] This doctrine implies that States remain liable for acts and omissions of their organs, irrespective of whether the measure was taken in order to comply with international legal obligations.[49] The ECtHR does allow, however, for a rebuttable presumption that the taken measure complies with the requirements of the Convention, if the international organization, whose rules the State was implementing, is considered to provide a comparable level of protection of fundamental rights.[50] Furthermore, so long as the EU has not acceded to the ECHR as has been envisaged, it may not be possible to bring a claim before the ECtHR complaining about acts and omissions committed by EU agencies, such as Frontex. In this respect, it is worth pointing out that as long as member State agents are involved in such actions, the State remains principally liable, as decided by the ECtHR in the *Bosphorus* judgment. Moreover, even if the claim would have to be directed against the EU or one of its agencies, this will presumably not change the test whether the ECHR applies to extraterritorial acts substantively, nor will it change what is materially

[46] For a comprehensive discussion of attribution, see J. Crawford, *State Responsibility: The General Part* (Cambridge Studies in International and Comparative Law, University Press 2013) 113–210.
[47] M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford Studies in European Law, University Press 2018).
[48] *Bosphorus v. Ireland* (2005) 45036/98 (European Court of Human Rights); For a more elaborate analysis of the judgment and subsequent application of the so-called Bosphorus doctrine, see C. Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6(1) Human Rights Law Review 87 accessed 8 March 2020; T. Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10(3) Human Rights Law Review 529 accessed 8 March 2020; and E. Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (Brill Nijhoff 2017).
[49] *Bosphorus v. Ireland* (n 48) [153].
[50] ibid [155–156].

required under Article 2 ECHR. While the question of attribution is therefore a very interesting one, it is not elaborated on in this study. In the remainder of the study, therefore, reference is made to the 'State' in general terms.
However, despite excluding the question of attribution, the study does at times discuss issues, which could also be discussed in relation to the question of attribution. The reason is that at times, the differentiation between jurisdiction exercised by States and the process of attribution is blurred, as is demonstrated by the fact that also the ECtHR is not always strictly dogmatic in this respect. This is especially relevant in the first chapter, discussing the term 'jurisdiction', as well as when discussing the Court's case law.

3.3 The Study Only Analyses State Responsibility under the ECHR

As has already been indicated, this study only focusses on the ECHR as the relevant source of obligation for States. This choice is justified by the fact that the ECHR is the relevant human rights instrument in the region equipped with the most far-reaching individual complaint mechanism and a court capable of rendering legally binding decisions. The potential for rights to be effectively invoked under the ECHR is therefore bigger than with many other human rights instruments lacking such a powerful review mechanism. Furthermore, this potential has already materialized in a wealth of case law relevant to the two questions set out above.

3.3.1 The Study Does Not Analyse State Responsibility under the EU Charter

Another relevant source of obligations with respect to the theme of the study is the Charter of Fundamental Rights of the European Union (the Charter). In this case, too, there is a court equipped with far reaching powers of review, which may enforce compliance with the requirements under fundamental rights. The opportunity to bring an individual claim before the Court of Justice of the European Union (CJEU, the Court of Justice) is however more limited than before the ECHR. Yet, the Charter potentially has a wider scope of territorial application than the ECHR, thereby filling possible protection gaps left uncovered by the ECHR. Contrary to the ECHR, the central issue in respect of the geographical scope of application of the Charter does not appear to be the boundaries of territory, but rather whether a given matter falls within the scope of application of European Union law.[51]
The question whether the EU Charter has a wider scope of application than the ECHR is discussed in a number of academic publications, which diverge as to whether the Charter applies extraterritorially and under which conditions.[52] The same is true for the case law in

[51] In this respect, see the prominent case of *Åklagaren v. Hans Åkerberg Fransson* (2013) C-617/10 21 (Court of Justice of the European Union).
[52] The most prominent of these is V. Moreno-Lax and C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in S. Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos/C.H. Beck/Hart Publishing 2014) 1658–1661. They point out that article 51 of the Charter does not contain any reference to jurisdiction or territory, as well as towards articles 2, 6 and 21 TEU, declaring that the Union is founded on, among others, the value of respect for human rights, that the Charter shall have the same legal value as the treaties and that the Union's external action shall be guided by human rights and shall seek to promote the universality and indivisibility of human rights and fundamental freedoms. Bartels does not take a firm position in respect to the extraterritorial application of the Charter, but he doubts that the CJEU will adopt the same position in respect to the extraterritorial application of the Charter as the ECtHR did in respect to the ECHR. See L. Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) 25(4) The European Journal of International Law 1071 1076–1078 accessed 10 March 2017; Cannizzaro disagrees with Bartels view that the EU is held to protect human rights also extraterritorially under various provisions. He appears to assume that any human rights protection under EU law does not go further than the protection offered by the ECHR. See E. Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2015) 25(4) The European Journal of International Law 1093 1096–1097 accessed 10 March 2017; Without elaborating on the reasons why he is convinced that the Charter has a wider margin of extraterritorial application than the ECHR, Borowsky joins those commentators who believe it does. See M. Borowsky, 'Artikel 51 Anwendungsbereich' in J. Meyer (ed), *Charta der Grundrechte der Europäischen Union* (4th edn. Nomos 2014) 750.

which the matter is explicitly addressed by the Court of Justice of the EU. The first judgment concerns the case of the *Council v. Front Populaire pour la liberation de la saguia-el-hamra et du rio de oro (Front Polisario)*.[53] The case concerned an agreement facilitating the export of products from Morocco to the EU, including some products originating from the territory of Western Sahara. While Morocco is of the opinion that the Western Sahara is part of its territory, this is not internationally recognized. Allegedly, the European Union thus contributed to the recognition of the occupation of Western Sahara by Morocco and infringed on the right of the Sahrawi people to exploit the natural resources of their territory to their own benefit. In first instance, the General Court did not doubt that fundamental rights could apply extraterritorially and held that the Council has a responsibility to verify whether its policies and acts, in this case the conclusion of the agreement with Morocco, did not indirectly infringe the fundamental rights of the people of the Western Sahara.[54] In appeal, besides arguing that the Front Polisario did not have standing before the Court, Advocate General Wathelet argued against the extraterritorial applicability of the Charter of Fundamental Rights, relying on the same criteria as those relevant to the extraterritorial application of the ECHR.[55] In his opinion therefore, the Charter does not potentially offer a wider scope of protection than the ECHR. Unfortunately, the Court of Justice did not address the question of the extraterritorial application of the Charter. The Court of Justice came to the conclusion that the agreement does not apply to the territory of Western Sahara and that the Front Polisario therefore did not have standing to bring an action for annulment.[56] This is unfortunate, as it leaves unanswered the question whether the additional criterion of control must really be applied when determining whether the Charter applies to an extraterritorial human rights violation.
The second case in which the question of the extraterritorial application of the Charter was explicitly addressed by the Advocate General is the case of *X and X v. Belgium*.[57] The case concerned a Christian family from Aleppo, Syria, requesting a visa in the Belgian embassy in

[53] *Council of the European Union v. Front Populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* (2016) C-104/16 P (Court of Justice of the European Union).
[54] *Front Populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union* (2015) T-512/12 230-231, 241 (General Court of the European Union).
[55] *Opinion of Advocate General Wathelet in the case of Council of the European Union v. Front Populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* (2016) C-104/16 P [270–271] (Court of Justice of the European Union).
[56] *Council v. Front Polisario* (n 53) 133.
[57] *X and X v. Belgium* (2017) C-638/16 PPU (Court of Justice of the European Union).

Beirut, to allow them to travel to Belgium in order to request asylum. In this case, the Belgian government argued that Article 52 (3) of the EU Charter, stating that the interpretation of the Charter must be guided by the interpretation of the ECHR, means that the territorial scope of application of the Charter is equal to the territorial scope of application of the ECHR.[58] Advocate General Mengozzi convincingly argued that the Charter applies irrespective of any territorial criterion.[59] The Court of Justice, however, avoided deciding on the matter by holding that the application lodged by the applicants was solely governed by national law and the Charter did therefore not apply.[60] The judgment of the Court of Justice in this case therefore did not allow any definite conclusion to be made on the question whether the extraterritorial scope of application of the Charter is possibly wider than the territorial scope of application of the ECHR.

Given the fact that the question whether the Charter has a wider territorial scope of application than the ECHR remains undecided, it is not considered of great value to include the Charter as a source of application in this study. Another reason not to do so, is that materially the rights enshrined in the Charter correspond closely to those laid down in the ECHR. This is the case as Article 52 of the Charter explicitly determines that the interpretation of the rights contained in the Charter shall correspond to the rights guaranteed by the ECHR, while not preventing a higher level of protection.[61] Furthermore, the explanations to the Charter explicitly set out that paragraph 2(2) ECHR must be understood to be part of Article 2 of the Charter, thereby further supporting the view that the right to life as set out by the Charter is meant to be understood in almost identical terms to the right to life under the ECHR.[62] In regard to the material scope of application of the right to life, a study of the Charter would therefore be of little additional relevance. For reasons of scope this study does therefore not discuss whether border deaths are a violation of the EU Charter. On the basis of the preliminary analysis of the Charter's possible contribution to the study, it is considered justified to limit this study to the ECHR.

3.3.2 The Study Accepts the Contemporary Human Rights Framework as its Parameter

Finally, another choice contained in the decision to focus exclusively on the responsibility of States for border deaths at sea under the ECHR is that the study does not delve into the legitimacy or appropriateness of the contemporary human rights system of which the ECHR is just one element. After all, noting that border deaths have been a persistent phenomenon for several decades now, even though the current human rights system has been in place all this time, begs the question whether the contemporary human rights system is equipped to actually protect lives and hold States to account. A relevant contribution on the issue has been made by

[58] *Opinion of Advocate General Mengozzi in the case of X and X v. Belgium* (2017) C-638/16 PPU [95] (Court of Justice of the European Union).
[59] ibid 89, 97-101.
[60] *X and X v. Belgium* (n 57) [44–45].
[61] See paragraph 3 of article 52 of the Charter of Fundamental Rights of the European Union (European Union).
[62] Explanation on Article 2 - Right to Life, Explanations Relating to the Charter of Fundamental Rights 14 December 2007 (European Union).

Mann.[63] He engages on a normative and theoretical level with the phenomenon that the continued loss of life exists in parallel to numerous human rights treaties concluded among States. In his view, human rights do not exclusively emerge from agreement between States, but are, while being contested, a more pervasive and personal norm which comes particularly to the forefront in the direct confrontation between individuals. In comparison to Mann, this study takes the contemporary human rights system as its parameters and performs much more of a black letter study of the law. Yet, the difficulties encountered when applying the ECHR to the loss of life at sea beyond situations of direct confrontation between State agents and migrants and asylum seekers, may underline the propriety of Mann's claim that there is a normative element to the bodily encounter of individuals. Thus, while recognizing the appropriateness of questioning the existing human rights framework, the study does not engage in a more theoretical discussion on human rights. Instead, by approaching the question within the parameters of the existing human rights framework, the aim is that its conclusions are accepted as a technical application of the law to the facts.

3.4 Conclusion on the Limitations of the Study

Based on the limitations set out here, the scope of the research question is clear. The study addresses the question whether the ECHR applies to border deaths at sea considered as an extraterritorial effect of immigration policies and whether the policies pursued in the past comply with the requirements laid down in Article 2 ECHR.

4 Methodology

The study relies to a great extent on an analysis of the Court's case law, as well as on the study of academic works. In all cases in which a structured search was performed to select relevant cases and doctrine, a description of the method applied is provided in the relevant chapter. Here, a general remark suffices.

A study of the Court's case law is central to the answer of the two research questions formulated above, namely whether the ECHR applies to border deaths and what the relevant requirements are under Article 2 ECHR. In relation to both, a structured search of the Court's case law database Hudoc was performed, searching the Court's cases in the period between 2001 and the date of the search. The subsequent use of the body of cases found, differed between the two chapters. With respect to the scope of application of the Convention, only those cases deviating from the general understanding of when the Convention applies extraterritorially were selected for individual and detailed discussion. In contrast, the cases that were found in the search performed for the requirements resting upon States under Article 2 ECHR were all studied in depth, however, they are generally not discussed individually nor in detail. Rather, the body of cases found was used to distil the Court's generally held views regarding Article 2 ECHR.

[63] I. Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge University Press 2016).

In addition to the analysis of case law, the study relies on other academic works. While in most regards academic works were selected on the basis of unstructured searches, this is not the case for the literature study performed to analyse the generally held views regarding the Convention's extraterritorial scope of application in the third chapter. Here, a structured search of the Peace Palace Library collection was performed. This structured search of literature for chapter 3 thus also results in a temporal limitation regarding the literature that was studied, namely literature falling within the period covered by the search. This is not the case for literature and other sources, such as media reports, that were found in an unstructured search, which may thus date up until the end of this study in September 2019.

5 Terminology

A few remarks are needed with respect to the terms used to refer to the persons trying to enter Europe by irregular travel via the Mediterranean Sea. The question is highly relevant, as many terms have been employed by various actors, including 'illegal migrants', 'irregular migrants', 'immigrants', 'migrants', 'refugees' and 'asylum seekers'. While terms such as 'illegal migrants' and 'irregular migrants' have a clear effect of dehumanizing the persons spoken about, this goes for all terms. After all, prior to belonging to a category such as 'migrants' or 'asylum seekers', the persons referred to are human beings. While this may be understood as stating the obvious, it appears that it is at times lost out of sight in many contemporary debates on the issue. Nevertheless, readability of this study is enhanced by not merely speaking of 'human beings' or 'persons' and comparable generic terms. Thus, the study employs the term 'migrants' understood as referring to a person who changes his or her country of usual residence, irrespective of the reason to do so and the legal status of the person. Furthermore, the study employs the term 'asylum seekers', understood as a person who seeks international protection. As readability also suffers from repetitively employing a single term, the study also refers to 'people', 'persons' and 'travellers'.

6 Structure

Finally, the next paragraph outlines the structure of the study.

6.1 Legal Context

The next chapter of the study sets out the legal context within which the central question needs to be answered. This relates primarily to the special legal regime applicable at sea, where border deaths occur. In the first place, this chapter introduces and discusses the various meanings of the term jurisdiction. In relation to the applicable legal regime at sea, the notion of prescriptive and enforcement jurisdiction and its regulation at sea is discussed. The various maritime zones in which States enjoy different degrees of prescriptive and enforcement jurisdiction are set out. The chapter analyses how the legal regime applicable at sea widens the possibilities of States

to implement policies with extraterritorial effects. Furthermore, the search and rescue regime, referring to the obligation of States to ensure the availability of life saving measures at sea, are introduced. This provides the legal context within which the two main questions are answered.

6.2 Applicability of the ECHR to Border Deaths

The third chapter turns to the first sub-question set out above: does the ECHR apply to border deaths at sea as an extraterritorial effect of the immigration policies of European States? It is Article 1 of the ECHR, which sets out the scope of application of the Convention. In the first place, a literature review is conducted of studies analysing the Court's jurisprudence under Article 1 trying to set out a conceptual framework concerning the scope of application of the Convention. As will be seen, the Court's jurisprudence on this issue is often criticized for not being coherent and not allowing for a uniform conceptual understanding of when the Convention applies extraterritorially. Despite this critique, a general focus of the Court is identified in these studies, relating to some form of effective control exercised by State agents over persons or territory abroad. In a second step, a review of relevant judgments is performed. Conducting a methodological research of the Court's case law, those judgments are selected for a detailed discussion that concern instances which point towards the extraterritorial application of the Convention in which the issue of control exercised by State agents was not relevant, or only relevant to a limited degree. While these judgments cannot be taken to provide a solid ground for holding that the Convention does apply to border deaths at sea as an extraterritorial effect of European immigration policies, they do indicate that there is room to argue that it does. Against the background of the lack of coherence of the Court's jurisprudence on the issue of extraterritorial application more generally, it must be said that the application of the Convention to border deaths at sea cannot be ruled out in a general fashion. As often is the case, much will depend on specific circumstances.

6.3 Material Requirements under Article 2 ECHR

The fact that application of the Convention to border deaths at sea appears possible, merits a closer look at the material rights under the Convention. The fourth chapter thus looks at the phenomenon of border deaths caused by immigration policies in the light of the positive dimension of Article 2 ECHR. While the negative dimension of the right to life is generally understood as prohibiting arbitrary killings, the positive dimension requires States to actively investigate deaths that have occurred and to take measures to prevent the loss of life. The fourth chapter therefore discusses which measures States are required to take when confronted with border deaths and when and how to take these measures to prevent the loss of life.

6.4 Conclusion

The last chapter summarizes the conclusions to be drawn with respect to State responsibility for border deaths under the ECHR. Furthermore, the relevance of the study beyond the context of border deaths is discussed.

Chapter 2

Legal Context

This chapter discusses the relevant legal context within which the research questions must be answered. A central issue distinguishing border deaths occurring at sea from those occurring on land is the matter of jurisdiction. At sea, a State's powers and obligations differ in some way from those which it exercises over its land territory. As will be seen, these differences are relevant to the answer to the question whether States can be held liable for the extraterritorial effects of their immigration policies, such as border deaths. As mentioned in the introductory chapter, some issues discussed in this chapter may be related to the matter of attribution, being the process of determining whether an act can be seen as an 'act of State'. While 'jurisdiction' and 'attribution' are two separate legal matters, the distinction between the two is not always sharp, as the ECtHR, too, does not always draw the line between the two clearly. At times, therefore, issues will be discussed that others would discuss in the context of attribution.
This chapter starts by introducing the notion of jurisdiction and its various meanings under international law. In a second step, the chapter provides an overview of the State's powers and the limitations thereto at sea. The third section briefly pauses at the interplay between the general rules on jurisdiction and the characterisation of the high seas as an area beyond the jurisdiction of any State. The final part of this chapter discusses the duty of States to provide search and rescue facilities at sea.

1 The Term 'Jurisdiction'

The term jurisdiction has numerous meanings, including the authority of a State to do something, the applicability of a human rights instrument, or the authority of a court to give a ruling in a particular case.[64] In this section, jurisdiction referring to the authority of the State is central. This kind of jurisdiction is referred to as prescriptive and enforcement jurisdiction. The meaning of the term jurisdiction when referring to the applicability of human rights treaties will be discussed in the next chapter. As will be seen, while these two types of jurisdiction are distinguished, the scope of the latter is at times influenced by the former. Thus, an understanding of jurisdiction referring to the authority of a State is relevant for the discussion of jurisdiction referring to the applicability of human rights treaties in the next chapter. The meaning of the term jurisdiction when referring to the authority of a court is not relevant to this study and is therefore not discussed.

1.1 Prescriptive and Enforcement Jurisdiction

Prescriptive jurisdiction refers to the State's authority to legislate and regulate. Enforcement jurisdiction relates to the State's authority to enforce such rules.[65] The authority to exercise jurisdiction understood in this way arises from the State's status as an independent sovereign.

[64] The differing meanings of jurisdiction are discussed in M. Milanovic, *Extraterritorial Application of Human Rights: Law, Principles, and Policy* (Oxford University Press 2011) 19–34.
[65] A.V. Lowe and C. Staker, 'Jurisdiction' in M. D Evans (ed), *International Law* (Oxford University Press 2010) 316.

At the same time, this authority is limited by the principle of sovereign equality, as a State is not free to exercise its jurisdiction there, where another State is entitled to do so.[66] Thus, in principle there must be a basis for jurisdiction, which generally takes the form of a connecting factor between the State and the subject of its jurisdiction.[67] Nevertheless, this does not mean that the jurisdiction of States is strictly delimited. Overlapping claims to jurisdiction are perfectly possible and common under international law.[68] Yet, the principal basis for jurisdiction is territorial. The ECtHR has phrased it comprehensibly:

> […] from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.[69]

It follows from this statement that a State's jurisdiction is not entirely limited to its own territory, but when it does exercise extraterritorial jurisdiction, this may be limited by another State's rights. Thus, the primary basis for jurisdiction is its territory, in which the State enjoys full jurisdiction, with the only exception of individuals or entities who enjoy immunity.[70] In this sense, a distinction must be made between the authority of a State to exercise prescriptive jurisdiction and its authority to exercise enforcement jurisdiction.

1.1.1 Prescriptive Jurisdiction

There are numerous bases upon which prescriptive jurisdiction may be based, which may result in the exercise of prescriptive jurisdiction which has effects in the territory of another State. The territoriality principle itself offers room for such expansion. Two notions of the principle are generally accepted as a legitimate basis for the exercise of extraterritorial jurisdiction. The first is the subjective territorial principle, which refers to situations in which the State applies its law to acts, which are commenced on its territory, but completed in the territory of another State. The objective territorial principle refers to the opposite situation, where an act is initiated in another State's territory, but completed within the State's territory.[71] As an example, one can think of a crime in which the culprit places a bomb on board of an airplane, which only explodes

[66] B.H. Oxman, 'Jurisdiction of States' in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press) para 1.
[67] ibid para 10.
[68] Milanovic, *Extraterritorial Application* (n 64) 25.
[69] *Banković and others v. Belgium* (2001) 5220/99 (European Court of Human Rights). While the decision in which the European Court for Human Rights made this statement has been criticized, this statement may be referred to as summarizing the general conception of prescriptive and enforcement jurisdiction in international law quite aptly. This conception is also put forward in literature. See Milanovic, who specifically refers to this statement and notes that there is little to dispute with in respect of this statement; Milanovic, *Extraterritorial Application* (n 64) 22; and Lowe and Staker (n 65) 319–320.
[70] C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2008) 126.
[71] Lowe and Staker (n 65) 321–322.

once the airplane has arrived in another country. Both the State in which the bomb was planted, as well as the State in which the bomb exploded could apply their criminal laws to the incident.[72] As long as a physical element of the act concerned takes place on the State's territory this is not problematic.

A more controversial expansion of the territorial principle is the effects doctrine, which refers to acts which take place outside the State's territory in their entirety, but nevertheless have effects on the State's territory.[73] The most well-known example of this is the implementation of antitrust law by the United States, which allowed American companies to sue non-American companies for their acts which took place entirely outside of United States territory but affected the US market.[74] It must be said, that this evoked strong criticism by other countries, demonstrating that this doctrine is disputed.

Another jurisdictional basis which allows the adoption of prescriptive jurisdiction with extraterritorial effects is the nationality principle.[75] It entails that a State may prescribe rules for the conduct of its nationals wherever they are. This is often the case in respect of a State's criminal laws and its tax rules.[76] Furthermore, it is accepted that a State may assert jurisdiction if its essential interests are at stake, even if the acts threatening such vital interests occur by non-nationals outside its territory. This is known as the protective principle. The extraterritorial planning of the circumvention of a State's immigration laws is accepted as a vital interest by some.[77] However, States rarely expressly rely on the protective principle.[78]

Both the protective and the objective territorial principle are of course of interest in the current context, as they provide a jurisdictional nexus upon which a State could base the exercise of extraterritorial prescriptive jurisdiction in relation to irregular migration even before the person has reached its territory. Thus, international law offers a range of jurisdictional bases which allow a State to legitimately adopt laws and regulations with extraterritorial effects.

1.1.2 Enforcement Jurisdiction

This does not mean, however, that a State is also free to enforce such rules extraterritorially. A State is not free to exercise its enforcement jurisdiction in respect of these rules, if this would require it to do so on another State's territory. This is only different if the other State consents to the exercise of enforcement jurisdiction.[79] Thus, the exercise of enforcement jurisdiction is much more limited than the exercise of prescriptive jurisdiction. The rationale behind this is the principle of equality of sovereign States.

[72] ibid.
[73] ibid 322–323.
[74] ibid.
[75] A. Mills, 'Rethinking Jurisdiction in International Law' (2014) 84(1) The British Yearbook of International Law 187 198 accessed 28 July 2015.
[76] B.H. Oxman (n 66) para 18.
[77] J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 462; Lowe and Staker (n 65) 326.
[78] Crawford, *Brownlie's Principles* (n 77) 462; A. T Gallagher and F. David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 219.
[79] Lowe and Staker (n 65) 335.

1.1.3 No Strict Hierarchy of Jurisdictional Bases

A State may thus assume prescriptive jurisdiction based on several jurisdictional principles. However, it may not enforce its laws so established if this would require enforcement action on the territory of another State. At the same time, the reasoning prohibiting extraterritorial enforcement jurisdiction also reflects on the exercise of extraterritorial prescriptive jurisdiction. While there are several bases upon which a State can exercise prescriptive jurisdiction, the fact that the main basis for jurisdiction is considered to be the territoriality principle is often reflected in a domestic presumption against the extraterritorial application of laws.[80] This presumption serves to avoid interference in the domestic affairs of other States and to avoid the likelihood of conflicts. Furthermore, it is a matter of comity and respect for the equal sovereign rights of other States not to assume extraterritorial prescriptive jurisdiction where this would interfere unreasonably with another State's sovereign rights.[81] This does not mean that there is an official hierarchy between the jurisdictional bases. Concurrent prescriptive jurisdiction is possible and occurs frequently. In practice, the rules of comity and respect for the sovereign rights of other States would usually result in primacy being accorded to the exercise of jurisdiction of the State that relies on the territorial principle by a State exercising jurisdiction on the basis of another principle and thereby sorting effect in another State's territory.

1.2 Rules and Policies with Extraterritorial Effects

Nevertheless, there are instances in which domestic laws and policies sort extraterritorial effects and in some cases they are even intended to have such effects. After all, international law does not prohibit the adoption of rules and regulations which have such extraterritorial effects.[82] While a State may not take enforcement action on the territory of another State, it may generally adopt laws on the basis of one of the jurisdictional principles, which have effects in another State's territory. An example for such rules are unilateral trade measures, by which one State prohibits its own nationals to trade with a particular country.[83] Such rules have clear and even intended effects in another State, but are nevertheless a legitimate exercise of jurisdiction based on the territorial principle. Unilateral trade measures may conflict with international trade rules laid down and developed within the World Trade Organization (WTO). However, while materially there may be a conflict with rules of international law, the exercise of jurisdiction itself is legitimate.

[80] Mills (n 75), 197.
[81] See *Asylum Case (Colombia/Peru)* (1950) ICJ Reports 266 275 (International Court of Justice); Annex E of the General Assembly, 'Report of the International Law Commission, Fifty-eighth Session (1 May - 9 June and 3 July - 11 August 2006): General Assembly Official Records, Sixty-first Session' (2006-2007) 531 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/636/20/PDF/G0663620.pdf?OpenElement> accessed 28 July 2015; R. Jennings and A. Watts, *Oppenheim's International Law Volume I: Peace* (9th edn, Oxford University Press 2008) 463–466; J. A Kämmerer, 'Comity' in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press) para 3.
[82] Jennings and Watts (n 81) 462.
[83] C. Ohler, 'Unilateral Trade Measures' in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press) paras 14–17.

Principally, a State is not restricted in the adoption of national laws and policies, even if these have extraterritorial effects.[84] This is also true for laws and policies in respect of migration.[85] Visa policies, which prohibit entry to the country if not in possession of a visa, are an exercise of territorial jurisdiction, but clearly have effects extraterritorially, because the nationals of other countries cannot travel to the country in question if they do not conform to the requirements to obtain a visa. These policies are even implemented extraterritorially through the use of liaison officers with the consent of the country in which they are stationed and by the use of carrier sanctions.[86] The latter are a very effective means to implement visa policies extraterritorially, without the need to seek the consent of the country affected by it. Given that the nationals of certain countries must fulfil stringent requirements to be eligible for a visa, they are virtually excluded from regular travel to Europe.[87] This, it appears, is a very tangible extraterritorial effect of policies implemented on the basis of the territorial principle. And it must be said that this effect is also desired. The fact that thousands of people subsequently chose to travel irregularly is obviously not intended, but could be considered an effect of such visa policies.

1.3 Conclusion on Prescriptive and Enforcement Jurisdiction

In sum, it may therefore be noted that the exercise of extraterritorial prescriptive jurisdiction is possible on a number of jurisdictional principles. Furthermore, there is no rule prohibiting States from implementing national rules or policies, which have extraterritorial effects. While rules of comity and respect for the sovereign rights of other States would generally limit excessive assertions of extraterritorial prescriptive jurisdiction, the possibility to do so is not precluded by international law. The enforcement of national laws on another State's territory is prohibited, unless the latter consents to enforcement action on its territory. The prohibition of regular travel to EU Member States for anyone not fulfilling the visa requirements set out, is an example of the exercise of prescriptive jurisdiction with clear and intended effects abroad. By relying on liaison officers and carrier sanctions, these rules are also implemented effectively abroad. The next section addresses jurisdiction on the high seas and the special character of this area under international law. The authority of States to prescribe and enforce rules differs at sea. This is relevant with respect to the issue at stake, migration by sea, which States are eager to regulate and suppress by, among other things, the exercise of enforcement jurisdiction at sea.

[84] Gallagher and David (n 78) 212.
[85] For a discussion of how rules on jurisdiction are used by States to circumvent obligations and responsibilities in the field of asylum law, see H. Battjes, 'Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses' in M. Kuijer and W. Werner (eds), *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law* (Netherlands Yearbook of International Law vol 47. T.M.C. Asser Press 2017).
[86] For a study on the use of carrier sanctions in immigration control, see S. Scholten, *The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control* (Immigration and Asylum Law and Policy in Europe vol 38, Brill/Nijhoff 2015).
[87] For an impression see www.passportindex.org and www.visamapper.com.

2 Jurisdiction at Sea

Jurisdiction at sea is regulated by specific international conventions, most notably the United Nations Convention on the Law of the Sea (UNCLOS).[88] It sets out the rules applicable to the delimitation of and jurisdiction within the different maritime zones. Principally, a distinction is made between a State's internal waters, its territorial sea, the contiguous zone, the high seas and the State's exclusive economic zone. The aim of this section is however not to provide a comprehensive overview of the various maritime zones including a discussion of the State's powers to take measures against seaborne migration in each of these zones. This has already been elaborately discussed by others, including reflections on how human rights law limits State agents when directly interacting with migrants and asylum seekers at sea.[89] Rather, the aim here is to briefly highlight the fundamentally different nature of the internal waters and the territorial sea, considered to be part of the State's territory, as compared to the high seas in terms of the exercise of prescriptive and enforcement jurisdiction by States. As the exclusive economic zone relates to the State's right to explore and exploit natural resources in the subsoil, the water and above, it is not relevant in the current context and will not be discussed.[90] The contiguous zone will only be discussed briefly. While the State's jurisdictional powers in the contiguous zone differ slightly from those on the high seas, a discussion thereof does not add to the understanding of the essentially different characters of the State's territory and the high seas. Before setting out on this discussion, the difference between a ship sailing a flag and a so-called flagless vessel must be introduced. This is the case, as the State's powers at sea are not only conditioned by the maritime zone in which it is acting, but also by the type of vessel it is confronting.

[88] United Nations Convention on the Law of the Sea 1982, UNCLOS (United Nations).
[89] For extensive contributions on this issue, see for example S. Rah, *Asylsuchende und Migranten auf See: Staatliche Rechten und Pflichten aus völkerrechtlicher Sicht* (Hamburg Studies on Maritime Affairs vol 15, Springer 2009); R. Barnes, 'The International Law of the Sea and Migration Control' in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Koninklijke Brill NV 2010); P. Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Publications on Ocean Development vol 66, Martinus Nijhoff Publishers 2010); T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge Studies in International and Comparative Law, University Press 2011) 100–157; S. Trevisanut, *Immigrazione Irregulare Via Mare: Diritto Internazionale e Diritto dell'Unione Europea* (Jovene 2012); Heijer, den, M. 'Europe and Extraterritorial Asylum' (2011) <https://openaccess.leidenuniv.nl/bitstream/handle/1887/16699/000-Heijer-07-03-2011.pdf?sequence=1> accessed 7 February 2014, in his contribution Den Heijer also touches on the extraterritorial reach of positive obligations, which may also be relevant in situations in which there is no direct contact between State agents and migrants; Gallagher and David (n 78) 403–489; For a brief discussion of this, see also L. Komp, 'The Duty to Assist Persons in Distress at Sea: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?' in V. Moreno-Lax and E. Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach.* Integrating Maritime Security with Human Rights (International Refugee Law Series vol 7. Brill/Nijhoff 2016) 223–229.
[90] See Art. 56 United Nations Convention on the Law of the Sea (n 88).

2.1 Nationality of Ships

A State may grant a ship its nationality.[91] This can be done by only one State at a time in respect of a particular ship, because a ship flying two or more flags is considered as a ship without nationality.[92] The common indicators by which a vessel shows which nationality it has, are the flying of the particular State flag, documentation on board and entry in a national register.[93] Those ships who do not fly the flag of a State are referred to as flagless vessels. These are generally small boats which do not qualify for registration for nationality within a State. It is on such unregistered vessels that most migrants and asylum seekers who do not have access to regular means of travel try to cross the Mediterranean.[94] It is problematic that, with respect to flagless vessels, no particular State bears the basic responsibilities normally borne by the flag State. Principally, these responsibilities touch upon social and administrative matters as well as safety at sea by requiring the flag State to make mandatory and control certain requirements regarding the vessel, its equipment, and crew as set out under Article 94 UNCLOS. Yet, also with respect to vessels with nationality, these basic precautionary rules are not always implemented and enforced.[95] The lack of supervision by the State of nationality and the use of stateless vessels form an obstacle for the implementation of all instruments obliging States to take measures to prevent the smuggling of persons.[96] With the distinction between vessels flying a flag and those who do not in mind, the next section discusses the State's powers in the various maritime zones set out by UNCLOS.

2.2 Internal Waters, Territorial Sea and Contiguous Zone

The breadth of the various zones is measured in reference to a baseline drawn along the State's coast.[97] Waters on the landward side of the baselines are internal waters.[98] The territorial sea extends 12 nautical miles seawards from the baseline.[99] These two maritime zones have in common that the State's sovereignty fully extends over these two zones.[100] In this sense, they can be equated to the land territory of a State.[101] With few exceptions, the State thus exercises

[91] Art. 91 ibid.
[92] Art. 92 (2) ibid.
[93] H. Meijers, *The Nationality of Ships* (Martinus Nijhoff Publishers 1967) 166.
[94] Frontex, 'Annual Risk Analysis 2012' 23–25 <http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2012.pdf> accessed 27 August 2013; and United Nations Office on Drugs and Crime (UNODC), 'Issue Paper: Smuggling of Migrants by Sea' (2011) 27–29 <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf> accessed 19 August 2013.
[95] Despite the fact that article 91 UNCLOS requires there to be a genuine link between the State granting nationality and the vessel, the purported link is generally rather meaningless and as a result, the jurisdiction and control over a vessel by the flag State are not always effective in practice. See R.-J. Dupuy and D. Vignes (eds), *A Handbook on the New Law of the Sea* (1, Martinus Nijhoff Publishers 1991) 404–405.
[96] Barnes, 'Law of the Sea and Migration Control' (n 89) 115.
[97] Arts. 5-7 United Nations Convention on the Law of the Sea (n 88).
[98] Art. 8 of the ibid.
[99] Art. 3 ibid.
[100] Art. 2 ibid.
[101] Mallia, *Migrant Smuggling* (n 89) 43, 47.

full prescriptive and enforcement jurisdiction within its internal waters and its territorial sea. With respect to the territorial sea, this power of the State is only limited by the right of innocent passage of vessels flying a flag.[102] Innocent passage refers to the right to traverse the territorial sea or to proceed to and from internal waters or port facilities. This must be done in a continuous and expeditious manner.[103] A State may stipulate further requirements a ship must live up to in order for the passage to be considered innocent in relation to a number of issues, among which the prevention of infringement of its immigration laws.[104] Should a vessel engage in the unloading of persons in violation of the State's immigration laws, its passage is not considered innocent and it may no longer benefit of the right of innocent passage.[105] While no ship enjoys a right of entry into the internal waters of a State, a presumption has developed to allow the entry of merchant vessels.[106] At this point it is important to note that flagless vessels do not enjoy the right of innocent passage, nor a presumption to be allowed entry into the internal waters of the State.[107] A State therefore always has the right to exercise full enforcement and prescriptive jurisdiction over flagless vessels within its internal waters and its territorial sea. With the exception of the right of innocent passage, it may also do so over vessels flying a flag. The nature of the territorial sea and the internal waters in terms of the State's jurisdiction, is therefore very much comparable to its land territory. This is fundamentally different on the high seas.

Before describing the nature of the high seas, the contiguous zone and the right of hot pursuit are introduced very briefly, as they extend the State's right to exercise prescriptive and enforcement jurisdiction in a limited way and under certain circumstances. The contiguous zone extends from the outer edge of the territorial sea to a maximum of 24 nautical miles from the baselines.[108] This zone is no longer considered part of the territory of the coastal State and not every coastal State has claimed a contiguous zone.[109] There has been some controversy regarding the rights the State enjoys in the contiguous zone.[110] For an understanding of the

[102] Art. 17 United Nations Convention on the Law of the Sea (n 88); See also F. Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (Printer Publishers 1990) 97.
[103] Art. 18 United Nations Convention on the Law of the Sea (n 88).
[104] Art. 21 (1) (h) ibid.
[105] Art. 19 (2) (g) ibid.
[106] There is some controversy whether a right of entry into ports exists under international law or not. Rothwell and Stephens argue that it does exist, basing their arguments on the arbitration between Saudi Arabia and the Arabian American Oil Company (Aramco) in 1958. See D.R. Rothwell and T. Stephens, *The International Law of the Sea* (Hart 2010) 55. Lowe argues that the Aramco arbitrators were mistaken and that no right of entry into ports exists. He concludes that a presumption of a right to enter has developed in respect of merchant vessels and that the coastal State should only close its ports if the peace, good order or security of the State so require. See A.V. Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 San Diego Law Review 597 accessed 14 December 2013. This opinion is also advanced by other scholars. See R. Barnes, 'Refugee Law at Sea' (2004) 53(1) International and Comparative Law Quarterly 47 57; Mallia, *Migrant Smuggling* (n 89) 44; and Y. Tanaka, *The International Law of the Sea* (University Press 2012) 80–81.
[107] This is only different if a vessel enters the internal waters of a State because it is in distress. In this case, all vessels are considered to enjoy immunity from prosecution for violating the coastal State´s laws when seeking shelter in its port. See Rothwell and Stephens (n 106) 56; Barnes, 'Law of the Sea and Migration Control' (n 89) 135.
[108] Art. 33 United Nations Convention on the Law of the Sea (n 88).
[109] R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd, Manchester University Press 1999) 136.
[110] These rights are laid down in art. 33 United Nations Convention on the Law of the Sea (n 88); For a discussion of the controversy regarding the interpretation of this article see T.T.B. Koh, 'The Territorial Sea, Contiguous

fundamental difference in nature in terms of jurisdiction between the various maritime zones, it is not necessary to discuss the State's rights in the contiguous zone in detail. At this point it is sufficient to note that within the contiguous zone the State may exercise the control necessary to prevent or punish the infringement of, amongst others, the State's immigration laws within its territory or territorial sea.[111] Should a vessel violate the State's laws in one of the maritime zones discussed in this paragraph, the doctrine of hot pursuit allows the State to chase the vessel, even beyond the limits of the contiguous zone.[112] Thereby, the contiguous zone and the doctrine of hot pursuit extend the State's power to exercise prescriptive and enforcement jurisdiction beyond the area considered part of its territory. The next paragraph will turn to a discussion of the high seas, showing that the State's jurisdiction in this area is generally much more limited.

2.3 High Seas

Most relevant in the current context is a dispute about the fundamental character of the seas, which was carried out in the 17th century. The central question was whether the sea should be open to every nation, or whether dominion of the sea by few, powerful nations should be given preference. Within the first scenario, the sea would be an area outside the jurisdiction of any State, while under the second, the sea would be considered part of the territory or zone of authority of the State powerful enough to establish its reign there over. Hugo Grotius is the most prominent advocate of the first position, setting out his argument in his book *Mare Liberum* of 1609. John Selden, on the other hand, advocated a *Mare Clausum* in his book of 1635.[113] Finally, it was the position advanced by Hugo Grotius that gained the upper hand and has come to shape the order of the oceans.[114] The high seas are therefore a quite particular geographic area under international law, as it is an area outside the jurisdiction of any State.
Article 89 of UNCLOS explicitly prohibits any attempt to appropriate part of the sea to itself by a State. In reference to the high seas therefore, instead of presuming the State's sovereignty and setting out the limits thereto, UNCLOS stipulates in which instances a State may exercise prescriptive and enforcement jurisdiction on the high seas. Most importantly, every State may exercise exclusive jurisdiction over vessels flying its flag.[115] All other States must respect the vessel's right to sail the seas, referred to as the freedom of navigation,[116] and may only exercise

Zone, Straits and Archipelagos Under the 1982 Convention on the Law of the Sea' (1987) 29(2) Malaya Law Review 163 174–176 accessed 19 December 2013; For an example of what Koh refers to as the majority interpretation of art. 33 UNCLOS, see S. Oda, 'The Concept of the Contiguous Zone' (1962) 11(1) International and Comparative Law Quarterly 131.
[111] Art. 33 United Nations Convention on the Law of the Sea (n 88).
[112] Art. 111 United Nations Convention on the Law of the Sea (n 88); For a detailed discussion of the doctrine see N. M Poulantzas, *The Right of Hot Pursuit in International Law* (2nd, Martinus Nijhoff Publishers 2002).
[113] J. Vervliet, 'General Introduction' in R. Feenstra (ed), *Hugo Grotius Mare Liberum 1609-2009* (Brill 2009) XIX–XXVII.
[114] M. Gidel, *Cours de Droit International Publique Rédigé d´Après la Sténographie et Avec l´Autorisation de M. Gidel I: Le Droit International Public des Espaces Maritimes en Temps de Paix* (Cours de Droit 1945-1946) 35–36.
[115] Art. 92 United Nations Convention on the Law of the Sea (n 88).
[116] Under article 87 UNCLOS a number of examples of the freedom of the high seas are listed. These include, inter alia, the freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to

jurisdiction over the vessel with the consent of the flag State or in few and explicitly enumerated exceptions.[117] Furthermore, every State enjoys the right to visit flagless vessels.[118] This is relevant in the current context, as, it has been pointed out before, most migrants and asylum seekers who do not have access to regular travel and try to cross the Mediterranean travel in such flagless vessels.[119] Flagless vessels do not enjoy freedom of navigation.[120] Controversies remain whether this implies that any State is free to subject flagless vessels on the high seas to its full jurisdiction, encompassing prescriptive and enforcement jurisdiction. Some judicial decisions point to the direction that the statelessness of a vessel is a sufficient basis for the assertion of full jurisdiction over it by any State.[121] This point of view has also been put forward in literature[122] and in a study by the European Commission[123]. Furthermore, this view seems to underlie Security Council resolution 2240 (2015), which exceptionally entitled States to inspect vessels flying the flag of another State suspected of transporting migrants and asylum seekers off the coast of Libya without the flag State's consent.[124] In respect of flagless vessels, no such exceptional entitlement was deemed necessary. Instead, States were called upon to inspect unflagged vessels suspected of transporting migrants and asylum seekers.[125]
Papastavridis on the other hand argues that a government vessel can only exercise jurisdiction over a flagless vessel in so far as this concerns the general duties of flag States.[126] His argument is based on the following reasoning. Article 110 UNCLOS grants every government vessel the right to visit another ship on a number of accounts, including if there is a suspicion that the vessel is engaged in piracy, slave trade, or unauthorized broadcasting and if the ship is flagless. The article, however, only provides for the authority of the government vessel to verify the ship's right to fly the flag it shows and to carry out an examination to this end on board the

construct artificial islands and other installations permitted under international law, freedom of fishing, and freedom of scientific research. See art. 87 (1) ibid.
[117] These exceptions are set out in arts. 99 - 110 UNCLOS, but are generally not relevant in respect to migration by sea, except for the right to visit flagless vessels, to be discussed below. It may be noted that Papastavridis also considers the prohibition of the transport of slaves laid down in art. 99 UNCLOS potentially relevant. For a discussion of this article in the context of migration by sea, see E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart 2013) 267–278.
[118] Art. 110 (1) (d) United Nations Convention on the Law of the Sea (n 88).
[119] Frontex (n 94) 23–25; and United Nations Office on Drugs and Crime (UNODC) (n 94) 27–29.
[120] Rah (n 89) 21.
[121] See *Naim Molvan v. Attorney General for Palestine (The "Aysa")* (1948) 81 LI L Rep 277 (Judicial Committee of the Privy Council of the United Kingdom); *United States v. Marino-Garcia* (1982) 679 F.2D 1373 [12] (United States Court of Appeals Eleventh Circuit); *United States v. Caicedo* (1995) 47 F.3d 370 [9–10] (United States Court of Appeals Ninth Circuit); and *Pamuk and others* (2001) 84 Rivista di Diritto Internazionale 1155 (Tribunale di Crotone (Italy)).
[122] See A. Watts, 'The Protection of Merchant Ships' (1957) 33 British Yearbook of International Law 52 67 accessed 4 August 2015; Meijers (n 93) 318–320; A. W Anderson, 'Jurisdiction over Stateless Vessels on the High Seas: an Appraisal under Domestic and International Law' (1982) 13(3) Journal of Maritime Law and Commerce 323 335–337 accessed 4 August 2015; and Heijer, den, M. (n 89) 238.
[123] Commission of the European Communities (COM), 'Commission Staff Working Document: Study on the International Law Instruments in Relation to Illegal Immigration by Sea' (15 May 2007) para 4 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/pdf/irregular-immigration/sec_2007_691_en.pdf> accessed 11 May 2017.
[124] United Nations Security Council, 'Resolution 2240' (2015) <http://unscr.com/en/resolutions/doc/2240> accessed 7 March 2020, clause 7.
[125] ibid, clause 5.
[126] Papastavridis, *Interception of Vessels* (n 117) 265–266.

ship.[127] With respect to the other grounds giving rise to the right to visit, UNCLOS provides for the right to take specific measures, but not with respect to the right to visit stateless vessels.[128] According to Papastavridis, this means that a State may not take measures against the boat solely because it is stateless. Rather, the State may only take those measures, which are necessary to perform the control task that the flag State would normally perform with respect to ships flying its flag regarding administrative, technical, and social matters as included in Article 94 UNCLOS.[129] Jurisdiction going beyond this could then only be established on the basis of a jurisdictional nexus.[130]

Yet, even if one adopts this more stringent view, the legitimate exercise of jurisdiction over stateless vessels on the high seas engaged in smuggling persons is surely not impossible. Such a jurisdictional nexus could be established on the basis of the protective principle or on the basis of the objective territoriality principle. After all, most likely the migrants will breach the State's immigration laws by trying to enter its territory. Depending on the route on which the boat travels, it may be quite obvious which State territory is the likely desired destination of the journey. Furthermore, the Protocol on the Smuggling of Migrants by Land, Air and Sea (Smuggling Protocol) potentially offers a basis for the assertion of jurisdiction over flagless vessels engaged in transporting migrants and asylum seekers.[131] Although the provision is not explicit, it suggests that measures can be taken against such vessels, by stating that if evidence of migrant smuggling is found, appropriate measures shall be taken in accordance with domestic and international law.[132] In any case, the Smuggling Protocol thereby encourages the extraterritorial application of a State's laws and possibly even their extraterritorial enforcement.[133] Although Article 15 paragraph 2 sub c (i) of the Convention against Transnational Organized Crime, to which the Smuggling Protocol is a supplement, refers to some additional criteria, it explicitly states that a State may assert jurisdiction over an act occurring outside its territory with a view to committing a serious crime on its territory.[134] Thereby, the convention explicitly encourages reliance on the protective principle. Therefore, it appears likely that a State will be able to legitimately assert full jurisdiction over a stateless vessel on the high seas engaged in the transport of migrants and asylum seekers. In the first place, a State is entitled to visit the vessel to verify it being flagless.[135] When it has done so, some hold that the State may assert jurisdiction by virtue of the vessel being flagless. Even if

[127] Art. 110 (2) United Nations Convention on the Law of the Sea (n 88).
[128] See art. 105 in respect to piracy and art. 109 in respect of unauthorized broadcasting, ibid.
[129] Papastavridis, *Interception of Vessels* (n 117) 265–266.
[130] Churchill and Lowe (n 109) 214; Papastavridis, *Interception of Vessels* (n 117) 265.
[131] Art. 8 (7) Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (n 23).
[132] Gallagher and David (n 78) 432.
[133] Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto 2004 (United Nations Office on Drugs and Crime) 386; Mallia, *Migrant Smuggling* (n 89) 121; Heijer, den, M. (n 89) 239.
[134] A 'serious crime' is defined as an offence punishable by a maximum deprivation of liberty of at least four years, see article 2 sub b United Nations Convention against Transnational Organized Crime 8 January 2001 (United Nations); See also den Heijer, who notes that since the definition of a serious crime refers to domestic laws, it will depend on domestic laws read together with the Convention whether the Convention offers a basis for the exercise of jurisdiction over acts taking place outside the State's territory, see Heijer, den, M. (n 89) 239.
[135] Art. 110 (1) (d) United Nations Convention on the Law of the Sea (n 88).

one adopts the position that a jurisdictional nexus is required, the State could rely on the objective territorial principle or on the protective principle to justify the establishment of jurisdiction if the boat appears to be carrying migrants and asylum seekers towards its territory. Thus, despite the fact that the high seas are generally declared an area beyond the jurisdiction of any State, the State has considerable leverage in designing and implementing immigration policies and policies aimed at mitigating migration by sea.

2.4 Conclusion on Jurisdiction at Sea

The discussion of the internal waters, the territorial sea and the high seas show that the former two are of a fundamentally different character than the latter. The internal waters and the territorial sea are considered to be part of the State's territory. The State is presumed to exercise sovereignty, or in other terms, full prescriptive and enforcement jurisdiction, there over. This is the opposite with respect to the high seas. Here, States are presumed not to have jurisdiction, with the exception of certain explicitly enumerated cases. Yet, the discussion of the right to exercise jurisdiction over stateless vessels has also shown that States do in fact have quite far reaching powers to design and implement immigration policies based on the exercise of jurisdiction over stateless vessels engaged in the transport of migrants and asylum seekers. Before continuing the discussion of the law of the sea by focusing on the State's duties at sea, the next section zooms in on the apparent paradox that the high seas are considered an area beyond the jurisdiction of any State, while States nevertheless have extensive options to act against flagless vessels engaged in the transport of migrants and asylum seekers.

3 Removal of a Territorial and National Link

The reason why possible claims to jurisdiction over flagless vessels arise is noteworthy in this respect, as it is precisely the fact that the high seas have been declared an area beyond the jurisdiction of any State. Thereby, the principal basis for jurisdiction, namely territoriality, is not at play in the case of stateless vessels on the high seas. This has two tangible consequences. In the first place, the prohibition to exercise enforcement jurisdiction on another State's territory does not present an obstacle in relation to the arrest of a stateless vessel on the high seas. If one adopts the point of view that any government vessel may subject a stateless vessel to its full jurisdiction, then the State in question may assert full jurisdiction over the vessel by virtue of it being stateless. Even if one adopts the more stringent view that a jurisdictional nexus must be established, this could be done on the basis of the protective principle or on the basis of the objective territorial principle.

If a State asserts jurisdiction over a stateless vessel on the basis of one of these jurisdictional principles, the fact that any territoriality or nationality link is not present works to its advantage. After all, the rules of comity, on the basis of which a State should refrain from exercising extraterritorial jurisdiction if it would thereby unreasonably interfere with another State's sovereign rights, would be no restriction in this respect. It is true that the persons on board in all likelihood have the nationality of a State, which could exercise concurrent jurisdiction on

the basis of the nationality principle. This might give rise to an act of diplomatic protection. In practice, however, this does not appear as a true obstacle in the context of migration by sea. In many cases, the nationality of the persons concerned is not immediately known. Furthermore, in such a situation the States of nationality often do not appear eager to assert diplomatic protection over these persons.[136] After all, many of the people found at sea have left their country of origin precisely because it is not willing or capable to provide its inhabitants with the security and stability needed to live in safety and with some reasonable perspective for the future. In the case of persons originating from failed States or from regions affected by persistent civil war, the case may be that there is no effective government to act on their behalf. Thus, factors which could normally limit a State's jurisdictional claims are not – or only to a much lesser extent – relevant in regard to stateless vessels on the high seas. The characterisation of the high seas as an area beyond the jurisdiction of any state has thus removed a presumption of jurisdiction by a particular state in the case of stateless vessels. This is even more so, where not even direct enforcement action on the high seas is at stake, but merely the extraterritorial effects of national policies, which may be partly implemented at sea. After all, no other State is directly affected by these extraterritorial effects, except for the States of nationalities of the migrants and asylum seekers. To a great extent the extraterritorial effects are only the concern of the migrants and asylum seekers travelling by sea, who can often not rely on the protection of their States of nationality and become confronted with an ever more perilous journey. This might be said to be the case for the rules and regulations adopted in order to make regular travel to Europe near impossible for persons of particular nationalities. The fact that this might result in a great number of persons travelling on the high seas on stateless vessels has not led to any noteworthy protest by the States of nationality. On a practical level, these extraterritorial effects therefore do not need to be considered a problem in the light of the rules of comity and respect for other States' territorial sovereignty. This is even more so in regard to policies which do not necessarily give rise to the need to travel irregularly in the first place, but which divert the routes at sea. This does not directly affect any other State at all.

In summary, it may thus be said that the opportunities to adopt policies with extraterritorial effects are widened with respect to migration by sea, due to the fact that a direct territoriality and nationality link is removed by the characterisation of the high seas as an area beyond the jurisdiction of any State. States have increasingly made use of these possibilities to exercise jurisdiction outside their State territory and this has arguably been encouraged further by the Smuggling Protocol and the Convention against Transnational Organized Crime. While the opportunities to exercise extraterritorial prescriptive and enforcement jurisdiction appear to widen due to the lack of a clear national or territorial link in the case of flagless vessels on the high seas, exactly the opposite appears to be true for the application of the rights laid down in the ECHR, as, principally, its application is limited to a State's territory. Before discussing the question whether the ECHR applies and may possibly prohibit the pursuance of policies which have extraterritorial effects resulting in increased peril for persons on the move, the next section discusses the search and rescue regime applicable at sea. This is the final aspect, which needs

[136] Barnes, 'Law of the Sea and Migration Control' (n 89) 131–132; Gallagher and David (n 78) 216.

to be discussed in order to provide the general legal context within which the extraterritorial effects of EU immigration policies on migrants and asylum seekers must be considered.

4 Search and Rescue

The search and rescue regime is not part of the regime stipulating the State's powers in various maritime zones discussed above. Instead, it obliges States to take measures to assist persons in distress at sea. As such, it codifies a long-standing maritime tradition based on considerations of humanity.[137] The duty to assist in distress is set out in Article 98 UNCLOS, Chapter V, Regulation 33 of the International Convention for the Safety of Life at Sea (SOLAS),[138] and Chapter 2, Article 10 of the International Convention on Salvage (Salvage Convention)[139]. It applies to all people in distress at sea, irrespective of their legal status.[140]

4.1 The Duty to Assist in Distress

The duty to assist consists of two elements. In the first place, it requires States to oblige ship masters to spontaneously render assistance to any person found in distress at sea, or to proceed to the assistance of such persons, if informed about the need to do so and if this can reasonably be expected of the master.[141] This duty is not geographically limited and applies wherever a master encounters another vessel in distress.[142] Furthermore, it applies equally to private vessels and to vessels on government service, entailing that a State vessel which has set out on a law enforcement mission, generally referred to as interception, is obliged to render assistance if the circumstances so require.

In the second place, the duty to assist requires coastal States to maintain an adequate and effective search and rescue service, which can coordinate and assist in rescue operations.[143] A framework for the provision of this service is set out by the International Convention on Maritime Search and Rescue (SAR Convention).[144] In order to provide search and rescue services, States are to establish search and rescue regions in agreement with neighbouring coastal States.[145] Furthermore, States must establish rescue coordination centres (RCC), which

[137] M. H Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (III, Kluwer Law International 1995) 171.
[138] International Convention for the Safety of Life at Sea 1974, SOLAS (International Maritime Organization).
[139] International Convention on Salvage 1989, Salvage Convention (International Maritime Organization).
[140] 2.1.10 of the Annex International Convention on Search and Rescue 1979, SAR Convention (International Maritime Organization), all references are to the revised SAR Convention, as lastly amended by resolution MSC.155(78), which was adopted in May 2004 and entered into force on 1 July 2006.
[141] Art. 98 (1) United Nations Convention on the Law of the Sea (n 88).
[142] Gallagher and David (n 78) 447.
[143] Art. 98 (2) United Nations Convention on the Law of the Sea (n 88); Chapter V Article 7 International Convention for the Safety of Life at Sea (n 138); Chapter 2 Article 2.1.1 of the Annex International Convention on Search and Rescue (n 140).
[144] International Convention on Search and Rescue (n 140).
[145] 2.1.4 and 2.1.5 of the Annex ibid.

are responsible for taking in and responding to distress calls.[146] These centres must be adequately equipped to respond to distress calls.[147] If necessary, States should coordinate the provision of search and rescue services with other States.[148] Upon rescue, persons must be disembarked at a 'place of safety', which is considered a place where the rescue operation is terminated and basic human needs can be met.[149] Contrary to the duty to assist resting on ship masters, the duty to provide SAR services is limited to the State's SAR zone. Nevertheless, if a RCC is alerted about a distress situation beyond its SAR zone, it must take immediate action and inform the responsible RCC.[150] Further guidance in this regard is offered by two sets of non-binding guidelines developed by the International Maritime Organization (IMO) and the International Civil Aviation Organization respectively.[151] These indicate that the State should also provide SAR services beyond its SAR zone, as the responsibility of the alerted RCC only ends once the responsible RCC has taken over.[152]

4.2 Practical Problems

In practice, the efficiency of search and rescue services suffers due to three problems in particular. It starts with the establishment of search and rescue zones. Despite the fact that SAR zones are not meant to have any implications with respect to sovereign claims to territory, their establishment has led to difficulties between neighbouring States.[153] Furthermore, not all States live up to their obligation to maintain an effective network of well-equipped RCC in order to actually receive and respond to distress calls.[154] The second issue resulting in problems is the question of when exactly the duty to assist is triggered. There is no common definition of the term 'distress', which may result in uncertainty whether action is required or not.[155] Finally, the issue most debated in regard to search and rescue is the question of disembarkation.[156] This is

[146] 2.3.1 of the Annex ibid.
[147] 2.6.1 of the Annex ibid.
[148] 3.1 of the Annex ibid.
[149] 1.3.2 and 3.1.9 of the Annex International Convention on Search and Rescue (n 140); Guidelines on the Treatment of Persons Rescued at Sea 20 May 2004 (International Maritime Organization) 6.12-6.18; United Nations High Commissioner for Refugees (UNHCR), 'Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea' (Final Version as discussed at the expert roundtable Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees, held in Lisbon, Portugal on 25-26 March, 2002 18 March 2002) 12, 23-24 <http://www.unhcr.org/3e5f35e94.html> accessed 24 January 2014.
[150] Art. 4.3 of the Annex International Convention on Search and Rescue (n 140)
[151] Guidelines on the Treatment of Persons Rescued at Sea (n 149); and the International Aeronautical and Maritime Search and Rescue Manual Vol. I-III 2008, IAMSAR (International Maritime Organization; International Civil Aviation Organization).
[152] Art. 3.6 International Aeronautical and Maritime Search and Rescue Manual - Mission co-ordination 2008, IAMSAR Vol II (International Maritime Organization; International Civil Aviation Organization).
[153] For an analysis of this problem see S. Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 The International Journal of Marine and Coastal Law 523.
[154] Gallagher and David (n 78) 461–462.
[155] For a discussion of both the wide and the narrow understanding of the term 'distress' and an argument for adopting the former, see Komp (n 89) 232–247.
[156] For a thorough discussion on this topic see J. Coppens and E. Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25(3) The International Journal of Marine and Coastal Law 377 accessed 27 January 2015; Trevisanut, 'Search and Rescue' (n 153); V. Moreno-Lax, 'The EU Regime on Interdiction, Search and Rescue, and Disembarkation: The Frontex Guidelines for Intervention at Sea' (2010) 25 The International

a result of the fact that the majority of the people in need of rescue in recent times, are migrants and asylum seekers. States are not keen to allow disembarkation on their territory, as this brings with it numerous obligations under human rights and refugee law. On several occasions, this has resulted in considerable delays for private vessels who had rescued migrants and asylum seekers and have subsequently not been allowed entry into port.[157] Despite ongoing debates of the matter within the IMO and on intergovernmental level, a satisfactory solution is outstanding. Thus, in some instances, the provision of search and rescue services fails. This has resulted in tragic incidents, such as the – as it has become known – 'Left-to-Die' boat, left adrift for 15 days despite being sighted by other vessels numerous times and resulting in the death of 63 persons.[158]

On the other hand, there are also examples of States engaging in serious efforts to provide extensive search and rescue services. The most noteworthy of these is the Italian operation Mare Nostrum. The operation deployed an extensive set of assets resulting in a substantial financial engagement on the side of Italy, and rescue missions were conducted right in front of the Libyan territorial sea.[159] Thereby, Italy may be considered to have done more than it would have strictly been obliged to under international law. Despite Italy's effort, however, Mare Nostrum could not prevent border deaths from occurring. Worse still, it has even been argued that Mare Nostrum has contributed to border deaths at sea, because it functioned as a pull factor and because travel conditions worsened, as smugglers and facilitators anticipated the presence of vessels deployed under Mare Nostrum close to the Libyan shore.[160] In this sense, it is important to consider that the mission was just one element within EU immigration policies, whose main

Journal of Marine and Coastal Law 621 accessed 10 September 2015; A. Huemer, 'Safety and Rescue at Sea: Contentious Legal Issues and Their Potential Detrimental Effect on Boat People' in V. Dzihic and T. Schmidinger (eds), *Looming Shadows: Migration and Integration at a Time of Upheaval.* European and American Perspectives (Center for Transatlantic Relations 2011); O'Brien, K. S. 'Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem' (2011) 3 Goettingen Journal of International Law 715; M. Di Filippo, 'Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea' [2013] Paix et Sécurité Internationales 53 <http://www.statewatch.org/news/2014/jan/psi-01-etudes-di-filippo-irregular-migration.pdf> accessed 24 February 2015; P. Mallia, 'The Challenges of Irregular Maritime Migration' (2013) <https://www.um.edu.mt/__data/assets/pdf_file/0006/228039/JM_Occasional_Paper_no._4_final_as_re-uploaded.pdf> accessed 10 September 2015
[157] For an account of some of such events, see Huemer (n 156) 52–59.
[158] T. Strik, 'Lives Lost in the Mediterranean Sea: Who is Responsible?' (5 April 2012) 7 <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18095&lang=en> accessed 4 February 2014; C. Heller and L. Pezzani, 'Forensic Oceanography: Report on the "Left-to-Die Boat"' (11 April 2012) <http://www.forensic-architecture.org/wp-content/uploads/2014/05/FO-report.pdf> accessed 13 March 2019; C. Heller and L. Pezzani, 'Forensic Oceanography: Addendum to the "Report on the Left-to-Die Boat"' (16 June 2013) <http://www.forensic-architecture.org/wp-content/uploads/2014/05/FO_report-addendum.pdf> accessed 13 March 2019; For further accounts of events resulting from the ambiguities of the SAR systemHuemer (n 156); For further accounts of events resulting from the ambiguities of the SAR system, see Huemer (n 156).
[159] For an overview of the assets deployed see Italian Ministry of Defence, 'Mare Nostrum Operation' <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx> accessed 26 January 2016; And for a description of the mode of operation see the section 'Mare Nostrum's Demise' in C. Heller and L. Pezzani, 'Death by Rescue' <https://deathbyrescue.org/report/narrative/> accessed 20 September 2016.
[160] For a discussion of the various critiques on Mare Nostrum, see Heller and Pezzani (n 159).

aim is to stop migrants and asylum seekers from reaching Europe and thus prevent these persons from travelling by regular and safe means.[161]

More recently, the efforts of States have turned away from providing SAR services as during the Mare Nostrum mission, and towards border control to prevent irregular crossings as such. After the end of Mare Nostrum, the decrease in SAR capacities was first attempted to be compensated by relying increasingly on private commercial vessels to perform rescue operations. These were neither equipped nor trained for the task. Subsequently, non-governmental organizations increasingly took the task of providing SAR services upon themselves.[162] The work of NGOs performing SAR services on a voluntary basis quickly attracted criticism by States, blaming such NGOs to function as a 'taxi' and accusing them of colluding with smugglers, resulting in efforts to introduce strict regulations for their activities.[163]

More recently, States have engaged in an effort to obstruct the work of NGOs providing SAR services on a voluntary basis. Again, the tactic has become to prohibit these NGO rescue vessels the entry into port or to hold their vessels in port while subjecting them to lengthy legal proceedings to prevent them from pursuing their mission. This has led to a number of NGOs having to terminate their mission and to numerous lengthy stand offs in which migrants had to remain aboard the rescue vessels.[164]

4.3 The SAR System Cannot Systematically End Border Deaths at Sea

In the context of this study, there is no need to discuss the shortcomings of the current SAR system further or to engage in a quest for solutions to these problems. The provision of SAR services, and more specifically the shortcomings therein, are relevant to the question whether the policies leading to ongoing border deaths at sea must be considered as a violation of the right to life under Article 2 ECHR. In the concluding chapter of this study, the failure to provide effective SAR services and in some cases even their obstruction is considered in the context of the measures a State is required to take to prevent the loss of life. As the example of Mare Nostrum shows, even the very extensive provision of SAR services going beyond what may be

[161] For a discussion of Mare Nostrum's dual role as contributing to the protection of fundamental rights, as well as to suppressing them, see P. Cuttita, 'Mare Nostrum, Humaitarianism and Human Rights Exclusion and Inclusion at the Mediterranean Humanitarian Border: Paper for the 22nd CES (Council for European Studies) conference "Contradictions: Envisioning European Futures" Paris, 8-10 July 2014' (2014) <https://core.ac.uk/download/pdf/43409484.pdf> accessed 21 February 2019.

[162] C. Heller and L. Pezzani, 'Ebbing and Flowing: The EU's Shifting Practices of (Non-)Assistance and Bordering in a Time of Crisis' (2016) 16–18 <file:///C:/Users/Lisa/Downloads/Heller_Pezzani_Ebbing_2016.pdf> accessed 20 September 2018; Amnesty International, 'A Perfect Storm: The Failure of European Policies in the Central Mediterranean' (6 July 2017) 16–18 <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF> accessed 13 March 2019.

[163] K. Curtis, 'The Tangled Politics of Search and Rescue Operations in the Mediterranean' (21 July 2017) <https://www.undispatch.com/tangled-politics-search-rescue-operations-mediterranean/> accessed 13 March 2019.

[164] By way of example, see The Irish Times, *Migrant ship docks in Malta after standoff with Italy: Mission Lifeline vessel carrying 230 rescuees had been refused entry to Italian ports* (2018); The Telegraph, *Italy orders seizure of migrant rescue ship Aquarius for 'illegal waste treatment'* (2018); P. Kingsley, *Stranded Migrants Are Finally Brought to Shore After 19 Days* (2019).

considered legally required has so far not been able to provide a systemic solution to the problem of persons dying at sea. This position has been put forward by the non-governmental organizations who jumped into the void left by the end of Mare Nostrum and took the task of providing SAR services greatly upon themselves.[165] This is due to the fact that SAR is centred on rescue once a situation endangering the lives of persons has already set in. SAR is not meant to prevent persons from getting into such dangerous situations in the first place. As mentioned above, it has developed from a maritime custom based on principles of humanity and on the understanding that any seafarer may once require assistance. It is not designed to provide a solution to the structural problem of a great number of migrants and asylum seekers travelling irregularly by sea. While extensive mechanisms have been developed stretching across borders and centred on ensuring the safety of regular travel, there has not been any effort in the recent past to do the same with respect to irregular travellers.[166] Thus, there is no merit in discussing the SAR system and its shortcomings as such in more detail in the current context, as it is not expected to provide a solution by and of itself to structurally occurring border deaths. Instead, State actions and inaction in regard to providing SAR services will be discussed in the light of the right to life under article 2 ECHR.

4.4 Conclusion on Search and Rescue

From the example of the 'Left-to-Die' boat it becomes clear that search and rescue is an essential element in preventing deaths at sea. The maintenance and provision of search and rescue services is of great importance in the immediate aftermath of a ship wreck. Yet, the example of Mare Nostrum demonstrates that search and rescue is not designed to and cannot tackle the systematic problem of persons embarking upon a life-threatening journey at sea, even if the legal framework or its implementation would be improved and intensified considerably. However, as long as irregular migration occurs, search and rescue services are an important means to prevent the loss of life in a particular incident. The position taken by States in regard to SAR services will thus be discussed in the context of the duty to prevent the loss of life under article 2 ECHR.

5 Conclusion on the Legal Context

This chapter has discussed the meaning of the term jurisdiction in reference to the State's authority to legislate and to enforce these rules, it has outlined the relevant maritime zones and the extent of the State's jurisdiction therein and it has discussed the search and rescue system installed under international law. In the first place, it has been seen that States have numerous options to take measures to prevent the unauthorized arrival of migrants and asylum seekers at

[165] Heller and Pezzani (n 162) 19.

[166] See Spijkerboer who compares the regimes of passenger safety in place for regular air and sea travel with the regulations in place for irregular travel by sea. See T. Spijkerboer, 'Wasted Lives. Borders and the Right to Life of People Crossing Them' (2017) 86 Nordic Journal of International Law 1 accessed 4 May 2018.

sea. This is even the case on the high seas, despite its general characterization as an area beyond the jurisdiction of any State. It has been pointed out, that this characteristic of the high seas may even be considered to extend the possibilities of the State to design and implement policies with extraterritorial effects. Notwithstanding these possibilities, EU Member States have so far not managed to prevent migration by sea in its entirety. People have kept coming regardless of the various measures taken by States. In this context, also search and rescue measures have not proven an effective tool to prevent border deaths at sea. It must be noted therefore, that the legal framework set out above has not managed to prevent border deaths. To the contrary, the hypothesis from which this study departs assumes that the interplay of policies aimed to prevent irregular migration to Europe has contributed to the great number of persons dying at sea. Therefore, the remainder of this study will be dedicated to answering the question whether a legislative and administrative framework contributing in varying degrees, directly or indirectly, to the loss of life violates the right to life enshrined in the ECHR. The requirements set out for the legislative and administrative framework of a State under the right to life are discussed below. Before an analysis of whether such policies materially violate the right to life can be conducted, the question, whether the ECHR applies to such extraterritorial effects of a State's policies at all, must be answered. The next chapter thus discusses the scope of application of the ECHR as set out in Article 1 of the Convention with a view to answering the question whether the wide extent of possibilities to design and implement policies with extraterritorial effects is accompanied by an equally wide scope of protection under the ECHR.

Chapter 3

Application of the ECHR to the Extraterritorial Effects of Immigration Policies

This chapter focuses on the first substantial research question: does the ECHR apply to border deaths at sea? It must be noted that the question at hand is not whether a State is responsible for a human rights violation, but rather whether the human rights obligations set out in the ECHR apply to State action in a given situation. As has been demonstrated above, a State may prescribe and implement rules which have effects outside its own territory. The opportunity to do so appears even wider, if the effects of such policies affect stateless vessels on the high seas. The central question therefore is whether a State is also bound to guarantee the rights set out in the ECHR when establishing such rules and enforcing them and, even more important in the current context, whether this obligation also covers the extraterritorial effects of such measures.

With respect to the applicability of the Convention, several aspects are relevant. The place where the Convention is considered applicable is not only of concern, but also the time period in which it is considered applicable, as well as whether it is considered applicable to a particular individual. The first aspect is referred to as jurisdiction *ratione loci*, the second as jurisdiction *ratione temporis* and the last as jurisdiction *ratione personae*. In this chapter, only the first aspect is considered elaborately, as this is the central issue at stake with respect to the question whether the Convention applies extraterritorially. The two others, *ratione temporis* and *ratione personae*, apply equally whether the facts at hand take place within the territory of the State or beyond it.

On a general note, it must be said that, even if the ECHR is not found to be applicable to border deaths as an extraterritorial effect of immigration policies, other human rights obligations may be applicable and provide a basis for holding the State responsible, albeit not before the ECtHR. This study, however, focuses exclusively on the question whether the ECHR can be considered applicable to border deaths considered as an extraterritorial effect of State's immigration policies. In order to answer this question, this chapter begins by undertaking a review of literature relating to the extraterritorial scope of application of the Convention. In a second step, a review of a number of cases considered of specific relevance to the current research is done.

1 The 'Effective Control' Concept

In most cases, a human rights treaty stipulates that the State must guarantee the rights incorporated in the treaty to people within its jurisdiction.[167] This is also the case for Article 1 ECHR, which reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'[168] Generally speaking, also in relation to human rights obligations flowing from other sources than treaty, such as from custom, these obligations apply to all actions which fall within a State's

[167] See for example art. 1 of the European Convention on Human Rights and Fundamental Freedoms 1950, ECHR (Council of Europe); art. 1 of the American Convention on Human Rights 1969, ACHR (Organization of American States); art. 3 (1) of the Arab Charter on Human Rights 2004 (League of Arab States); art. 2 (1) of the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment 1984, CAT (United Nations) states that a State Party must prevent acts of torture in any territory under its jurisdiction.
[168] Art. 1 European Convention on Human Rights and Fundamental Freedoms (n 167).

jurisdiction.[169] In the majority of cases, the exercise of the State's jurisdiction in this sense, giving rise to the application of human rights obligations, is undisputed within the territory of a State. However, human rights may also apply outside the State's territory. It is with respect to this extraterritorial application of human rights that the doctrine of effective control has been developed, as will be elaborated on below. As has been pointed out in the previous chapter, the term jurisdiction in relation to the application of human rights treaties is distinguished from the term jurisdiction relating to the authority of a State. Used in reference to the scope of application of human rights treaties, the term jurisdiction refers to something else than prescriptive or enforcement jurisdiction. Jurisdiction in the context of the application of human rights treaties does not necessarily overlap with the exercise of prescriptive and enforcement jurisdiction that have been the subject of the previous chapter. The latter establish whether a State may lawfully claim to regulate certain conduct. Some authors therefore conclude that jurisdiction referred to in the human rights context differs from the public international law concept of jurisdiction.[170] Others take the view that while having a specific meaning in the human rights context, the term remains influenced by and part of the public international law conception of jurisdiction.[171] As the analysis of cases in this chapter will show, the Court at times applies an understanding of jurisdiction delimiting the scope of application of the Convention that is clearly informed by the public international law concept of jurisdiction. To avoid confusion regarding the terminology employed, this chapter refers to the term 'jurisdiction' in the human rights context, unless specifically mentioned otherwise by using the term prescriptive, enforcement or *de jure* jurisdiction. After a brief note on methodology, this chapter will explore the understanding of the term jurisdiction in the specific context of the extraterritorial application of the ECHR.

1.1 Methodology

The study of the way in which the term jurisdiction in the context of the application of the ECHR is generally understood has been done on the basis of a review of doctrine. Given the vast extent of available literature on the subject, the study does not aim to provide a comprehensive literature review. Instead, the generally held views have been distilled from a study of selected doctrine. In the first place, selection occurred randomly. To ensure no relevant contributions were overlooked, the random selection was completed by a structured search.[172] All contributions dating from before the case *Banković and others v. Belgium*[173] in 2001 were removed, as this is considered a watershed decision, meaning that contributions from before

[169] Gammeltoft-Hansen, *Access to Asylum* (n 89) 100; Milanovic, *Extraterritorial Application* (n 64) 19–20.
[170] See for example M. Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 Netherlands International Law Review 349-387 364 accessed 22 August 2017; and Heijer, den, M. (n 89) 25.
[171] See for example Gammeltoft-Hansen, *Access to Asylum* (n 89) 112.
[172] The search was conducted on 29th January 2018 in the following way. The catalogue of the Peace Palace Library (https://www.peacepalacelibrary.nl/), being the most complete catalogue accessible to the author, was searched using the following terms: "extraterritorial + human + rights", resulting in 118 hits, "extraterritoriality + human + rights", resulting in 18 hits, and "extraterritorial + asylum", resulting in 16 hits. From the results, articles were selected for study on the basis of the apparent relevance based on their title.
[173] *Banković and others v. Belgium* (n 69).

this judgment are not taken to reflect a contemporary understanding of the doctrine.[174] From the remaining articles, those discussing the jurisprudence of the ECtHR relating to the extraterritorial application of the Convention in general terms or in relation to migration were selected for study. With a few exceptions, only one contribution by each author was studied. On the basis of this selection, the following analysis of the general understanding of the extraterritorial application of the ECHR has been undertaken.

1.2 The Doctrine of Effective Control

The question regarding the existence and contents of a concept of extraterritorial application of the ECHR can best be addressed by stating the overall conclusion first. When reviewing the literature on the topic it becomes clear that there is consensus about two notions. The first being that in most cases, jurisdiction as mentioned in Article 1 ECHR, can be established if a State exercises effective control over territory or over persons.[175] The second point on which authors

[174] Gallagher and David (n 78) 259; and M. Gibney, *International Human Rights Law: Returning to Universal Principles* (2nd edn, Rowman & Littlefield 2016) 82; For an example of authors who identify a move away from the Banković case, see R. Lawson, 'Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights' in F. Coomans and M. T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Maastricht Series in Human Rights vol 2. Intersentia 2004) 116–120; Gondek, 'Territorial Focus in the Age of Globalization?' (n 170) 368-369; E. Papastavridis, 'Extraterritorial Immigration Control: The Responsibility of States for Human Rights Violations' (2011) 6 Annuaire International des Droits de l'Homme 315 323 accessed 2 May 2018; Heijer, den, M. and R. Lawson, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' in M. Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (University Press 2013) 177; N. Butha, 'The Frontiers of Extraterritoriality - Human Rights Law as Global Law' in N. Butha (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (The Collected Courses of the Academy of European Law XXIV/1. University Press 2016) 11; T. Treves and C. Pitea, 'Piracy, International Law and Human Rights' in N. Butha (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (The Collected Courses of the Academy of European Law XXIV/1. University Press 2016) 103–104; Some have organized their analsyis of the Court's case law around the Banković case, see chapter IV of M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 121–228; and the second chapter of K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Graduate Intsitute of International and Development Studies vol 11, Martinus Nijhoff Publishers 2012) 93–253.

[175] See for example G. Ress, 'State Responsibility for Extraterritorial Human Rights Violations: The Case of Banković' (2003) 6(1) Zeitschrift für Europarechtliche Studien 73 86 accessed 2 May 2018; Gondek, 'Territorial Focus in the Age of Globalization?' (n 170) 354-355; A. Uzun, 'Extraterritorial Application of the European Convention on Human Rights: An Overview of the Strasbourg Case-law' in Société Internationale de Droit Militaire et de Droit de la Guerre (ed), *La Règle de Droit Dans Les Opérations de la Paix: Dix-septième Congrès International, Scheveningen (Pays-Bas), 16-21 Mai 2006* (Recueils de la Société Internationale de Droit Militaire et de Droit de la Guerre vol 17. Société Internationale de Droit Militaire et de Droit de la Guerre) 465–466; T. Gammeltoft-Hansen, 'The Refugee, the Sovereign, and the Sea: European Union Interdiction Policies' in R. Adler-Nissen and T. Gammeltoft-Hansen (eds), *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (Governance, Security and Development. Palgrave MacMillan 2008) 178; Gondek, *The Reach of Human Rights in a Globalising World* (n 174) 226–227; M. Nowak, 'Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective' in M. Gibney and S. Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (Pennsylvania studies in human rights. University of Pennsylvania Press 2010) 12–14; Milanovic, *Extraterritorial Application* (n 64) 40; Heijer, den, M. (n 89) 35; Gammeltoft-Hansen, *Access to Asylum* (n 89) 109; F. Hampson, 'The Scope of the Extra-territorial Applicability of International Human Rights Law' in G. Gilbert, F. Hampson and C. Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge 2011) 178; R. Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in S. Scott and Rodley, N. Sir (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 641 and 644; S. Ghandi, 'Al-Skeini and the Extraterritorial Application of

generally concur, is the fact that the jurisprudence of the ECtHR on the issue is not coherent, but conflicting in many ways.[176]

1.2.1 The Core: Effective Control over Territory or Persons

In relation to the principal question of when a State is considered to exercise extraterritorial jurisdiction, a number of cases concerning the Turkish occupation of Northern Cyprus are often referred to as particularly relevant.[177] In these cases the Court, or the no longer active European Commission on Human Rights, most prominently set out what has developed into the core of the doctrine of effective control. It is around this core, that the consensus that jurisdiction refers to effective control over territory or persons evolves. Given the importance attached to these cases, the relevant paragraphs will be cited here. In the decision on *Cyprus v. Turkey*[178] of 1975, the Commission set out the following in reference to earlier case law:

> In Art. 1 of the Convention, the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone "within their jurisdiction" (in the French

the European Convention on Human Rights' in A. Burrows, D. Johnston and R. Zimmermann (eds), *Judge and Jurist: Essays in memory of Lord Rodger of Earlsferry* (University Press 2013) 577–581; A. Liguori, 'Some Observations on the Legal Responsibility of States and International Organizations in the Extraterritorial Processing of Asylum Claims' (2015) 25 The Italian Yearbook of International Law 135 155–157 accessed 2 May 2018; Butha (n 174) 10; For a differen view, see S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857 859–860 accessed 22 August 2017; M. Milanovic, 'Extraterritoriality and Human Rights: Prospects and Challenges' in T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge Human Rights series. Routledge 2017) 55.

[176] M. O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic'' in F. Coomans and M. T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Maastricht Series in Human Rights vol 2. Intersentia 2004) 128; G. S Goodwin-Gill, 'The Extraterritorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction' in L. Boisson de Chazournes and M. G Kohen (eds), *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowland-Debbas = Le Droit International et la Quête de sa Mise en Oeuvre* (Brill 2010) 298–299; Papastavridis points out several inconsistencies in the Court's case law, see Papastavridis, 'Extraterritorial Immigration Control' (n 174) 323–329; Milanovic, *Extraterritorial Application* (n 64) 265; Heijer, den, M. (n 89) 49; Da Costa (n 174) 223; Heijer, den, M. and Lawson (n 174) 188; V. Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36(1) Michigan Journal of International Law 129 141 accessed 22 August 2017; Gallagher and David (n 78) 258; Butha (n 174) 10–11; Gibney (n 174) 82; Milanovic, 'Extraterritoriality and Human Rights' (n 175) 54; In this regard, it may be noted that the Steering Committee for Human Rights, that reviewed the Court's functioning with a view to ensuring the authority and effectiveness of the Court in the future, identified the need to ensure the consistency of the Court's case law as an important element in doing so. See Steering Committee on Human Rights (CDDH), 'The longer-term future of the system of the European Convention on Human Rights' (11 December 2015) 61–62 <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> accessed 20 June 2019; As a result the Drafting Group II on the Follow-Up to the CDDH Report on the Longer-Term Future of the Convention (also referred to as DH-SYSC-II) has been given the task to prepare a follow up report covering, among other things, the issue of the extraterritorial application of the Convention. See Steering Committee on Human Rights (CDDH), 'Outline of the Future Report of the CDDH on the Place of the Convention in the European and International Legal Order' (31 July 2017) <https://rm.coe.int/draft-outline/168073ebd3> accessed 20 June 2019.

[177] See for example Milanovic, *Extraterritorial Application* (n 64) 128–129; and Da Costa (n 174) 105–108.

[178] *Cyprus v. Turkey* (1975) 6780/74 and 6950/75 (European Commission of Human Rights).

> text: "relevant de leur juridiction"). The Commission finds that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad. The Commission refers in this respect to its decision on the admissibility of Application No. 1611/62-*X. v/Federal Republic of Germany*-Yearbook of the European Convention on Human Rights, Vol. 8, pp. 158-169 (at pp. 168-169).
>
> The Commission further observes that nationals of a State, including registered ships and aircrafts, are partly within its jurisdiction wherever they may be, and that authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.[179]

When applying these principles to the facts of the case, the Commission concluded:

> It follows that these armed forces are authorised agents of Turkey and that they bring any other persons or property in Cyprus "within the jurisdiction" of Turkey, in the sense of Art. 1 of the Convention, to the extent that they exercise control over such persons or property.[180]

While the Commission also referred to control over property in its reasoning, it was only control over persons that was developed further. In the case of *Loizidou v. Turkey* that followed, an alternative basis for assuming extraterritorial application of the Convention, control over territory, was formulated:

> In this respect the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention (see the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, pp. 35-36, para. 91; the *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69 and 70, and the *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, p. 34, para. 103). In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the *Drozd and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 29, para. 91).

[179] ibid 136, underlined by the author.
[180] ibid 137, underlined by the author.

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[181]

As has been mentioned above, these references to control over persons or over territory, are now widely accepted as the principal basis for establishing extraterritorial jurisdiction for the purpose of Article 1 ECHR. While the jurisprudence of the Court on this issue has not developed into a coherent concept, a general line of development has been identified by a number of authors. Generally, the jurisprudence on the issue is divided into the early cases, mostly decided by the Commission, in which a relatively wide conception of extraterritorial application was pursued.[182] The next phase of the development of the issue is generally considered to be incorporated in a single Grand Chamber decision: *Banković and others v. Belgium*.[183] The case concerned the bombing of a radio station in Belgrade by a NATO forces aircraft in the context of the campaign of the allied NATO forces against the Federal Republic of Yugoslavia. Sixteen people were killed in the attack. The relatives of some of the deceased brought a case before the ECtHR, holding that the attack constituted a violation of the right to life.[184] In this case, the Court posited the extraterritorial application of the Convention as very exceptional and appeared to lay down very strict criteria governing the extraterritorial application of the Convention. Among these were the requirement that the State in question exercises all or some public powers normally to be exercised by the government, that a cause and effect reasoning as suggested by the applicants was prohibited, as this would require dividing and tailoring the Convention, which was impossible in the view of the Court, and finally that the Convention was in any case not operable beyond the Member States' territory, the so called *espace juridique*.[185] While this decision was and still is understood as a leading decision on the topic, various academics soon described how the Court appeared to retract from its overly strict interpretation in *Banković* in judgments that followed shortly after.[186] The best example for this development might be Gondek and Da Costa, who divide their analysis of the Court's case law along these lines: pre *Banković, Banković,* post *Banković*.[187]

In particular, the issue of whether or not the concept of the *espace juridique* of the Convention as the Court formulated in *Banković* poses a strict limit to the Convention's scope of application

[181] *Loizidou v. Turkey* (1995) 15318/89 [62] (European Court of Human Rights), underlined by the author.
[182] Heijer, den, M. (n 89) 60; Heijer, den, M. and Lawson (n 174) 172–173.
[183] *Banković and others v. Belgium* (n 69).
[184] ibid 9-11, 28.
[185] ibid 71, 75, 80.
[186] For those authors explicitly considering Banković to be the most authoritative case on the issue until this day, see Gallagher and David (n 78) 259; and Gibney (n 174) 82; For an example of authors who identify a move away from the Banković case, see Lawson (n 174) 116–120; Gondek, 'Territorial Focus in the Age of Globalization?' (n 170) 368-369; Papastavridis, 'Extraterritorial Immigration Control' (n 174) 323; Heijer, den, M. and Lawson (n 174) 177; Butha (n 174) 11; Treves and Pitea (n 174) 103–104.
[187] Some have organized their analsyis of the Court's case law around the Banković case, see chapter IV of Gondek, *The Reach of Human Rights in a Globalising World* (n 174) 121–228; and the second chapter of Da Costa (n 174) 93–253.

gave rise to discussion. If the concept did indeed pose an absolute restriction, this would *a priori* exclude the applicability of the Convention to extraterritorial effects occurring outside this geographic space, on the high seas for example. However, there is general consensus in literature that the concept of an *espace juridique* is not to be considered a strict limitation to the Convention's scope of application.[188] This conclusion is drawn by reference to numerous judgments in which the Court did hold the Convention to be applicable outside the so called *espace juridique*. Yet, Nigro takes a more nuanced position. While she does not actually use the term *espace juridique*, the concept underlays her argument. According to her, the Court applies a more stringent test of applicability in third States outside the Convention's *espace juridique*, than if the facts occur within the territory of another member State and thus within the Convention's *espace juridique*.[189] In the judgment of *Al-Skeini and others v. the United Kingdom*, the Court explicitly noted that jurisdiction under Article 1 could be exercised outside the territory of the Member States.[190] Hence, it is clear that the *espace juridique* is not an absolute limit to the extraterritorial scope of application of the Convention.

1.2.2 Alternative Grounds for Extraterritorial Application?

Taking another look at the reasoning the Court formulated in *Loizidou* cited above, the Court appeared to formulate two other sets of situations giving rise to extraterritorial jurisdiction, being extradition cases and the acts of State authorities, which produce effects abroad. Yet, it is only the second category, situations producing effects abroad, which can truly be considered relevant under Article 1 ECHR. Despite the fact that the Court addressed the most well-known extradition judgment, *Soering v. United Kingdom*,[191] in the context of an inquiry under Article 1 ECHR,[192] the judgment is not of great interest with respect to the geographic scope of application of the Convention. The case concerned a German national detained in the UK and pending extradition to the US where he would be tried for murder.[193] If convicted, Soering was likely to face the death penalty. According to the *Soering* judgment, the treatment of prisoners on death row in Virginia amounted to inhuman and degrading treatment and the Court followed him in this proposition. He therefore argued that the UK could not extradite him to the United States as it would thereby itself breach the prohibition of inhuman and degrading treatment

[188] Gondek, 'Territorial Focus in the Age of Globalization?' (n 170) 375-377; Uzun (n 175) 464; Gondek, *The Reach of Human Rights in a Globalising World* (n 174) 227–228; Referring to a number of cases, Da Costa concludes that the espace juridique is not relevant. Only in relation to the case of Andreou v. Turkey does she note that the Court appears to refer back to this concept. See Da Costa (n 174) 164, 178, 184, 187, 188, 210; and Treves and Pitea (n 174) 104.
[189] R. Nigro, 'Notion of Jurisdiction in Article 1: Future Scenarios for the Extra-Territorial Application of the European Convention on Human Rights' (2010) 20 Italian Yearbook of International Law 11 17–18 accessed 2 May 2018.
[190] *Al-Skeini and others v. The United Kingdom* (2011) 55721/07 [142] (European Court of Human Rights).
[191] *Soering v. the United Kingdom* (1989) 14038/88 (European Court of Human Rights).
[192] As do V. Mantouvalou, 'Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality' (2005) 9(2) The International Journal of Human Rights 147 149 accessed 25 August 2015; Gondek, 'Territorial Focus in the Age of Globalization?' (n 170) 355; and N. Mole, 'Issa v Turkey: Delineating the Extra-territorial Effect of the European Convention on Human Rights?' (2005) 1 European Human Rights Law Review 86 86 accessed 2 May 2018.
[193] *Soering v. the UK* (n 191).

enshrined in Article 3 ECHR. While the Court did indeed rule that this would be the case, this does not imply that the Court considered the United Kingdom to exercise extraterritorial jurisdiction as the applicant was located within the territory of the UK. As Da Costa points out, the applicants in the case of *Banković* tried to make a comparison to the case of *Soering,* to support their argument that they came within the jurisdiction of Belgium.[194] The Court, however, was not convinced stating that the decisive difference between the two cases was that Soering was within the territory of the UK and therefore did not concern the exercise of extraterritorial jurisdiction by the State.[195] Similarly, Goodwin-Gill notes that the *Soering* judgment is telling in respect of the foreseeability of harm rather than with respect to extraterritorial jurisdiction.[196] In that sense, the *Soering* judgment is relevant, as also foreseeable harm that will be suffered outside the State's territory may entail obligations for the State. Regarding the extraterritorial applicability of the Convention under Article 1 ECHR its relevance is limited, however, as Soering was clearly situated within the UK's territory.

The second category of situations indicated by the Court, namely situations producing effects abroad, has not developed into a separate ground for application of jurisdiction. Instead, such situations have resulted in uncertainty as to whether mere extraterritorial effects give rise to jurisdiction. Some cases concerning such situations have been brought before the Court. Yet, the Court has not developed a coherent line of case law in this respect. Sometimes, the Court has engaged in a cause and effect reasoning, while ruling such reasoning impermissible in other cases. The cases which are relevant with respect to this discussion are discussed in more detail in the second part of this chapter, as they may be considered to diverge from the general mantra that extraterritorial jurisdiction is primarily based on effective control.

1.2.3 What Kind of Control?

As may have already become apparent from the citations above, a central element of the doctrine of extraterritorial jurisdiction is the element of control. Yet, the Court also speaks of authority. The question that needs to be posed is whether jurisdiction can be based purely on factual control exercised over territory or over persons, or whether the State must also, or alternatively, exercise some form of authority to conclude that it exercises extraterritorial jurisdiction. While the reference to authority keeps returning in the Court's case law in *Banković* and also in later cases,[197] Besson is one of the few authors who considers that jurisdiction cannot be established purely on the basis of the exercise of factual control.[198] She argues that jurisdiction also contains a normative element relating to the State's claim to be entitled to act and the corresponding appeal for compliance.[199] Yet, by far the majority of

[194] Da Costa (n 174) 145.
[195] *Banković and others v. Belgium* (n 69) [68].
[196] Goodwin-Gill (n 176) 302.
[197] *Banković and others v. Belgium* (n 69) [73], in which the Court refers to the exercise of jurisdiction abroad through consular or diplomatic agents, or on crafts and vessels flying the flag of the State; This passage was repeated in *Medvedyev and others v. France* (2010) 3394/03 [65] (European Court of Human Rights).
[198] Besson (n 175), 859.
[199] ibid 865.

authors conclude that factual control is the most essential part of establishing jurisdiction.[200] The most explicit in this respect might be Milanovic, who considers the Court is mistaken when referring to elements other than the exercise of factual control when establishing jurisdiction.[201] In relation to the judgment of *Medvedyev and others v. France*[202], for example, Milanovic criticizes the relevance the Court attaches to the fact that a State exercises prescriptive jurisdiction over vessels flying its flag in the context of Article 1 jurisdiction.[203] He argues that the question only turns on the facts, e.g. whether the State exercises control, and that the nationality of the ship or aircraft is not relevant when determining whether the Convention applies.[204] The exercise of such factual control is also referred to as *de facto* jurisdiction, as opposed to *de jure* jurisdiction, referring to the exercise of prescriptive or enforcement jurisdiction not necessarily amounting to effective control. In reference to the *Medvedyev* judgment, Milanovic is right when holding that *de jure* jurisdiction exercised by virtue of the nationality of the ship was not relevant for determining that France exercised jurisdiction for the purpose of Article 1. In this case, a French commando team boarded a Cambodian flagged ship and confined the crew to their cabins on their own ship, which they towed to France during a thirteen-day journey.[205] Here, the flag of the vessel on which the crew was confined would have only pointed to the jurisdiction of a State not member to the Convention, Cambodia. Nevertheless, the Court considered that France exercised jurisdiction over the crew, because it exercised full and effective *de facto* control.[206] Considerations regarding which State exercised prescriptive jurisdiction over the vessel were not relevant in this case. Thus, Milanovic considers the exercise of effective control the only, or at least the most essential, element when determining whether a State exercises extraterritorial jurisdiction. He further takes the ruling in the case of *Al-Skeini and others v. United Kingdom* as a confirmation of his reading.[207] In this judgment the Court, referring to a number of other cases among which the case of *Medvedyev*, stated that the exercise of physical power and control over the person in question had been decisive in the finding of jurisdiction.[208] Milanovic may thus be considered one of the fiercest defenders of the view that it is exclusively control that matters when determining whether a State exercises extraterritorial jurisdiction.

[200] See for example E. Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the responsibility of the EU and its Member States' in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Koninklijke Brill NV 2010) 217; Gammeltoft-Hansen, *Access to Asylum* (n 89) 107; Heijer, den, M. (n 89) 33; Da Costa (n 174) 248; Heijer, den, M. and Lawson (n 174) 181; Ghandi (n 175) 580; Gallagher and David (n 78) 261; Butha (n 174) 10; Milanovic, 'Extraterritoriality and Human Rights' (n 175) 55.
[201] Milanovic, *Extraterritorial Application* (n 64) 42.
[202] *Medvedyev and others v. France* (n 197).
[203] Milanovic, *Extraterritorial Application* (n 64) 163–164.
[204] ibid 166–167.
[205] *Medvedyev and others v. France* (n 197) [9–18].
[206] ibid [67].
[207] See M. Milanovic, 'European Court Decides Al-Skeini and Al-Jedda' (7 July 2011) <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/> accessed 17 February 2016; referring to *Al-Skeini and others v. UK* (n 190) [136].
[208] *Al-Skeini and others v. UK* (n 190) [136].

1.2.4 The Degree of Control Required

Another relevant aspect is the degree of control required to consider that a State exercises effective control. While there is doubt concerning the exact degree of control that must be exercised, it is held that the threshold of control to be exercised in order to amount to effective control under Article 1 ECHR is generally high.[209] A contribution deserving particular attention in this context is the one by Gammeltoft-Hansen, as he focuses explicitly on extraterritorial migration control.[210] He, too, is of the opinion that the Convention applies extraterritorially only in cases in which the State exercises a high degree of physical control over territory or over persons.[211] In relation to migration control at sea, therefore, he concludes that bringing persons on board a government vessel would clearly entail the exercise of extraterritorial jurisdiction by the State. In his view, the application of the Convention remains questionable, however, with respect to any State action short of this.[212]
In this context, the question arose whether the required degree of control differs depending on the nature of the obligation at issue being positive or negative. Den Heijer holds that – next to effective control over territory and over persons – there is a third category of cases in which the Convention applies extraterritorially, namely with respect to positive obligations.[213] Put like this, the degree of control required for the application of positive obligations would be much lower, or absent in total. He discusses a number of cases, in which the Court held that the State must take positive action to prevent the violation of Convention rights, if it is in a position to do so. In some of the cases referred to, however, there is a clear jurisdictional link with the respondent State, such as property or legal proceedings within the State, or State agents are in direct vicinity of the events.[214] In contrast to Den Heijer, most other authors do not explicitly discuss whether there is a difference in the scope of application between positive and negative obligations under the Convention. Milanovic argues exactly the opposite position to Den Heijer: given the fact that positive obligations often require more far reaching action by States, their application should, in principle, be limited to the State's territory.[215] Tzevelekos may be taken to agree with this position, in so far as he argues that positive obligations can only apply

[209] In this respect, see Gammeltoft-Hansen, 'The Refugee, the Sovereign, and the Sea' (n 175) 178; Gondek, *The Reach of Human Rights in a Globalising World* (n 174) 226–227; Goodwin-Gill (n 176) 300; Hampson (n 175) 181; Milanovic, *Extraterritorial Application* (n 64) 142; Gammeltoft-Hansen, *Access to Asylum* (n 89) 112; M. Szydlo, 'Extra-Territorial Application of the European Convention on Human Rights after Al-Skeini and Al-Jedda' (2012) 12 International Criminal Law Review 271 288 accessed 2 May 2018; M. Giuffré, 'Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to extraterritorial Human Rights Obligations' in V. Moreno-Lax and E. Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach*. Integrating Maritime Security with Human Rights (International Refugee Law Series vol 7. Brill/Nijhoff 2016) 262.
[210] Gammeltoft-Hansen, *Access to Asylum* (n 89).
[211] ibid 112, 124-125, 132.
[212] ibid 124.
[213] Heijer, den, M. (n 89) 52–55.
[214] These concern *Manoilescu and Dobrescu v. Romania and Russia* (2005) 60861/00 (European Court of Human Rights); *Treska v. Albania and Italy* (2006) 26937/04 (European Court of Human Rights); and *Isaak v. Turkey* (2008) 44587/98 (European Court of Human Rights).
[215] Milanovic, *Extraterritorial Application* (n 64) 211, 217-218; He repeats his position in Milanovic, 'Extraterritoriality and Human Rights' (n 175) 58–59.

proportionately to the effective control exercised.[216] Besson, on the other hand, concludes that positive and negative obligations alike may apply extraterritorially under certain circumstances.[217] In sum, there is no clear line to be drawn regarding the positions taken in literature on whether the degree of control required differs with respect to the nature of the obligation. Den Heijer's position is the most explicit in this respect. Yet, given the fact that many of the cases he refers to do offer a jurisdictional link to the respondent State, it is questionable that they would allow the general conclusion that positive obligations apply irrespective of territorial boundaries. Den Heijer does not take this position either. Rather, he concludes that the Convention allows for an understanding in which it is held to apply to situations in which the relationship of the State and the facts at hand are of such special nature, as to invoke the State's positive obligations.[218] Overall, however, literature supports the view that the degree of control required for the Convention to apply extraterritorially is high, irrespective of the nature of the obligation at issue.

1.3 Conclusion on the Doctrine of Effective Control

To conclude, in the reviewed literature the exercise of factual control is considered a central element in the establishment of jurisdiction under Article 1, if not the decisive element. With respect to the situation under consideration in this research, namely border deaths as an extraterritorial effect of immigration policies, this means that the Convention is unlikely ever to be found applicable, precisely because it concerns an extraterritorial effect and not a direct confrontation between State agents and persons. Yet, it has already been pointed out that a second issue about which a general consensus can be found in literature, is the fact that the Court's case law on the issue has not resulted in a coherent concept of effective control. As a result, there are a number of judgments which point to the fact that the exercise of physical power may not always be the (only) decisive factor regarding the exercise of Article 1 ECHR jurisdiction, providing leeway for arguing that the Convention can be found applicable to the extraterritorial effects of migration policies. These cases will be discussed below.

2 Cases Deviating from the 'Effective Control' Concept

In a number of cases the Court has made reference to other factors than mere power and control to determine whether a situation fell within the jurisdiction of the respondent State and for which the Convention therefore was applicable. They differ from each other in significant ways, but most have in common that it is not credible to hold that merely questions of factual control, considered most relevant under the doctrine of effective control, lead the Court in its finding on jurisdiction. Instead, in many instances the understanding of jurisdiction relating to the authority of a State as discussed in chapter 2 appears to be relevant for the interpretation of the

[216] Tzevelekos (n 176), 163.
[217] Besson (n 175), 878.
[218] Heijer, den, M. (n 89) 55.

term jurisdiction pertaining to the scope of application of the Convention. Performing an analysis of these cases by and of itself proves the point already made by many authors that the Court's case law does not neatly fit into a coherent concept of extraterritorial application based on effective control. However, the goal of this section is not to critically review where the Court deviated from the concept of effective control. After all, the literature review has demonstrated that the concept of effective control cannot be described as coherent. Rather, the majority of authors agree that the Court's case law on the issue is characterised by many inconsistencies. To put it in other words: while there is a core understanding on when the Convention applies extraterritorially, the fault lines of its extraterritorial application are not clear cut. Thus, rather than to critically analyse these cases with a view to where the Court has overstepped, misinterpreted or wrongly applied the boundaries and criteria of a supposedly coherent concept of the Convention's extraterritorial application, these cases are taken as they are. After all, these cases form an integral part of the body of case law shaping the understanding of when the Convention applies extraterritorially. Analysing these cases without aspiring coherence unveils that the Court has and puts to use a certain degree of flexibility in order to apply the Convention as it deems fit to the facts of the case. As will be seen, the Court is quite creative in the tools and mechanisms it applies in doing so. It is bringing to light the flexibility and creativity that the Court at times avails itself of that is considered to be the contribution this study makes to the existing body of literature on the subject. While it is not held that the cases can support the argument that the extraterritorial effects of migration policies fall within the scope of application of the Convention, they may be taken to chip away at the general conception that it is first and foremost factual control that matters when determining whether the Convention applies. Before entering the material discussion of the cases, a brief note on methodology regarding the way in which the cases were selected is provided.

2.1 Methodology

The cases discussed in this chapter were selected on the basis of a combination of searches in the ECtHR's case law database, HUDOC. The database was searched for judgments and decisions using the following terms: "effective control", "authority and control", "control and authority", and by searching for the keyword "article 1 – jurisdiction of states". The three terms have been selected, as they were considered the most relevant in the context of extraterritorial jurisdiction, based on the review of literature conducted in the first part of this chapter. The selection of the keyword was used to make sure all cases in which Article 1 is discussed were included in the results. From the list of cases that resulted from these searches, all duplicates were removed. Furthermore, all cases before *Banković* and the *Banković* case itself were removed. The reason for doing so is the same reason that underlay the decision to focus on doctrine discussing the development of the Court's case law post-*Banković:* the aim of the chapter is to reach an understanding of the contemporary concept of extraterritorial jurisdiction.[219] The cases therefore fall within the period of 12 December 2001, until the date

[219] For a comprehensive overview of the Court's case law on the subject, see Milanovic, *Extraterritorial Application* (n 64); and Da Costa (n 174) 93–253.

of the search, 14 September 2017. Overall, this resulted in a list of 219 cases.[220] These were reviewed, and in total 23 cases were identified as relevant for discussion. These cases were considered relevant for discussion, as they can be taken to shed a different light on the mantra that jurisdiction depends primarily on the exercise of effective control. They do so in varying ways, and not all cases concern the exercise of extraterritorial jurisdiction. Some of the selected cases concern the exercise of jurisdiction within the State's territory, in which the State nevertheless lacks actual control over the region or the actors in question.

The cases will be discussed in groups, as some cases are considered to relate to comparable matters. However, as many cases could be assigned to more than one group, the organization into groups should not be taken to imply anything by and of itself.

The very small number selected out of the overall number of 219 cases already indicates that – even though the selected cases open leeway for arguing that the exercise of jurisdiction is possible, even in the absence of effective control – they do not provide a firm basis upon which to build this argument. Against this backdrop, it is considered justified to focus primarily on the cases that support the applicability of the Convention to the extraterritorial effects of State policies. The gross number of cases supporting the finding that factual control is a necessary requirement for applying the Convention to human rights violations occurring extraterritorially will not be discussed. The big discrepancy between the number of cases supporting factual control as a necessary requirement, as compared to the limited number of cases that indicate other avenues, sheds light on the overall conclusion to be drawn from the case analysis.

2.2 Cases Involving Vessels

The first group of cases to be discussed here, concerns cases which involve the acts of State agents on board or in respect of vessels.[221] One of these cases, *Medvedyev and others v. France*, has already been discussed above.[222] In its judgment, the Court based its finding of jurisdiction on the factual control exercised by French agents over the vessel on which the applicants were confined. Milanovic therefore refers to the case as supporting his theory that it is exclusively *de facto* control that is relevant in determining whether a State exercises extraterritorial jurisdiction.[223] While the exercise of factual control by French state agents over the applicants has been decisive in *Medvedyev*, the Court also repeated that the exercise of flag state jurisdiction, being *de jure* jurisdiction, is one of the recognized instances of extraterritorial jurisdiction, as it had already set out in *Banković*.[224] A number of subsequent cases concerning the acts of State agents on or in respect of vessels shed light on the question, whether the finding of extraterritorial jurisdiction turns solely on the exercise of de facto control, as Milanovic concludes on the basis of *Medvedyev,* despite the Courts statement that the exercise of flag State

[220] The list of cases is available with the author.
[221] Another case concerning vessels is the case of *Xhavara et al v. Italy and Albania* (2001) 39473/98 (European Court of Human Rights). As the decision dates from before Banković it has not been included in the case selection and will not be discussed here.
[222] *Medvedyev and others v. France* (n 197).
[223] Milanovic, *Extraterritorial Application* (n 64) 163–164.
[224] *Banković and others v. Belgium* (n 69) [73]; *Medvedyev and others v. France* (n 197) [65].

jurisdiction is a recognized instance of extraterritorial jurisdiction. These cases are considered here.

2.2.1 Hirsi Jamaa and others v. Italy

The first example concerns the case of *Hirsi Jamaa and others v. Italy,*[225] which concerned the prohibition of refoulement under Article 3 of the Convention. An Italian vessel that, in Italy's opinion, rescued a migrant boat in the course of a SAR operation, took migrants and asylum seekers on board, and disembarked the persons in Libya. The operations took place outside Italian territorial waters on the high seas. It is the line of reasoning that underlies the Court's conclusion that Italy exercised extraterritorial jurisdiction, which is most interesting in this judgment:

> The Court observes that, by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognise, in cases concerning acts carried out on board vessels flying a State's flag, in the same way as registered aircraft, cases of extraterritorial exercise of the jurisdiction of that State (see paragraph 75 above). Where there is control over another, this is *de jure* control exercised by the State in question over the individuals concerned.
>
> The Court observes, furthermore, that the above-mentioned principle is enshrined in domestic law in Article 4 of the Italian Navigation Code and is not disputed by the Government (see paragraph 18 above). It concludes that the instant case does indeed constitute a case of extraterritorial exercise of jurisdiction by Italy capable of engaging that State's responsibility under the Convention.
>
> Moreover, Italy cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas. In particular, the Court cannot subscribe to the Government's argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time.
>
> In that connection, it is sufficient to observe that in *Medvedyev and Others*, cited above, the events in issue took place on board the *Winner*, a vessel flying the flag of a third State but whose crew had been placed under the control of French military personnel. In the particular circumstances of that case, the Court examined the nature and scope of the actions carried out by the French officials in order to ascertain whether there was at least *de facto* continued and uninterrupted control exercised by France over the *Winner* and its crew (ibid., §§ 66-67).
>
> The Court observes that in the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian

[225] *Hirsi Jamaa v. Italy* (n 45).

> authorities. Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion.[226]

Note how the Court did not attach primary relevance to the question whether Italy exercised effective control over the applicants. Instead, the Court explicitly considered the nationality of the ship as a relevant factor when determining whether Italy exercised jurisdiction. The Court started by noting that Italy was exercising *de jure* jurisdiction, as the law of the sea determines that a vessel is under the exclusive jurisdiction of its flag State.[227] On the basis of this *de jure* jurisdiction, the Court concluded that Italy was exercising jurisdiction capable of engaging the State's responsibility.[228] Only in a second step the Court noted that Italy was also exercising *de facto* control.[229] The Court's reasoning in this case cannot simply be done away with as a mistake. After all, the Court explicitly noted that Italy exercises *de jure* jurisdiction over the vessel, because it is flying the Italian flag. The Court was therefore conscious of the fact that it is not effective factual control upon which it bases its finding that Italy was exercising jurisdiction capable of engaging its responsibility. Instead, the Court was of the opinion that the exercise of *de jure* jurisdiction forms a basis for holding that Italy also exercises jurisdiction for the purpose of Article 1 ECHR in this case. Yet, this finding is difficult to reconcile with the considerations the Court put forward in paragraphs 70 to 75 under the heading 'General principles governing jurisdiction within the meaning of article 1 of the Convention'. There, the Court reinstated the general doctrine of effective control.[230] It did so by stating that jurisdiction must be determined by the facts and by referring to its finding in *Al-Skeini*, where it explicitly stated that findings of extraterritorial jurisdiction were based on the exercise of physical power and control.[231] Thereby, the Court set out that what matters is *de facto* control – just before considering the exercise of prescriptive jurisdiction and therefore *de jure* control over the vessel at hand, as a sufficient basis for finding that Italy exercised jurisdiction for the purpose of Article 1 ECHR. The Court's line of reasoning therefore appears contradictory in the case of *Hirsi*.

Yet, in this case it was quite clear that the Italian government agents exercised effective control over the persons taken on board the Italian vessel. It is hard to picture how the Court would have concluded, if there would not also have been effective *de facto* control. Would it still have considered the exercise of prescriptive jurisdiction over the Italian vessel sufficient to conclude that Italy was exercising jurisdiction for the purpose of Article 1 ECHR? The Court's reasoning in *Hirsi* does not provide an answer to this question. This is unfortunate, as it directly concerns the situation of migrants and asylum seekers at sea.

[226] ibid [77–81].
[227] ibid [77].
[228] ibid [78].
[229] ibid [81].
[230] ibid [71–72].
[231] See *Al-Skeini and others v. UK* (n 190) [136].

2.2.2 Bakanova v. Lithuania

The next case concerns the case of *Bakanova v. Lithuania*, in which the applicant complains that Lithuania violated its obligation to investigate the death of her husband.[232] He had worked as a mechanic on a private vessel, and was found dead in his cabin, when the vessel was on a voyage in Brazil. A Brazilian doctor noted acute heart attack as the cause of death. The applicant was of the opinion that the working conditions on the vessel were dangerous and might have caused her husband's death. She therefore requested the Lithuanian authorities to investigate the circumstances leading to her husband's passing. While such an investigation was opened, the applicant submitted that it was not conducted properly, resulting in a violation of Article 2 by Lithuania.[233] While Lithuania did not dispute that the case fell within its jurisdiction, the Court considered the applicability of the Convention under Article 1 on its own motion. It made the following observation in this respect:

> […] the Court has already recognised that instances of the extraterritorial exercise of jurisdiction by a State to include cases involving the activities on board of ships registered in, or flying the flag of, that State (see *Banković and Others v. Belgium and Others* (dec.) [GC], no.52207/99, §§ 59-61, ECHR 2001-XII, and *Medvedyev and Others v. France* [GC], no. 3394/03, § 65, ECHR 2010). In the instant case the Court observes that the *Vega* belonged to a Lithuanian company Limarko, the ship was registered in the Register of Ships of the Republic of Lithuania and sailed under a Lithuanian flag (see paragraphs 6, 33, 44 and 53 above). Under Lithuanian legislation, the *Vega's* captain exercised exclusive control over the ship while it was on a voyage (see, *mutatis mutandis*, *Medvedyev*, cited above, §§ 65-67). The relations between the ship's crew and the captain, including those related to safety at work, were determined by Lithuanian laws (see paragraph 53 above). The Court therefore considers that the special features of this case do not absolve Lithuania from an obligation to carry out an effective investigation (see *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 243-247, ECHR 2010 (extracts)).[234]

In so far as the judgment of *Medvedyev* left room for doubt as to whether the exercise of *de jure* jurisdiction over a vessel suffices to find jurisdiction of the State, this doubt is dispersed by the Court's findings in *Bakanova*. All aspects the Court mentioned in the above statement concern the exercise of *de jure* jurisdiction over the vessel. The vessel was a private vessel and not a single State agent was on board, capable of exercising *de facto* control over the vessel. This is also true for the captain, in respect of whom the Court mentions that he exercises exclusive control over the ship on the basis of Lithuanian law. However, a regulation determining that the captain of a vessel is in command over the crew and the vessel, does not turn the captain into a State agent.

The Court's reflection on the fact that the relevant regulations, namely those regulating the relations between the captain and the crew and safety at work, were determined by Lithuanian law is of particular interest. If the statement must be understood to imply that the question which

[232] *Bakanova v. Lithuania* (2016) 11167/12 (European Court of Human Rights).
[233] ibid [5–50].
[234] ibid [63].

State regulated the relevant conduct bears weight in determining whether the State exercised extraterritorial jurisdiction, this would also have consequences for the question whether migrants and asylum seekers dying at sea come within the jurisdiction of EU States. After all, they have strictly regulated immigration, resulting in migrants and asylum seekers taking unsafe routes. Yet, in the case of *Bakanova*, the nationality of the State that regulated the relevant conduct is just one of several heads of jurisdiction. It is therefore not justified to draw the conclusion that the regulating State may be found to exercise extraterritorial jurisdiction only on the basis of this case.

However, all heads of jurisdiction mentioned by the Court concern the exercise of prescriptive jurisdiction of Lithuania over the vessel. By holding that the vessel fell within Lithuania's jurisdiction while the facts had occurred when the vessel was in Brazil, the Court confirmed that the exercise of *de jure* jurisdiction over a vessel was indeed sufficient to conclude that a State exercised extraterritorial jurisdiction. It is thus clear that effective control is not a necessary requirement for holding that a State exercises jurisdiction outside its territory for the purpose of Article 1 ECHR.

2.2.3 Kebe and others v. Ukraine

The final case discussed in this section is the case of *Kebe and others v. Ukraine*.[235] The case concerned two Eritrean nationals and an Ethiopian national who had all fled to Djibouti, where they secretly boarded a private vessel flying the Maltese flag heading towards Ukraine. Shortly after, they were discovered by the crew. A non-governmental organization informed the Ukrainian border control about the expected arrival of the three stowaways and dispatched a lawyer. Upon arrival in a Ukrainian port, Ukrainian border guards embarked the vessel several times. While the applicants claimed that they had expressed their wish to seek asylum in Ukraine, the Ukrainian border guards produced written statements signed by the applicants, in which they allegedly declared that they wished to seek asylum in Sweden. In a letter addressed to the UNHCR, the captain of the vessel stated that these statements had been prepared by the Ukrainian border guards. Following a request for interim measures by the lawyer acting on behalf of the applicants, the three men were allowed to disembark the vessel into Ukraine, as the ship was scheduled to depart to Saudi Arabia, from where they feared to be returned to their countries of nationality. The applicants complained before the Court that the actions of the Ukrainian border guards violated Articles 3 and 13 ECHR.[236] The cases of the second and third applicant were struck out of the list.[237] In relation to the first applicant, Ukraine claimed that it had not exercised control over the applicant, or over the vessel.[238] It is interesting to note that the applicant's objection to this claim was partly based on the argument that the vessel was flying the Maltese flag as a flag of convenience, with the aim to avoid State regulation. Malta

[235] *Kebe and others v. Ukraine* (2017) 12552/12 (European Court of Human Rights).
[236] ibid [6–32].
[237] ibid 62, 65.
[238] ibid [68].

therefore did not actually exercise control over the vessel, according to the applicant.[239] While the Court did not consider the issue of flags of convenience, its statements in this case are of interest. The Court explicitly referred to the rules of the law of the sea and maritime law, concerning the powers and duties of States in maritime traffic, thereby indicating that these rules, relating to *de jure* jurisdiction of States, may be of relevance.[240] However, the Court noted that:

> […] it does not have to decide whether and how those provisions applied in the present case, as its subject-matter concerns Ukraine's exercise of its sovereign powers to control the entry of aliens into its territory. Nor is the Court required to address the question of *de facto* or *de jure* control over the vessel, in so far as such an argument transpires from the parties' submissions set out above.[241]

Instead, the Court found it relevant that Ukraine's acts of border control, intended to exercise its sovereign right to control entry into its territory, were aimed at the applicant:

> As the border control carried out by the Ukrainian authorities concerned the first applicant, the Court finds that he was thus within Ukraine's "jurisdiction", for the purposes of Article 1 of the Convention, to the extent that the matter concerned his possible entry to Ukraine and the exercise of related rights and freedoms set forth in the Convention (see, *mutatis mutandis*, *Amuur v. France*, 25 June 1996, § 52, *Reports of Judgments and Decisions* 1996-III) […][242]

This consideration is quite remarkable in the context of the current research. After all, the Court stated that it was the exercise of border control aimed at the applicant, which brought him within the jurisdiction of Ukraine to the extent that it concerned his right to enter Ukraine and related rights enshrined in the Convention. Does this mean that all acts of border control bring the persons, at whom such acts are aimed, into the jurisdiction of the State? This would mean that all persons affected by border control measures come within the jurisdiction of the State exercising border control, even absent a direct confrontation between State agents and the persons affected. Such a sweeping conclusion would probably go too far. In the current case, the ship was within the Ukrainian harbour and the Ukrainian State agents entered the vessel on several occasions. There was, therefore, a direct link between Ukraine and the applicants. Yet, the Court did not consider it necessary to determine, whether the applicants could be considered to fall within Ukraine's territorial jurisdiction, by virtue of being present in its port on a Maltese flagged ship. Instead, the Court attached importance to the fact that the border control was aimed at the applicant, bringing him into Ukrainian jurisdiction to the extent relevant to his right to enter the territory. This reasoning is in fact a cause and effect reasoning. Thereby, the case of *Kebe* may be held to support the argument that State immigration policies may bring affected persons into the State's jurisdiction, even if only to the extent relevant to the situation.

[239] ibid [70].
[240] ibid [75].
[241] ibid.
[242] ibid [76].

2.2.4 Conclusion on Cases Involving Vessels

From the cases analysed here, it may be concluded that the statement the Court made in *Banković* and *Medvedyev*, holding that flag State jurisdiction is a recognized instance of extraterritorial jurisdiction, was not a hollow statement or a mistake. On the basis of the *Hirsi* case, it is not possible to reach this conclusion, as the Court's reasoning in this case is contradictory. However, in the case of *Bakanova*, the Court explicitly concluded that the facts of the case came within the jurisdiction of the State, while the respondent State 'merely' exercised prescriptive jurisdiction over the vessel. The exercise of effective factual control is therefore not a necessary element for concluding that a State exercises jurisdiction for the purpose of Article 1 ECHR.

Furthermore, the cases provide a basis to argue that legislative measures regulating relevant conduct or aimed at a person, bring that person within the State's jurisdiction, with respect to the rights and freedoms relevant to the situation. Following this cause and effect reasoning, would imply that persons affected by the extraterritorial effects of State immigration policies could rely on the relevant rights enshrined in the ECHR.

2.3 Extraterritorial Effects of Legislative or Administrative Measures

The next group of cases is of interest, because it concerns the extraterritorial effects of legislative or administrative measures. All of these cases relate in some way to an argument made by the applicants in the case of *Banković*. In this case, the applicants held that the fact that the decision to bomb the tower was taken within the respondent States, brought the applicants within the jurisdiction of the State.[243] In *Banković*, the Court rejected this argument. In later judgments, the Court has adopted very differing views on the topic. In two out of four cases found in this category, the Court decided that the applicants fell outside the scope of jurisdiction of the Convention.

The first concerns the admissibility decision in the case of *Ben el Mahi and others v. Denmark*, which concerned caricatures of the prophet Mohammed, published by a privately-owned Danish newspaper, the Jyllands-Posten.[244] The publication sparked judicial proceedings in a number of European and non-European countries, where the cartoons had been reprinted.[245] In the proceedings before the ECtHR the applicants were a Moroccan national and two Moroccan organizations. These were not the same organizations that had brought the proceedings in Denmark.[246] They had therefore not exhausted domestic remedies and the claim was in any event not admissible for this reason. While the Court did not specify what the exact ground for dismissing the case was, it did consider that no acts of extraterritorial control had been shown in the present case and that there were no jurisdictional links between the applicants and the

[243] *Banković and others v. Belgium* (n 69) [53].
[244] *Ben el Mahi and others v. Denmark* (2006) 5853/06 (European Court of Human Rights).
[245] For an overview of the proceedings in different countries, see L. Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions* (Cambridge Studies in International and Comparative Law no. 106, Cambridge University Press 2014) 64–83.
[246] ibid 84–85.

respondent State.[247] This consideration can therefore be taken to demonstrate that the Court followed the generally held conception that effective control is essential to a finding that the Convention applies extraterritorially. Yet, it may be noted that the fact that the case was evidently inadmissible deprived the Court of any incentive to consider the issue closer or to look for alternative ways to consider the case, as it has done in other cases.[248] Thus, while the case of *Ben el-Mahi* can be used to argue against a cause and effects reasoning, it is a rather poor example for doing so.

A better one, may be the case of *Abdul Wahab Khan v. United Kingdom*.[249] The case concerned a Pakistani national, who studied in the United Kingdom and was served a notice of deportation. Instead of appealing it, the applicant left for Pakistan voluntarily. After his departure, the notice of deportation was withdrawn and his leave to remain in the United Kingdom was cancelled. The applicant appealed the latter decision and requested the United Kingdom to facilitate his re-entry on the basis of Article 3 ECHR and because not doing so violated his right to family life under Article 8, given that he had developed ties with the student community. The United Kingdom refused this request, holding that the applicant's voluntary decision to leave had brought him outside the jurisdiction of the United Kingdom, so that he could no longer rely on Article 3.[250] Before the ECtHR the applicant argued that there was a difference between a person who had never been within the jurisdiction of the State and a person who had left and was refused re-entry, as was the case with him. Furthermore, his appeal against the decision to cancel his leave to remain had continued the United Kingdom's jurisdiction over him.[251] The Court dismissed the applicant's arguments. It held that there was no principled reason to distinguish between someone who had been within the State's jurisdiction and left and someone who had never been within the State's jurisdiction. The Court explicitly considered that holding otherwise, would entail a duty for States to allow entry to any person who requested entry and feared ill-treatment in his or her country of nationality.[252] This, it is clear, would completely undermine a State's right to control entry to its territory. In this case, therefore, the Court also followed the generally held concept that the State must exercise effective control over a person in order for it to come within the State's jurisdiction, which was not the situation at hand. The Court might have looked at the case differently, if it had conceptualised the case as an act of consular agents, which, according to the Court, is a standard example of a situation giving rise to the extraterritorial application of the Convention.[253] Nevertheless, the case of *Abdul Wahab Khan* represents the strongest argument against the stance that European States may be held responsible for the extraterritorial effects of their immigration policies. Yet, even this case leaves room to argue in favour of this position, as the remedy sought must not be a leave to enter. It is clear that requiring the State to grant entry to any person fearing persecution, would render its right to control entry meaningless. However, this has to be distinguished from

[247] *Ben al Mahi and others v. Denmark* (n 244) 8.
[248] In this sense, see especially the line of cases following *Ilaşcu and others v. Moldova and Russia* (2004) 48787/99 (European Court of Human Rights), to be discussed below.
[249] *Abdul Wahab Khan v. The United Kingdom* (2014) 11987/11 (European Court of Human Rights).
[250] ibid [2–16].
[251] ibid [19].
[252] ibid [26–27].
[253] *Banković and others v. Belgium* (n 69) [73].

requiring the State to ensure that its policies do not have lethal effects by and of themselves. The means of achieving this while exercising the right to control entry, are not limited to simply granting leave of entry to anyone. To the contrary, a State can choose between a great range of differing measures to control entry which may contribute to the loss of life of the persons affected to a greater or lesser degree. It is not the same to require a State to choose those means which have less detrimental effects or to require the State to allow entry to anyone. Nevertheless, the case of *Abdul Wahab Khan* seriously complicates the argument that States may be responsible for the extraterritorial effects of their policies.
However, the following two cases show that the Court has also decided differently with respect to the extraterritorial effects of State's administrative measures. In both judgments, the Court found jurisdiction, thereby deviating from the stance that effective control is a prerequisite for extraterritorial jurisdiction. As such, these are discussed in detail here.

2.3.1 Kovačić and others v. Slovenia

The first and most promising case in this respect is the admissibility decision in *Kovačić and others v. Slovenia*.[254] While the case was declared admissible, it was struck out in 2008 due to new facts that had become known after the admissibility decision. Namely, two of the applicants had received full satisfaction after the admissibility decision and the third had initiated a procedure before a national court.[255] Unfortunately, the Court has therefore not rendered a judgment on the merits of this case, but the admissibility decision is nevertheless interesting for the current inquiry. To place this case in the right perspective, a few words on the value of the Court's considerations in admissibility decisions are required.

2.3.1.1 The Value of Admissibility Decisions of the ECtHR

In its admissibility decisions, the Court examines whether an application meets the admissibility criteria set out in Article 35 of the Convention and whether it has jurisdiction to hear the case according to Article 32 ECHR. Article 32 states that the Court has jurisdiction concerning the interpretation and application of the Convention and its Protocols. If it is clear from the outset that the Convention is not applicable, because, for example, the applicant cannot be considered to be within the jurisdiction of the respondent State, then the case does not concern the application of the Convention and the Court would find that it lacks jurisdiction to hear the case. Therefore, when considering whether it has jurisdiction to hear the case, the Court already provides a first insight regarding the question whether the Convention applies to a given situation. The close interconnection between considerations regarding whether a person comes within the jurisdiction of the State and considerations regarding whether the Court has jurisdiction to hear the case, also becomes evident in the Court's Practical Guide on

[254] *Kovačić and others v. Slovenia* (2003) 44574/98, 45133/98 and 48316/99 (European Court of Human Rights).
[255] *Kovačić and others v. Slovenia* (2008) 44574/98, 45133/98 and 48316/99 (European Court of Human Rights).

Admissibility Criteria.[256] Here, it is set out that the Court examines whether the situation and the persons concerned come within the jurisdiction of the Court *ratione temporis, ratione loci* and *ratione personae*. The considerations whether this is the case are basically the same considerations as the Court takes into account when deciding whether a person comes within the jurisdiction of the respondent State.[257] Therefore, when explicitly considering its jurisdiction *ratione loci* and *ratione personae* in the case of *Kovačić and others v. Slovenia* the Court already sheds some light on the question whether the situation comes within the jurisdiction of Slovenia. Of course, the Court's reflections at the admissibility stage do not prejudice its findings on the merits. Nevertheless, these considerations are of interest for the current quest as pointed out above and will therefore be considered here.

2.3.1.2 The Court's Analysis under Article 1

The case concerns the extraterritorial effects of laws adopted as part of its monetary and banking policies. The applicants in this case complained that Slovenia had violated their right to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention. The facts of the case occurred in the context of the falling apart of the Federal Republic of Yugoslavia. Put very simply, the situation concerned Slovenian laws and regulations adopted and implemented within Slovenian territory, which had effects outside its territory, namely to exclude depositors who had deposited foreign currency with the Ljubljana Bank in Zagreb from the Slovenian government protection scheme. The government further hollowed out any security left for these deposits by restructuring the Ljubljana Bank in such a way that all assets of the bank belonged to the New Ljubljana Bank, while the old Ljubljana Bank retained the worthless claims regarding foreign currency deposits towards the National Bank of Yugoslavia. Thus, the case concerns the mere effects of legislation outside the State's territory. After all, in no way did Slovenia exercise control on the territory of Croatia, where the bank holding the claimants' deposits and the claimants themselves, were located. It is further worth noting that Croatia was, at the time that Slovenia had enacted the legislative measures in question, not a member of the Council of Europe.[258]
While still deciding on the admissibility of the case, the Court made some interesting findings with respect to the question whether effective control is a necessary prerequisite for finding that the State exercises jurisdiction for the purposes of Article 1 ECHR. In respect of the question whether the Court has jurisdiction to hear the case, the Slovenian government, quite rightly, held that none of the recognised instances of extraterritorial jurisdiction were at play.[259] Slovenia thus claimed that the Court did not have jurisdiction *ratione loci*, as the deposits had been made in Croatia and where still located there. The Court quite bluntly considered it has jurisdiction nevertheless:

[256] See the Practical Guide on Admissibility Criteria of the European Court of Human Rights 2019. It must be noted that the guide is not binding upon the Court. Nevertheless, it provides insights into the interpretation of the Court's considerations regarding the question whether it has jurisdiction to hear the case.
[257] ibid 191-204 and 216-224.
[258] See the facts of the case, *Kovačić and others v. Slovenia* (n 254) 2.
[259] ibid 51.

> As already noted above, Article 22(b) of the 1994 Constitutional Law […] related to foreign-currency accounts opened with the Ljubljana Bank's branches situated outside Slovenian territory, such as those held by the three applicants.
>
> Therefore, without prejudice to its ultimate findings on the merits, the Court finds that the Slovenian Government's plea of inadmissibility on the ground of lack of jurisdiction *ratione loci* must be dismissed.[260]

The Court responded equally brief to Slovenia's argument that the Court did not have jurisdiction *ratione personae* to hear the case, because Slovenia had never directly taken measures to nullify the applicant's claims concerning their deposits and that their position had been equally affected by Croatian measures and omissions. The Court began by reiterating that the responsibility of the State may be engaged by acts of their authorities that produce effects outside their own territory.[261] Then, the Court went on to find that:

> […] the Slovenian National Assembly introduced legislation addressing the issue of foreign-currency savings deposited with branches of Slovenian banks outside Slovenian territory including, in particular, the Constitutional Law of 27 July 1994, which is not amenable to judicial review by the Slovenian courts due to its constitutional nature. The applicants' position as regards their foreign-currency savings deposited with the Zagreb Main Branch was and continues to be affected by that legislative measure. This being so, the Court finds that the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged.[262]

On the basis of the foregoing, the Court concluded that Slovenia's responsibility under the Convention might be engaged and that the Court was competent to review the claim brought before it by the three applicants.

With these conclusions, the Court appears to deviate significantly from the widely held doctrine that the Convention applies extraterritorially only if a State exercises effective control. Instead, the Court appears to follow an effects-reasoning here. The finding that the Slovenian legislation has effects on the applicants' legal position sufficed for the Court to conclude that the case comes within its jurisdiction and thereby that it concerns the application of the Convention. There are no further elements to indicate the exercise of actual control by Slovenia beyond its territory. This was unmistakably pointed out by the Slovenian government, holding that not a single element of the exercise of extraterritorial effective control was present in the case at hand. Yet, the Court sidestepped this argument by finding that the effect of domestic policies on the applicants abroad sufficed for the Convention to be applicable. The Court clearly did not consider that the case falls outside the scope of application of the Convention, which would have resulted in it being inadmissible. It is quite unfortunate that the Court is not more elaborate in its argument, as the current analysis can go no further than noting that the Court was willing

[260] ibid 52.
[261] *Kovačić and others v. Slovenia* (n 254) 54; The Court thereby refers to *Drozd and Janousek v. France and Spain* (1992) 12747/87 [91] (European Court of Human Rights).
[262] *Kovačić and others v. Slovenia* (n 254) 55.

to consider this case while none of the generally recognised instances of extraterritorial jurisdiction were at play.

2.3.2 Stephens v. Malta

The Court did decide on another case that concerned the effects of administrative measures taken by a State. This is the case of *Stephens v. Malta*.[263] The applicant had been arrested in Spain by Spanish law enforcement officials following a request for extradition based on an arrest warrant issued by Malta. The applicant contested the legality of the arrest warrant while detained in Spain. The Maltese courts concluded that the arrest warrant had indeed been flawed. Following another arrest warrant, the applicant was extradited to Malta.[264] Before the ECtHR, the applicant complained that his arrest and detention in Spain had violated Articles 5 and 7 of the Convention, as it had not been lawful. While Malta did not dispute having jurisdiction in the case, the Court considered the matter out of its own motion. While referring to Article 1 and its 'ordinary and essentially territorial notion' of jurisdiction, the Court explicitly considered the matter of attribution. The Court correctly considered that the sole origin for the applicant's deprivation of liberty was attributable to Malta. Spain merely followed its treaty obligations and was entitled to trust that an arrest warrant issued by an EU Member State would be lawful. The Court concluded on this basis that the applicant's complaints under Article 5 of the Convention engage the responsibility of Malta.[265]

The analysis of the Court is entirely correct. Yet, regarding the question of extraterritorial jurisdiction, it must be noted that the applicant was not within Malta's territory, nor did Maltese agents exercise effective control over him. Nevertheless, the fact that his unlawful detention was entirely attributable to administrative orders issued in Malta, led the Court to find that the applicant's complaint engaged the responsibility of Malta. It is clear, therefore, that effective physical control of the respondent State over the applicant was not at issue in this case, but merely the extraterritorial effects of Malta's administrative orders. Given that the Court considers Malta's jurisdiction under Article 1 out of its own motion and expressly refers to the 'ordinary meaning' of the Article, it is not reasonable to assume that the Court simply overlooked the matter. The judgment is thus a good example that the Court is, at times, willing to apply the Convention to the extraterritorial effects of a State's legislative or administrative measures. However, its implications for other cases might be limited because of the special circumstances of the case, in which Malta could affect the applicant's arrest in another Member State on the basis of a European arrest warrant.

[263] *Stephens v. Malta (no.1)* (2009) 11956/07 (European Court of Human Rights).
[264] See the facts of the case, ibid [6–27].
[265] ibid [51–54].

2.3.3 Conclusion on Cases Concerning Extraterritorial Effects of Legislative or Administrative Measures

The four cases falling within the category of cases concerning the extraterritorial effects of legislative or administrative measures point towards different directions of how jurisdiction under Article 1 ECHR is to be understood. The case of *Ben el Mahi* argues against the position that a State may bear responsibility for the extraterritorial effects of its legislative and administrative measures. Yet, the strategy to bring the case before the ECtHR was doomed to fail. It is therefore not a very powerful example for the Court's rejection of considering the effects of State policies to fall within its jurisdiction. The strongest case to argue against the stance that a State may be liable for the extraterritorial effects of its policies is the case of *Abdul Wahab Khan*. The judgment renders it clear that the fact that a person is affected by the extraterritorial effects of State policies does not grant that person a right of entry, as this would fully undermine the State's right to control entry.

These cases must be distinguished from the cases of *Kovačiç* and *Stephens*, which support the position that the extraterritorial effects of a State's administrative or legislative measures may be considered the exercise of extraterritorial jurisdiction under Article 1. While discussed under the previous section as they concerned vessels, the cases of *Bakanova* and *Kebe* must be added to this list, as here too the Court attached weight to the fact that the respondent State had taken administrative or legislative measures which affected the applicants. These cases therefore argue for the extraterritorial application of the Convention if a person is affected by a State's legislative or administrative measures outside the State's territory. It is clear that the notion of effective control is not at play in these situations. The cases therefore offer an example for instances in which the Court found the Convention to apply despite the fact that the respondent State did not exercise effective factual control over the applicants.

2.4 Cases Concerning Article 56 ECHR

The search resulted in two cases relating to Article 56 ECHR. This Article is often referred to as the Convention's colonial clause and allows Member States to extend the application of the Convention to territories for whose international relations the State is responsible by way of declaration. The cases are discussed as they diverge from the general understanding that effective control is decisive for the extraterritorial application of the Convention. Nevertheless, the cases differ in an important manner from the other cases discussed in this section, as they do not concern a situation in which the Court finds that the Convention applies despite the fact that the State did not exercise effective control in the classic sense. Rather, these cases concern situations in which there can be no doubt that the respondent State exercised effective control, but the Court nevertheless finds that the applicants do not fall within the scope of application of the Convention. While it is clear that this relates to the very particular context of Article 56 ECHR, it does show that effective control is not always the decisive element for the extraterritorial application of the Convention.

2.4.1 Quark Fishing Ltd. v. United Kingdom

The first of these cases concerned a fishing company operating a vessel flying the flag of the Falkland Islands and was specialised in fishing the Patagonian toothfish, which are found in the waters of the South Georgia and South Sandwich Islands (SGSSI). The SGSSI is a British Overseas Territory, for whose international relations the United Kingdom is responsible. The government of the SGSSI is comprised of officials posted from the United Kingdom. There was a licence system in place to control fishing in the wasters of the SGSSI. Under this system, the applicant, Quark Fishing Ltd., was granted a licence every year from the introduction of the licence system in 1997 until 2001. In that year, the applicant was refused a licence. The order to do so had been issued by the British Foreign and Commonwealth Office. The applicant challenged the refusal of the licence in the High Court in London, which quashed the decision not to grant the licence. The decision was upheld in appeal, but the additional claim for damages for the losses incurred during the 2001 fishing season based on Article 1 of Protocol no. 1 of the Convention was rejected. The Court of Appeal considered that the applicant was not able to rely on Article 1 of Protocol 1, as the United Kingdom had only extended the application of the Convention to the SGSSI under Article 56 ECHR, but not Protocol no. 1. Protocol no. 1 therefore did not apply to the SGSSI.[266] Before the ECHR, the applicant argued that Protocol no. 1 did nevertheless apply to the SGSSI, because the United Kingdom exercised effective control over it.[267] The ECtHR, however, did not follow the applicant in this argument, referring to the extraterritorial application of the Convention and holding that:

> The situations which it covers are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56 (former Article 63), extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see Gillow v. the United Kingdom, 24 November 1986, § 62, Series A no. 109; Bui Van Thanh and Others v. the United Kingdom, no. 16137/90, Commission decision of 12 March 1990, Decisions and Reports 65, p. 330; and Yonghong v. Portugal (dec.), no. 50887/99, ECHR 1999-IX).[268]

The Court goes on to consider that:

> Since there is no dispute as to the status of the SGSSI as a territory for whose international relations the United Kingdom is responsible within the meaning of Article 56, the Court finds that the Convention and its Protocols cannot apply unless expressly extended by declaration.[269]

The Court thereby holds that the concept of extraterritorial application of the Convention is not applicable in the case of overseas territories. In fact, this leaves overseas territories worse off

[266] See the facts of the case, *Quark Fishing Ltd. v. United Kingdom* (2006) 15305/06 1–2 (European Court of Human Rights).
[267] ibid 3.
[268] ibid 4.
[269] ibid.

than just any random territory in the world. After all, even though it is apparent that the United Kingdom exercises effective control over the SGSSI in general, by virtue of posting its officials to govern the territory, and in the particular issue leading to the contention, as the order not to grant the applicant a licence was issued by the Foreign and Commonwealth Office, the applicant cannot rely on Article 1 Protocol no. 1 because the United Kingdom has not made a declaration to that effect under Article 56 of the Convention. This paradoxical effect was explicitly discussed in a similar judgment of the Court.

2.4.2 Chagos Islanders v. United Kingdom

The case concerned the complaint of (the descendants of) former residents of the Chagos Islands, a British overseas territory, against their removal from the Islands and the conditions under which this occurred in 1967-1973. The situation was comparable to the one in *Quark Fishing*, in that the United Kingdom had not extended the application of the Convention or the Protocols thereto to the Chagos Islands. In this case, the applicants explicitly pointed out that the reasoning followed in *Quark Fishing* had a perverse effect and should therefore be abandoned:

> Any other interpretation would give rise to the perverse result that the United Kingdom could be held responsible for the conduct of its own authorities anywhere in the world in the exceptional circumstances described in the Court's case-law, even in territories which had historically, geographically and culturally never been included in the European family of nations, whereas victims of the same breaches in the same circumstances committed by the same authorities in land that had been part of the United Kingdom's sovereign territory for over 200 years would be without protection under the Convention.[270]

Somewhat ironically, the Court pointed out that in the case of *Al Skeini* the government of the United Kingdom relied on the exact same reasoning as the Chagos Islanders, to argue that the United Kingdom should not be found to exercise jurisdiction in Iraq.[271] The Court continued to cite its consideration in *Al Skeini*:

> The "effective control" principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, "with due regard ... to local requirements", to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1. The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see *Loizidou* (preliminary objections), cited above, §§ 86-89, and *Quark Fishing Ltd*, cited above).[272]

In consequence, the Court upheld its ruling in *Quark Fishing*, leaving the Chagos Islanders without resort to the protection of the Convention.[273]

2.4.3 Conclusion on Cases Concerning Article 56 ECHR

The cases of *Quark Fishing* and of the *Chagos Islanders* both support the position that effective control is not always decisive with respect to the extraterritorial application of the Convention. At the same time, they could be taken to support the position that the effects of governing measures outside the State's territory do not bring the affected persons within the jurisdiction of the State for the purpose of Article 1. However, the impact of this conclusion is limited in both respects to overseas territories for whose international relations a Convention State is responsible. The Court leaves no doubt that these territories are in a worse position than any other territory in the world, by virtue of the declaration system set out in Article 56 of the Convention.

2.5 The Extraterritorial Effects of Force

The next group of cases to be discussed concerns cases regarding the extraterritorial effects of the use of force by State agents. In the case of *Loizidou,* which is often referred to as one of the cases in which the Court set out the basic understanding of when the Convention applies extraterritorially, the Court also referred to the extraterritorial effects of the acts of State agents as a basis for jurisdiction, whether those took place within or outside the State's territory. The reasoning underlying this argument is a cause and effect reasoning. This category appears to be of particular interest in the query of whether border deaths as an extraterritorial effect of immigration policies fall within the scope of application of the Convention. After all, if one presumes border deaths to be caused by the immigration policies of the EU and its Member States, one could argue that the persons affected come within the jurisdiction of the States concerned based on a cause and effect reasoning.

The question whether a cause and effect reasoning is permissible has not been determined with clarity. While it appeared as if the Court had deemed a cause and effect reasoning permissible in *Loizidou*, the issue had been subject of discussion by the Court on several occasions thereafter. Most notably, a cause and effect reasoning was explicitly rejected by the Court in *Banković*.[274] The applicants in the case argued that their relatives, who were killed by a bomb dropped from a NATO plane on a TV tower in Belgrade were thereby brought within the jurisdiction of Belgium and the other NATO States to the extent of the consequences of that

[270] *Chagos Islanders v. United Kingdom* (2012) 35622/04 [50] (European Court of Human Rights).
[271] ibid [73].
[272] *Al-Skeini and others v. UK* (n 190) [140]; Repeated in *Chagos Islanders v. United Kingdom* (n 270) [72].
[273] *Chagos Islanders v. United Kingdom* (n 270) [73].
[274] *Banković and others v. Belgium* (n 69) [75].

action. It was clear that the respondent States were effectively not in the position to guarantee all rights enshrined in the Convention to the applicants' relatives in the circumstances at hand. Nevertheless, the respondent States were in a position to guarantee the right to life of the applicants' relatives with respect to the bombing of the TV tower. In the view of the Court, however, holding that the applicants' relatives came within the jurisdiction of the respondent States to the extent of the consequences of the bombing, would require dividing and tailoring the rights and freedoms of the Convention according to the particular circumstances of each case. This, the Court held, is not supported by the Convention.[275] The factual power to kill the applicants' relatives was thus not sufficient in the eyes of the Court to bring the deceased within the jurisdiction of Belgium and therefore not capable of engaging its responsibility, as this power did not presuppose the power on the side of Belgium to guarantee the enjoyment of all rights enshrined in the Convention. Thereby, the Court required an extremely high degree of control for the exercise of jurisdiction, which is only reached if the State is in the position to guarantee the enjoyment of all Convention rights. Yet, later cases clearly depart from this stance.[276]

One of the relevant cases in this respect is the case of *Al Skeini and others v. United Kingdom*.[277] While this case is a rather classic example of the importance of effective control when determining jurisdiction, the Court therein explicitly rejected the Court's finding in *Banković* that the Convention could not be divided and tailored. Thus, the case of *Al Skeini and others v. United Kingdom* is discussed below. The other cases discussed concern a situation in which State agents use force by firing bullets, which hit a person outside the respondent State's territory. A case that may come to mind in this context and which appears of particular relevance with respect to border deaths is the case of *Streletz, Kessler and Krenz v. Germany*.[278] Materially, the case is indeed of particular relevance to the current study and is discussed in the next chapter. With respect to the question of jurisdiction, however, it is not. The applicants in the case were former senior members of the German Democratic Republic (GDR) State apparatus, and as such responsible for the GDR's shoot to kill policy in respect of anyone trying to flee the GDR. After the GDR's dissolution and Germany's reunification, they had been held criminally liable for doing so, despite the fact that their acts had not been a criminal offence under the GDR's law applicable to them at the time of the acts. In the case before the ECtHR, the applicants complained that Germany violated Article 7 of the Convention, determining that criminal liability requires a legal basis and prohibits the retroactive application of criminal laws. While the applicants also raised a complaint under Article 1 ECHR, this complaint did not concern the question whether they were within the jurisdiction of the Federal Republic of Germany, but rather whether their criminal convictions implied discriminatory treatment of citizens of the former GDR compared to citizens of the Federal Republic of Germany.[279] In

[275] ibid.
[276] For a discussion of the Court's use of a cause and effect reasoning, also see Da Costa (n 174) 251–252; Wilde (n 175) 642; and Liguori (n 175), 156–157.
[277] *Al-Skeini and others v. UK* (n 190).
[278] *Streletz, Kessler and Krenz v. Germany* (2001) 34044/96, 35532/97 and 44801/98 (European Court of Human Rights).
[279] ibid [109–114].

fact, the question of jurisdiction under Article 1 was not debated in the case. This makes sense, as the applicants complained about a criminal conviction issued by the courts of the Federal German Republic, in whose territory they were. Therefore, the applicants clearly fell within the jurisdiction of Germany.

The cases to be discussed in this section therefore concern the situation in which the consequences of the use of force of State agents materialize outside the State's territory and more broadly speaking the question whether a cause and effect reasoning, categorically dismissed by the Court in the case of *Banković,* may after all be permissible.

2.5.1 Pad and others v. Turkey

One of the cases concerning the cross-border use of force by State agents was the case of *Pad and others v. Turkey*.[280] The case concerned the killing of seven men on the border of Turkey and Iran. The applicants claimed that they had been on the Iranian side of the border, when a Turkish helicopter shot at them. Then, the helicopter had landed and Turkish soldiers arrested the men. Finally, the men were shot dead on the Turkish side of the border.[281] While Turkey did not dispute having killed the men, it claimed that the helicopter nor its soldiers had entered Iranian territory.[282] Somewhat ironically, both parties to the case argued that the applicants had been within the jurisdiction of Turkey. The applicants claimed that Turkey had exercised authority and control over them, while the Turkish government claimed that the applicants had been within Turkish territory.[283] First, the Court confirmed that a State may be considered to exercise extraterritorial jurisdiction by virtue of the extraterritorial effects of its acts:

> Although the words "within their jurisdiction" in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial (see Bankovic and Others v. Belgium and 16 other Contracting States (dec.) [GC], application no. 52207/99, §§ 59-61, ECHR 2001-XII, and Cyprus v. Turkey [GC], no. 25781/94, § 76, ECHR 2001-IV), in exceptional circumstances the acts of Contracting States which are performed outside their territory or which produce effects there ("extraterritorial act") may amount to the exercise by them of jurisdiction within the meaning of Article 1 (see Issa and Others, cited above, § 68). Accordingly, a State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State which does not necessarily fall within the legal space of the Contracting States, but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State (see Issa and Others, cited above, § 71; Öcalan v. Turkey [GC], no. 46221/99, § 91, ECHR 2005-IV; Sánchez Ramirez v. France, application no. 28780/95, Commission decision of 24 June 1996, Decisions and Reports (DR) 86, p. 155; Reinette v. France, no. 14009/88, Commission decision of 2 October 1989, DR 63, p. 189; and Freda v. Italy, no. 8916/80, Commission decision of 7 October 1980, DR 21, p. 250).[284]

[280] *Pad and others v. Turkey* (2007) 60167/00 (European Court of Human Rights).
[281] ibid [5–8].
[282] ibid [21–25].
[283] ibid 48, 51.
[284] ibid [53].

Note how the Court expressly extended its reasoning to States who are not a Member State to the ECHR. The Court then appears to suggest that it does not matter in its opinion whether the applicants had been on the Turkish or the Iranian side of the border:

> However, in the instant case, it was not disputed by the parties that the victims of the alleged events came within the jurisdiction of Turkey. While the applicants attached great importance to the prior establishment of the exercise by Turkey of extraterritorial jurisdiction with a view to proving their allegations on the merits, the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives, who had been suspected of being terrorists (see, *a contrario*, *Issa and Others*, cited above).
>
> Accordingly, the Court finds that the victims of the impugned events were within the jurisdiction of Turkey at the material time.[285]

The Court's considerations here are noteworthy, as it follows a cause and effect reasoning. After all, it grounds the fact that the applicants have come within the jurisdiction of Turkey on Turkey's admission that the fire discharged from the helicopter had killed the applicants. In other words, contrary to its reasoning in *Banković,* the Court finds that the factual power to kill the applicants by discharging shots from a helicopter is sufficient to bring the applicants' relatives within the jurisdiction of Turkey. This is a cause and effects reasoning. It appears that it would not even have been necessary for the Court to follow this reasoning, as in both the scenarios described by the applicants and the government, the persons had been killed, whether by shots fired from the helicopter or shots fired from soldiers from close range, on the Turkish side of the border. Nevertheless, the case of *Pad and others v. Turkey* is an example of the fact that the Court does at times follow a cause and effect reasoning.

2.5.2 Kallis and Androulla Panayi v. Turkey

Another case in which there was uncertainty about the exact location where the victim had been killed concerns the case of *Kallis and Androulla Panayi v. Turkey*.[286] The case took place in the UN Buffer zone on Cyprus, which separates the territory controlled by Cyprus from that controlled by the Turkish Republic of Northern Cyprus (TRNC), falling under Turkish control. It concerned the killing of the applicant's son, who had been a Cypriot soldier. He had entered the UN Buffer zone, supposedly to exchange his hat with a Turkish soldier. According to the applicants, he had then been shot by Turkish soldiers while he was still within the UN Buffer zone.[287] According to the Turkish government, the son of the applicants had already crossed into TRNC territory when he was shot.[288] In this case, as in all cases concerning Northern

[285] ibid [54–55].
[286] *Kallis and Androulla Panayi v. Turkey* (2009) 45388/99 (European Court of Human Rights).
[287] ibid [8].
[288] ibid [17].

Cyprus, Turkey argued that it did not exercise jurisdiction over Northern Cyprus.[289] Again, the Court principally followed a cause and effect reasoning, basing its finding of jurisdiction primarily on the fact that it was clear that the applicant had been shot by TRNC soldiers:

> According to the Government's own version of the facts, Stelios Kalli Panayi died as a result of the use of lethal force by Turkish or Turkish-Cypriot soldiers. Moreover, when he was hit by the bullets, he was entering the territory of the "TRNC".[290]

In this case, it does not become clear whether the fact that the applicant had been within TRNC territory according to Turkey's own version of events is of great importance to the Court's finding that the applicant had been within its jurisdiction, or whether the fact that he had been shot by TRNC soldiers had been enough to bring him within the jurisdiction of Turkey. There is, however, another case concerning the UN Buffer zone in which it does become clear that extraterritorial effects may by and of themselves suffice to bring a person within the jurisdiction of a State.

2.5.3 Andreou v. Turkey

This concerns the case of *Andreou v. Turkey,* in which a woman standing outside the UN Buffer zone on the Cypriote side, was hit by a bullet fired by a TRNC agent standing on the Turkish side of the UN Buffer zone.[291] During a protest in the vicinity of and in the UN Buffer zone, the TRNC agents had started indiscriminately firing into the crowd in order to control it. As usual, Turkey disputed it had jurisdiction over Northern Cyprus. More specifically, it pointed out that the applicant had not been in the territory of the TRNC.[292] When considering whether Turkey had exercised jurisdiction over the applicant, the Court set out that:

> The Court reiterates that, in exceptional circumstances, the acts of Contracting States which produce effects outside their territory and over which they exercise no control or authority may amount to the exercise by them of jurisdiction within the meaning of Article 1 of the Convention. […]
>
> In these circumstances, even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as "within [the] jurisdiction" of Turkey within the meaning of Article 1 and that the responsibility of the respondent State under the Convention is in consequence engaged.[293]

The Court therefore concluded that the extraterritorial effects of the use of force had on the applicant brought her within the jurisdiction of Turkey. Yet, the Court made a somewhat

[289] ibid [25].
[290] ibid [27].
[291] *Andreou v. Turkey* (2008) 45653/99 (European Court of Human Rights).
[292] ibid 8.
[293] ibid 10.

confusing comment, noting that: "Unlike the applicants in the *Bankovic and Others* case (cited above) she [the applicant] was accordingly within territory covered by the Convention."[294] This is a reference to the concept of an *espace juridique* formulated in *Banković* and is contrary to its express inclusion of third States in the case of *Pad and others v. Turkey*. It does not appear likely that the Court thereby wished to limit the theory that the extraterritorial effects of the use of force may give rise to the exercise of jurisdiction to the Convention's *espace juridique*. In fact, there was no need to distinguish the situation of *Andreou* from that of *Banković*, in the sense that *Banković* concerned the extraterritorial use of force and not the extraterritorial effects of the use of force. Moreover, it would seem arbitrary to hold that the Court's conclusion on the exercise of jurisdiction in the case of *Andreou* would have looked very differently if the situation had occurred on the border between a Member State to the Convention, and a State who is not member to the Convention. Irrespective of the question whether the Court really wanted to limit its reasoning to the Convention's *espace juridique*, the case shows that the Court follows a cause and effect reasoning in some cases.[295] The case does not provide any clarity, however, on the question how far such a cause and effect reasoning may be stretched. The case could be referred to, to argue that extraterritorial effects of the use of force only give rise to the exercise of jurisdiction, if the link between the use of force and the violation is very close. One can also hold, however, that the Court does not find it necessary to expressly limit this theory to such border situations and that the case can therefore not be held to have only this limited implication. As the case does not provide clarity on this issue, this is discussed in a wider context in the concluding part below. Before doing so, the case of *Al Skeini and others v. the UK* is discussed, which is a classic example of cases in which the notion of effective control is central to a finding of jurisdiction. Nevertheless, in this judgment, the Court made a relevant finding with respect to the permissibility of a cause and effect reasoning.

2.5.4 Al-Skeini and others v. the UK

The case of *Al Skeini and others v. the UK* concerns six individuals who were killed by British soldiers in British controlled Basra in Iraq.[296] Five of the applicants had been killed by British soldiers on patrol, while one of the applicants had been arrested and had subsequently died in a

[294] ibid 11.
[295] In this respect, also see Heijer, den, M. (n 89) 47–49; and Heijer, den, M. and Lawson (n 174) 178-179, 191; Den Heijer and Lawson may also be understood as considering that the Court does in fact follow a cause and effect reasoning in many cases, as they conclude that the territorial scope of human rights mainly depends on where the effects of State activity are felt. Besides the cases considered here, they refer to cases relating to State action over private property located within its territory or domestic legal proceedings, in which the applicants reside outside the respondent State. Or, as was the case in Haydarie v. the Netherlands, the effects of domestic administrative proceedings relating to the issuing of a visa to a family partly living within the territory of the respondent State and partly living outside its territory. This leads Den Heijer and Lawson to conclude in broad terms that the Convention applies where its effects are felt. Yet, it must be pointed out that in the majority of the cases discussed in this context, there was a clear link with the respondent State. Such link being the property located within the State, the fact that domestic legal proceedings evidently take place within the respondent State's territory, or that part of the applicants claiming a violation of their right to family life resided within the respondent State. This, in the eyes of the Court, rendered it irrelevant that some members of the family lived outside the respondent State. See *Haydarie v. The Netherlands* (2005) 8876/04 (European Court of Human Rights).
[296] *Al-Skeini and others v. UK* (n 190).

British run detention facility.[297] Although the case is a rather classic example of the conception that it is primarily physical control over territory or over persons that gives rise to extraterritorial jurisdiction of the State, it is interesting for the current study for another reason.[298] In *Al Skeini*, the Court shed a little light on two issues that have arisen in the cases discussed above. Firstly, this concerns the question whether a cause and effect reasoning is permissible, or whether, as the Court had stated in *Banković*, this was impermissible as it would require dividing and tailoring the Convention. Hence, a State could only be considered to exercise extraterritorial jurisdiction, if it exercised control to the degree to be able to guarantee the enjoyment of all Convention rights. In *Al Skeini*, the Court held that the exercise of jurisdiction brought with it an obligation to guarantee the rights and freedoms enshrined in the Convention relevant to the situation of the individual, thereby renouncing its finding in *Banković:* "In this sense, therefore, the Convention rights can be "divided and tailored" (compare *Banković and Others*, cited above, § 75)."[299] Unfortunately, it is not clear in how far the Court thereby also renounced the reasoning that led to its finding that the Convention could not be divided and tailored in *Banković*.[300] According to the Court, this was the case, because a cause and effect notion of jurisdiction was not contemplated by Article 1 ECHR. Nevertheless, this move may be seen as widening the scope of application of the Convention to situations in which the respondent State may not be in a position to guarantee all Convention rights.[301]
The second relevant issue the Court addresses in *Al Skeini*, concerns the question in how far the *espace juridique* of the Convention is relevant. As has already been mentioned above, the Court explicitly rejected a strict application of the concept of an *espace juridique* in this case:

> The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "legal space of the Convention" (see *Cyprus v. Turkey*, cited above, § 78, and *Banković and Others*, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. […][302]

Thus, while acknowledging that it may be considered relevant if not to apply the Convention within the *espace juridique* of the Convention would result in a vacuum of protection, the Court explicitly stated that the Convention can also be applied outside its so called *espace juridique*. With this consideration, the Court not only held that the application of the Convention is not

[297] ibid [34–71].
[298] See ibid [136], where the Court explicitly notes that it is physical control that is to be considered decisive in findings on extraterritorial jurisdiction.
[299] ibid [137].
[300] *Banković and others v. Belgium* (n 69) [75].
[301] Butha criticizes that, in his view, this also entails a watering down of the obligations the State is considered to have in a given situation. See Butha (n 174) 17–18.
[302] *Al-Skeini and others v. UK* (n 190) [142].

limited to the Convention legal space, but it also demonstrated that it attaches importance to normative considerations when determining the scope of application of the Convention. After all, the Court finds that the need to prevent a vacuum within the Convention's *espace juridique* is an argument in favour of a finding of jurisdiction, while it is clear that the question whether a vacuum of protection might arise or not is unrelated to the question of control by the State. At the same time, this argument cannot be used to argue against the application of the Convention beyond the Convention legal space.

Overall, while the judgment in the case of *Al Skeini* is often referred to as a classic example highlighting the importance of effective control, in this judgment the Court has opened the way for an application of the Convention in a more flexible way and better tailored to the circumstances of the case. Furthermore, the Court acknowledged that normative arguments play a role in determining the application of the Convention under Article 1.

2.5.5 Conclusion on Cases Concerning the Extraterritorial Effects of Force

In light of the above cases and analyses, it can be concluded that the Court, despite initially rejecting a cause and effect reasoning, does appear to follow such a reasoning at times. The question whether such a reasoning provides a legitimate and additional basis for a finding of jurisdiction nevertheless remains uncertain.

Another question arising from the cases concerning the cross-border use of force, is the question how far this theory of the extraterritorial effects of the use of force can be stretched. In the case of *Andreou*, the case in which it was most clear that the effects of the use of force materialized in territory over which the respondent State did not exercise control, the causal connection between the use of force, being the firing of bullets into the crowd, and the violation of the applicants right to life by being hit by the bullet, is very close. Should the judgment also be understood to support the stance that the extraterritorial effects of State policies may give rise to the application of the Convention? There is a significant difference between a cross-border shooting, directly killing or harming the victim, and persons dying at sea as a result of the much less direct effects of immigration policies. The cases discussed above do not give guidance on how to answer this question. After all, in none of these cases does the Court elaborate on the question how direct the link between the State agent's actions and the loss of life must be to give rise to jurisdiction. However, the case of *Kovačić and others v. Slovenia* concerning the extraterritorial effects of Slovenia's monetary and banking policy discussed above, may be referred to as an example in which the Court appeared to allow for a cause and effect reasoning with respect to a situation in which the effects of State policy were at issue, thus a situation in which the causal link was much less direct than in a cross border shooting.[303]

As will be seen in the next chapter, the question how closely an act of State and its result must be linked to give rise to State responsibility has been resolved with respect to the material question whether the right to life has been violated or not. In this regard, the Court adopted a wide understanding of State responsibility for the loss of life. The Court held, in short, that if

[303] *Kovačić and others v. Slovenia* (n 254).

life is lost in a situation in which the State knew or should have known about a threat to an individual and was in a position to mitigate the threat, it will be responsible for the loss of life if it fails to take measures to protect the right to life. Furthermore, Article 2 expressly obliges States to introduce a legal system that contributes to the protection of the right to life. This has resulted in State responsibility in situations in which State agents had in no way directly contributed to the threat to the right to life, such as loss of life due to natural disasters or threats arising from the acts of individuals. Thus, if indirect effects of State policies can give rise to responsibility under Article 2 ECHR on a material level, should they also form a basis for holding that the affected persons come within the jurisdiction of the State, who knows or ought to know about a threat and is in a position to mitigate it? So far, the Court has not provided clarification on this issue and it must be noted that, as a matter of principle, the fact that an act may qualify as a violation of a Convention right materially does not necessarily reflect on the scope of application of the Convention. However, it is also clear that following the classic doctrine of effective control has the effect of sanctioning State acts that lead to the loss of life outside the State's territory, which conflicts with the express obligation to introduce a regulatory system that protects the right to life. This is problematic with respect to all situations in which the acts of a State inherently have transboundary effects and may even be intended to have this effect.

In this regard, another field of law may come to mind, namely environmental law. Here, the fact that the acts of a State within its territory may have detrimental transboundary effects has been dealt with more explicitly. As a result of the inherently transboundary nature of the environment and hence its pollution, the 'no harm' or 'good neighbour' principle has been developed, requiring States to prevent such detrimental effects occurring beyond their territory.[304] Another relevant principle developed under international environmental law and relevant to the question how closely related action and reaction must be to confer an obligation on States is the precautionary principle. This principle sets out that even in the absence of scientific certainty regarding the detrimental effects of certain acts, States are obliged to take precautionary measures to prevent the risk of such detrimental effects from materializing.[305] In a number of cases, the ECtHR has recognized the relevance of environmental law principles in the context of human rights.[306] Yet, to the knowledge of the author, the Court has not decided cases concerning transboundary environmental harm and has therefore not explicitly dealt with the question whether residents of one State negatively affected by environmentally harmful activities of another State can rely on the ECHR for protection against such acts. Nevertheless, it appears reasonable to argue that, depending on the circumstances at hand, it would be possible

[304] C. Redgwell, 'International Environmental Law' in M. D Evans (ed), *International Law* (Oxford University Press 2010) 695.

[305] For examples of cases in which the precautionary principle was relied on in interstate litigation, see *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case* (1995) ICJ Reports 288 [5] (International Court of Justice); and *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (1997) ICJ Reports 7 [113] (International Court of Justice).

[306] For a list of such cases see Annex III of the Council of Europe, 'Manual on Human Rights and the Environment' (2012) 150–158 <https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf> accessed 19 June 2019.

making reference to the 'no harm' principle. On the basis of the environmental precautionary principle, this should also be possible in situations in which there is no scientific certainty on a particular causal connection, but a State is in a position to take mitigating measures likely to have effect.

Currently, however, these are merely lines of thought as the Court has not dealt with transboundary environmental cases, nor has it provided guidance on how close the link between the action of a State agent and the result of such action must be in order to provide a basis for extraterritorial application of the Convention. The cases regarding the transboundary use of force discussed in this section are all examples of a rather close connection between the act of a State and its consequences. However, as the judgment of *Kovačić and others v. Slovenia* indicates, the Court appeared willing to employ a cause and effect reasoning also with respect to situations in which cause and effect are less directly linked. Finally, the judgment of *Al-Skeini* elucidates that the fact that a State may not be in a position to guarantee all of the Convention rights to a person does not automatically preclude a finding of jurisdiction. While it is therefore clear that the Court does at times follow a cause and effect reasoning, it remains unclear how far the Court is willing to go in this respect.

2.6 Lack of Control within the State

There are a number of cases, in which the facts take place within the territory, but in which the respondent State does not actually exercise control. Therefore, these cases are relevant to the current study, as they shed light on the relevance of factual control for the exercise of jurisdiction under Article 1 ECHR. One of these is the case of *Assanidze v. Georgia*.[307] Another one is the case of *Ilaşcu v. Moldova and Russia* and following cases.[308] As the relevance of the *Ilaşcu* line of cases in part derives from the cases read in conjunction, and because they also concern extraterritorial jurisdiction with respect to Russia, these cases will be discussed in a separate section below.

2.6.1 Assanidze v. Georgia

Assanidze was the former mayor of Batumi, the capital of the Ajarian Autonomous Republic of Georgia. Assanidze had been convicted of being a member of a criminal association and attempted kidnapping. The ruling was quashed by the Supreme Court of Georgia and Assanidze was acquitted due to serious procedural deficiencies as well as a lack of proof. Thus, the Supreme Court ordered his immediate release.[309] The judgment, however, was never implemented and Assanidze remained in custody. The General Prosecutor's Office of Georgia, the Public Defender, the Georgian Ministry of Justice and the Legal Affairs Committee of the Georgian Parliament all contacted the local authorities of the Ajarian Autonomous Republic requesting the implementation of Assanidze's acquittal. Yet, Assanidze remained in custody.

[307] *Assanidze v. Georgia* (2004) 71503/01 (European Court of Human Rights).
[308] *Ilascu and others v. Moldova and Russia* (n 248).
[309] *Assanidze v. Georgia* (n 307) [50–56].

Finally, the department responsible for the execution of judgments of the Georgian Ministry of Justice advised Assanidze's wife to bring a case against the State of Georgia before the ECtHR to effectuate his release.[310]

2.6.1.1 The Court's Analysis under Article 1 ECHR

Before the Grand Chamber of the Court, Georgia stated that the Ajarian Autonomous Republic was part of its territory and therefore under its jurisdiction, but that there were serious problems regarding the exercise of said jurisdiction in practice.[311] While Georgia did not dispute its jurisdiction, the Court carefully analysed whether Georgia could be considered to have jurisdiction for the purpose of Article 1 ECHR. Based on the fact that the Ajarian Autonomous Republic is undisputedly an integral part of the Georgian territory, the Court noted: "In other words, there is a presumption of competence. The Court must now determine whether there is valid evidence to rebut that presumption."[312]

The Court subsequently examined whether Georgia had formally excluded the Ajarian Autonomous Republic from applicability of the Convention. This was not the case, and even if it would have done so, the exemption would not be valid.[313] The Court therefore concluded that the acts complained of were within the jurisdiction of Georgia.[314]

Yet, the apparent lack of effective control over the Ajarian authorities by the Georgian government prompted the Court to devote several paragraphs to the question of imputability and responsibility in a second step. Referring to the cases of *Loizidou* and *Cyprus v. Turkey*, the Court held that the case of *Assanidze* could be distinguished, because:

> The position in the present case is quite different: no State apart from Georgia exercised control – and therefore had jurisdiction – over the Ajarian Autonomous Republic […][315]

Thereby, the Court appeared to consider whether there are circumstances rebutting the presumption of competence it had formulated before. Interestingly, in this respect the Court considered it relevant whether there is another State or entity exercising effective control over the area in which the acts had taken place. After all, as a matter of logic, a vacuum of power and control over a given area is perfectly possible and it should not matter whether another State or entity exercises control. Yet, a vacuum of control is less tolerable in terms of human rights protection, as it would deprive the people living in such an area of the protection they are formally entitled to. The Court therefore concluded that the fact that Assanidze continued to be imprisoned despite the elaborate efforts of the Georgian authorities, was imputable to the Ajarian authorities. Nevertheless, this engaged the Georgian State's jurisdiction and responsibility.[316]

[310] ibid [59–65].
[311] ibid [133].
[312] ibid [139].
[313] ibid [140–142].
[314] ibid [143].
[315] ibid [144].
[316] ibid [145–147].

In light of the general rule in international law that a State cannot preclude responsibility by invoking its incapacity to control its local authorities, this conclusion may not be surprising.[317] Nevertheless, the finding shows that it is not always mere factual power and control that is relevant when considering whether certain acts fall within the jurisdiction of the State and the Convention is therefore applicable. Instead, the Court held that Article 1 confers upon the State a duty to ensure compliance with the Convention with respect to all parts of its jurisdiction:

> The general duty imposed on the State by Article 1 of the Convention entails and requires the implementation of a national system capable of securing compliance with the Convention throughout the territory of the State for everyone. That is confirmed by the fact that, firstly, Article 1 does not exclude any part of the member States' "jurisdiction" from the scope of the Convention and, secondly, it is with respect to their "jurisdiction" as a whole – which is often exercised in the first place through the Constitution – that member States are called on to show compliance with the Convention (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports* 1998-I, pp. 17-18, § 29).[318]

In the eyes of the Court, Georgia's lack of effective control over the Ajarian authorities therefore reflected a failure on its part to ensure that it is in a position to guarantee the Convention rights under its jurisdiction, rather than a reason to preclude a finding of Georgia's jurisdiction. The duty so formulated reflects the duty to design its legal and administrative system in such a way as to contribute to the protection of the right to life, developed with respect to Article 2 of the Convention.[319] Under the latter, too, the State may face responsibility for situations in which it did not itself contribute to the loss of life. The concurring opinion of Judge Loucaides is enlightening in this respect. Therein, he explained that in his opinion 'jurisdiction' means the exercise of State authority, wherever in the world it occurs and irrespective of whether it is exercised legally or illegally.[320] According to him:

> [t]he test should always be whether the person who claims to be within the "jurisdiction" of a High Contracting Party to the Convention, in respect of a particular act, can show that the act in question was the result of the exercise of authority by the State concerned. Any other interpretation excluding responsibility of a High Contracting Party for acts resulting from the exercise of its State authority would lead to the absurd proposition that the Convention lays down obligations to respect human rights only within the territory under the lawful or unlawful physical control of such Party and that outside that context, leaving aside certain exceptional circumstances (the existence of which would be decided on a case-by-case basis), the State Party concerned may act with impunity contrary to the standards of behaviour set out in the Convention. I believe that a reasonable interpretation of the provisions of the Convention in the light of its object must lead to the conclusion that the Convention provides a code of behaviour for all High Contracting Parties whenever they act in the exercise of their State authority with consequences for individuals.[321]

[317] See Article 7 Vienna Convention on the Law of Treaties 1969, VCLT (United Nations); and J. Crawford and S. Olleson, 'The Nature and Forms of International Responsibility' in M. D Evans (ed), *International Law* (Oxford University Press 2010) 453; The Court also refers to this principle and earlier cases in which it has made a similar finding, see *Assanidze v. Georgia* (n 307) [146].
[318] *Assanidze v. Georgia* (n 307) [147].
[319] This duty will be elaborated on in the next chapter.
[320] See the concurring opinion of Judge Loucaides in ibid.

Thereby, Judge Loucaides pointed out the possibility of the State to exercise its authority, within and beyond its own territory, without exercising effective control and that there is no good reason to require the State to abide by the obligations under the Convention when exercising effective control over a person, but not to require this when a State exercises authority over a person without there being effective control, such as in the present case.

2.6.1.2 The Court's Order to Ensure the Applicant's Immediate Release

The case is interesting for another reason. The Court unanimously found that Georgia had breached Article 5 (1) of the Convention and ordered it to secure the applicant's release at the earliest date possible, while generally the choice how to abide by the judgment is left to the respondent State.[322] In his partly concurring opinion Judge Costa pointed out the difficulty of requiring Georgia to do what it has been trying to achieve the past several years without success, while the immediate release, also in his mind, is the only way to end the arbitrary detention of Assanidze.[323]
In this way, the judgment of *Assanidze* clearly demonstrates, on the one hand, the sensibility of referring to effective control as a prerequisite to the finding that the State is obliged to guarantee the rights enshrined in the Convention. On the other hand, it demonstrates that the Court is willing to hold a State responsible for acts over which it does not exercise effective control, accepting the difficulties this brings with it.

2.6.2 Conclusion on the Cases Concerning the Lack of Control within the State

The case of *Assanidze* thus offers room to argue why it is sensible to require the State to exercise effective control in order for the Convention to apply, as well as an example to argue against this stance. As Judge Loucaides pointed out, there is no principled reason to hold that the general obligation incorporated in Article 1 of the Convention should only apply to the exercise of jurisdiction within the State's territory. Rather, the obligations under the Convention should guide the State whenever it exercises its jurisdiction. Furthermore, by explicitly requiring Georgia to secure the release of Assanidze, the Court demonstrated that it is willing to accept the difficulties that arise when holding that the Convention applies even though the State does not exercise effective control. If such difficulties are acceptable to the Court within the State's territory, there is no obvious reason why this should be different beyond the State's borders. A good example to illustrate this point further is the *Ilaşcu* line of cases relating to both the situation in which a State does not exercise effective control over its own territory, as well as to the situation in which a State exercises a lesser degree of control over the territory of another State.

[321] See the concurring opinion of Judge Loucaides in ibid.
[322] ibid [203].
[323] See the partly concurring opinion of Judge Costa in ibid [8].

2.7 The Ilaşcu Line of Cases

The next cases to be discussed concern a line of cases. They all relate to the separatist Transdniestrian region in Moldova. The line of cases is of interest, as the Court faced a situation in which neither the territorial State, Moldova, nor Russia, who supported the local separatist regime, exercised the high degree of control the Court usually requires for a finding of extraterritorial jurisdiction. Nevertheless, the Court found that both States exercised jurisdiction over the applicants. With respect to both States, but especially with respect to Russia, the Court did not merely bridge a lower degree of control in its finding of jurisdiction. Arguably, the Court went further by putting to use creative legal tools in developing an almost automatic responsibility test. Thus, while the cases discussed and the reasoning of the Court are intrinsically connected to the circumstances in the Transdniestrian region, the *Ilaşcu* line of cases is a good example for the fact that effective control is not always decisive in the Court's findings on jurisdiction, and furthermore, that, if willing, the Court is able to bridge far stretches of decreasing levels of control.

As the Court's findings with respect to both Moldova's and Russia's jurisdiction and responsibility have been clarified in various cases following each other, the discussion will not be split by the different cases, but rather by the issues that are discussed in all of them.

2.7.1 General Background to the Situation in Transdniestria

The cases related to the Transdniestrian region located on the eastern border of the Republic of Moldova. Transdniestria is a separatist region that has opposed the sovereignty of Moldova before and ever since the latter has declared its sovereignty in June 1990 within the process of dissolution of the Union of Soviet Socialist Republics (USSR).[324] Shortly afterwards, in September 1990, the 'Moldovan Republic of Transdniestria' (MRT) was proclaimed.[325] In 1991, presidential elections were held in the MRT which were not recognised by Moldova.[326] Conflict ensued between the two administrations resulting in armed clashes in 1991-1992.[327] The USSR's 14th Army and a number of its weapon stocks were stationed in the Transdniestrian region and never effectively pulled out after Moldova had declared its sovereignty.

The Court considered the development of events in detail in the case of *Ilaşcu and others v. Moldova and Russia*.[328] In its judgment, it found it to be established beyond reasonable doubt that the Transdniestrian separatists had been able to arm themselves with weapons coming from the weapon stocks of the 14th Army stationed in the region.[329] Russian nationals who had come to Transdniestria to fight alongside the separatists as well as members claiming allegiance with the 14th Army participated in the fighting.[330] Due to the transfer of arms to the separatists and

[324] *Ilascu and others v. Moldova and Russia* (n 248) [43].
[325] ibid [30].
[326] ibid [47].
[327] ibid [51].
[328] ibid.
[329] ibid [57].
[330] ibid [60–64].

the support of the 14th Army, the Moldovan military was not capable to halt the separatist aspirations.[331] During these armed confrontations, the Russian 14th Army threatened to take counter measures if the Moldovan armed forces would not immediately withdraw from their position encircling the separatists.[332] In July 1992, the President of Moldova and the President of Russia signed a cease fire agreement, which provided for peace keeping troops composed by five Russian, three Moldovan and two Transdniestrian battalions.[333] Following the provisional settlement of the armed conflict, political efforts to settle the conflict permanently ensued. Several agreements between Moldova and Russia were signed, concerning, among other things, the use of an airport within the Transdniestrian region and the withdrawal of Russian troops and ammunition from the region.[334] In 1999, Russia committed to completing the withdrawal by the end of 2002. At that time, approximately 42,000 tonnes of ammunition were still stationed in the Transdniestrian region and in June 2001 about 2,200 Russian troops were still present.[335] While there was no formal cooperation or supervision by the Russian forces over the MRT troops, Russia provided economic and political support to the MRT regime. This took the form of the opening of polling stations by Russia in the Transdniestrian region, official visits to and from MRT representatives, direct investment by Russian firms in the arms industry, the delivery of Russian gas on more favourable financial terms and the provision of electricity to the region.[336] This forms the background to all cases concerning the Transdniestrian region.

2.7.2 Facts in the Case of Ilaşcu

The case of *Ilaşcu and others v. Moldova and Russia* was the first case concerning the region and here the Court set out the reasoning concerning the jurisdiction of Moldova and Russia which it followed in the ensuing cases. For a good understanding of the Court's reasoning in this and the ensuing judgments concerning the Transdniestrian region, knowledge of the facts in *Ilaşcu* is required.

Ilaşcu and others v. Moldova and Russia concerned the arrest and detention of four Moldovan nationals. They had been arrested in their homes in the Transdniestrian region between the 2nd and 4th of June 1992 by a number of persons, some of whom wore uniforms of the Russian 14th Army.[337] The applicants were subsequently accused of committing several crimes and of illegally fighting the legitimate State of Transdniestria.[338] Shortly afterwards, three of the applicants were transferred to the 14th Army garrison headquarters in Tiraspol where they were detained for about two months during which they were interrogated and ill-treated by soldiers of the 14th Army and by Transdniestrian police officers.[339] On the 23rd of August 1992 the applicants were transferred to the Tiraspol police headquarters by soldiers belonging to the

[331] ibid [65].
[332] ibid [72].
[333] ibid [87–90].
[334] See ibid [111–123].
[335] ibid [124].
[336] ibid [137–161].
[337] ibid [188].
[338] ibid [193].
[339] ibid [196–199].

Russian 14th Army.[340] The 'Supreme Court of the Moldovan Republic of Transdniestria' held all four applicants liable for the crimes they had been accused of and sentenced them to several years imprisonment in December 1993.[341] In the same month, the Moldovan President declared the conviction unlawful as it was pronounced by an unconstitutional court, a criminal investigation against the judges and prosecutors involved was launched and the Supreme Court of the Republic of Moldova quashed the judgment and ordered the applicants' release.[342] Despite these and other measures undertaken by the Moldovan government, the applicants remained in custody. In August 2000 the Moldovan public prosecutor declared void the judgment of the Moldovan Supreme Court quashing the applicants' conviction in 1993, because the basis upon which the decision was based was, according to him, not the correct one. Yet, the public prosecutor did not launch a new criminal investigation against the judges and prosecutors of the Transdniestrian court as such investigation was time barred.[343] On the 5th of May 2001 one of the applicants, Ilaşcu, was transferred to the Moldovan secret service who then released him.[344] The other applicants remained imprisoned up until and during the proceedings. The applicants alleged that both Moldova and Russia were responsible for a violation of numerous Convention rights, among which the right to life and the prohibition of torture.

2.7.3 Jurisdiction Ratione Temporis

The difficult political situation in the region, as well as the facts at hand formed the complex background against which the Court analysed whether the applicants came within the jurisdiction of Moldova and Russia in the case of *Ilaşcu*. Firstly, the Court briefly dealt with the fact that the arrests had taken place in 1992, while Moldova and Russia only ratified the Convention in 1997 and 1998 respectively. The Court set out that a wrongful act under international law may be described as continuing, if it extends over a period of time.[345] As the detention of the applicants continued after 1997 and 1998 respectively, they came within the jurisdiction of Moldova and Russia *rationae temporis*. As will be seen, the Court extended the relevance of this reasoning to bear also on jurisdiction *ratione loci* in following cases.

2.7.4 Jurisdiction Ratione Loci of Moldova

As usual, the Court set out some general principles concerning jurisdiction. Among others, this concerned the assumption that a State exercises jurisdiction throughout the whole of its territory. According to the Court, this presumption could be limited in exceptional circumstances, in which a State is prevented from exercising its authority in the whole of its

[340] ibid [200].
[341] ibid [216–219].
[342] ibid [220–223].
[343] ibid [229].
[344] ibid [279].
[345] ibid [320–321].

territory, just as exceptional circumstances may justify a finding of extraterritorial jurisdiction.[346]

When considering whether Moldova exercised jurisdiction more specifically, the Court primarily recalled its decision on admissibility, in which it had decided that Moldova's declaration holding that it was unable to guarantee the Convention rights within Transdniestria, was not a valid reservation to the Convention.[347] Against the background of the facts, the Court explicitly acknowledged that Moldova did not exercise authority over the part of its territory under control of the MRT.[348] Yet, the Court finds the following:

> However, even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.[349]

It is worth spelling out that the Court did not conclude with the finding that Moldova lacked effective control over the Transdniestrian region. If effective control would be the decisive factor in determining whether a State exercises jurisdiction, then this would have been the logic conclusion. It most certainly is not, as the Court found that even in the complete absence of control by Moldova, the Convention had a bearing on its actions and was therefore applicable. The reason for doing so, was that the Transdniestrian region was officially considered to be part of Moldova's territory.[350]

2.7.4.1 The Nature of Moldova's Obligations in Light of the Absence of Control

While the complete lack of effective control did not preclude the application of the Convention, it did affect the nature of the obligations borne by Moldova, as the Court considered that Moldova had positive obligations under Article 1 ECHR, despite its lack of control over the region. When setting out the scope of these positive obligations under Article 1 ECHR, the Court pointed out that a balance must be struck between the general interests and the interests

[346] ibid [312–315].
[347] *Ilascu and others v. Moldova and Russia* (n 248) [324]; for the Court's reasoning see *Ilaşcu and others v. Moldova and Russia* (2001) 48787/99 20–21 (European Court of Human Rights).
[348] *Ilascu and others v. Moldova and Russia* (n 248) [330].
[349] ibid [331].
[350] The fact that this is the underlying reason to conclude that Moldova exercises jurisdiction despite a complete lack of control over the territory becomes more evident in later cases concerning the Transdniestrian reason. See *Turturica and Casian v. The Republic of Moldova and Russia* (2016) 28648/06 and 18832/07 [28] (European Court of Human Rights); *Paduret v. The Republic of Moldova and Russia* (2017) 26626/11 [16] (European Court of Human Rights); *Apcov v. The Republic of Moldova and Russia* (2017) 13463/07 [21] (European Court of Human Rights); *Soyma v. The Republic of Moldova, Russia and Ukraine* (2017) 1203/05 [20] (European Court of Human Rights); *Vardanean v. The Republic of Moldova and Russia* (2017) 22200/10 [20] (European Court of Human Rights); Note that another judgment relating to the Transdniestrian region was issued shortly after the end of the period covered by the search of this study. Both Moldova and Russia took the same positions in respect to their jurisdiction over the region as in the preceding cases. The Court, too, does not develop a new stance or reasoning in this respect, but refers back to its earlier case law on the matter. See *Braga v. The Republic of Moldova and Russia* (2017) 76957/01 [19–27] (European Court of Human Rights).

of the individual and that such positive duties must not impose an impossible or disproportionate burden.[351] These positive obligations under Article 1 ECHR require the State to:

> […] endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organizations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.[352]

It is up to the State itself to determine the specific measures how best to comply with such positive obligations, but the Court will verify whether the measures taken were appropriate and sufficient. This, according to the Court, is especially necessary when the fundamental rights guaranteed under Articles 2 and 3 of the Convention are at stake.[353] The Court further specified that the measures required under the positive dimension of Article 1 are two-legged. On the one hand, general measures to re-establish control over the territory at hand are needed, and on the other hand, specific measures to ensure respect for the applicants' rights are required.[354] Regarding the question whether Moldova complied with its positive obligations under Article 1 ECHR, the Court concluded that it did so until Ilaşcu's release in 2001, but not thereafter. The Court took into account that the Moldovan authorities had taken several judicial and later mostly diplomatic measures to regain control over the area.[355] More specifically with respect to the applicants' situation, the Court noted that Moldova took several measures to end the violation of the Convention rights of the applicants, such as sending doctors, providing financial support to their families and raising the issue of the applicants' release with officials of the MRT and Russia.[356] Yet, the Court concluded that it did not have evidence of any such measures after the release of *Ilaşcu*.[357] This lead the Court to conclude that:

> […] Moldova's responsibility could be engaged under the Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001.[358]

Neither before nor after May 2001 was Moldova considered to have exercised effective control over the Transdniestrian region. The Court merely analysed whether Moldova tried to use the very limited means at its disposal to regain control over the area and to end the violation of the applicant's Convention rights. The analysis whether there had been a breach of the prohibition of ill-treatment under Article 3 lead the Court to conclude that Moldova was not responsible for the detainment and ill-treatment of *Ilaşcu*, who was released in May 2001. It was found

[351] *Ilascu and others v. Moldova and Russia* (n 248) [332].
[352] ibid [333].
[353] ibid [334].
[354] *Ilascu and others v. Moldova and Russia* (n 248) [339]; The two legged nature of the positive duties under Article 1 has been endorsed in the case of *Sargsyan v. Azerbaijan* (2015) 40167/06 [131] (European Court of Human Rights).
[355] *Ilascu and others v. Moldova and Russia* (n 248) [344].
[356] ibid [346–347].
[357] ibid [348].
[358] ibid [352].

responsible for the violation of Article 3 in respect of the three other applicants from May 2001 onwards, however.

The Court thereby developed a sort of double-responsibility test in which the distinction between the determination of jurisdiction and the question whether the Convention has been breached materially becomes blurred. The question whether Moldova is held liable for a breach of one of the rights contained in section I of the Convention turns entirely on the question whether Moldova fulfilled its positive obligations under Article 1. If it did not live up to these positive obligations and a violation of one of the Convention rights has taken place, Moldova may be held liable for it irrespective of the role it played in the actual perpetration of the violation. Thus, the Court held Moldova responsible for acts committed by a separatist regime over which it had no control, committed in a territory over which it did not have control either. Yet, by failing to discharge its positive obligations under Article 1, as defined by the Court, Moldova became fully liable for the violation of the Convention rights, despite a complete lack of control. This reasoning by the Court is not centred on the question of effective control. Quite to the contrary, Moldova is required to take all the measures at its disposal to safeguard the rights of the applicants, however minimal these may be, or it risks being held responsible for the acts of a regime over which it has no control whatsoever. Moreover, just as was the case in *Assanidze*, the Court required both respondent States to ensure the immediate release of the applicants, while being fully aware that Moldova was not actually in the position to do so.[359]

2.7.4.2 Differing Views in Regard to Moldova's Responsibility

The decision regarding Moldova's jurisdiction was disputed among the judges of the Grand Chamber, as reflected by the votes and the separate and dissenting opinions. The findings with respect to Moldova were adopted by eleven votes to six. Generally, the separate and dissenting opinions published reflect a great deviation in the appreciation of the facts. Judge Casadevall, joined by Judges Ress, Bîrsan, Tulkens and Fura-Sandström, concluded that Moldova did not, at any time after becoming party to the Convention, pursue its positive obligations under Article 1 with sufficient firmness to justify the finding that it could not be held responsible for the events before May 2001.[360] Yet, Judge Sir Nicolas Bratza, joined by Judges Rozakis, Hedigan, Thomassen and Panţîru, appeared unconvinced that Moldova did less than it could or should have done under Article 1 in the period after May 2001.[361] They criticized that the positive obligations under Article 1 as formulated in the judgment, required the Court to assess whether certain measures would be effective to regain control over the territory against a complex and fluctuating factual background.[362] This criticism is well placed. Yet, this can also be said in relation to other positive obligations. The positive obligation under Article 2, for example, also requires the Court to assess whether it considers that a State could have done more to prevent

[359] ibid 116.
[360] See the partly dissenting opinion of Judge Casadevall, joined by Judges Ress, Bîrsan, Tulkens and Fura-Sandström ibid [9].
[361] See partly dissenting opinion of Judge Sir Nicolas Bratza, joined by Judges Rozakis, Hedigan, Thomassen and Panţîru, ibid [26].
[362] See partly dissenting opinion of Judge Sir Nicolas Bratza, joined by Judges Rozakis, Hedigan, Thomassen and Panţîru, ibid [8].

the loss of life in often complex situations. So long as this is considered acceptable under the other Articles of the Convention, this argument can therefore not serve to dismiss the acceptance of a positive obligation under Article 1.

Furthermore, the degree of control exercised by Moldova and the basis for jurisdiction were hotly debated. Not surprisingly, the Russian Judge Kovler favoured an understanding of jurisdiction purely based on territoriality, under which Moldova would be responsible based solely on the fact that Trandsniestria is officially part of its territory.[363] Quite to the contrary, the question of territoriality did not appear relevant to Judge Loucaides. He referred back to his concurring opinion in the case of *Assanidze,* quoting the passage set out above.[364] He then went on to say:

> I wish to expand on my aforesaid position by adding that a State may also be accountable under the Convention for failure to discharge its positive obligations in respect of any person if it was in a position to exercise its authority directly or even indirectly over that person or over the territory where that person is.[365]

Judge Loucaides thereby clearly expressed the opinion that a State must be conscious of the effects of its sovereign acts on persons, wherever it exercises them. He disagreed with the majority's conclusion that the applicant's come within Moldova's jurisdiction and that Moldova failed to discharge its positive obligations, because Moldova did not actually exercise any authority over Transdniestria despite the fact that it is officially part of its territory. He pointed out the danger of the reasoning applied by the Court, which is often referred to as a reason for the need to limit the scope of application of the Convention. According to Judge Loucaides, this reasoning risks holding a State responsible for the fate of any person wherever in the world, because the State did not press another State actually exercising authority over these persons to secure the Convention rights to them.[366] He referred to the case of *Banković*, stating that it did not make sense to him to hold that the dropping of bombs over an inhabited area did not bring the persons affected thereby within the jurisdiction of the State, while the fact that Moldova did not do all it could to regain control over an area over which it did not have any authority was sufficient to bring the applicants within the jurisdiction of Moldova. Thereby, Loucaides appeared to follow an effects-based approach to jurisdiction. After all, the question central to his reasoning is whether the acts of the State actually had a bearing on the fate of the applicants or not. From the statement cited above, Judge Loucaides also allowed for indirect influences on the applicants life. In his view, States must be conscious of and held liable for the actual impact on human rights of their own policies.

Yet another approach flows from the dissenting opinion of Judge Ress. According to Judge Ress, the situation of Moldova was comparable to the situation of Georgia in the case of *Assanidze*.[367] Here, the Court considered that Georgia 'merely' encountered practical

[363] See dissenting opinion of Judge Kovler, ibid 150.
[364] See partly dissenting opinion of Judge Loucaides, ibid 139.
[365] See partly dissenting opinion of Judge Loucaides, ibid.
[366] See partly dissenting opinion of Judge Loucaides, ibid 150.
[367] See the partly dissenting opinion of Judge Ress, ibid [3].

difficulties of implementing its authority, but that this did not diminish its jurisdiction in any way. Thereby, Judge Ress points out the difficulty of distinguishing between situations in which the central government exercises only limited control, or none at all. As will be discussed below, the Court elaborated on the difference between these two situations in a case relating to the Nagorno-Karabakh region in Azerbaijan.

2.7.4.3 Conclusion on Moldova's Jurisdiction Ratione Loci

The dissenting and separate opinions demonstrate that there are different approaches to the concept of jurisdiction in which other considerations than mere factual control play a role. In any event, the Court's finding with respect to the jurisdiction of Moldova represents a new and to some extent instrumental approach to the concept of jurisdiction. Instead of holding that jurisdiction is purely a matter of fact, turning on the degree of control exercised by the State, the judgment demonstrates that territorial jurisdiction, even in the absence of control, brings with it the obligation to ensure enjoyment of the Convention rights. The finding of the Court with respect to Moldova shows that effective control is not a necessary prerequisite for the application of the Convention. Finally, the Court's reasoning in its judgment cannot be done away with as an odd mistake. Despite the lively disagreement between the judges on the question of Moldova's jurisdiction, this finding has been confirmed in numerous following cases concerning the region of Transdniestria.[368]

2.7.5 Jurisdiction of Russia

There is another relevant aspect of the *Ilaşcu* line of cases, namely Russia's jurisdiction.

2.7.5.1 The Court's Reasoning in the Case of Ilaşcu

In the case of *Ilaşcu*, the Court carefully reconstructed the involvement of the Russian 14th Army in the creation of the MRT regime in general, as well as their involvement in the imprisonment of the applicants. As has been pointed out above, a considerable stretch of time had elapsed since the arrest of the applicants, in which Russian soldiers had partaken. The Court seemed to reverse the analysis, whether the applicants fell within Russia's jurisdiction and whether Russia could be held liable for the ill-treatment they had been subjected to, as the Court first considers that Russia's responsibility was engaged in respect of unlawful acts committed by the MRT regime on the basis of its involvement in the conflict between the MRT and Moldova.[369] In doing so, the Court attached relevance to Russia's overall support to the MRT regime and to the fact that Russian soldiers had been directly involved in the applicants' arrest. It held that Russia could be held responsible for the ill-treatment of the applicants by the MRT regime, because the soldiers of the 14th Army were involved in the applicants' arrest and

[368] See *Ivanţoc and others v. Moldova and Russia* (2011) 23687/05 [105–107] (European Court of Human Rights); *Catan and others v. Moldova and Russia* (2012) 43370/04, 8252/05 and 18454/06 [109–110] (European Court of Human Rights); *Mozer v. Moldova and Russia* (2016) 11138/10 [99–100] (European Court of Human Rights).
[369] *Ilascu and others v. Moldova and Russia* (n 248) [379–382].

subsequently transferred the applicants to the separatist regime, while being aware of the fate that awaited them.[370] On the basis of this, the Court concluded that Russia had exercised jurisdiction when the applicants had been arrested in 1992.[371] The Court then continued considering whether this was also the case for the period of time after Russia had become member to the Convention in 1998. Despite acknowledging that the number of Russian troops present in Transdniestria since the armed conflict in 1992 had decreased significantly, the continuing presence of Russian arms stocks, and the political and considerable financial support by Russia were sufficient to conclude that the MRT regime was able to survive by virtue of the support by the Russian Federation.[372] The Court therefore concluded:

> All of the above proves that the "MRT", set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.
>
> That being so, the Court considers that there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate, as the Russian Federation's policy of support for the regime and collaboration with it continued beyond 5 May 1998, and after that date the Russian Federation made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998.
>
> Regard being had to the foregoing, it is of little consequence that since 5 May 1998 the agents of the Russian Federation have not participated directly in the events complained of in the present application.
>
> In conclusion, the applicants therefore come within the "jurisdiction" of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility is engaged with regard to the acts complained of.[373]

The finding that the applicants came within the jurisdiction of Russia was broadly supported, as it was adopted by sixteen votes to one.[374]

2.7.5.2 The Court's Reasoning in the Case of Catan

The special nature of the reasoning of the Court in this respect only becomes fully visible in a following judgment concerning the Transdniestrian region. It is in the case of *Catan and others v. Moldova and Russia* that the Court recapitulated this reasoning and assisted the reader in conceptualising it.[375] The case concerned the complaints of numerous applicants regarding the

[370] ibid [384].
[371] ibid [385].
[372] ibid [392].
[373] ibid [392–394], underlined by the author.
[374] ibid 114.
[375] *Catan v. Moldova and Russia* (n 368).

effects of the 'MRT law on languages' under which the MRT regime prohibited the use of the Latin script, used by Moldovans, and required the exclusive use of the Cyrillic script, used by Russians. Schools who continued to use the Latin script were closed down in 2004 and could only reopen in much poorer premises than before.[376]

When considering whether Russia exercised jurisdiction over the applicants, the Court explicitly referred to its reasoning in *Ilaşcu*:

> […] It is true that in that case the Court considered it relevant to the question whether Russian jurisdiction was engaged that Mr Ilaşcu, Mr Leşco, Mr Ivanţoc and Mr Petrov-Popa had been arrested, detained and ill-treated by soldiers of the 14th Army in 1992, who then transferred them to "MRT" custody. The Court considered that these acts, although they took place before Russia ratified the Convention on 5 May 1998, formed part of a continuous and uninterrupted chain of responsibility on the part of the Russian Federation for the detainees' fate. The Court also found, as part of that chain of responsibility, that during the uprising in Transdniestria in 1991-1992, the authorities of the Russian Federation contributed both militarily and politically to the establishment of the separatist regime (see *Ilaşcu,* cited above, § 382). Furthermore, during the period between May 1998, when Russia ratified the Convention, and May 2004, when the Court adopted the judgment, the Court found that the "MRT" survived by virtue of the military, economic, financial and political support given to it by the Russian Federation and that it remained under the effective authority, or at the very least under the decisive influence, of Russia (*Ilaşcu,* cited above, § 392). The Court therefore concluded that the applicants came within the "jurisdiction" of the Russian Federation for the purposes of Article 1 of the Convention (*Ilaşcu,* cited above, §§ 393-394).[377]

Note how the Court dubbed the reasoning it established in the case of *Ilaşcu* a 'chain of responsibility'. Now, in the case of *Ilaşcu* this reasoning was used in order to be able to hold Russia responsible for violations which had started before it became member to the Convention, thus relating to jurisdiction *ratione temporis*. The judgment of *Catan* adds an additional dimension to this reasoning, relating to jurisdiction *ratione loci*. After all, the enforcement of the discriminatory legislation resulting in violations of Convention rights in the case of *Catan* took place after Russia had ratified the Convention. Thus, the Court's considerations on the issue did not relate to jurisdiction *ratione temporis*, but rather to the question whether Russia exercised jurisdiction *ratione loci*. In this respect, the Russian government emphasized the fact that in the case of *Ilaşcu* the Court had considered the direct involvement of Russian soldiers in the arrest of the applicants relevant in its finding on jurisdiction.[378] In the case of *Catan* the Court acknowledged that Russian State agents had no direct role in the closure of the schools.[379] The Court further noted that the number of Russian military present in the region at the time of the violations was small in relation to the size of the territory.[380] Yet, on the basis of Russia's initial involvement in the rise of the MRT regime and its continuing political, economic and

[376] ibid [43–63].
[377] ibid [111], underlined by the author.
[378] ibid [113].
[379] ibid [114].
[380] ibid [118].

financial support, the Court held that its conclusion that Russia exercised jurisdiction in the case of *Ilaşcu* was still applicable.[381]

The Court then considered whether Russia could be held responsible for the violation of the applicants' right to education:

> The Court notes that there is no evidence of any direct participation by Russian agents in the measures taken against the applicants. Nor is there any evidence of Russian involvement in or approbation for the "MRT"'s language policy in general. Indeed, it was through efforts made by Russian mediators, acting together with mediators from Ukraine and the OSCE, that the "MRT" authorities permitted the schools to reopen as "foreign institutions of private education" (see paragraphs 49, 56 and 66 above).
>
> Nonetheless, the Court has established that Russia exercised effective control over the "MRT" during the period in question. In the light of this conclusion, and in accordance with the Court's case-law, it is not necessary to determine whether or not Russia exercised detailed control over the policies and actions of the subordinate local administration (see paragraph 106 above). By virtue of its continued military, economic and political support for the "MRT", which could not otherwise survive, Russia incurs responsibility under the Convention for the violation of the applicants' rights to education. In conclusion, the Court holds that there has been a violation of Article 2 of Protocol No. 1 to the Convention in respect of the Russian Federation.[382]

This statement highlights the stretch of the 'chain of responsibility' as applied by the Court. In the first place, the purpose for which the Court used this concept is wider than in *Ilaşcu*. There, the use of the concept was limited to reason that ongoing violations of the MRT regime fell within the temporal scope of application of the Convention. In the case of *Catan*, the Court used the concept to be able to take Russia's initial involvement in the establishment of the regime into account to justify its finding of jurisdiction over the area, despite the fact that Russia's presence and influence has decreased over the years. It comes to this conclusion regardless of the fact that Russian State agents had not, as opposed to the case of *Ilaşcu*, had any direct role in the violation of the applicants' rights. To the contrary, Russia had made efforts to mediate in order to end the violation of the applicant's rights and it was due to the efforts of Russian mediators, that the MRT allowed the schools to reopen, albeit under poorer circumstances.[383] Yet, in the eyes of the Court, these measures could not avert the finding that Russia bore responsibility for the violation of the rights of the applicants in light of its overall support for the MRT regime. Thereby, the line between jurisdiction and responsibility becomes further blurred, as the circumstances which lead the Court to conclude that Russia exercised jurisdiction are now also the basis for holding that it is responsible for the violation of the applicants' rights, despite the concrete measures Russia took in regard to the MRT's language policies to end the violation. Now, this reasoning might be explained by referring to the concept of overall control as developed in the case of *Loizidou*. Here, the Court held that detailed control over the policies of the local authorities was not required for holding the State responsible for the acts of these

[381] ibid [118–122].
[382] ibid [149–150].
[383] ibid [149].

local authorities.[384] Yet, it is not reasonable to place these two cases on an equal footing, as a difference in the intensity of control exercised must be acknowledged. While the area of Northern Cyprus is smaller than the region of Transdniestria, the Turkish government had stationed more than 30,000 soldiers in Northern Cyprus, which constantly patrolled the area and established check points.[385] Furthermore, in the case of *Loizidou*, Turkish troops themselves had on occasion been involved in the violation of the applicant's rights, by denying her access to her property.[386] In comparison to this, the control exercised over the MRT by Russia appears marginal. The Court estimated that Russia had only about 1,500 military personnel in Transdniestria in 2002 to guard the arms stores still in place.[387] Furthermore, direct involvement of the Russian soldiers in the violation of the applicants' rights was absent in the case of *Catan.* It must therefore be admitted that the degree of control exercised by Russia was much less intense than the control exercised by Turkey over Northern Cyprus. This also seems to be reflected in the wording the Court uses to refer to the basis for finding that Russia has jurisdiction: effective control and *decisive influence*.[388] It cannot therefore be denied that the Court is satisfied, in this case, with a lesser degree of control than was the case in *Loizidou*.

2.7.5.3 Reversal of the Burden of Proof

Another legal stepping stone the Court availed itself of in the judgment of *Catan* and following judgments is worth noting, namely the reversal of the burden of proof to the detriment of Russia:

> In these circumstances, where the Court has already concluded that the Russian Federation had jurisdiction over certain events in Transdniestria during the relevant period, it considers that the burden now lies on the Russian Government to establish that Russia did not exercise jurisdiction in relation to the events complained of by the present applicants.[389]

While normally the fact that a State exercises jurisdiction has to be established, it is now assumed to be the case, unless Russia rebuts this assumption. This is a quite remarkable legal tool the Court used here, especially in the light of the, according to the Court, exceptional nature of the extraterritorial exercise of jurisdiction for the purpose of Article 1. This is even more so, in view of the fact that the Court side stepped some significant differences between the case of *Catan* and that of *Ilaşcu* in its analysis of Russia's jurisdiction, as pointed out above. The interpretation of the Court in *Catan* has been confirmed in another Transdniestrian case, *Mozer v. Moldova and Russia*, concerning the detention of the applicant from November 2008 until July 2010.[390] Here too, the Court acknowledged that Russian State agents had no direct role in the violation of the applicant's rights.[391] When analysing the control and influence of the

[384] *Loizidou v. Turkey* (1996) 15318/89 [56] (European Court of Human Rights).
[385] ibid [16].
[386] ibid [54].
[387] *Catan v. Moldova and Russia* (n 368) [117–118].
[388] ibid [122].
[389] ibid [112].
[390] *Mozer v Moldova and Russia* (n 368).
[391] ibid [101].

Russian government over the MRT in this last case, the Court found that there was no significant change in Russia's policy in this respect. Therefore, the Court concluded that its findings of jurisdiction in *Ilaşcu* and *Catan* also hold true in the case of *Mozer*. Subsequently, the Court stretched the presumption that Russia exercises jurisdiction over the Transdniestrian region further until May 2011 in the case of *Vardanean v. Moldova and Russia*.[392]

2.7.5.4 Responsibility of Russia for Violations of the Convention

The combination of, on the one hand, allowing for a finding of jurisdiction despite decreasing control of Russia over the MRT regime, and on the other hand, the reversal of the burden of proof to the detriment of Russia, has another effect worth noting. The Court's reasoning with respect to whether Russia exercised jurisdiction already demonstrated that the difference between the question of jurisdiction and responsibility became blurred. In fact, in *Ilaşcu* the Court first considered whether Russia could be held responsible for the applicants' arrest and detention, and based its finding of jurisdiction on the fact that this was the case. Against this background, the fact that the Court has subsequently established an assumption of jurisdiction, has led to an automatic finding on responsibility, as becomes clear in later cases concerning the Transdniestrian region. For example, in the case of *Turturica and Casian v. Moldova and Russia*, the Court held:

> In so far as the Russian Federation is concerned, the Court notes that it has already found that the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria in 1991-1992 (see *Ilaşcu and Others*, cited above, § 382). The Court also found in subsequent cases concerning the Transdniestrian region that up until July 2010, the "MRT" was only able to continue to exist, and to resist Moldovan and international efforts to resolve the conflict and bring democracy and the rule of law to the region, because of Russian military, economic and political support (see *Mozer*, cited above §§ 108 and 110). The Court therefore concluded in *Mozer* (cited above) that the "MRT"'s high level of dependency on Russian support provided a strong indication that Russia exercised effective control and a decisive influence over the "MRT" authorities and that, therefore, the applicant fell within Russia's jurisdiction under Article 1 of the Convention.
>
> The Court sees no grounds on which to distinguish the present case from *Ilaşcu and Others*, *Catan and Others* and *Mozer* (all cited above).
>
> Consequently, the Court dismisses the Russian Government's objections *ratione personae* and *ratione loci* and holds that the applicants in the present case fall within Russian jurisdiction under Article 1 of the Convention.
>
> The Court therefore considers that by virtue of its continued military, economic and political support for the "MRT", which could not otherwise survive, Russia's responsibility under the Convention will be engaged in an automatic manner as regards any violations of the applicants' rights which are found in the present case (see, for the latest reference, *Mozer*, cited above, §§ 156-157).[393]

The Court therefore no longer analyses whether Russia exercises jurisdiction as this is presumed to be the case, nor does it analyse whether and what role Russia played in the perpetration of the applicants' Convention rights.[394] Russia's responsibility for human rights violations in the Transdniestrian region has become a matter of course.

2.7.5.5 Conclusion on Russia's Jurisdiction

The *Ilaşcu* line of judgments truly represents a widened approach to the requirements to consider that a State exercises extraterritorial jurisdiction. It was already apparent in the judgment of *Illaşcu* that the Court was satisfied with a much lesser degree of control exercised by Russia over the Transdniestrian region and the applicants. In the cases of *Catan* and *Mozer*, the Court took this reasoning even further. Despite acknowledging the fact that there were significant differences between the latter two cases and the case of *Ilaşcu*, namely the fact that Russian State agents were not directly involved in the violation of the applicant's rights and the decreasing military presence of Russia over time, the Court established the presumption that Russia exercised jurisdiction over the region. The Court has stretched this presumption and its self-proclaimed chain of responsibility over a period of 20 years from the Moldovan conflict in 1991-1992 until the end of the violation of the rights of *Vardanean* in 2011. The significance of the presumption that Russia exercises jurisdiction over the Transdniestrian region becomes even greater by the second line of reasoning crystalizing from these cases. Not only is Russia presumed to exercise jurisdiction, it is also considered to be responsible for the rights violation complained of in an automatic manner. The far-reaching nature of this reasoning is especially apparent in the case of *Catan*, in which Russia even took measures to contribute to an end of the rights violation but was held responsible for it nevertheless. With respect to the jurisdiction of Russia therefore, the *Ilaşcu* line of cases represents a far-reaching move away from a concept of jurisdiction in which effective control is considered the essential factor.

2.7.6 Conclusion on the Ilaşcu Line of Cases

The *Ilaşcu* line of cases provides valuable insights into the Court's understanding regarding the scope of application of the Convention under Article 1. Maybe it is most noteworthy that the Court did not shy away from tackling several difficulties it encountered with respect to establishing the respondent States' jurisdiction, but availed itself of different legal tools. Such is the case in regard to its finding that even a complete lack of effective control over parts of its territory, does not necessarily preclude the application of the Convention. Instead, it merely affected the nature of the obligations borne by the Moldova. Furthermore, with respect to Russia the Court was satisfied with the finding that Russia exerted decisive influence over the MRT

[392] *Vardanean v. Moldova and Russia* (n 350) [23].

[393] *Turturica and Casian v. Moldova and Russia* (n 350) [30–33].

[394] See in this respect also *Paduret v. Moldova and Russia* (n 350) [36]; *Apcov v. Moldova and Russia* (n 350) [48]; *Soyma v. Moldova, Russia and Ukraine* (n 350) [41]; *Vardanean v. Moldova and Russia* (n 350) [45].

regime as a basis for jurisdiction. Moreover, it introduced the concept of a chain of responsibility, which is sufficiently flexible to bridge decreasing degrees of overall control, a lack of direct involvement in the specific acts that lead to the violation at hand, and considerable periods of time. All this demonstrates that the Court is not willing to consider the question whether the Convention applies a mere question of fact. There where the actual control and influence of the respondent State is admittedly less than in other cases, as was the case for Moldova and also for Russia in the more recent cases concerning Transdniestria, the Court found alternative solutions in order to ensure that the applicants were protected by the Convention.

2.8 Distinguishing Between 'Difficulties of Implementation' and Lack of Control

A question that arises when comparing the case of *Assanidze* to the Court's finding with respect to Moldova in the *Ilaşcu* line of cases, is how to distinguish between a situation in which the State merely encounters practical difficulties in requiring local authorities to comply with its orders, or in which the State has completely lost control over part of its territory. This difficulty was pointed out by Judge Ress in the case of *Ilaşcu*, as he thought Moldova's situation was the same as the one of Georgia in the case of *Assanidze*.[395] The question is relevant, as the reasoning the Court relies on to differentiate the two situations, clearly shows that normative considerations are relevant in the eyes of the Court when determining the scope of application of the Convention. The following case law sheds some light on the considerations of the Court in this respect.

2.8.1 Sargsyan v. Azerbaijan

The case of *Sargsyan v. Azerbaijan* concerned the jurisdiction of the latter over a village on the frontline between Azerbaijani forces and the forces of the secessionist Nagorno-Karabakh Republic (NKR).[396] The NKR had declared its independence and had occupied several Azerbaijani provinces and claimed that these were part of its territory.[397] The village of Gulistan, in which the applicant claimed to have had property, lay on the frontline between the Azerbaijani and NKR military positions. The government argued that it could only be held to have limited responsibility under the Convention, as it was in the same position as Moldova in the case of *Ilaşcu*.[398] The Court first set out the following:

> The present case differs from the above-mentioned cases: Gulistan is on the frontline between Azerbaijani and "NKR" forces and it is in dispute whether Azerbaijan has effective control of the village. The Court notes that on the basis of its case-law the respondent Government would have to show that another State or separatist regime has

[395] See the partly dissenting opinion of Judge Ress, *Ilascu and others v. Moldova and Russia* (n 248) 3.
[396] *Sargsyan v. Azerbaijan* (n 354).
[397] *Sargsyan v. Azerbaijan* (2011) 40167/06 [11] (European Court of Human Rights).
[398] *Sargsyan v. Azerbaijan* (n 354) [146].

> effective control over Gulistan where the alleged violations of the Convention take place.[399]

On the basis of the finding that Gulistan was not occupied by NKR troops, the Court continued:

> In the above-cited cases concerning Moldova the acceptance that the territorial State had only limited responsibility under the Convention was compensated by the finding that another Convention State exceptionally exercised jurisdiction outside its territory and thus had full responsibility under the Convention. In contrast, in the present case it has not been established that Gulistan is occupied by the armed forces of another State or that it is under the control of a separatist regime. In such circumstances the Court, taking into account the need to avoid a vacuum in Convention protection, does not consider that the respondent Government has demonstrated the existence of exceptional circumstances of such a nature as to qualify their responsibility under the Convention.[400]

The Court went on to state that the situation in *Sargsyian* was more like the situation in *Assanidze*.[401] In the statement quoted here, the Court made reference to two differing factors that appeared to be of influence on its finding of jurisdiction. On the one hand, it held that the fact that the finding that Moldova had only limited responsibilities in the case of *Ilaşcu* was compensated by the finding that another Member State exercised jurisdiction over the area and could thus be held fully responsible. On the other hand, it referred to the fact that it had not been established in the case of *Sargsyan* that Gulistan was under the control of a separatist regime. According to the Court, the need to avoid a vacuum of protection had to be taken into account.

The question thus arises what makes the decisive difference between the case of *Sargsyan* and the case of *Illaşcu*: was this the fact that control over the village of Gulistan was disputed between NKR and Azerbaijani forces and that it was therefore not clearly established that the NKR forces exercised effective control over the village? Or might it have also played a role that even if NKR forces were held to exercise control over the village, this would have led to a vacuum of protection, as the NKR as a separatist regime cannot be held responsible under the Convention? While Armenia was found to have effective control over the NKR forces in later cases, this was not argued in *Sargsyian*, nor was Armenia a party to the proceedings.[402] Therefore, no other State member to the Convention could have been found to exercise jurisdiction in the case of *Sargsyan*. The need to prevent a vacuum of protection therefore appears to have been of considerable weight in the reasoning of the Court.

[399] ibid [142].
[400] ibid [148].
[401] ibid [150].
[402] *Chiragov and others v. Armenia* (2015) 13216/05 (European Court of Human Rights); *Muradyan v. Armenia* (2016) 11275/07 (European Court of Human Rights).

2.8.2 Conclusion on the Case of Sargsyan

The reasoning followed by the Court and the importance it attaches to preventing a vacuum of protection within the territory of a Member State indicates that there is also a normative element to the finding of jurisdiction, as there is no need to do so as a matter of logic. A vacuum of control and therefore protection would be perfectly possible. Yet, this appears less acceptable in the light of human rights protection. It is therefore the conviction that the rights established in the Convention should be respected, that has prompted the Court to require Moldova to take positive measures to regain control and to improve the applicant's situation despite its complete lack of control in the case of *Ilaşcu* and to interpret the Convention in such a way as to prevent a vacuum of protection in *Sargsyan*.

2.9 Conclusions from the Court's Case Law

Now, what can we make from the cases discussed above? And what does this mean for border deaths as an extraterritorial effect of immigration policies? From the cases discussed here, a number of relevant conclusions can be drawn, which demonstrate that jurisdiction for the purpose of Article 1 is not exclusively or necessarily based on physical power and control of a State over a person or a territory. Instead, the Court has considered various other circumstances relevant when considering whether the Convention is applicable, showing how the understanding of jurisdiction under article 1 ECHR is at times influenced by jurisdiction referring to the authority of a State.

The first group of cases discussed here has shown that the Court considers the exercise of prescriptive jurisdiction over a vessel the exercise of jurisdiction for the purpose of Article 1 ECHR. This means that the use of State vessels or even private vessels flying the State's flag on the high seas may bring persons within the State's jurisdiction, even if State agents do not exercise physical control over the former. While this is an important conclusion in the light of the question whether jurisdiction can only be based on physical control, the practical relevance for migrants and asylum seekers dying at sea may be limited so long as they are travelling on their own vessels. After all, most migrants and asylum seekers who cannot access regular means of travel attempt the dangerous crossing on stateless vessels and not on a vessel registered with one of the Member States of the European Union. This changes, however, if these persons are rescued by State or private vessels flying the flag of a State. Then, it could be argued that they fall within the jurisdiction of the State by virtue of the ship's nationality.

Another important conclusion to be drawn from the analysis of cases, is the fact that territoriality itself gives rise to jurisdiction under Article 1, even in the complete absence of control. This clearly follows from the Court's findings with respect to Moldova in the *Ilaşcu* line of cases and is another example of how jurisdiction relating to the authority of a State influences the understanding of jurisdiction under article 1 ECHR. With respect to migrants and asylum seekers, this means that any person dying within the State's territorial sea, falls within the State's jurisdiction, despite the fact that the State may not exercise physical control over that person. This conclusion is in fact of great practical relevance in the case of migrants and

asylum seekers at sea, as a significant number of people die within the territorial waters of southern European States. They thereby come within the State's jurisdiction.

Yet another relevant conclusion to be drawn from the cases analysed here, is the fact that the Court includes normative considerations when determining whether a State exercises jurisdiction or not. This becomes especially clear by the Court's findings in respect of Moldova in the *Ilaşcu* line of cases, its considerations in *Assanidze*, as well as in its considerations in the case of *Sargsyan*. Here, the fact that a negative finding on jurisdiction would render the applicants without protection under the Convention, is explicitly considered relevant and prompts the Court to hold that the respondent State does exercise jurisdiction. It is not clear how the need to avoid a vacuum of protection would play out in the case of migrants and asylum seekers travelling by sea. It appeared relevant to the Court that the area in which the applicants were, would have normally been covered by the Convention, the so-called Convention legal space, which has been declared irrelevant by the Court in other cases. Migrants and asylum seekers die both within and outside the area normally covered by the Convention during their travel. If this occurs within the Convention legal space, *en route* from Turkey to Greece for example, this line of cases may be referred to in order to support a finding that the applicants come within either of the two State's jurisdiction in order to prevent a vacuum of protection. In the case of migrants and asylum seekers suffering injury or loss of life on the high seas, it is hard to forecast how the fact that the high seas are an area outside the jurisdiction of any State would play into this line of reasoning. If a person suffers or dies on another State's territory not member to the ECHR, it could nevertheless seek protection from that State. This may not be the same extensive protection as offered by the ECHR, but theoretically a person could seek damages and compensation for losses suffered from the State in whose territory they are. This option is not available if the loss is suffered on the high seas. Would the fact that no other State exercises jurisdiction and there would therefore be a vacuum of protection be an incentive for the Court to conclude that the applicants come within the jurisdiction of the State who affected their travels by its immigration policies? On the basis of the cases analysed here, the question remains unanswered. The cases do show, however, that such normative considerations may be considered relevant by the Court.

Moreover, the Court has demonstrated that it can be very creative in the finding of practical tools and arguments to overcome difficulties in respect of establishing jurisdiction for the purpose of article 1 ECHR. The *Ilaşcu* line of cases is the best example for this, in which the Court developed a chain of responsibility upon which to base jurisdiction and responsibility in a single move across decreasing levels of control and considerable stretches of time. Furthermore, in spite of the so-called exceptional nature of extraterritorial jurisdiction, the Court established a rebuttable assumption that Russia exercised jurisdiction, thereby reversing the burden of proof to its detriment. Furthermore, the cases of *Kovačić* and *Stephens* show that the Court is willing to apply a cause and effects reasoning, even in light of the fact that it was explicitly pointed out to the Court that the applicants and the State were only linked to each other by the extraterritorial effects of Slovenia's national laws in the case of *Kovačić*.

Finally, the Court has proven to be willing at times to accept the very difficult consequences that a finding of jurisdiction in spite of a lack of effective control brings with it. This is demonstrated by the case of *Assanidze*, in which Georgia is ordered to release the applicant as

soon as possible, as well as by the *Ilaşcu* line of cases, in which Moldova is required to take measures under its positive obligation under article 1, despite its complete lack of control over the Transdniestrian region.

The fact that the Court appears creative and daring in these cases, may foster the perspective that the Court may be equally willing to overcome problems of establishing jurisdiction in the case of migrants and asylum seekers dying at sea. On the other hand, it must be acknowledged that it is only a small number of cases opening avenues for arguing that EU Member States may be held to exercise jurisdiction over migrants and asylum seekers travelling at sea by virtue of their immigration policies. The majority of cases supports the position that factual control is a necessary requirement for the establishment of jurisdiction. Furthermore, the case of *Abdul Wahab Khan* clearly shows that jurisdiction for the purpose of Article 1 ECHR cannot be interpreted so as to require the State to allow entry to its territory. Nevertheless, this does not exclude a reading of Article 1, which would require the State to at least try to prevent the violation of Convention rights as much as possible. An example for this is the way in which the Court interprets the changed nature of Moldova's obligation towards the applicants under Article 1 in the *Ilaşcu* line of cases.

Overall, the judgments analysed show that the Court can be creative and willing to find an avenue to construct jurisdiction and responsibility if it encounters difficulties in doing so via the ordinary route of effective control. This means that while chances for successfully arguing that migrants and asylum seekers dying at sea come within the jurisdiction of EU member States by virtue of the detrimental effects of their immigration policies may not be high, this should not be dismissed *a priori*. Furthermore, those persons suffering loss or injury within the territorial waters of southern EU Member States come within the latter's jurisdiction, as the State bears certain obligations in the whole of its territory, irrespective of whether it actually exercises physical control or not. In those cases at least, the applicability of the Convention can be established. Possibly, this may also be said for persons on board ships over which the State exercises *de jure* jurisdiction.

3 Conclusion on the Application of the ECHR to the Extraterritorial Effects of Immigration Policies

The review of literature relating to the concept of effective control has demonstrated that effective physical control over territory or over persons is considered necessary or at least essential for the establishment of jurisdiction for the purpose of Article 1 by many authors. Yet, the review has also revealed that the concept of effective control is by no means coherently interpreted and applied by the Court. Instead, many authors have pointed out that the Court does not appear to limit itself to analysing physical power and control and that the Court has often appeared to follow a cause and effect reasoning. Some consider this to be a mistake by the Court. Yet, the analysis of the cases identified for discussion in this chapter has further strengthened the picture that such incoherencies cannot be done away with as a mistake by the Court. Instead, the Court has demonstrated not always to be willing to stoically apply an inflexible concept to determine whether the Convention is applicable to a given situation or not.

The analysis of cases has demonstrated the Court's flexibility and creativity in this respect. While sometimes the reasoning of the Court is not entirely palpable, in many instances the Court explicitly considers the lack of control when formulating an alternative basis to hold the Convention applicable. In regard to some of these, the influence of the understanding of jurisdiction relating to the authority of a State for the understanding of jurisdiction relating to the scope of application of the Convention is clear. Furthermore, the analysis has showed that the Court is at times willing to accept the very difficult consequences of applying the Convention, even if the respondent State cannot be said to exercise effective control. This appears to open a few limited avenues for arguing that migrants and asylum seekers at sea affected by a State's immigration policies may come within its jurisdiction. For those dying within the southern EU Member States' territorial waters, one may conclude that they surely do come within those States' jurisdiction and the Convention therefore applies. This means that a closer look at the material obligations bearing on the State in this respect is warranted. This will be done in the next chapter focusing on the obligations borne by States under the right to life.

Chapter 4

The Right to Life and Extraterritorial Effects of Immigration Policies

This study sets out from the assumption that one of the consequences of the measures rendering regular travel unavailable to many migrants and asylum seekers, is that these persons travel irregularly. This brings with it many more dangers for the travellers than regular travel would. By further trying to suppress their travel, irregular travel routes are additionally diverted to often more dangerous routes. Migrants and asylum seekers are thereby confronted with much greater risks than regular travel bears and a considerable number of persons has even lost their life in the attempt to travel to Europe.[403] The previous chapter has concluded that the case law of the Court regarding the territorial scope of application of the Convention supports the view that all those persons who die or suffer injury within the State's territorial waters come within the scope of application of the Convention. With respect to those dying or suffering injury as a consequence of the State's immigration policies on the high seas, the application of the Convention is less evident. However, the Court's case law offers limited avenues to argue that the Convention rights are also relevant in this situation. Thus, a look at the rights relevant to migrants and asylum seekers travelling by sea is in place. The relevance of the right to life in this context is evident. It is laid down in Article 2 ECHR, which reads as follows:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

In general, it may be said that the right to life lays down obligations for States in relation to four scenarios. The first is that the use of force by State agents leads to the intentional or unintentional killing of a person. The killing of a person is prohibited, safe under the conditions set out within the Article. This scenario, the deprivation of life by the use of force is relevant when considering the loss of life at sea, as States do at times resort to the use of force and coercive measures to implement border control at sea.[404] However, it is not discussed in this chapter, as the study focuses on border deaths as an extraterritorial effect of immigration policies and not on the direct use of force against migrants and asylum seekers. Article 2 incorporates more than a restraint on the use of force. It also obliges States to protect the right to life and, in this vein, to prevent the loss of life. It is this positive dimension of the right to life

[403] For the number of persons found dead on Europe's southern shores, see the introduction to this study.
[404] See for example Z. Campbell, 'Shoot First: Coast Guard Fired at Migrant Boats, European Border Agency Documents Show' (22 August 2016) <https://theintercept.com/2016/08/22/coast-guard-fired-at-migrant-boats-european-border-agency-documents-show/> accessed 4 April 2020.

that is of particular relevance to the discussion of measures aimed at preventing irregular migration.[405] Under this provision, States must primarily refrain from acts that endanger the lives of individuals. At the same time, they are also required to proactively take measures to prevent the loss of life.[406] Furthermore, the right to life requires States to protect the right to life *by law*. The Article thereby requires States to install an administrative and regulatory framework that contributes to the safeguarding of life. Finally, Article 2 ECHR lays down obligations relating to how States must react if life has been lost. In this scenario, Article 2 demands an effective investigation and judicial remedies if life is lost. The last component of the right to life, the duty to investigate if life is lost, is generally referred to as a procedural obligation, as compared to the material obligation to prevent the loss of life and to protect it by law.

This chapter begins by setting out the method used to research the requirements the Court has developed with respect to the right to life. Subsequently, it discusses the requirements laid down by the right to life in the three relevant scenarios set out above, namely under which circumstances a State is required to prevent the loss of life, the requirements resting on the State under the duty to protect life by law, and the requirements resting on the State if the loss of life has occurred. Finally, the chapter analyses the relevance of these three components of the right to life with respect to migration by sea.

1 Methodology

The analysis of the requirements under Article 2 ECHR are primarily based on an analysis of the Court's case law. The following methodology has been applied. In the first place, the most well-known or standard cases most often discussed in literature on the subject were studied. This resulted in the selection of 15 cases relevant to the topic. This study was completed by a more structured case study. This case search was done using the Hudoc search engine. As the study focuses on the need to prevent the loss of life of migrants and asylum seekers at sea, the search was conducted combining the term 'prevent' with the keyword 'art. 2 positive obligations'. While no date limitation was set, the use of the keyword introduces a date limitation, as cases dating before 2001 appear not to have been tagged with the keyword. This date limitation was deemed acceptable, as it corresponds well with the period selected for the case search in the previous chapter also starting in 2001. The search has resulted in a selection of 72 cases in the period starting in 2001 until the date of the search, 29 January 2018.[407] The systematic search included two cases that had already been studied, resulting in a total number of 85 cases. The cases have all been studied and grouped into groups relating to the origin of the threat. As the discussion will show, some cases are worth discussing by and of themselves,

[405] For an elaborate analysis of positive obligations in general, see L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016).
[406] J. Gerards, 'Right to Life (Article 2)' in Dijk, van, P. and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn. Intersentia 2018) 367.
[407] An excel sheet including all cases selected is available with the author upon request.

while others do not by themselves give rise to insights of particular interest. Yet, in some instances the inferences to be drawn from the group of cases as a whole is relevant and will be discussed as such. Furthermore, the systematic search allows getting a good grasp of the standard considerations of the Court, as these are the passages that are repeated in numerous cases. While the exact requirements under the right to life are dependent on the circumstances of the case, these standard considerations reflect the core of the obligation, which a State must live up to under any circumstances. The structured case search thus allows to differentiate between measures a State is expected to prevent the loss of life in any circumstances and measures States are required to take only in more specific circumstances. The next section lays out the conclusions drawn from the case analyses completed.

2 The Duty to Prevent the Loss of Life

This section sets out the requirements developed by the Court to prevent the loss of life, referred to as the substantive aspects of the right to life. Under Article 2 ECHR States must not only refrain from actions that endanger life, but they are also obliged to take positive measures to prevent the loss of life:

> The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36).[408]

Various cases decided by the ECtHR clarify under which circumstances the State is obliged to do so. First, the scope of application of this duty will be discussed, before elaborating on the measures States are required to take thereunder.

2.1 Scope of Application

While the Court does speak of persons within the State's jurisdiction, it does not further elaborate on this requirement. This makes sense, as the question of the general scope of application of the Convention, including its territorial scope of application, would have already been dealt with under Article 1 ECHR. Thus, in its considerations regarding the right to life, the Court has focused on the circumstances in which a State is required to take measures to prevent the loss of life, without paying attention to the location of the victim. Rather, the Court

[408] *Osman v. the United Kingdom* (1998) 87/1997/871/1083 [115] (European Court of Human Rights); see also Human Rights Committee, 'General Comment No. 6: Article 6 (Right to Life)' (30 April 1982) para 6 <http://www.refworld.org/docid/45388400a.html> accessed 22 May 2014; C. N Satlanis, *Fundamental Notions and Principles of Public International Law (with Elements of International Criminal Law and Procedure)* (Ant. N. Sakkoulas Verlag 2010) 280; and A. Redelbach, 'Protection of the Right to Life by Law and by Other Means' in B. G Ramcharan (ed), *The Right to Life in International Law* (International Studies in Human Rights. Martinus Nijhoff Publishers 1985) 185.

has formulated the requirements of the material scope of application of Article 2.[409] The Court has done so in the well-known case of *Osman v. United Kingdom*, which developed into a line of cases concerning the State's duty to take measures to prevent the loss of life if State authorities know or should have known about a risk to the life of a person.[410] The case concerned the killing of a man and the wounding of his son by the son's former teacher who had been showing signs of mental disorder. The Court put it as follows:

> In the opinion of the Court […] it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life […] For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.[411]

Overall, the Court thereby unmistakably sets out that the State is under a duty to protect the right to life of an individual if it is in the position to do so, even if the origin of the threat is unrelated to the State. This requires measures to be taken proactively that could prevent the loss of life. This is underlined by the fact that the Court explicitly rejects the argument that responsibility only arises when the failure to take preventive measures amounts to gross negligence. The Court sets out the circumstances under which a State is under an obligation to take such preventive measures, which relate to the identity of the victims, the knowledge of State agents about the threat, and finally relating to the nature of the threat.

At the outset it may be noted that a person must not actually die in order to be able to rely on the right to life.[412] Nevertheless, the standards formulated in the *Osman* judgment, being that the authorities knew or ought to have known about a real and immediate risk to life of an identified individual, are quite narrow. From later cases it becomes clear, however, that the Court has widened the circumstances in which a State is required to take measures to prevent the loss of life. The three relevant elements set out by the Court in the *Osman* judgment, are discussed below.

[409] See also Stoyanova, who discusses the different elements discussed here in relation to causation, see V. Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18(2) Human Rights Law Review 309 accessed 2 March 2019.
[410] *Osman v. the UK* (n 408).
[411] ibid [116].
[412] *Makaratzis v. Greece* (2004) 50385/99 [49] (European Court of Human Rights).

2.1.1 The Identity of the Potential Victim

The *Osman* judgment raises the question how much knowledge the State must have of the identity of the potential victim of the threat in question in order to give rise to the positive dimension of Article 2. In this case, the Court indicated that the State is obliged to take preventive measures if it knows or ought to know about a threat to an *identified individual or individuals*.[413] By putting it in these terms, the Court appears to require very specific knowledge about the persons that are threatened by a certain hazard.
Yet, numerous other cases indicate that this requirement must not be applied strictly, as the Court considered the State obliged to take preventive measures in situations in which the State could only have general knowledge about a group of persons possibly at risk, or even of society at large running a risk. An example in point is the case of *Mastromatteo v. Italy,* concerning the son of the applicant who was shot by two criminals who absconded from prison leave.[414] In its judgment, the Court explicitly concluded that the circumstances at hand did not pose a risk to an identified individual. According to the Court, the victim was merely a passer-by who fell victim by chance. Nevertheless, the State was under an obligation to take measures to mitigate a potential risk to life. In this regard, the Court held that:

> […] it must be shown that the death of A. Mastromatteo resulted from a failure on the part of the national authorities to "do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge" (*Osman*, cited above, para. 116), the relevant risk in the present case being a risk to life for members of the public at large rather than for one or more identified individuals.[415]

The Court concluded that there had been no violation of article 2 ECHR, as the decision to grant the two detainees prison leave had been taken by judges based on the reports of the prison authorities, who were satisfied with the prisoners' behavior. Furthermore, the detainees had been subject to the police supervision normally envisaged for prison leave. The Court found that there was nothing in the material before the national authorities to alert them to the risk to life the two prisoners' release would pose.[416] The Court continued:

> Nor was there anything to alert them to the need to take additional measures to ensure that, once released, the two did not represent a danger to society.[417]

Thus, the Court concluded that Italy had not violated Article 2 ECHR, as the risk emanating from the two detainees granted prison leave was not previously known to the authorities. Nevertheless, it is clear from the wording of the Court that if this had been different, the Italian authorities would have been required to take measures to mitigate a risk to life of society at

[413] *Osman v. the UK* (n 408) [116].
[414] *Mastromatteo v. Italy* (2002) 37703/97 (European Court of Human Rights).
[415] ibid [74].
[416] ibid 75, 76 and 78.
[417] ibid [76].

large. The Court further considered the question in how far a potential victim must be identifiable in advance for the positive obligation under Article 2 to apply in the case of *Bljakaj and others v. Croatia*.[418] The case concerned a man who attacked his wife and killed her divorce lawyer. The applicants in the case were the lawyer's relatives, who complained that Croatia had failed to take measures to prevent the killing of their loved one.[419] Referring to the *Osman*-test the Court held:

> Moreover, the positive obligations may apply not only to situations concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act, but also in cases raising the obligation to afford general protection to society (see Maiorano and Others v. Italy, no. 28634/06, § 107, 15 December 2009, and Gorovenky and Bugara v. Ukraine, nos. 36146/05 and 42418/05, § 32, 12 January 2012). In the latter circumstances, the positive obligation covers a wide range of sectors (see Ciechońska v. Poland, no. 19776/04, §§ 62-63, 14 June 2011) and, in principle, will arise in the context of any activity, whether public or not, in which the right to life may be at stake (see Öneryıldız v. Turkey [GC], no. 48939/99, § 71, ECHR 2004-XII).[420]

With these considerations the Court clarifies that States are also obliged to take measures to mitigate risks they are or ought to be aware of that pose a threat to society at large, rather than to specific individuals. The Court explicitly notes that this positive obligation under Article 2 may arise in the context of any public or private activity in which the right to life may be at stake. The Court thereby clarifies that the requirement that the threat must endanger an identified individual or individuals does not apply strictly. If the State is aware of a potential threat, it must take measures that may reasonably be expected to protect society at large against that threat. Furthermore, the duty to prevent the loss of life also covers groups of individuals who are not individually identifiable beforehand. This is true, for example, for the persons living near a rubbish dump that exploded or for the residents of a village in Russia who lost their loved ones in a mudslide.[421] In both cases, State authorities could know that a particular group of persons was exposed to a risk, yet they could not know who of them would actually fall victim to the threat materialising. Nevertheless, the Court found the right to life applicable. Thus, on the basis of these cases, it is clear that the State is under an obligation to protect society at large against possible threats, as well as groups of individuals.
In other cases, the Court has pointed out that certain groups are in a vulnerable position, requiring extra care in regard to preventing loss of life and with respect to the procedural aspects of the right to life. See for example the position the Court takes in regard to prisoners:

> In the context of prisoners, the Court has had previous occasion to emphasise that persons in custody are in a vulnerable position and that the authorities are under a duty

[418] *Bljakaj and others v. Croatia* (2014) 74448/12 (European Court of Human Rights).
[419] ibid [5–26].
[420] ibid [108].
[421] *Öneryildiz v. Turkey* (2004) 48939/99 (European Court of Human Rights); and *Budayeva and others v. Russia* (2008) 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (European Court of Human Rights).

> to protect them (see, for example, Salman v. Turkey [GC], no. 21986/93, § 99, ECHR 2000-VII).[422]

Comparably, the Court also found that conscripts belong to a particularly vulnerable group:

> Similarly to persons in custody, conscripts are entirely in the hands of the State and any events involving the army lie wholly, or in large part, within the exclusive knowledge of the authorities. Therefore, the State is also under an obligation to account for any injuries or deaths occurring in the army (see Beker v. Turkey, no. 27866/03, §§ 41-42, 24 March 2009, and Mosendz v. Ukraine, no. 52013/08, § 98, 17 January 2013).[423]

From these judgments it is therefore clear that the State is not only obliged to take measures to protect life with respect to identifiable individuals, but also with respect to society at large, to groups of persons and especially with respect to vulnerable groups.[424] The case law following the *Osman* judgment has thus shown that the criterion initially formulated in a strict way by the Court, must be understood in a much broader sense. Next, the degree to which State authorities must have knowledge of a risk to life in order to be obliged to take preventive measures is discussed.

2.1.2 Knowledge about the Risk

In the *Osman* judgment, the Court set out that a State must take measures to prevent the loss of life, if "the authorities knew or ought to have known"[425] of a real and immediate risk to life. Thereby, the Court already indicated that it doesn't matter whether the authorities actually knew about a given threat. If they should have known about it, this may give rise to responsibility under Article 2. This was the case, for example, in *Öneryildiz v. Turkey*.[426] The case concerned a group of persons who lived near a rubbish dump which exploded. Here, the Court found it to be a decisive factor that information was available regarding a threat to the physical integrity of the individuals living in the vicinity.[427] The threat arose from the rubbish dump nearby, which was not operated according to the standards required, thereby increasing the risk of a gas explosion. The Court decided that, given the fact that information was available, the authorities ought to have known about the risk and were thus under an obligation to take preventive measures which were necessary and sufficient to protect the individuals.[428]
Regarding the question which degree of certainty State authorities must have that a given threat may actually endanger the lives of persons in order to be under an obligation to take preventive measures, the various threats recognised as such by the Court are telling. The threats that may

[422] *Česnulevičius v. Lithuania* (2012) 13462/06 [84] (European Court of Human Rights).
[423] *Marina Alekseyeva v. Russia* (2013) 22490/05 [121] (European Court of Human Rights).
[424] See also the case of Marro and others in which the Court explicitly makes this distinction and relates it to the cases of Osman and Mastromatteo. See *Marro and others v. Italy* (2014) 29100/07 [43] (European Court of Human Rights).
[425] *Osman v. the UK* (n 408) [116].
[426] *European Court of Human Rights, Öneryildiz v. Turkey, 30 November 2004,* (n 421).
[427] ibid [98].
[428] ibid [101].

give rise to the duty to take preventive measures are very diverse and, in many cases, hardly foreseeable, as is the case with accidents and natural disasters. Before discussing these threats in the next section, it is useful to briefly consider the Court's considerations in this regard in a case relating to the environmental hazards posed by a gold mine. In the case of *Tătar v. Romania* the complainants argued that the operation of a gold mine in the vicinity of their homes endangered their lives.[429] While the Court decided to review the claims of the applicants under Article 8 ECHR, the right to private life, the case is relevant to the knowledge required regarding certain hazards nevertheless.[430] The applicants complained that the mining company was allowed to operate using sodium cyanide, a substance that bore potential risks to the environment and human health. The risk assessment that had been performed by the authorities could not exclude several such risks with certainty.[431] Nonetheless, the company was allowed to operate. Furthermore, the company could continue operations after a cyanide spill.[432] When examining the merits, the Court referred to the precautionary principle recognized under environmental law, entailing that States should take precautionary measures to prevent irreversible damage to the environment, even in the absence of scientific certainty that a particular activity will cause such damage.[433] Thereby, the Court clarified that, at least in regard to environmental damage, the authorities of a State are under an obligation to take precautionary measures even if the information available about a given threat does not provide absolute certainty that damage will ensue. It is reasonable to expect that, similarly, the Court would consider States obliged to take precautionary measures against potential threats to life, even in the absence of absolute certainty that such threats will materialise. As the next section demonstrates, the Court considers State authorities obliged to take preventive measures in regard to a wide array of threats. With respect to many of these threats, it is not possible to predict beforehand with certainty whether and when they will materialise.
Overall, therefore, it may be said that the Court allows for a wide understanding of when State authorities knew or ought to have known about a given threat. Neither is actual knowledge on the side of the authorities required, nor does the Court require scientific certainty in regard to the negative consequences an activity might entail.

2.1.3 The Nature of the Risk

Besides these explicit considerations regarding the standard of knowledge required on the side of the authorities to trigger the duty to prevent the loss of life, the nature of the threats against which States must protect persons is revealing with respect to the degree to which the risk to life must be foreseeable for the authorities to be under a duty to act. In the *Osman* judgment, the Court held that there must be a 'real and immediate risk' in order for the duty to take preventive measures to arise. Again, this appears to set a very high bar for the duty to prevent

[429] *Tătar v. Romania* (2007) 67021/01 [46] (European Court of Human Rights).
[430] ibid [47].
[431] ibid [14].
[432] ibid [7].
[433] *Tătar v. Romania* (2009) 67021/01 [109] (European Court of Human Rights).

the loss of life to arise. Yet, the various risks the Court has considered relevant with respect to the right to life, reveal that this is not the case. In this regard, the structural case search performed for this chapter was useful, bringing into view different types of threat with respect to which the duty to prevent the loss of life is at play.[434] These are illustrative of the fact that State authorities must not be in a position to foresee when and where exactly a risk will materialise. Rather, knowledge of a general threat or the fact that a particular activity is dangerous may give rise to duties for the State authorities under the right to life. Here, a number of such categories of threats will be set out.

2.1.3.1 Other Individuals

The *Osman* judgment itself is a good example how the acts of an individual threatening another person may give rise to the duty to protect the right to life. While in the *Osman* judgment the Court did not find a violation of this duty, it did so, for example, in a number of cases concerning abusive husbands who injured or killed their wives and children.[435] In all these cases, for the duty to take preventive measures to arise, the authorities must have had a possibility to know about the potential danger emanating from a particular individual, for example on the basis of previous aggressions or signs of strange behaviour. In this sense, the case of *Talpis v. Italy* is interesting, because the Court stated that in estimating the seriousness of the threat, the authorities should have taken into account the common knowledge that domestic violence is often repetitive.[436] This should have prompted the authorities to react more vigorously when they were alerted that a drunk man with a history of abusing his wife was behaving strangely. Furthermore, it emanates from the case of *Matsromatteo* discussed above, as well as from the case of *Bljakaj and others v. Croatia,* in which a man injured his wife and killed her divorce lawyer, that the duty to protect persons from dangerous individuals is not limited to persons who belong to the circle of likely victims, such as partners and children, but also covers society at large.[437] Thus, even if it is uncertain whom the threat emanating from a particular individual is aimed at, the authorities must take measures to prevent such a dangerous individual from harming others.

2.1.3.2 State Agents

It is evident that the State is responsible for the intentional killing of a person by State agents. As indicated above, these cases are not of particular interest at this point, nor are the cases in which the violence used by State agents is so severe, that no other result than the death of a person could have been expected. However, the duty to prevent the loss of life also arises in situations in which State agents are principally entitled to use force if necessary and the loss of life occurs accidentally. A well-known example for this is the case of *Makaratzis v. Greece*, in

[434] See also Gerards (n 406) 367–376.
[435] See *Kontrová v. Slovakia* (2007) 7510/04 (European Court of Human Rights); and *Talpis v. Italy* (2017) 41237/14 (European Court of Human Rights).
[436] *Talpis v. Italy* (n 435) [114].
[437] *Mastromatteo v. Italy* (n 414); and *Bljakaj and others v. Croatia* (n 418).

which a person was injured trying to escape a police hunt.[438] In this respect the Court found that the police hunt had been performed chaotically and using excessive force owing to a deficient regulatory framework regarding the use of force by police officers. This lead the Court to conclude that the State had failed its obligation to do everything that could reasonably be expected to prevent even the accidental loss of life.[439] Another example is the judgment of *Svitlana Atamanyuk and others v. Ukraine*, in which the State was indisputably considered responsible for the death of persons who died when a military plane crashed at an air show as a result of a technical mistake by the pilot.[440] In relation to such accidents, it may be noted that they take place during activities that carry potential danger in general, but which are not individually predictable as such. The fact that the duty to protect the right to life also arises with respect to accidents, shows that it is more of an ever-present duty continuously resting on State agents, rather than being triggered only once a very particular danger in a specific situation becomes evident.

2.1.3.3 Man-Made Accidents

The fact that the duty to protect life covers situations which may be considered hardly foreseeable as such becomes even clearer when looking at a range of cases relating to man-made accidents not directly attributable to State agents. In this respect, the case of *Öneryildiz v. Turkey* mentioned above is of interest. Here, the government argued that Article 2 ECHR does not apply to accidents or disasters, which are not directly attributable to State agents.[441] The Court did not follow the government in this reasoning, holding that the duty to prevent the loss of life applies in respect of any activity, whether private or public and especially in regard to activities which are by their nature dangerous.[442] Thus, even accidents and disasters not caused by State agents fall within the realm of the duty to protect life, again showing the character of the duty to be one which rests on the State continuously and with respect to a very wide range of possible threats to the lives of individuals.
This is further affirmed in a case concerning a woman who died in a mountaineering accident, which, by its nature, is not predictable. While the Court declared the case of *Furdik v. Slovakia* inadmissible, it does set out that the provision of emergency relief services in case of accidents brought to the attention of the authorities falls within the ambit of Article 2 ECHR.[443] Thereby, the Court requires States to make general preparations for effectively functioning emergency relief in case of accidents, as the occurring of a specific accident as such is not foreseeable so far in advance to allow the State to only then prepare measures to be able to rescue a person. In its general considerations the Court set out a whole range of situations, which give rise to the State's obligation to take measures to prevent the loss of life:

[438] *Makaratzis v. Greece* (n 412); See also *Kasap and others v. Turkey* (2014) 8656/10 (European Court of Human Rights).
[439] *Makaratzis v. Greece* (n 412) [64–71].
[440] *Svitlana Atamanyuk and others v. Ukraine* (2016) 36314/06; 36285/06; 36290/06; 36311/06 [130] (European Court of Human Rights).
[441] *European Court of Human Rights, Öneryildiz v. Turkey, 30 November 2004,* (n 421) [67].
[442] ibid [71].
[443] *Furdik v. Slovakia* (2008) 42994/05 13 (European Court of Human Rights).

> The State's positive obligation under Article 2 has also been found to be engaged in the healthcare sector, be it public or private, as regards the acts or omissions of health professionals (see *Dodov v. Bulgaria*, no. 59548/00, §§ 70, 79-83 and 87, ECHR 2008-...; *Byrzykowski v. Poland*, no. 11562/05, §§ 104 and 106, 27 June 2006; and *Vo v. France* [GC], no. 53924/00, §§ 89-90, ECHR 2004-VIII, with further references), as well as in respect of the management of dangerous activities (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 71, ECHR 2004-XII), ensuring safety on board a ship (see *Leray and Others v. France* (dec.), no. 44617/98, 16 January 2008) or on building sites (see *Pereira Henriques and Others v. Luxemburg* (dec.), no. 60255/00, 26 August 2003). In certain circumstances positive obligations may attach to a State to protect individuals from risk to their lives resulting from their own action or behaviour (see *Bone v. France* (dec.), no. 69869/01, 1 March 2005, with further references). In addition, the extent of the State's positive obligation under Article 2 has been addressed by the Court in the context of road safety (see, for example, *Rajkowska v. Poland* (dec.), no. 37393/02, 27 November 2007).[444]

It is clear from both the *Öneryildiz* judgment as well as the wide list of activities giving rise to the duty to protect life in the *Furdik* judgment, that the obligation to prevent the loss of life is not limited to a particular sort of risk or activity. The Court confirmed this again in the case of *Banel v. Lithuania*, in which it noted that this list of activities is not exhaustive.[445]
In regard to accidents, the role the victim itself has played in this respect is relevant. After all, in some cases, it is the victims themselves who decide to engage in an activity bearing inherent risks. Yet, the *Furdik* judgment indicates that the fact that the victim itself chooses to engage in an activity bearing an inherent risk, such as mountaineering, does not preclude the duty of the State to take measures to protect life. This point is explicitly made in the case of *Bone v. France*, in which the victim itself contributed to the peril arising.[446] The Court explicitly stated that the duty to prevent the loss of life may also arise if the threat arises from the actions of the victim itself. Nevertheless, the Court did not find a violation of the right to life in this case.[447] The case concerned a young boy travelling by train and stepping out of the train on the side of the tracks, despite the warning of fellow passengers and warning signs on the door. There, he was hit and killed by another train passing by. The danger in this case was due to a lack of safety measures, which would have prevented the boy from stepping out of the train on the wrong side of the tracks. At the time of the accident, a system had already been developed that blocks all doors of the train on the side of the tracks. However, the system was not made obligatory for older trains, but only recommended, as its installation would require a complete refurbishment of the trains.[448] The train in which the accident happened was an old train and did not have such a system in place. The Court concluded that France could not be held responsible for a violation of the right to life, as all safety measures required by law had been put in place and the determining factor in the case at hand, was the boy's imprudent behaviour of stepping out of the train despite being warned not to do so.[449] In a very similar case a father

[444] ibid.
[445] *Banel v. Lithuania* (2013) 14326/11 [64–65] (European Court of Human Rights).
[446] *Bone v. France* (2005) 69869/01 (European Court of Human Rights).
[447] ibid 8.
[448] ibid 3.
[449] ibid 8.

and his son were killed in Turkey, as their train stopped on a track located in between two other tracks. While here, too, the behaviour of the victims contributed to the accident, the Court decided that this could not preclude the State´s responsibility, as the very poor construction of placing three tracks next to each other was the determining factor that had caused the accident.[450] Hence, these cases, too, underline the wide scope of application of Article 2 ECHR. Nonetheless, the case of *Prilutskiy v. Ukraine* demonstrates that the duty to protect life remains limited. The case concerned the death of a young man who died in a car rally in which the driver of the car lost control over the car. The Court noted that States are obliged to regulate dangerous activities, however, this duty does not legitimize a paternalistic reading of the Article:

> Still in the field of dangerous activities, the positive obligations under Article 2 should not be unduly impaired by paternalistic interpretations, bearing in mind that the notion of personal autonomy is an important principle underlying the Convention guarantees, primarily those pertinent to private life. The Court has observed that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned, and improper State interference with this freedom of personal choice may give rise to an issue under the Convention (see Pretty v. the United Kingdom, no. 2346/02, §§ 60 and 61, ECHR 2002-III).[451]

Thus, while the duty to prevent accidents stretches quite far, it is not unlimited. Overall, however, this group of cases demonstrates that the duty to protect life requires the State to take measures to prevent the loss of life with respect to any activity in which the occurrence of accidents is possible. While the article should not be understood in a paternalistic manner, it does cover situations in which the victim itself chooses to engage in an inherently dangerous activity or otherwise contributes to the accident occurring.

2.1.3.4 Natural Disasters

The duty to protect life also arises with respect to natural disasters. This was accepted by the Court in the *Budayeva and others v. Russia* judgment, which was brought by the victims of a mudslide.[452] It confirmed this in the *M. Özel and others v. Turkey* judgment, holding:

> The Court reiterates that Article 2 of the Convention requires the State not only to refrain from intentionally causing deaths but also to take appropriate steps to safeguard the lives of those within their jurisdiction. That obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, but it also applies where the right to life is threatened by a natural disaster (see Budayeva and Others, cited above, §§ 128-130).
>
> In that respect, the Court pointed out, in connection with natural hazards, that the scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is

[450] *Kalender v. Turkey* (2009) 4314/02 [45–47] (European Court of Human Rights).
[451] *Prilutskiy v. Ukraine* (2015) 40429/08 [32] (European Court of Human Rights).
[452] *Budayeva and others v. Russia* (n 421).

> susceptible to mitigation, and clearly affirmed that those obligations applied in so far as the circumstances of a particular case pointed to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use (ibid., § 137). Therefore, the applicability of Article 2 of the Convention and the State's responsibility have been recognised in cases of natural disasters causing major loss of life. In the instant case, the applicants' complaints must be assessed under the substantive and procedural heads of Article 2 of the Convention.
>
> The Court observes that earthquakes are events over which States have no control, the prevention of which can only involve adopting measures geared to reducing their effects in order to keep their catastrophic impact to a minimum. In that respect, therefore, the prevention obligation comes down to adopting measures to reinforce the State's capacity to deal with the unexpected and violent nature of such natural phenomena as earthquakes.[453]

Thus, while a State can quite logically not be expected to prevent natural disasters as such, it is required to take measures to mitigate the effects of such natural disasters, in so far as the occurrence of a natural threat is known for a specific area. Here too the Court requires States to make general preparations, even if the exact timing of a natural phenomenon such as an earthquake cannot be predicted.

2.1.3.5 Systemic Risks

Comparable to the requirement to make preparations in a general fashion with respect to natural disasters that are known to occur in a given area, States are required to act if they are aware of structural deficiencies in their healthcare system resulting in the loss of life. In the judgment of *Lopes de Sousa Fernandes v. Portugal*, the Court recapitulated an extensive body of case law relating to infringements of the right to life as a result of defectively functioning healthcare systems. The Court held that the State is not responsible for every healthcare omission, but may be considered to be so in two situations, one of them relating to systemic deficiencies of the healthcare system:

> The second type of exceptional circumstances arises where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger (see, for example, *Asiye Genç* and *Aydoğdu,* both cited above).[454]

Thus, when the loss of life may be expected due to systemic deficiencies which have led to the loss of life of which the State is aware, the State is obliged to take measures to prevent further deaths as a result of such systemic deficiencies.

[453] *M. Özel and others v. Turkey* (2015) 14350/05; 15245/05; 16051/05 [170–173] (European Court of Human Rights).
[454] *Lopes de Sousa Fernandes v. Portugal* (2017) 56080/13 [192] (European Court of Human Rights).

2.1.3.6 Self-Harm

The cases in which the victim voluntarily engaged in a dangerous activity or in which its behaviour contributed to an accident have been discussed above. The material scope of application of Article 2 is even wider, as in some circumstances the State is even required to take measures in order to protect a person from his own actions, such as suicide. The Court has considered this to be the case, for example, with respect to persons of whom the authorities knew that they were in a vulnerable position given their mental state. Examples include the judgments of *Hiller v. Austria*[455] and *Fernandes de Oliveira v. Portugal*, in which the Court stated:

> The Court further reiterates that Article 2 may imply, in certain well-defined circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself (see *Renolde v. France*, no. 5608/05, § 81, ECHR 2008 (extracts), and *Haas v. Switzerland*, no. 31322/07, § 54, ECHR 2011). However, in the particular circumstances of the danger of self-harm, the Court has held that for a positive obligation to arise, it must be established that the authorities knew or ought to have known at the relevant time that the life of the person concerned was at real and immediate risk and that they had not taken measures which could reasonably have been expected of them (see *Hiller v. Austria*, no. 1967/14, §§ 52-53, 22 November 2016, and *Keenan*, cited above, § 93). Such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (compare with *Tanrıbilir v. Turkey*, no. 21422/93, §§ 70-71, 16 November 2000, and *Keenan*, cited above, § 90). At the same time, the Court reiterates that the very essence of the Convention is respect for human dignity and human freedom. In this regard, authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned and in such a way as to diminish the opportunities for self-harm, without infringing personal autonomy (see, *mutatis mutandis*, *Mitić v. Serbia*, no. 31963/08, § 47, 22 January 2013, and *Jagiełło v. Poland* (dec) [Committee], no.21782/15, § 23, 24 January 2017).[456]

The Court has concluded similarly with respect to persons belonging to vulnerable groups under the authorities' control, such as prisoners.[457] Here, it even considered such obligation to exist in relation to drug abuse.[458] But even in the more general context of a man – not detained – known to have a history of alcohol abuse and violence behaving strangely, the Court noted:

> In such a situation, even if the undisputed threat of suicide is taken alone into account, the Court reiterates that where State agents become aware of such a threat a sufficient

[455] *Hiller v. Austria* (2016) 1967/14 [47–49] (European Court of Human Rights). While the Court found no violation in this case, it did set out that under certain circumstances the State may be obliged to protect individuals against self-harm.
[456] *Fernandes de Oliveira v. Portugal* (2017) 78103/14 [67] (European Court of Human Rights). Note that the case has been referred to the Grand Chamber at the time of writing.
[457] The Court set out this principles while not finding a violation in *Volk v. Slovenia* (2012) 13/12/2012 [84–85] (European Court of Human Rights); and *Mitić v. Serbia* (2013) 31963/08 [45–48] (European Court of Human Rights).
[458] *Marro and others v. Italy* (n 424) [45]. While setting out this principle, no violation was found as the case was declared inadmissible.

> time in advance, a positive obligation arises under Article 2 requiring them to prevent that threat from materialising, by any means reasonable and feasible in the circumstances (compare Mikayil Mammadov v. Azerbaijan, no. 4762/05, § 115, 17 December 2009).[459]

Thus, even if a person poses a threat to him or herself, the authorities must take measures to prevent the loss of life if they are in a position to do so.

2.1.4 Circumstances Precluding the Application of the Duty to Prevent the Loss of Life

The question may arise, whether there are circumstances which preclude application of the duty to prevent the loss of life. The long and wide-ranging list of possible threats that a State must offer protection against, if it knows or should know about such risk, already indicates that there is no particular source of a threat that can be categorically excluded from the application of the duty to prevent the loss of life. Furthermore, the behaviour of the victim and the role the victim has played in bringing about the threat to his or her own life has been discussed. Whether the victim disobeys instructions by the authorities and engages in a road chase to flee the police,[460] knowingly and voluntarily engages in dangerous activities,[461] fails to oversee a dangerous situation correctly,[462] or even inflicts harm on him- or herself,[463] none of these circumstances preclude the application of the duty to prevent the loss of life resting on the State. The Court sets out very clearly that, principally, the duty to prevent the loss of life applies also in these circumstances. Rather, the actions of the victim may reflect on the question whether the State is considered to have taken sufficient measures to prevent the loss of life. As the cases of *Bone v. France* and *Prilutskiy v. Ukraine* show, the duty to prevent the loss of life does not require States to take measures that can prevent even the most imprudent behaviour, nor is the State required to act in a paternalistic fashion.[464]

Another case not directly concerning the right to life adds another relevant aspect in the context of this study. This concerns the case of *Streletz, Kessler and Krenz v. Germany*.[465] The case was brought by former senior members of the German Democratic Republic (GDR) State apparatus. In their positions within the GDR's institutions, they had contributed to the deaths of several persons trying to flee the GDR by ordering border security measures such as anti-personnel mines and automatic-fire systems, as well as the use of fire arms intended to kill people who tried to flee the GDR. After the unification of Germany, the applicants had been held criminally liable for doing so, despite the fact that, at the time they had acted, their acts had been in accordance with the law and policy of the GDR. The case thus primarily concerned the question whether Germany had violated the prohibition of punishment without a legal basis,

[459] *Bljakaj and others v. Croatia* (n 418) [129].
[460] *Makaratzis v. Greece* (n 412).
[461] *Furdik v. Slovakia* (n 443); *Prilutskiy v. Ukraine* (n 451).
[462] *Bone v. France* (n 446); *Kalender v. Turkey* (n 450).
[463] *Volk v. Slovenia* (n 457); *Mitić v. Serbia* (n 457); *Marro and others v. Italy* (n 424); *Hiller v. Austria* (n 455); *Fernandes de Oliveira v. Portugal* (n 456).
[464] *Bone v. France* (n 446); *Prilutskiy v. Ukraine* (n 451).
[465] *Streletz, Kesller and Krentz v. Germany* (n 278).

enshrined in Article 7 ECHR. Nevertheless, the reasoning of the Court in this respect is relevant to this study and thus merits brief discussion. The Court cites the reasoning upon which the German Federal Constitutional Court concluded that the applicants could be held criminally liable for their acts, despite the fact that their actions had been according to the laws applicable in the GDR at the time. The reasoning included the following:

> In that connection it [the Federal Constitutional Court] has referred to the writings of Gustav Radbruch [Gustav Radbruch (1878-1949): German professor of law who considerably influenced the philosophy of law. Following the crimes of the Nazis, he formulated the principle, also known as "Radbruch's formula" (Radbruch'sche Formel), that positive law must be considered contrary to justice where the contradiction between statute law and justice is so intolerable that the former must give way to the latter] […]
>
> The Federal Court of Justice has since further developed its case-law when trying cases of so-called 'government criminality' [Regierungskriminalität] during the Socialist Unity Party regime in the GDR ... That case-law also forms the basis for the decisions challenged here. It states that a court must disregard a justification if it purports to exonerate the intentional killing of persons who sought nothing more than to cross the intra-German border unarmed and without endangering interests generally recognised as enjoying legal protection, because such a justification, which puts the prohibition on crossing the border above the right to life, must remain ineffective on account of a manifest and intolerable infringement of elementary precepts of justice and of human rights protected under international law. The infringement in question is so serious as to offend against the legal beliefs concerning the worth and dignity of human beings that are common to all peoples. In such a case positive law has to give way to justice.[466]

The German Federal Constitutional Court thus concluded that the applicants were criminally liable, despite the fact that their acts had not been defined as a crime when they had pursued them. The ECtHR had a somewhat differing view from the German Federal Constitutional Court, holding that the GDR's constitution and international obligations prohibited the acts of the applicants, while recognizing that in reality, those norms were not considered relevant in the GDR. Importantly, however, in its reasoning the Court concurs with the findings of the German Federal Constitutional Court and affirms the supremacy of the right to life in the hierarchy of norms:

> Moreover, regard being had to the pre-eminence of the right to life in all international instruments on the protection of human rights (see paragraphs 92-94 below), including the Convention itself, in which the right to life is guaranteed by Article 2, the Court considers that the German courts' strict interpretation of the GDR's legislation in the present case was compatible with Article 7 § 1 of the Convention. […]
>
> The Court considers that a State practice such as the GDR's border policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention. That practice, which emptied of its substance the

[466] ibid [22].

> legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including its judicial bodies, cannot be described as "law" within the meaning of Article 7 of the Convention.
>
> The Court, accordingly, takes the view that the applicants, who, as leaders of the GDR, had created the appearance of legality emanating from the GDR's legal system but then implemented or continued a practice which flagrantly disregarded the very principles of that system, cannot plead the protection of Article 7 § 1 of the Convention. To reason otherwise would run counter to the object and purpose of that provision, which is to ensure that no one is subjected to arbitrary prosecution, conviction or punishment.[467]

Given that the Court thereby posits the right to life as a supreme norm, it is hard to imagine that there could be circumstances that preclude the application of the right to life in its entirety. After all, this would require subordinating the right to life. This is all the more unlikely, now that the Court can take such circumstances into account in regard to the measures a State is required to take. This allows the Court to tailor the burden the right to life imposes on States to the circumstances at hand. It may thus be said that the application of the right to life is unlikely to be excluded entirely under certain circumstances. Moreover, the case of *Streletz, Kessler and Krentz v. Germany* allows a conclusion that the need of border protection more specifically is not an interest that allows precluding the application of the right to life. While the circumstances of the case differ a great deal from the circumstances in which border deaths occur in the Mediterranean, the conclusion that border security does not preclude the right to life is relevant to this context. After all, the case unmistakably sets out that the interest of border protection cannot trump the right to life. Instead, the need to protect the border may weigh into the measures a State is considered to be obliged to take to prevent the loss of life.

In sum, the Court considers the right to life a norm of such importance that it is generally held to apply if the life of persons may be threatened. The Court, however, allows to take circumstances into account that may either directly conflict with the need to protect life, such as border control may do, or which lay entirely outside the State's influence, such as the role the victim itself plays. These circumstances impact the measures a State is required to take to prevent the loss of life, but not the application of the right to life as such.

2.1.5 Conclusion on the Scope of Application of the Duty to Prevent the Loss of Life

The case of *Osman v. United Kingdom* is prominent in the discussion of the material scope of application of Article 2 regarding the State's duty to take measures to prevent the loss of life and sets out a rather restrictive scope of application. Yet, from the cases discussed above, it appears that the Court itself does not consider the positive dimension of Article 2 limited to cases in which both the concrete threat and the identity of the potential victim are or should be known beforehand.[468] Instead, the Court finds that there rests a general obligation upon the

[467] ibid 85, 87-88.

[468] For a discussion of the incoherent application of the criteria developed in Osman v. United Kingdom see also F. C Ebert and R. I Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American

State to protect the right to life of persons within its jurisdiction. Regarding the knowledge required in order for the authorities to be obliged to take measures to mitigate the risk, it is sufficient if the authorities should have knowledge of a risk to the life of a person. The person does not need to be individually identifiable beforehand, as the duty to prevent the loss of life covers society at large and has even more bearing with respect to vulnerable groups. Furthermore, the wide range of threats with respect to which the Court has found the duty to prevent the loss of life at play demonstrates that it may potentially apply to any sort of threat, even if the victim itself contributes to it materializing. It speaks for itself that this range of threats also includes threats arising due to actions of the State itself. In this case, the State may be required to refrain from taking such action, rather than to proactively take measures. All in all, if State authorities were in a position to know about a threat and they are in a position to mitigate it, they must do so. It can therefore be concluded that the material scope of application of the duty to prevent the loss of life is very broad. Now, this raises the question what kind of measures a State is expected to take under the duty to protect life.

2.2 Measures Required to Prevent the Loss of Life

The measures that a State is required to take or refrain from taking under the duty to prevent the loss of life are depend heavily on the circumstances of the case. In regard to measures required by the Court to prevent the loss of life, it may be set out at the beginning that these can be quite far reaching. However, the State always enjoys discretion in the choice of means and is not required to perform the impossible.[469] Rather, the State must take those measures which can reasonably be expected to mitigate a given risk. This emanates from one of the standard considerations the Court makes with respect to the duty to prevent the loss of life:

> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.[470]

Despite allowing room for practical considerations and political choices, the Court sets the bar quite high, requiring the State to take all reasonable measures that could have prevented the loss of life:

> In the Court's view, there are several other measures which the domestic authorities might reasonably have been expected to take to avoid the risk to the right to life from

Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?' (2015) 15 Human Rights Law Review 343 accessed 21 January 2016.

[469] *Budayeva and others v. Russia* (n 421) [134].

[470] *Osman v. the UK* (n 408) [116]. This principle has been repeated in numerous other cases, among which *Bone v. France* (n 446) 8; and *Furdik v. Slovakia* (n 443) [52].

> the violent acts of A.N. While the Court cannot conclude with certainty that matters would have turned out differently if the authorities had acted otherwise, it reiterates that the test under Article 2 does not require it to be shown that "but for" the failing or omission of the authorities the killing would not have occurred (see Opuz, cited above, § 136 and, mutatis mutandis, E. and Others v. the United Kingdom, no. 33218/96, § 99, 26 November 2002), as it could be inferred from the decisions of the domestic courts (see paragraphs 74-76 above). Rather, what is important, and sufficient to engage the responsibility of the State under that Article, is that reasonable measures the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm (see Opuz, loc. cit. and, mutatis mutandis, E. and Others v. the United Kingdom, loc. cit.).[471]

It is clear that what may be considered reasonable measures capable of mitigating a given threat depends heavily on the circumstances of the case. A number of examples illustrate that the measures required may be far-reaching.

In cases concerning a concrete threat to an identifiable individual, the State may be obliged to take specific and individualised protection measures. Examples are cases in which the authorities were aware of the threat an individual poses to another, such as in *Osman* or in cases concerning abusive spouses.[472] Also persons who fear an attack by unknown perpetrators based on the opinions they have expressed in public must be provided with individual protection measures, as was the case with two journalists in Turkey.[473] Another example is the requirement not to endanger the safety of protected witnesses and their families by ending personal protection measures while the threat has not disappeared, as was the case with a former Serbian drug trafficker hiding in Hungary, where he had confessed to the authorities.[474]

Furthermore, the measures required under the duty to prevent the loss of life with respect to society at large are considerable, as demonstrated by the case of *Furdik v. Slovakia*. In this case, the Court noted that under the positive dimension of the right to life the State is obliged to provide for emergency rescue services to prevent the loss of life resulting from accidents:

> For the Court […] the State's duty to safeguard the right to life must also be considered to extend to the provision of emergency services where it has been brought to the notice of the authorities that the life or health of an individual is at risk on account of injuries sustained as a result of an accident. Depending on the circumstances, this duty may go beyond the provision of essential emergency services such as fire-brigades and ambulances and, of relevance to the instant case, include the provision of air-mountain or air-sea rescue facilities to assist those in distress.[475]

Thus, States are expected not only to generally prepare for the provision of ambulance services, but also for more complicated rescue operations requiring air-mountain or air-sea rescue.

[471] *Bljakaj and others v. Croatia* (n 418) [124].
[472] See for example *Kontrová v. Slovakia* (n 435) [49]; *Bljakaj and others v. Croatia* (n 418) 108 and 114; and *Talpis v. Italy* (n 435) [101].
[473] See for example *Kiliç v. Turkey* (2000) 22492/93 [76] (European Court of Human Rights); and *Dink v. Turkey* (2010) 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 74 (European Court of Human Rights).
[474] *R.R. and others v. Hungary* (2012) 19400/11 (European Court of Human Rights).
[475] *Furdik v. Slovakia* (n 443) 13.

Finally, the case of *Tagayeva and others v. Russia* is worth discussing in some detail here, as it illustrates the difficulties of navigating between the States discretion in the choice of means and enforcing the duty to prevent the loss of life in a meaningful way.[476] The case concerns a terrorist attack on a school in Beslan. While some information was available to the authorities regarding a general terrorist threat in the region, the school was only protected by an unarmed police officer. On the day the new academic year was ceremoniously opened, over thirty men took children, teachers, and parents hostage. They held about 1,100 hostages in a gymnasium surrounded by explosive devices. On the third day, two explosions occurred, the roof caught fire, and the Russian authorities intervened to free the hostages using extreme force. Over 330 persons lost their lives and about one-third of the bodies were burnt to an extent that identification was not possible.[477] The complaint of the applicants concerned the failure to prevent the attack as well as the aftermath of the event. At this point only the first aspect is of interest.

At the beginning of its assessment, the Court acknowledged the difficulties facing authorities in protecting society from terrorist attacks and itself in reviewing the effects such policies have on the rights enshrined in the Convention:

> As an introduction to the examination of the complaints brought under Article 2 of the Convention, the Court confirms that it is acutely conscious of the difficulties faced by modern States in the fight against terrorism and the dangers of hindsight analysis (see *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, §§ 212-13, ECHR 2011 (extracts)). The Russian authorities, in particular, have been confronted in the past few decades with the separatist movements in the North Caucasus – a major threat to national security and public safety. As the body tasked with supervision of the human rights obligations under the Convention, the Court would need to differentiate between the political choices made in the course of fighting terrorism, that remain by their nature outside of such supervision, and other, more operational aspects of the authorities' actions that have a direct bearing on the protected rights […][478]

Nonetheless, this difficulty did not prevent the Court from critically analysing the events. In analysing the preventive measures, which the authorities could have reasonably been expected to take, the Court took into account the region's previous experience with terrorist attacks:

> By August 2004 the Russian authorities were already familiar with the terrorists' ruthless attacks on the civilian population, including its most vulnerable sectors. In the ten years preceding the events in Beslan, at least three major terrorist acts with a similar pattern were committed by the Chechen separatists. In June 1995 a group of terrorists under the command of Shamil Basayev captured over 1,500 people in a hospital in Budennovsk in the Stavropol Region; in January 1996 a group headed by Salman Raduyev seized, among other targets, a maternity ward with patients and staff in Kizlyar, Dagestan; and in October 2002 a group under the leadership of Movsar Barayev took hold of a theatre in Moscow with over 800 people during a popular youth

[476] *Tagayeva and others v. Russia* (2017) 26562/07; 14755/08; 49339/08; 49380/08; 51313/08; 21294/11; 37096/11 (European Court of Human Rights).
[477] ibid [9–105].
[478] ibid [481].

> show. Each time the terrorists used the hostages to amplify their message related to the situation in Chechnya, causing immense suffering to their victims. In each case, the attacks resulted in massive loss of life.
>
> Against this background, the information known to the authorities as summarised above can be seen as confirming the existence of a real and immediate risk to life. The Court notes that the experts pointed out that, although the targeted individuals or groups had not been identified with precision, complementary information should have been available to the competent authorities from covert sources and intelligence operations (see paragraph 437 above). In any event, in the face of a threat of such magnitude, predictability and imminence, it could be reasonably expected that some preventive and protective measures would cover all educational facilities in the districts concerned and include a range of other security steps, in order to detect, deter and neutralise the terrorists as soon as possible and with minimal risk to life.[479]

The Court continued by criticising the lack of preparative measures in the days preceding the attack. Its criticism covered the lack of sufficiently tight security checks on the roads in the area, allowing the terrorist to drive into the town of Beslan. While the insufficient security checks were owed to a lack of resources, this did not prompt the Court to excuse the failure, but rather to question the manner in which this lack of resources was dealt with.[480] Furthermore, the Court noted the security measures at the school itself were insufficient to ensure the safety of a gathering of over 1,000 people and that no warning had been communicated to the attendees.[481] Moreover, referring to the magnitude of the possible threat, the Court found that it could have been expected that better preparations were made in setting up a coordinating structure to respond to an attack once it occurred.[482] The Court thus concluded that the Russian authorities had failed to take measures which, judged reasonably, could have been expected to minimize the risk.[483]

Keeping in mind that the authorities did not know which educational facility was the potential target of the attack, the requirement to provide all educational facilities with security measures which could have been expected to detect, deter, and neutralize terrorists as soon as possible and with a minimal risk to life, may be considered far-reaching. From this as well as from its critical analyses of the total array of measures taken by the authorities, it appears that the complexity of the issue did not prompt the Court to lower the standards applied under Article 2. Rather, in the eyes of the Court, the magnitude of the possible loss of life to be expected based on previous terrorist attacks in the region, should have been a reason to be even more diligent in allocating resources and taking measures to prevent the tragic events from happening. According to the Court, the fact that a great number of persons were exposed to possibly life-threatening conditions called for the mobilisation of all available resources and for measures calculated also at dealing with a great number of casualties. This would have also required the mobilisation and coordination of various emergency services. While

[479] ibid [485–486].
[480] ibid 488 and 490.
[481] ibid [489].
[482] ibid [490].
[483] ibid [491–493].

acknowledging the considerable effort undertaken by persons involved in the emergency rescue under difficult circumstances, the Court found that the authorities did not do all that could have reasonably been done:

> In a situation which involves a real and immediate risk to life and demands the planning of a police and rescue operation, one of the primary tasks of the competent authorities should be to set up a clear distribution of lines of responsibility and communication within the OH and with the agencies involved, including the military and security, rescue, fire and medical services. This body should be responsible for collecting and distributing information, choosing negotiation strategies and partners and working out the possible outcomes, including the possibility of a storming and its consequences. It is therefore striking to see that the majority of the members of the body tasked precisely with those questions were effectively excluded from any discussions or decision-making processes. The absence of any records, however concise, of the OH meetings and decisions adopted, highlight the appearance of a void of formal responsibility for the planning and control of the operation, as the situation developed. The subsequent domestic proceedings were unable to fill in this void, and it is still unclear when and how the most important decisions had been taken and communicated with the principal partners, and who had taken them. It is also undisputed that the organisation of the OH had been entirely under the authorities' control, that it should have relied on the pre-existing legislative and operational framework provided for such situations, and that the magnitude of the threat commanded that the maximum available State resources be mobilised.
>
> The Court reiterates that in situations such as the one at hand, some measure of disorder is unavoidable. It also formally recognises the need to respect the security concerns and thus keep certain aspects of the operations secret (see Finogenov and Others, cited above, § 266). It also does not question the political decisions taken by the authorities, for example, on negotiations with the terrorists, the distribution of responsibility between officials for different aspects of the operation or the general choice of strategy to pursue. It does not lose sight of the courage and efficiency demonstrated by the services involved, including the medical and rescue teams, who ensured a mass and rapid evacuation, sorting and emergency aid to hundreds of victims, despite the difficulties. There is no doubt that their professionalism contributed to limiting the number of victims once the rescue operation had ended (see paragraphs 241, 250 and 557-560 above), unlike the situation described in Finogenov and Others (ibid.).
>
> In view of this, one cannot avoid the conclusion that this lack of responsibility and coordination contributed, to some extent, to the tragic outcome of the events. The investigation did not attribute a single death or injury to the actions of the State officials, yet this conclusion seems untenable in view of the known circumstances of the case.
>
> The Court reiterates that its role is not to establish the individual liability of those involved in the planning and coordination of the operation (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 182, ECHR 2011 (extracts)). Rather, it is called upon to decide whether the State as a whole complied with its international obligations under the Convention, namely its obligation to "take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life" (see *Ergi v. Turkey*, 28 July 1998, *Reports* 1998-IV, § 79).

> In the light of the above, the Court finds that the Russian authorities failed to take such feasible precautions, in particular because of the inability of the commanding structure of the operation to maintain clear lines of command and accountability, coordinate and communicate the important details relevant to the rescue operation to the key structures involved and plan in advance for the necessary equipment and logistics. This constitutes a breach of Article 2 of the Convention.[484]

It emanates from this case that the discretion the authorities enjoy in making political as well as practical choices confirmed in the standard consideration set out above, does not derogate from the expectation of the Court that overall, whichever measures are chosen, they must actually be expected to be capable to minimize the risk to life. Furthermore, while the Court is aware of budgetary limitations and practical realities, it does not shy away from scrutinizing the way in which the State has dealt with such difficulties.

From the cases mentioned here, it emanates that the concrete measures a State may be required to take to prevent the loss of life are very diverse and depend heavily on the specific circumstances of the case. They show how States are required to take all measures that may reasonably be expected to avert possible danger to the life of a person. While the Court is willing to allow for political and budgetary choices, it is also prepared to scrutinize how the State dealt with these realities. As the specific circumstances required in a particular situation depend on the circumstances at hand, there is no merit in delving into further examples. Rather, a measure stipulated in the text of Article 2 itself and encompassing more structural measures to protect the right to life is discussed in the next section, namely the requirement to protect the right to life by law.

2.3 Conclusion on the Duty to Prevent the Loss of Life

The discussion on the duty to prevent the loss of life, falling under the substantive limb of the right to life, has demonstrated that the Court had first set out this duty in a rather narrow fashion in the case of *Osman*. Originally holding that the duty to prevent the loss of life only applies if the identity of the potential victim is known to the State and if the threat is imminent and immediately foreseeable, the Court has steadily broadened the material scope of application in aforementioned cases. It may be concluded that now the duty to prevent the loss of life covers any person or group and society at large, irrespective of whether the authorities knew the identity of the potential victim. Furthermore, the broad range of threats with respect to which the Court has required States to take preventive measures shows two things. First, the threat can essentially take any form whatsoever. No particular threat to life is categorically excluded from the State's duty to take measures to prevent such a threat from materialising. Second, while the authorities must be in a position to be aware about the threat in question, general knowledge about a given danger may suffice. The duty to prevent the loss of life is not only triggered, once a concrete accident or tragedy can be foreseen. Rather, the State is required to take measures to manage any potential threat or dangerous activity of which it is or should be aware. This

[484] ibid [570–574].

demanding stance towards States party to the Convention can also be seen with respect to the measures required to prevent the loss of life. The concrete measures required are dependent on the circumstances of the case and may also include the requirement to discontinue a measure that turns out to be a threat to the right to life. The essence of the Court's case law on the matter can be summarized in one sentence: the State is required to take all measures that can reasonably be expected to mitigate a threat to life.

3 The Duty to Protect the Right to Life by Law

The first sentence of Article 2 ECHR reads: "Everyone's right to life shall be protected by law." From the Court's case law, it can be discerned that this requirement comprises an overall duty to install a legislative and administrative framework that is geared towards the protection of life in all sectors of society. As such, the duty to protect the right to life by law can also be seen as part of the duty to prevent the loss of life. Nevertheless, it will be discussed separately here. The importance of the requirement to protect the right to life by law for the safeguarding of the right to life transpires from the following passage:

> The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 (see paragraph 71 above) entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life (see, for example, *mutatis mutandis*, *Osman*, cited above, p. 3159, § 115; *Paul and Audrey Edwards*, cited above, § 54; *İlhan v. Turkey* [GC], no. 22277/93, § 91, ECHR 2000-VII; *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III; and *Mahmut Kaya v. Turkey*, no. 22535/93, § 85, ECHR 2000-III).[485]

It is thus clear, that the Court attaches great importance to the duty to ensure that the State's legislative and administrative framework is designed so as to contribute to the protection of the right to life.

3.1 Scope of Application

As with the duty to prevent the loss of life more generally, the Court will only consider a situation under the duty to protect the right to life by law, if the applicants have successfully surpassed the hurdle of Article 1 ECHR. As a result, the Court has not made explicit considerations regarding the question whether the duty to protect the right to life by law must also cover threats to life outside the territory of a State. Possibly, however, the duty to do so in regard to all threats to life that may arise within or result in the death of a person within the State's territory, may have the practical effect of also minimizing threats to life that occur beyond the State's territory.

[485] *European Court of Human Rights, Öneryildiz v. Turkey, 30 November 2004,* (n 421) [89].

Regarding the material scope of application, the text of the article does not contain any provisions defining or limiting the scope of application of the duty to protect the right to life by law. Rather, this duty is formulated in a general fashion. The Court's case law shows that the duty to protect the right to life by law covers a wide range of possible threats, just as the duty to prevent the loss of life does. This becomes clear when looking at the situations in which the Court found this duty to be at play. These include, for example, ensuring proper regulation, selection, training and supervision for the use of force by the police,[486] securing safety on building sites and in buildings,[487] the regulation of dangerous activities,[488] the provision of emergency rescue services,[489] disaster prevention and relief,[490] and the provision of emergency medical services as well as the proper functioning of the healthcare system more generally.[491] Any activity or situation touching upon the safety of persons therefore require proper regulation aimed at the protection of the right to life.

3.2 Measures Required Under the Duty to Protect the Right to Life by Law

As emanates from the Court's judgment in the case of *Öneryildiz v. Turkey* cited above, the duty to protect the right to life by law primarily entails a duty to 'put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.'[492] In general, therefore, the State's legislative and administrative system must be designed to serve the purpose of safeguarding the right to life.
However, the Court does not consider it sufficient for the State to put in place an administrative and legislative system that is considered to do so. In addition, the effective implementation and functioning of such a regulatory system must be ensured:

> The obligation on the part of the State to safeguard the lives of those within its jurisdiction has been interpreted so as to include a positive obligation to take regulatory measures as appropriate, which measures must be geared to the special features of the activity in question, with particular regard to the level of the potential risk to human lives involved. The regulatory measures in question must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels (see *Öneryıldız*, cited above, §§ 89-90, and *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 131-132, ECHR 2008 (extracts)).[493]

The obligation to ensure the effective functioning of a regulatory framework therefore also includes the installation of appropriate procedures for identifying shortcomings in the process. The State is therefore required to proactively monitor the proper functioning of regulatory frameworks, as this would allow the State to identify and address any shortcomings in the systems designed to protect the right to life. In this regard, the group of cases concerning the provision of healthcare services is of particular interest. While the judgment of the Grand Chamber in the case of *Lopes de Sousa Fernandes v. Portugal* may actually limit the situations in which such structural deficiencies give rise to State responsibility, as compared to previous cases concerning the provision of medical services, it nevertheless allows for State responsibility in the case of structural deficiencies under specific circumstances.[494] The Court set out that not every case of medical negligence gives rise to State responsibility, but this may be the case in two situations:

> Even in cases where medical negligence was established, the Court would normally find a substantive violation of Article 2 only if the relevant regulatory framework failed to ensure proper protection of the patient's life. The Court reaffirms that where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient cannot be considered sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life (see, among many other authorities, *Powell* and *Sevim Güngör*, both cited above).
>
> For the Court's examination of a particular case, the question whether there has been a failure by the State in its regulatory duties calls for a concrete assessment of the alleged deficiencies rather than an abstract one. In this regard, the Court reiterates that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015 and the cases cited therein). Therefore, the mere fact that the regulatory framework may be deficient in some respect is not sufficient in itself to raise an issue under Article 2 of the Convention. It must be shown to have operated to the patient's detriment (compare and contrast *Z v. Poland*, cited above, §§ 110-12, and *Arskaya*, cited above, §§ 84-91).
>
> It must, moreover, be emphasised that the States' obligation to regulate must be understood in a broader sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement.

[486] *Makaratzis v. Greece* (n 412); *Gerasimenko and others v. Russia* (2016) 5821/10; 65523/12 (European Court of Human Rights).
[487] *Cevrioğlu v. Turkey* (2016) 69546/12 (European Court of Human Rights); and *Banel v. Lithuania* (n 445).
[488] *European Court of Human Rights, Öneryildiz v. Turkey, 30 November 2004,* (n 421).
[489] *Furdik v. Slovakia* (n 443).
[490] *Budayeva and others v. Russia* (n 421); and *M. Özel and others v. Turkey* (n 453).
[491] *Mehmet Şentürk and Bekir Şentürk v. Turkey* (2013) 13423/09 (European Court of Human Rights); and *Lopes de Sousa Fernandes v. Portugal* (n 454).
[492] *European Court of Human Rights, Öneryildiz v. Turkey, 30 November 2004,* (n 421) [89].
[493] *Cevrioğlu v. Turkey* (n 487) [51]; See also *European Court of Human Rights, Öneryildiz v. Turkey, 30 November 2004,* (n 421) [89].
[494] *Lopes de Sousa Fernandes v. Portugal* (n 454).

> On the basis of this broader understanding of the States' obligation to provide a regulatory framework, the Court has accepted that, in the very exceptional circumstances described below, the responsibility of the State under the substantive limb of Article 2 of the Convention may be engaged in respect of the acts and omissions of health-care providers.
>
> The first type of exceptional circumstances concerns a specific situation where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment (see, for example, *Mehmet Şentürk and Bekir Şentürk*, and, by contrast, *Sayan*, both cited above). It does not extend to circumstances where a patient is considered to have received deficient, incorrect or delayed treatment.
>
> The second type of exceptional circumstances arises where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger (see, for example, *Asiye Genç* and *Aydoğdu,* both cited above).[495]

The Court continued by setting out three cumulative criteria which must be fulfilled in order to give rise to State responsibility, if someone dies as a result of a structural deficiency in the provision of healthcare services. These criteria encompass the following: the omission of the healthcare providers must go beyond a mere error or negligence, the dysfunction must be objectively identifiable as systemic, and that there must be a causal link between the systemic dysfunction and the harm suffered by the victim.[496] From these requirements, it is clear that a structural problem in the provision of healthcare services does not automatically result in State responsibility. Yet, if the State wants to avoid the risk of bearing responsibility for the loss of life of a person, it must take measures to resolve any systemic dysfunction of which it is or ought to be aware.

Thus, on the basis of the above cases, it may be concluded that States are obliged to design their legislative and administrative frameworks in such fashion that they contribute to the overall goal of safeguarding the right to life. This obligation covers all sorts of activities and sectors of society. Furthermore, it is not sufficient to install a regulatory system that prevents the loss of life in theory, but the authorities must ensure that it is actually implemented and functions effectively. If the State fails to address systemic deficiencies in such regulatory systems, it bears the risk of being held responsible, if a person is harmed as a result of such systemic shortcoming.

3.3 Conclusion on the Duty to Protect the Right to Life by Law

The duty to protect the right to life by law serves the overall purpose of preventing the loss of life. As such, it may be seen as falling under the more general duty to prevent the loss of life. Nevertheless, the importance the Court attaches to this element, as well as the specific measures required in this regard, justify a separate discussion.

[495] ibid [187–192].
[496] ibid [194–196].

With regard to the scope of application of the duty to protect the right to life by law, the Court's case law shows that it covers a wide range of situations and activities in which a potential threat to life may arise. With respect to all activities in which this is the case, States are required to design their administrative and legislative system in such fashion that it contributes to the overarching goal of protecting the right to life. Furthermore, the Court is not satisfied with the installation of a regulatory framework that should protect the right to life in theory. The State must monitor and ensure its effective implementation and functioning. If it fails to address systemic deficiencies that the regulatory framework appears to have in practice, it may be held responsible if a person is harmed as a result.

4 The Duty to Respond Adequately to the Loss of Life

Aside from the duty to prevent the loss of life, Article 2 ECHR also encompasses obligations if the life of a person has been lost. The Court put it quite aptly:

> The obligations deriving from Article 2 do not end there. Where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished (see, *mutatis mutandis*, *Osman*, cited above, p. 3159, § 115, and *Paul and Audrey Edwards*, cited above, § 54).[497]

The Court's case law indicates that an adequate response to an incident in which the life of a person is lost comprises of an investigation into the circumstances of death and, if appropriate, the provision of a judicial remedy to the victim or its family. This is referred to as the procedural obligations under the right to life, which are important in their own right. In this sense, the Court has declared the procedural obligations enshrined in Article 2 ECHR to be independent from the obligations arising under the substantive limb of Article 2 ECHR.[498] Before discussing the standards that an investigation and a judicial remedy must meet, the scope of application of the procedural aspect of Article 2 are discussed, as well as its underlying aim.

4.1 The Scope of Application of the Duty to Respond Adequately

Given the independent nature of the procedural obligations under Article 2, their scope of application can diverge from the scope of application to prevent the loss of life. While not every death of a person will require the State to take measures, the scope of application of the duty to respond adequately is wider than the duty to take preventive measures, as it is not limited to cases in which a threat was in some way foreseeable. The duty appears to apply in all cases in

[497] *Budayeva and others v. Russia* (n 421) [138].
[498] *Ramsahai and others v. The Netherlands* (2007) 52391/99 311 and 322 (European Court of Human Rights); See also Gerards (n 406) 376.

which a person dies a non-natural death that has come to the attention of the authorities, whether foreseeable or not. To put it differently, the case search has not resulted in a single case in which the Court explicitly concluded that the duty to respond adequately does not apply. This appears logical as, depending on the circumstances, it might differ what is considered adequate, but it is hardly imaginable that the death of a person who died in non-natural circumstances is brought to the attention of the authorities and it would be deemed acceptable that they do not respond at all. Examples of cases in which the duty to respond adequately applies illustrate the wide variety of situations in which it is relevant. These include a family found dead in their car at the side of the road with signs indicating that their death was the result of a crime,[499] the aftermath of a robbery,[500] or a car accident caused by a drunk driver killing another person.[501] Most importantly to the current study, the duty to respond adequately applies to the situation in which the victims tried to immigrate irregularly by sea. This was determined in the case of *Ranđelović and others v. Montenegro*.[502] The case was brought by the relatives of a group of 70 Roma people who had transited Montenegro and boarded a boat on the Montenegrin shore with the aim to reach Italy. The boat sank and only one person was found alive on the Montenegrin shore, as well as 35 bodies. The Court found that Montenegro had not responded adequately to the event, as the investigation into the incident had been deficient and the judicial proceedings were still pending 17 years after the incident. The case leaves the question unanswered whether it was relevant in the given case that the victims had boarded the boat on the Montenegrin shore and whether the conclusions of the Court would have been any different if they had embarked on the journey in another country. Neither is it clear whether the boat sank in Montenegrin territorial waters or beyond that. Yet, the Court did not attach particular relevance to the fact that the persons had embarked on the journey in Montenegro with respect to the latter's duty to respond adequately. It is also hard to imagine that the Court would have decided that Montenegro had responded adequately if it had done nothing when 35 bodies were found on its beach, even if the travellers had embarked on their journey in another country. A comparison to the Court's findings with regard to the temporal scope of application of the Convention may clarify the matter. In this respect, the Court has explicitly determined that under certain circumstances, the procedural obligations of the right to life may be applicable to investigations carried out after the entry into force of the Convention, even if the loss of life in question has occurred before the entry into force of the Convention.[503] While the temporal scope of application of the Convention differs from its territorial scope, the fact that the duty to investigate the death of a person may be applicable under particular circumstances, even if the substantive violation of the right to life falls outside the temporal scope of application, may be taken as an indication that a similar divergence is possible regarding the territorial scope of application of the Convention. If the loss of life occurs outside the State's territory and outside

[499] *Güzelyurtlu and others v. Cyprus and Turkey* (2017) 36925/07 (European Court of Human Rights).
[500] *Kitanovska Stanojkovic and others v. "The Former Yugoslav Republic of Macedonia"* (2016) 2319/14 (European Court of Human Rights).
[501] *Starčević v. Croatia* (2014) 80909/12 (European Court of Human Rights).
[502] *Ranđelović and others v. Montenegro* (2017) 66641/10 (European Court of Human Rights).
[503] *Janowiec and others v. Russia* (2013) 55508/07 and 29520/09 [141] (European Court of Human Rights); for a brief discussion of the case, see Gerards (n 406) 376.

the territorial scope of application of the Convention, it is nevertheless reasonable to hold that the discovery of a dead body within the State's territory may trigger the application of the independent procedural obligations under Article 2. It therefore appears reasonable to assume that the location where the loss of life occurs in a particular case, could only have affected what would be considered an appropriate response, but not the application of the duty to respond adequately as such. This may also be discerned from the case of *Česnulevičius v. Lithuania*, in which the Court held:

> The Court has recently found that the obligation under Article 2 to carry out an effective investigation has evolved into a "separate and autonomous duty" (see Šilih v. Slovenia [GC], no. 71463/01, § 159, 9 April 2009). However, it would emphasise that this obligation may differ, both in content and in terms of its underlying rationale, depending on the particular situation that has triggered it (see Calvelli and Ciglio v. Italy [GC], no. 32967/96, § 51, ECHR 2002-I, and Banks and Others v. the United Kingdom (dec.), no. 21387/05, 6 February 2007) […][504]

Additionally, in many cases the conclusion that a person has died beyond the State's territory can only be drawn after an investigation into the death of a person has taken place. In this regard, an investigation into the death of a person is indispensable to come to conclusions regarding the circumstances and location of death.
Thus, it is reasonable to conclude that the duty to carry out an effective investigation applies, whenever the authorities become aware of a non-natural death, irrespective of where the loss of life has occurred. The contents and ratio of the duty to respond adequately, however, may differ according to the circumstances of the case. The ratio generally underlying the duty to respond adequately to the loss of life, is discussed in the next section.

4.2 The Ratio of the Duty to Respond Adequately

The overall aim of requiring an effective investigation into the loss of life under non-natural circumstances and the provision of a judicial remedy is to ensure the effective functioning of the legislative and administrative framework a State is required to put into place to protect the right to life.[505] The underlying aim to protect the right to life emanates from the requirement to perform the investigation in such a way as to allow the authorities to gain insight into complex structures of various circumstances which may have contributed to the loss of life. An example is the case of *Özel and others v. Turkey* concerning the collapse of several houses during an earthquake. The Court considered that government authorities are often the only entity with sufficient knowledge and resources to conduct such a complex investigation with a view to identify shortcomings in the regulatory system meant to prevent the loss of life, and, if appropriate, hold State agents to account:

[504] *Česnulevičius v. Lithuania* (n 422) [92].
[505] *McCann and others v. United Kingdom* (1995) 18984/91 [161] (European Court of Human Rights); *Mustafa Tunç and Fecire Tunç v. Turkey* (2015) 24014/05 [171] (European Court of Human Rights).

> The Court further emphasises that Article 2 requires the authorities to conduct an official investigation in the context of dangerous activities when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents (see Öneryıldız, cited above, § 93). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see Paul and Audrey Edwards v. the United Kingdom, no. 46477/99, §§ 69 and 71, ECHR 2002-II, and Mastromatteo v. Italy [GC], no. 37703/97, § 89, ECHR 2002-VIII).
>
> The Court also reiterates that the principles developed in relation to judicial responses to incidents resulting from dangerous activities also lend themselves to application in the area of disaster relief. Where lives are lost as a result of events engaging the State's responsibility for positive preventive action, the judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied to the extent that this is justified by the findings of the investigation (see Budayeva, § 142). In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue (ibid., § 142).[506]

Comparably, in respect of structural deficiencies in the provision of healthcare, the Court has emphasised that:

> […] Knowledge of the facts and of possible errors committed in the course of medical care is essential to enable the institutions and medical staff concerned to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of all users of health-care services (see *Oyal*, cited above, § 76).[507]

Thus, to be able to serve the overall aim to protect the right to life and to prevent future loss of life, an investigation must be of such quality and depth to uncover even divergent and complex circumstances that may have contributed to the loss of life. On the basis of the investigation, the authorities should be able to identify who is to be held accountable and whether there is a structural shortcoming in the legislative framework installed by it in order for the State to be able to address such a shortcoming.

Finally, this overarching aim may also explain why the Court reverses the burden of proof to the detriment of the authorities, if the circumstances so require. Examples in point are cases concerning vulnerable groups under control of the authorities, such as prisoners and conscripts. Here, the Court has developed a line of case law holding that the duty to explain harm suffered

[506] *M. Özel and others v. Turkey* (n 453) [188–189].
[507] *Lopes de Sousa Fernandes v. Portugal* (n 454) [218].

by a person under control of the authorities rests on the latter. The mere failure to provide such an explanation is by and of itself sufficient to give rise to the responsibility of the State under Article 2.[508] Similarly, the Court was willing to assume that a person has disappeared and, if the passage of time or other circumstances so indicate, died at the hands of State agents in cases concerning disappearances in Chechnya, where the applicants made a prima facie case that a person has been abducted by service men. It does so against the background that enforced disappearances in Chechnya are a structural problem, which often appear to involve State agents and the Russian State has time and again proven unwilling to conduct a proper investigation and even to produce all documents to the Court.[509] Thus, if the State does not comply with its obligation to investigate such suspicious situations on a structural basis, this may even be detrimental to the position of the State in respect of the question whether the substantial limb of Article 2, the prohibition to deprive a person of his or her life, has been violated. This too shows how the Court ultimately sees the duty to respond adequately to the death of a person to be at the service of the overarching goal to protect the right to life.

4.3 Requirements under the Duty to Respond Adequately

Essentially, the duty to respond adequately in the event that life is lost comprises of a duty to investigate the deaths or, as the Chechen cases mentioned above show, the disappearance of a person and to provide an appropriate judicial remedy. The Court refers to the duty to investigate and provide an appropriate judicial procedure as the procedural limb of Article 2. Both are often dealt with by the Court conjointly, as in practice an investigation into the death of a person as well as a judicial response to the event are often similarly closely intertwined. After all, in many cases, the investigation is performed as part of a criminal investigation, which might, if the results so require, lead to a criminal prosecution. At the same time, victims or their next of kin may initiate judicial proceedings to require additional investigative steps or they may claim (additional) damages for the harm suffered in civil judicial proceedings. In most cases, the question what may be an appropriate judicial remedy is therefore closely related to the way in which the investigation is conducted and the results it yields. The judicial remedy itself must meet the standards of Article 6 ECHR, incorporating the right to a fair trial. As the focus of this chapter lays on the duties resting on States under Article 2, the requirements developed under Article 6 with respect to judicial proceedings are not elaborated upon at this point. Here, it suffices to say that, if the results of the investigation into the death of a person so requires, victims of a violation of Article 2 or their next of kin must have access to civil, or if appropriate, criminal proceedings that meet the requirements laid down in Article 6 ECHR. The remainder

[508] See for example *Keller v. Russia* (2013) 26824/04 81, 83 (European Court of Human Rights); *Marina Alekseyeva v. Russia* (n 423) [121]; *Karsakova v. Russia* (2014) 1157/10 [57] (European Court of Human Rights); and *Metin Gültekin and others v. Turkey* (2015) 17081/06 32-33 and 36-37 (European Court of Human Rights).
[509] See for example *Musayeva and others v. Russia* (2007) 57941/00; 58699/00; 60403/00 144, 147 (European Court of Human Rights); *Shakhgiriyeva and others v. Russia* (2009) 27251/03 [155] (European Court of Human Rights); *Avkhadova and others v. Russia* (2013) 47215/07 95, 98 (European Court of Human Rights); *Turluyeva v. Russia* (2013) 63638/09 [85] (European Court of Human Rights); *Makayeva v. Russia* (2014) 37287/09 [86] (European Court of Human Rights); and *Gaysanova v. Russia* (2016) 62235/09 [112] (European Court of Human Rights).

of this section thus focuses on the requirements the investigation into the death of a person must meet under Article 2 ECHR.

The Court has developed a long list of requirements the response to the death of a person must meet in order to satisfy the standard of Article 2. The specific measures required are dependent on the circumstances of the case. In its Grand Chamber judgment in the case of *Mustafa Tunç and Fecire Tunç v. Turkey*, the Court has summarised numerous requirements to be met by an investigation into the death of a person worth citing here:

> The form of investigation required by this obligation varies according to the nature of the infringement of life: although a criminal investigation is generally necessary where death is caused intentionally, civil or even disciplinary proceedings may satisfy this requirement where death occurs as a result of negligence (see, inter alia, Calvelli and Ciglio v. Italy, cited above, § 51; Mastromatteo v. Italy [GC], no. 37703/97, § 90, ECHR 2002-VIII; and Vo v. France, cited above, § 90).
>
> By requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction, Article 2 imposes a duty on that State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. This obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances, even where the presumed perpetrator of the fatal attack is not a State agent (see Menson v. the United Kingdom (dec.), no. 47916/99, ECHR 2003-V; Pereira Henriques v. Luxembourg, no. 60255/00, § 56, 9 May 2006; and Yotova v. Bulgaria, no. 43606/04, § 68, 23 October 2012).
>
> In order to be "effective" as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate (see Ramsahai and Others v. the Netherlands [GC], no. 52391/99, § 324, ECHR 2007-II). That is, it must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible.
>
> The obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures available to them to secure evidence concerning the incident at issue (see Jaloud v. the Netherlands [GC], no. 47708/08, § 186, ECHR 2014; and Nachova and Others v. Bulgaria [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII).
>
> In any event, the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard (see Giuliani and Gaggio v. Italy [GC], no. 23458/02, § 301, ECHR 2011).
>
> In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances

> of the case and, where appropriate, the identity of those responsible (see Kolevi v. Bulgaria, no. 1108/02, § 201, 5 November 2009).
>
> Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria (see Tanrıkulu v. Turkey [GC], no. 23763/94, §§ 101-110, ECHR 1999-IV; and Velikova v. Bulgaria, no. 41488/98, § 80, ECHR 2000-VI).
>
> Moreover, the persons responsible for the investigations should be independent of anyone implicated or likely to be implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (see Anguelova v. Bulgaria, no. 38361/97, § 138, ECHR 2002-IV).
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> A requirement of promptness and reasonable expedition is implicit in this context (see Al-Skeini and Others, cited above, § 167).
>
> In addition, the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case (see Hugh Jordan v. the United Kingdom, no. 24746/94, § 109, ECHR 2001-III). The requisite access of the public or the victim's relatives may, however, be provided for in other stages of the procedure (see, among other authorities, Giuliani and Gaggio, cited above, § 304; and McKerr v. the United Kingdom, no. 28883/95, § 129, ECHR 2001-III).
>
> Article 2 does not impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation (see Ramsahai and Others, cited above, § 348; and Velcea and Mazăre v. Romania, no. 64301/01, § 113, 1 December 2009).
>
> The question of whether an investigation has been sufficiently effective must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see Dobriyeva and Others v. Russia, no. 18407/10, § 72, 19 December 2013; and Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], no. 47848/08, § 147, 17 July 2014).
>
> Lastly, the Court considers it useful to reiterate that, when it comes to establishing the facts, and sensitive to the subsidiary nature of its role, it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see Ataykaya v. Turkey, no. 50275/08, § 47, 22 July 2014, or Leyla Alp and Others v. Turkey, no. 29675/02, § 76, 10 December 2013). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see, among other authorities, Edwards v. the United Kingdom, 16 December 1992, § 34, Series A no 247-B). Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact

> reached by the domestic courts (see Giuliani and Gaggio, cited above, § 180; and Aydan v. Turkey, no. 16281/10, § 69, 12 March 2013).[510]

It emanates from the above that a State is required to perform an effective and independent investigation into the death of a person actually capable of establishing the facts. Therefore, all reasonable lines of enquiry must be pursued and the investigation must be independent. Furthermore, the Court attaches importance to the involvement of the next of kin in the investigation as it "serves to ensure the public accountability of the authorities and public scrutiny of their actions in the conduct of the investigation."[511] While not every situation calls for criminal proceedings, the victims or their relatives should have access to civil, administrative, or disciplinary proceedings in order to have the harm suffered by the victim reviewed. If the outcome of the investigation indicates that a person or entity may bear criminal liability for the death of a person, then the authorities need to instigate criminal proceedings out of their own volition.[512]

The list of requirements to be met by an investigation and judicial remedy under Article 2 is thus extensive. Under all circumstances must the investigation be of such quality and depth that it may actually serve the overarching goal of protecting the right to life. This is even the case if such an investigation or judicial proceedings take place under circumstances which render it more difficult to comply with these standards as would usually be the case. A number of cases serve to illustrate this point. A good example is the situation in which the investigation or the judicial proceedings at hand require cooperation with another State. If the circumstances call for this, the authorities may be required to take steps to ensure investigative measures are also taken abroad, as emanates from the case of *Huseynova v. Azerbaijan* in which the Court criticised Azerbaijan's failure to look into the possibility of transferring the prosecution of murder suspects to Georgia.[513] Additionally, this flows from the case of *Güzelyurtlu and others v. Cyprus and Turkey,* where the Court held:

> […] This obligation may include taking steps to secure relevant evidence located in other jurisdictions (see Rantsev, cited above §§ 241 and 245) or where the perpetrators are outside its jurisdiction, to seek their extradition (see Agache and Others v. Romania, no. 2712/02, § 83, 20 October 2009; see also, in relation to Article 3, Nasr and Ghali v. Italy, no. 44883/09, §§ 270-272, 23 February 2016).
>
> Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible will risk falling short of this standard (see Nachova, cited above, § 113).[514]

Overall, the Court makes it clear that while it is willing to take practical realities and difficulties into account, the existence of difficult circumstances cannot preclude the duty to respond

[510] *Mustafa Tunç and Fecire Tunc v. Turkey* (n 505) [170–182].
[511] *Perevedentsevy v. Russia* (2014) 39583/05 [118] (European Court of Human Rights); also *Tikhonova v. Russia* (2014) 13596/05 [96] (European Court of Human Rights).
[512] *European Court of Human Rights, Öneryildiz v. Turkey, 30 November 2004,* (n 421) [92–95].
[513] *Huseynova v. Azerbaijan* (2017) 10653/10 (European Court of Human Rights).
[514] *Güzelyurtlu and others v. Cyprus and Turkey* (n 499) [259–260].

adequately in its entirety or to a degree at which the investigation can no longer be considered effective. This was the case, for example, in *Ranđelović and others v. Montenegro* concerning the deficient investigation into the deaths of about 70 persons who had capsized when trying to clandestinely travel from Montenegro to Italy by sea. Fifteen years after the incident only 13 of the 35 bodies that had washed up on the Montenegrin shore had been identified and the criminal proceedings against the drivers of the boat were still pending.[515] Montenegro tried to excuse the shortcomings in the investigation and the proceedings by pointing to the vulnerable position of the applicants. It held that the persons involved had only been on transit through Montenegro, meaning that many of the applicants did not live there, and that "because of all the abuses of the Roma population which unfortunately took place, cooperation with them was more difficult."[516] Admittedly, the identity of the group of next of kin involved may have presented some practical hurdles to the investigating authorities, as they lived in different countries and some were illiterate.[517] These difficulties are also evidenced by the fact that the claims of 12 out of the 13 applicants were struck out of the list, as they had not responded to the Court's request to submit their views.[518] Nevertheless, the Court did not follow Montenegro in this reasoning. Despite the difficulties the authorities may have experienced, it held that the investigation as well as the criminal proceedings fell short of the requirements under Article 2 ECHR. The case of *Ranđelović and others v. Montenegro* also serves as an example that the identification of the deceased is considered part of an investigation into the loss of life.

The Court addressed the extent to which the difficult circumstances in which an investigation takes place can excuse shortcomings therein more explicitly in *Jaloud v. The Netherlands*.[519] The case concerned the investigation into the shooting of the applicant's son at a check point in Iraq, which manned by Dutch military personnel as well as by Iraqi forces. In this case the Court noted:

> The Court is prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work. In particular, it must be recognised that they were engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population – witness the first shooting incident on 21 April 2004 (see paragraph 10 above) – clearly included armed hostile elements.
>
> Even so, the Court must conclude that the investigation into the circumstances surrounding Mr Azhar Sabah Jaloud's death failed, for the following reasons, to meet the standards required by Article 2 of the Convention: firstly, documents containing important information were not made available to the judicial authorities and the applicant (the official record of statements taken from the ICDC personnel and the list, compiled by Lieutenant A., recording which ICDC members had fired their weapons and the number of rounds fired by each); secondly, in that no precautions were taken to prevent Lieutenant A. from colluding, before he was questioned, with other witnesses to the events; thirdly, in that no attempt was made to carry out the autopsy under

[515] *Ranđelović and others v. Montenegro* (n 502) 7-8, 116.
[516] ibid [119].
[517] ibid [10].
[518] ibid [65–70].
[519] *Jaloud v. The Netherlands* (2014) 47708/08 (European Court of Human Rights).

> conditions befitting an investigation into the possible criminal responsibility of an agent of the State, and in that the resulting report was inadequate; and fourthly, in that important material evidence – the bullet fragments taken from the body – was mislaid in unknown circumstances. It cannot be found that these failings were inevitable, even in the particularly difficult conditions prevailing in Iraq at the relevant time.[520]

Finally, the Court acknowledges that the magnitude of the loss of life may be another factor complicating the investigation in the aftermath of an event. Nonetheless, this cannot excuse all shortcomings in the investigation into the circumstances of death of each individual victim, especially not if the mass scale loss of life was foreseeable and preparatory measures could have been taken to allow for a proper investigation to be done also in such difficult circumstances. This is the conclusion the Court drew in the case of *Tagayeva and others v. Russia* concerning the terrorist attack on the school in Beslan. In this case, the Court explicitly acknowledged the immense amount of work performed by the authorities, but found that they nevertheless had not done all they could and should have done to establish the circumstances in which each of the 330 victims had died:

> In the present case the cause of death of the majority of victims were established on the basis of external examinations of the bodies only. No additional examinations were carried out, for example, to locate, extract and match external objects such as metal fragments, shrapnel and bullets. The decision to limit the examination of the bodies to external only was taken by the investigation in the immediate aftermath of the rescue operation and, in the authorities' opinion, was justified by the constraints on storage of the bodies and the need to identify the victims (see paragraph 414 above).
>
> It is clear that at that time the authorities found themselves under high pressure. After the siege and its violent outcome, thousands of aggrieved relatives were desperate to receive news about their family members, including several hundred children. Naturally, identifying the victims and informing the relatives of their fate was seen at that time as the most pressing need. The Court is fully aware of the practical difficulties that authorities face when organising investigative steps in difficult circumstances involving active conflict situations. The Court has acknowledged the difficulties faced by the Russian Federation in maintaining law and order in the North Caucasus and the restrictions that may be placed on certain aspects of the investigation (see Aslakhanova and Others, cited above, § 231).
>
> However, the Court does not lose sight of the fact that the circumstances preceding the storming strongly indicated a likelihood of mass casualties. It is therefore difficult to understand the apparent lack of preparation in terms of facilities for storing, examining and identifying the remains that were first laid out in the school courtyard and then taken to the Vladikavkaz town mortuary, which was insufficient in size to store them. This failure appears particularly serious in view of the hot weather that was prevalent in the region at the time of the events and which should have alerted the competent authorities to the need to ensure sufficient facilities, at least for some time, in order to ensure adequate conditions for the forensic work.

[520] ibid [226–227].

> In any event, even accepting that the decision to limit the examination of the victims' bodies to external inspections only was justified in the circumstances of the events, it is difficult to extend the same logic to the later stages of the criminal investigation. On several occasions the relatives of those who had lost their lives at the school requested that the bodies of the victims be exhumed and that additional enquiries be performed in order to reach more specific conclusions about the causes of their deaths, but no such requests were granted.
>
> A third of the victims died of causes that could not be established with certainty, in view of extensive burns. Such a high proportion of unestablished deaths seems striking […] The Court has already acknowledged the difficulties faced by the Russian authorities in this case. Nevertheless, it reiterates that as this was a situation of violent loss of life, once the identifications had been carried out, individual and more conclusive scrutiny about its causes should have been one of the crucial tasks of the investigation. Where the exact causes of deaths were not established with precision, the investigation failed to provide an objective ground for the analysis of the use of lethal force by the State agents […]
>
> Furthermore, the Court notes that the location of the hostages' bodies in the school was not marked or recorded with any precision (see the relevant passages of the site inspection report cited above in paragraphs 120 and 122). The location of only three of the bodies was noted with some precision, but even these findings were not marked in order to match them later. The absence of such basic information as the place of the victim's death contributed to the ambiguity concerning the circumstances in which it had occurred.
>
> To sum up, the Court finds that deficient forensic measures led to a situation where it was impossible to establish, with any degree of certainty, the causes of death of at least a third of all the victims, and the exact circumstances and location of the bodies of many more. An individualised description of their location and a more in-depth examination of the remains should have served as starting points for many of the important conclusions drawn in the course of the investigation. Failure to ensure this basis for subsequent analysis constitutes a major breach of the requirements of an effective investigation.[521]

Thus, also in the face of considerable difficulties the investigation and the judicial proceedings must meet the standard required under Article 2 ECHR that is realistic in the given circumstances. The fact that large-scale loss of life is predictable requires the State to take preparatory measures to be able to perform an investigation into each individual's death that meets the standards of Article 2. Rather than lowering these standards, the magnitude of the loss of life actually results in additional duties resting on the State.

In sum, it may be concluded that the circumstances in which an investigation into the death of persons must take place, have an impact on what may be expected of the State. Such difficulties may emanate from the identity of the next of kin, the location where the investigation must be undertaken, the need to cooperate with other countries, as well as the magnitude of the loss of life. Yet, even under difficult circumstances, the Court requires States to perform an effective investigation capable of providing the authorities with insights into the complex and diverging

[521] *Tagayeva and others v. Russia* (n 476) [503–509].

elements that may have contributed to the loss of life. This is all the more so, where these difficulties could have been anticipated and preparatory measures taken.

4.4 Conclusion on the Duty to Respond Adequately to the Loss of Life

The case law of the Court clearly shows that State authorities are under an independent obligation to respond adequately to the loss of life in non-natural circumstances. The scope of this duty is wider than the duty to take measures to prevent the loss of life, as it also applies in situations in which the loss of life could not have been foreseen. Nevertheless, the overarching aim of this duty is also to prevent the loss of life, by ensuring the effective functioning of the regulatory framework installed to prevent the loss of life. Under this duty authorities must investigate the loss of life in a manner which is capable of establishing the facts, identifying the often complex set of circumstances that have contributed to the loss of life, recognizing systemic failures among them, and identifying and prosecuting persons and entities responsible for the loss of life. If appropriate, the victims of a violation of the right to life or their next of kin must have access to judicial remedies. Difficulties arising from the circumstances in which such response must take place or from the characteristic of the victims or their next of kin cannot serve as an excuse not to perform such investigation or the subsequent judicial response diligently.
Together with the requirements the Court has developed under the duty to prevent the loss of life, the standards developed under the procedural limb of Article 2 ECHR befit the fundamental character of the provision. In both respects the Court is willing to take into account the practical realities in which State authorities must comply with these high standards. It is not prepared to lower these standards considerably, however, in the face of difficult circumstances. Furthermore, in order to enforce the effective protection of life by the authorities, the Court is willing to reverse the burden of proof in favour of the applicant and to the detriment of the authorities. It does so if circumstances indicate that the authorities may bear responsibility for the death of a person, but the State fails to provide the applicants and the Court with the full picture of circumstances that have contributed to the loss of life owing to a deficient investigation or the refusal to provide all relevant documents. The procedural branch of the right to life in fact also serves the overarching goal to protect the right to life and must be implemented to effectively serve this purpose. Hence, the State must demonstrate that it took all reasonable measures to investigate the circumstances in which the loss of life occurred, whether it was foreseeable or not, and that it provided the victims and their families with a judicial remedy. If it does not do so, the State risks being held responsible under Article 2 ECHR.

5 The Right to Life and the Effects of Immigration Policies

This final section analyses what the requirements and standards that the Court has developed under Article 2 ECHR mean in relation to migration by sea. The question arises whether EU member States potentially violate Article 2 ECHR by failing to implement or discontinue

measures in order to prevent the loss of life at sea or by responding inadequately to it, assuming such deaths are caused by the immigration policies of European Member States. While the Court has determined that it will not review the functioning of a regulatory system in the abstract, it will analyse the compatibility of certain measures with respect to individual cases, taking into account the circumstances at hand.[522] The Court has done so in three cases concerning irregular migration by sea, namely in the cases of *Hirsi Jamaa and others v. Italy*, *Kebe and others v. Ukraine* and the case of *Ranđelović and others v. Montenegro*.[523] In all three cases the Court found a violation of the Convention rights. Despite the fact that the legislative framework cannot by and of itself be tested for compliance with the Convention, the relevance of the standards developed by the Court in relation to Article 2 in the context of migration by sea are discussed here.

5.1 Applicability of Article 2 to the Loss of Life at Sea

With respect to the scope of application of Article 2 ECHR to border deaths at sea, it is useful to distinguish between the duty to prevent the loss of life, the duty to protect the right to life by law, and the duty to respond adequately.

5.1.1 The Duty to Prevent the Loss of Life

To conclude on the question whether the duty to prevent the loss of life applies to border deaths at sea, the criteria the Court developed in the case of *Osman v. United Kingdom* are relevant.[524] These concern the identity of the potential victim, knowledge about the risk on the side of the authorities, and the nature of the risk. It emanates from the case law discussed that the Court allows for a very wide understanding of what qualifies as an *identified individual or individuals*, to whom the State is obliged to offer protection against lethal threats. The Court has understood this criterion to cover society at large, as well as groups of individuals who were not identifiable beforehand.[525] Based on the Court's wide understanding of identified individuals, it is reasonable to assume that this criterion is fulfilled with respect to border deaths at sea, covering the group of persons who embark on a sea journey to Europe from Turkish and North African shores. Secondly, the Court requires State authorities to have knowledge about the risk, or that they should have known about a risk. It may be recalled that neither actual knowledge on the side of the authorities is required, nor is the Court likely to require scientific certainty regarding a possible threat and its consequences, in order to hold that a State is under the duty to take

[522] *Hristozov and others v. Bulgaria* (2012) 47039/11; 358/12 [105] (European Court of Human Rights).
[523] *Hirsi Jamaa v. Italy* (n 45); *Kebe and others v. Ukraine* (n 235); *Ranđelović and others v. Montenegro* (n 502). It may be noted that the first two cases concerned the prohibition of torture and inhumane treatment under article 3 ECHR.
[524] *Osman v. the UK* (n 408).
[525] *Mastromatteo v. Italy* (n 414); *European Court of Human Rights, Öneryildiz v. Turkey, 30 November 2004,* (n 421); *Budayeva and others v. Russia* (n 421); *Bljakaj and others v. Croatia* (n 418).

preventive measures.[526] In this regard, too, one may conclude that the criterion is fulfilled. After more than two decades of uninterrupted dying at sea in the context of migration, it is clear that travelling irregularly by sea is very dangerous and that the lives of the persons concerned may be at risk. While this is true for the phenomenon of border deaths at sea as a whole, this is particularly relevant in cases in which European authorities become aware of a boat carrying migrants at sea, for example because a warship has spotted such a vessel, other vessels have spotted migrants at sea and have informed the authorities about their presence, or because the persons aboard have contacted the authorities directly. As the attempt to enter Europe by sea irregularly has resulted in the loss of life repeatedly in the past, it is safe to conclude that the authorities are or ought to be aware of the threat to life of the persons on board in such a situation. Finally, the Court has held that the duty to prevent the loss of life applies in regard to a real or immediate risk to life. The analysis of the Court's case law has demonstrated that the Court considers very diverse threats, emanating from differing sources to trigger the duty to prevent the loss of life. Given the wide array of threats against which a State must offer protection if it is in a position to do so, there is no principled reason to assume that the dangers of travelling irregularly at sea would be generally excluded from this obligation. This is further confirmed by the discussion of circumstances that may preclude the application of the duty to prevent the loss of life. The analysis of the Court's case law in this regard showed that the role the victim itself has played with respect to the threat to life arising does not affect the application of the duty to prevent the loss of life as such, but may affect the measures a State is required to take.[527] Moreover, the case of *Streletz, Kessler and Krenz v. Germany* underlines the importance the Court attaches to the right to life, preventing its subordination in a general fashion to the interest of border protection.[528] On the basis of the analysis of the Court's case law, it is therefore sound to conclude that also the last criterion set out by the Court in the case of *Osman* is fulfilled. The duty to prevent the loss of life is therefore applicable to border deaths at sea.

The only question remaining in this respect is whether it matters that the persons are within the territorial waters of the State or beyond that. While the text of Article 2 itself does not contain any geographical limitation to its scope of application, the Court does refer to the State's duty to protect the right to life of everyone *within its jurisdiction* in its standard consideration regarding the positive dimension of the right to life.[529] Yet, the Court does not deal with this requirement explicitly when discussing the material scope of application under Article 2. It is clear that this hurdle would have to be surpassed under Article 1 ECHR regarding the scope of application of the Convention in general. The Court's case law on this matter has been discussed extensively in the previous chapter. It has been concluded that while principally the Convention only applies within the State's territory, it may also apply extraterritorially in specific circumstances and that the Court's case law offers room to argue that the deaths of persons heading towards Europe at sea fall within the scope of application of the Convention. An important difference between the test for extraterritorial application of the Convention as a

[526] *European Court of Human Rights, Öneryildiz v. Turkey, 30 November 2004,* (n 421); *Tătar v. Romania* (n 433) [109].
[527] *Bone v. France* (n 446); *Prilutskiy v. Ukraine* (n 451).
[528] *Streletz, Kesller and Krentz v. Germany* (n 278).
[529] See for example *Osman v. the UK* (n 408) [115].

whole as developed under Article 1 ECHR and the scope of applicability of Article 2 more specifically is that for the applicability of Article 2 the fact that State agents and the victims may never be in direct contact does not present a problem. As demonstrated by the wide array of situations in which the Court found the duty to protect the right to life to apply, the State must also prevent unintentional loss of life which occurs far away from the physical presence of or interference by State agents. Thus, given that the Convention is presumed to apply within the State's territory under Article 1 ECHR and that the application of Article 2 does not require physical contact between State agents and victims, it may be concluded that the duty to prevent the loss of life applies to any border deaths occurring within the territorial sea of a Member State. Whether the duty to prevent the loss of life also applies beyond territorial waters will principally have to be determined under Article 1 ECHR. However, the duty to prevent border deaths within the State's territorial waters may reflect beyond its territorial sea. After all, the fact that border deaths occur also within the State's territorial waters obliges States to take all reasonable measures to prevent the loss of life within its territorial waters. Arguably, this is all the more likely to be the case, if what would be needed to prevent the loss of life is not that the State takes far reaching measures, but where it would suffice for the State to discontinue measures which contribute to the loss of life. Such measures, and especially the discontinuance of measures that may actually contribute to the loss of life, may have an effect beyond the territorial waters of the State. While a definite answer to the question whether Article 2 requires States not only to prevent the loss of life within their territorial waters, but also in a more general fashion must remain open, it is possible that the application of the duty to prevent the loss of life within the territorial waters has this effect. If measures taken or discontinued based on the duty to prevent the loss of life within the State's territorial sea have such an extraterritorial effect, this would be of great practical importance for the phenomenon of border as a whole.

5.1.2 The Duty to Protect the Right to Life by Law

It is possible to be brief with respect to the application of the duty to prevent the loss of life by law to the phenomenon of border deaths. After all, the duty is formulated in a general fashion, requiring States, in general, to ensure that their legislative and administrative framework contributes to the overarching aim to protect the right to life. Rather than pointing towards any limitations of the scope of application of the duty to prevent the loss of life by law, the Court's case law confirms that it is relevant with respect to a wide range of potentially dangerous activities or situations. Thus, there is no reason to presume that the duty to prevent the loss of life would not apply to border deaths at sea.

As with respect to the duty to prevent the loss of life, the question whether this only concerns border deaths within the territorial waters of a State or also border deaths outside the territorial waters, the same reasoning as set out above with respect to the duty to prevent the loss of life applies. This question will principally be decided under Article 1 ECHR.

5.1.3 The Duty to Respond Adequately to the Loss of Life

The answer to the question whether the duty to respond adequately applies in the context of border deaths is straight forward. After all, the most relevant case discussed in this respect, is the case of *Ranđelović and others v. Montenegro,* which specifically concerns migrant deaths at sea.[530] The case renders beyond doubt that the procedural aspect of the right to life applies to border deaths at sea. The case also demonstrates that, under the circumstances at hand, the Court did not attach any importance to the question where the people had started their journey, or whether they had lost their lives within or beyond the territorial sea of Montenegro. It thus appears that the duty to respond adequately to the loss of life would apply in any case in which the body of a deceased person is found within the State's territory, irrespective of where the death occurred. As discussed above, it is reasonable to hold that the specific circumstances of the case, including the location of embarkation and of the loss of life, may impact the measures required under the procedural limb of Article 2, but not its application as such. This reasoning is supported by the fact that not requiring the State to investigate the death of a person it presumes to have embarked on his or her journey in another country, or to have lost his or her life beyond the State's territorial waters would frustrate the very purpose of the duty to investigate non-natural deaths. After all, in many cases, the validity of this presumption would remain uncertain without an investigation taking place. Thus, on the basis of the case of *Ranđelović and others v. Montenegro,* as well as the other cases discussed in the previous section, it is safe to conclude that the procedural limb of Article 2 ECHR applies, whenever a body is found within the territorial waters of a State, irrespective of whether the death of the person occurred within or beyond the State's territory.

5.1.4 Conclusion on the Application of Article 2 to Border Deaths

To conclude on the applicability of the right to life, it may be said that the duty to respond adequately applies irrespective of where the person has died. If a body is discovered in the territory of an EU member State, the State is required to instigate an investigation into this loss of life. With respect to the scope of application of the duty to prevent the loss of life, it may be concluded with certainty that it applies to all instances of the loss of life at sea occurring within the State's territorial waters. A definite conclusion on the applicability of this duty on the loss of life at sea beyond the State's territorial waters is not possible on the basis of the cases studied. The same can be said for the duty to protect the right to life by law.

5.2 Measures Required under the Right to Life with respect to the Loss of Life at Sea

As the study of the Court's case law has shown, the concrete measures required under all three components of Article 2 depend heavily on the circumstances at hand. As a result, only the most important concrete measures required under each element of the right to life will be set out very

[530] *Ranđelović and others v. Montenegro* (n 502).

briefly below. The exact measures needed, as well as the terms of implementation depend on the circumstances of each specific case. More importantly therefore, the next section discusses three circumstances that can be assumed to be relevant with respect to most incidents of border deaths and how these influence the State's duties under Article 2.

5.2.1 The Duty to Prevent the Loss of Life

The most relevant concrete measure with respect to the duty to prevent the loss of life with respect to border deaths at sea is the requirement to make rescue services available to persons in distress, including air-sea rescue facilities.[531] The right to life and the duty to provide search and rescue facilities under the law of the sea as discussed in chapter two complement each other in this regard and render beyond doubt that the provision of search and rescue services is one of the relevant measures required to prevent the loss of life in the context of migration at sea. It is worth pointing out in this respect that the provision of search and rescue services encompasses the instalment of properly equipped and trained rescue centres, as well as the duty of States to coordinate and cooperate with respect to search rescue operations performed by private parties. While it has been pointed out that the provision of search and rescue services does not by and of itself provide for a structural solution to border deaths, it is clear that the provision of SAR services is of utmost importance in a specific instance in which persons travelling at sea find themselves in a dangerous situation.

5.2.2 The Duty to Protect the Right to Life by Law

The duty to prevent the loss of life by law most importantly enshrines the duty to review and monitor the legislative and administrative system with a view to ensuring that it contributes to the overall aim to protect the right to life. The review must be done in a way to be able to reveal complex and diverging causes of a threat to life. In the first place, this requires States to collect relevant data in order to be in a position to undertake such a review. With respect to border deaths, an essential element in this regard would be to account for the number of people travelling and dying when travelling at various routes across the Mediterranean Sea. After all, insight into the number of persons travelling and dying and the routes used is an elementary step in analysing the functioning of the legislative and administrative system. The system would have to be adapted according to the insights gained and subsequently monitored again.

5.2.3 The Duty to Respond Adequately to the Loss of Life

With respect to the measures required in order to adequately respond to the loss of life, the Court has set out a long list of requirements with which an investigation in such event must generally comply, including that the investigation is effective, thorough, independent, prompt,

[531] *Furdik v. Slovakia* (n 443) 13.

and accessible to the victim's next of kin.[532] If needed, States must seek cooperation with another State in such an investigation to ensure its effectiveness.[533] Overall, the investigation must be of such quality that it can lead to the establishment of facts and the identification and punishment of those responsible, if appropriate.[534] With respect to instances of border deaths, the most basic relevant facts to be established include the circumstances of death, as well as the identity of the victim.[535] If possible, steps should be taken to allow next of kin to be informed about the investigation and its results. As pointed out, States may be required to cooperate with each other in order to do so.

5.3 Circumstances Relevant to Most Border Deaths

With respect to all three components of the right to life, it may be noted that the specific measures required depend strongly on the circumstances of each case. Difficult circumstances, however, do not offer a blanket excuse for failing to prevent the loss of life or to respond adequately. While the specific circumstances will differ in every single case, there are three circumstances which can be said to be relevant in most incidents of deaths at sea. The first is that incidents of loss of life at sea cannot be seen as standing by themselves. After more than two decades of continuous and large-scale loss of life at sea, it is clear that this is a structural problem. Another relevant aspect is the fact that migrants and asylum seekers contribute to endangering their own lives by deciding to embark on a dangerous journey. Finally, the fact that migrants and asylum seekers can be considered an identifiable group, is a circumstance most incidents of loss of life at sea have in common. Here, the manner in which these circumstances might generally weigh into the application of the right to life in a particular instance are discussed.

5.3.1 The Loss of Life at Sea as a Structural Problem

One relevant aspect is that the loss of life at sea does not occur incidentally, but has taken place for several decades unabated. In the first place, this has an impact on the way in which States must investigate incidents in which persons lose their life at sea, by virtue of the duty's overarching aim to prevent the loss of life. States enjoy discretion in the choice of the policy they pursue in order to prevent the loss of life at sea. This means, that the overall political choice to try and prevent deaths at sea by further restricting irregular migration with the ultimate aim to render it all together impossible is a policy choice the State is free to take. However, despite ongoing efforts of EU Member States to halt this form of irregular migration, they have not succeeded so far. Overall, this has resulted in continuously high numbers of deaths at sea. The duty to investigate the deaths obliges the State not only to look into the circumstances of death and identity of a particular person found. Additionally, the investigation into the circumstances

[532] *Mustafa Tunç and Fecire Tunc v. Turkey* (n 505) [170–182].
[533] *Güzelyurtlu and others v. Cyprus and Turkey* (n 499); *Huseynova v. Azerbaijan* (n 513).
[534] *Mustafa Tunç and Fecire Tunc v. Turkey* (n 505) [172].
[535] *Ranđelović and others v. Montenegro* (n 502) 7-8, 116; *Tagayeva and others v. Russia* (n 476) [503–509].

of a death must be performed in such a way as to be capable of identifying divergent and complex circumstances that have contributed to the death of the person. As a basic first step, this would require States to count the number of border deaths in order to be able to draw any conclusions on the development of the phenomenon of border deaths as such and how it may be influenced by the State's policies. Furthermore, when performing such an investigation, State authorities should take into account all viable lines of investigation and should ultimately seek to unveil systemic failures in the regulatory framework put in place to regulate the activity as well. Given that migration by sea and the loss of life at sea is ongoing for more than two decades now, the scenario in which the regulatory framework installed with the declared aim to prevent the loss of life fails to perform this function in practice must be taken into account and tested. After all, the duty to investigate must serve the overarching aim to ensure the effective implementation of the regulatory framework put in place in order to prevent the loss of life. Thus, while the State is free to make the political choice to prohibit irregular migration as much as possible with the declared aim to prevent the loss of life, Article 2 ECHR does not allow State authorities to further rely on that assumption untested. It is not sufficient that the regulatory framework installed protects the right to life in theory, it must do so in practice. Not testing whether the installed framework actually fulfils the declared aim to protect the right to life amounts to a violation of the procedural limb of Article 2.

By not reviewing and, if necessary, adapting the functioning of the applicable regulatory framework, States also run the risk of being held responsible under the substantive limb of Article 2 ECHR for failing to prevent the loss of life in view of a structural deficiency of the regulatory system. This scenario is comparable to the cases concerning health services. While a State is not automatically held responsible for the death of a person within a particular regulatory system, this may be the case if a person dies as a result of a structural deficiency that was or should have been known to the State. Another requirement for holding a State responsible for the loss of life as a result of a structural deficiency, as developed in the case of *Lopes de Sousa Fernandes v. Portugal*, is that the omission of the healthcare providers goes beyond a mere error or negligence.[536] In this regard, a comparison can be made to the provision of SAR services. States are required to provide SAR services under the positive dimension of Article 2 ECHR, as well as by relevant international treaty provisions. While it has been argued that the provision of SAR services do not provide a solution to the structural problem of border deaths currently witnessed, their effective provision is important so long as the underlying problem has not been solved.[537] Where the failure to provide SAR services goes beyond a mere error or negligence, it may be argued, the State is responsible for the loss of life as a result of a structural deficiency in the regulatory framework applicable. This is relevant with respect to events in recent years. In many cases, it may be said that the omission of States to provide effective SAR services went beyond a mere error or negligence. States increasingly relied on private vessels and NGOs to take up the task of rescuing persons in distress. In view of the obligation resting on the State to provide these services, this could by and of itself be seen as a shortcoming under Article 2. Furthermore, private vessels have been discouraged to engage in

[536] *Lopes de Sousa Fernandes v. Portugal* (n 454) [194–196].
[537] See chapter 2.

rescue operations by States refusing to allow swift disembarkation of the people taken on board. With respect to NGOs providing SAR services on a more structural basis, States went even further in many instances, trying to actively obstruct their operations. Thereby, it could be said, States have acted in a way that increased threats to the right to life, rather than mitigating them. Such behaviour goes beyond a mere error or negligence, pointing to the responsibility of States for border deaths resulting from the systemic deficiency of their regulatory system.

Another consequence resulting from the repeated recurrence of border deaths is that the need to prevent and respond adequately to such deaths is predictable. It is reasonable to assume that this will reflect on the measures the Court may consider a State required to take to prevent the loss of life, as the general need to do so, as well as the likelihood of death occurring in this situation is or should be known to the authorities. They can therefore make general preparations in case migrants and asylum seekers travelling at sea are brought to their attention.

In the case of *Tageyeva and others v. Russia* concerning the terrorist attack on the school of Beslan, the Court considered this predictability to require the authorities to make preparations to adequately deal with the loss of life, too. Here, the Court found that the authorities should have prepared in order to be able to store all the bodies in the conditions needed to perform all necessary investigations to conclude on the identity of the victims and the exact cause of death of each individual.[538] It may therefore be said that with respect to the recurring death of migrants and asylum seekers at sea, those States in which bodies of deceased migrants are found on a regular basis must make sure to be equipped so as to be able to take all steps possible and necessary to identify the person and to conclude on their cause of death and the circumstances in which it occurred.

Thus, given that the loss of life at sea has occurred repeatedly over more than two decades has an impact on what measures a State may be required to take with respect to the duty protect the right to life by law, the duty to prevent the loss of life, as well as with respect to the duty to respond adequately. As the following two paragraphs show, this circumstance also affects the way in which the agency of the migrants themselves is taken into account, as well as how the fact that they may be considered an identifiable group may be taken into account.

5.3.2 Agency of Migrants and Asylum Seekers

A relevant aspect which comes to play with respect to border deaths at sea is the agency of the migrants and asylum seekers themselves. In how far can States excuse any deficiency in preventing further loss of life at sea with the agency of the migrants and asylum seekers who chose by their free will to embark on such a journey? This, is a factor to be taken into account, as it may be assumed to be clear to anyone embarking on the journey that there are dangers involved in doing so. Nevertheless, it appears difficult to accept that the agency of the migrants can excuse the loss of life at the scale it has been occurring in the recent past. It may be helpful to compare the situation with the one in *Bone v. France*, in which a boy stepped out of a train on the side of the tracks where he was hit and killed by another train.[539] It cannot be disputed

[538] *Tagayeva and others v. Russia* (n 476) [506].
[539] *Bone v. France* (n 446).

that the State did not take all measures it could have taken to prevent this, as a technical system had already been available at the time, which prevented the doors on the side of the tracks from opening. Yet, in the circumstances of the case, the Court considered that the State could not have reasonably been expected to install this system also in old trains as the one the boy had stepped out of, as this would have required a complete refurbishment of the trains. The Court was satisfied that the State had done all that could have been reasonably expected from it to prevent people from stepping out of a train on the side of the tracks, by requiring the use of this technique in new trains and by installing warning signs in old trains. In addition, the boy had been warned by fellow passengers before stepping out of the train not to do so. In these circumstances, the Court concluded that the death of the boy was primarily caused by his own imprudent behaviour and could not raise the responsibility of the respondent State.[540] Now, if one imagines that thousands of persons stepped out on the wrong side of the train and onto the tracks in France every year killing hundreds or even thousands of persons and that this had been going on for over twenty years, is it not doubtful that the Court would have still been satisfied with the installation of warning signs? Wouldn't the repetition of the extremely poor choice to get out of the train on the wrong side of the track by all of the victims raise questions as to whether the issuing of a warning was really all that could be expected of France under the circumstances? It seems feasible to assume that the repetition of such incidents would affect the appreciation of the measures taken by the State by the ECtHR. This may also reasonably be assumed if one compares the case of migrants and asylum seekers dying at sea with the case of *Prilutskiy v. Ukraine*, in which the applicant's son died in a car rally.[541] Here, the Court set out that the duty to prevent the loss of life should not be interpreted in a paternalistic manner, leaving room for the choices of individuals even if they thereby expose themselves to a particular threat.[542] While the case may therefore be considered to argue against State responsibility with respect to the loss of life at sea as migrants and asylum seekers knowingly expose themselves to the risks attached to irregularly crossing the sea, a closer look at the case reveals that this reading is not correct. First, the Court noted that the participants of the rally were bound by the general rules applicable to road traffic and that the 'preventive and deterrent capacity of the available legislative framework is not in question.'[543] The Court then continued to consider whether Ukraine was obliged under Article 2 ECHR to take any specific operational measures to prevent the death of the applicant's son:

> The Court notes that the entertainment at issue was a private initiative without the involvement of the authorities. The applicant's son, an adult, enjoyed a freedom to act and decided to participate in the game of his own free will, having taken upon himself the responsibility to follow the existing rules. The domestic authorities did not identify the activity in question as a "sport competition" or "festive" to be covered by section 36 of the Automobile Roads Act 2005. The applicant did not claim that he or anyone else had applied to the police or other authorities asking them to take any specific measures before the entertainment. Neither did he specify which preventive operational

[540] ibid 8.
[541] *Prilutskiy v. Ukraine* (n 451).
[542] ibid [32].
[543] ibid [34].

> measures should have been taken by the authorities against the background that all the participants remained bound by the traffic regulations and the responsibilities arising in case of their breach. Likewise, there is no information before the Court that the available legal framework was not sufficient to ensure the requisite protection of life or that it had to be reinterpreted in light of these new activities.
>
> Even if the authorities were in possession of certain general information about such forms of entertainment, the applicant does not claim that they were so widespread a social phenomenon that their growth had to alert the authorities on a necessity to put in place additional measures to protect the public. It has not been established in the present case that the danger that emanates from these games was different from an inherent danger of road traffic, and as such called for a special regulation of these activities. Furthermore, there is no information that the authorities were aware of the exact time and place of the game in which the applicant's son took part and died.[544]

From the Court's considerations in this case, it becomes clear that it does matter with respect to the measures required under Article 2 whether an inherently dangerous activity has led to incidental loss of life or whether it has resulted in the loss of life on a more structural basis. Whereas the Court finds that the balance between the personal autonomy of the individual and the responsibility of the State pleads against State responsibility in the first scenario, it indicates that this would be different if the scale of the loss of life resulting from the activity should alert the authorities to the fact that the available legal framework does not function effectively to prevent the loss of life. Hence, this case, too, supports an understanding of Article 2, which requires State authorities to review the existing regulatory framework and to take additional measures to prevent the loss of life, if a particular activity structurally results in the loss of life.
Another aspect to be taken into account when comparing the structural loss of life at sea with the cases of *Bone v. France* and *Prilutskiy v. Ukraine* is the freedom of choice the victims may be considered to have had. Whereas both in the cases of *Bone* and *Prilutskiy*, there was no need whatsoever to engage in the dangerous activity at hand, this is slightly different in the case of migrants and asylum seekers. While the reasons to decide to engage in the dangerous sea journey to Europe may be very different from one person to another, it is fair to say that the choice is not made purely for the sake of entertainment, as was the case in *Prilutskiy*, or what may be said to be pure carelessness in the case of *Bone*. In any case, the migrants and asylum seekers who lose their life at sea do not have the choice to travel safely, as they are barred from regular travel to Europe. This should also be taken into account when considering in how far the individual itself is to blame for the danger arising. This becomes evident when looking at the group of cases in which State agents are considered to be under an obligation to protect a person from harming themselves discussed above. Even if getting onto a boat to reach Europe is so dangerous that it could be considered suicidal, this does not dismiss State agents from taking measures to prevent the loss of life of individuals of whom they know are in such a dangerous situation.
Thus, it is clear that migrants are or should be aware of the dangers of travelling irregularly by sea and doing so anyway is a circumstance that weighs into the appreciation of the measures

[544] ibid [36–37].

required by States. Yet, it does not appear reasonable to consider this circumstance to justify the continuing loss of life Europe has and still is witnessing on its shores. Despite the fact that migrants and asylum seekers decide themselves to travel by sea irregularly, this does not dismiss the State from its obligation to take all reasonable measures to prevent the loss of life. To the contrary, the continuing large-scale loss of life must in fact prompt the State to review the applicable regulatory system with an eye to the question whether it actually prevents the loss of life in practice.

5.3.3 Migrants and Asylum Seekers as an Identifiable Group

Another aspect relevant to the application of Article 2 to the death of migrants and asylum seekers at sea is whether and how the characteristics common to the group of migrants and asylum seekers plays out. One could say that migrants and asylum seekers are identifiable as a group, comparable to the residents of particular areas, conscripts, or detainees. If one assumes this to be the case, would this argue for higher or lower requirements under Article 2?
In the case of *M.S.S. v. Belgium and Greece* the Court considered this question and held:

> The Court attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, *mutatis mutandis*, *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 147, ECHR 2010). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive.[545]

In this case, the Court considered the applicant's vulnerable position relevant both in regard to the question whether the detention conditions the applicant had been subjected to violated the prohibition of inhuman and degrading treatment under article 3 ECHR, as in regard to the living conditions in which he had found himself for several months. With respect to both, the Court held that Greece had to have due regard for the applicant's vulnerability, which, in the words of the Court, accentuated the applicant's distress.[546] Although the Court did not analyse the applicant's claims under article 2 ECHR, this judgment can be understood to point to higher requirements under article 2 with respect to asylum seekers, as they must be considered a vulnerable group. However, this stance is not undisputed. Firstly, Judge Sajó argues in his partly concurring partly dissenting opinion to the judgment that asylum seekers cannot generally be considered a vulnerable group.[547] Secondly, the partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque in the case of *Lopes de Sousa Fernandes v. Portugal* may shine another light on the matter.[548] The case concerns the death of a man after a minor surgery which was supposedly caused by structural deficiencies in Portugal's healthcare system at the time.

[545] *M.S.S. v. Belgium and Greece* (2011) 30696/09 [251] (European Court of Human Rights).
[546] ibid 233 and 263.
[547] See the partly concurring partly dissenting opinion of Judge Sajó in ibid.
[548] *Lopes de Sousa Fernandes v. Portugal* (n 454).

Judge Pinto de Albuquerque elaborately discussed the right to healthcare of various groups under the Convention. First, he noted that the right to healthcare is not as such guaranteed by the Convention, but implied by several Convention Articles, amongst which Article 2.[549] He concluded that prisoners and conscripts enjoy a privileged position under the Convention with respect to the healthcare they must be provided. Given the vulnerable position these groups are in, they may be entitled to an elaborate range of medical treatment including "dentures, orthopaedic footwear, glasses, [and] medication for chronic back pain".[550] All of these treatments are quite clearly not strictly necessary for the preservation of life. Even outside the direct and exclusive control of State agents, migrants and asylum seekers may be considered a group in a particularly vulnerable position. This however does not result in a comparably privileged position under the Convention. To the contrary, Judge Pinto de Albuquerque concludes that migrants are only accorded a sub-standard level of protection with respect to their healthcare needs under the Convention.[551] According to Judge Pinto de Albuquerque, only in the most extreme cases have migrants succeeded in preventing their expulsion from the country relying on article 3 of the Convention in relation to their healthcare needs. While it emanates clearly that Judge Pinto de Albuquerque finds this very unfortunate, in his opinion the reason the Court is so unsympathetic to the healthcare needs of migrants is quite clear:

> placing an obligation on States to provide healthcare to aliens without a right to stay would put too great a budgetary burden on them and promote Europe as the sick-bay of the world. In other words, the Court was driven by the concern not to open up the floodgates to medical immigration.[552]

The same fear of opening the floodgates is quite clearly also relevant in relation to the right to life and the death of migrants and asylum seekers at sea. If this fear legitimises curtailing rights to a certain extent under Article 3 ECHR, this may also have effects on the measures the Court considers reasonable to require States to take to prevent the loss of life at sea. Nevertheless, it must be noted that there is a relevant difference between the right to life and the prohibition of inhumane treatment and torture under Article 3 ECHR. While Article 3 is, just like Article 2, considered one of the most fundamental provisions under the Convention, there is some room to manoeuvre in what may be considered inhumane treatment with respect to differing groups even if this ultimately affects a person's life expectancy. In relation to the loss of life of migrants and asylum seekers at sea, there is no such room in an individual case. The death of an individual does not occur in degrees which can still be considered acceptable. It is a question of all or nothing. If such an argument would be considered acceptable in reference to the right to life at all, this could only be considered to weigh into the balance of how many deaths are deemed acceptable in total, while still considering the regulatory framework to function effectively to prevent the loss of life. In other words, this argument touches on what would be considered reasonable with respect to the measures a State is required to take. Admittedly, this

[549] Partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque ibid [29].
[550] Partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque ibid [54].
[551] Partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque in ibid.
[552] Partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque in ibid [43].

is quite a tasteless argument to make. Nevertheless, the Court does allow for such an argument relating it to the need to manage limited State resources. However, it is questionable whether the situation of the past decades can be deemed to have struck an acceptable balance with hundreds of deaths registered each year on the shores of Southern Europe since 2000 and a much higher estimate number of deaths based on media reports, the bodies of whom may never have reached Europe.[553] Even if the balance struck would be deemed acceptable, the discovery of bodies would time and again trigger at the very minimum the obligation to investigate the death of a person with a view of uncovering the complex circumstances that have led to the death in question and ensuring that the legislative framework effectively prevents the loss of life. Based on such an investigation, State authorities would have to be in the position to make a convincing argument why, given the circumstances, this is the lowest number of deaths attainable with respect to migration by sea. Furthermore, the case of *Tagayeva and others v. Russia* shows that the Court is willing to critically review whether the way in which a State decided to deal with limited resources has contributed as much as possible to the prevention of the loss of life.[554]

To conclude, while the Court recognises asylum seekers as a vulnerable group, it simultaneously appears to accept that migrants and asylum seekers as an identifiable group are afforded lesser protection standards than other groups. This is justified by the need to manage limited State resources. Nevertheless, even allowing for a lower standard given the circumstances, States are required to show that they have done everything that could reasonably be expected to protect the right to life within these circumstances. At the very least, this requires States to be able to demonstrate that State resources are effectively put to use to minimise the number of border deaths as much as possible, and that the measures taken actually have this effect.

5.4 Conclusion on the Measures Required under the Right to Life

Overall, there are three circumstances that may be said to be relevant with respect to most incidents of loss of life at sea. All of them have a noticeable impact on the measures required to prevent the loss of life and in response to life lost. The structural occurrence of border deaths in the past obliges States to investigate whether the applicable regulatory system, which is often claimed to be put in place with the aim to protect life, may actually have an adverse effect. After more than two decades of structurally occurring border deaths, the possibility of this being the case cannot be ignored or dismissed without thorough investigation. Furthermore, the structural nature of border deaths requires States to take preparatory measures in order to be in a position to respond adequately to instances of loss of life at sea. With respect to the substantive branch of Article 2, it may be argued that systemic deficiencies in the regulatory framework give rise to the responsibility of States. In particular, this may be said to be the case with regard to States parties' failure to provide effective SAR services in the past, which went beyond a mere error or negligence. The systemic nature of border deaths in the past also influences the way in which

[553] Last and others (n 32), 702, figure 4.
[554] *Tagayeva and others v. Russia* (n 476) 488 and 490.

the second relevant circumstance weighs into the interpretation of what may be reasonably expected of States to prevent the loss of life. This concerns the agency of migrants and asylum seekers, who knowingly decide to embark on a dangerous journey. While the agency of migrants and asylum seekers is a factor that weighs into the appreciation of the responsibility of the State for border deaths, it cannot serve as a blanket justification for the continuing occurrence of border deaths. To the contrary, the high number of people that have and still do embark on this dangerous journey, point out that the precautions currently taken to prevent people from endangering themselves are insufficient. Finally, the fact that migrants and asylum seekers may be considered an identifiable group is relevant. With regard to the need to managing limited State resources, the Court deems it acceptable to allow for lower standards of protection for migrants and asylum seekers. While this is so, this does not mean that migrants and asylum seekers do not enjoy the protection of Article 2. States are thus required to demonstrate that they do all that may reasonably be expected to prevent the loss of life under the circumstances at hand.

6 Conclusion on the Right to Life

This chapter has discussed the right to life laid down in Article 2 ECHR based on an analysis of the Court's case law. The positive dimension of Article 2 contains a substantive limb, which requires States to prevent the foreseeable loss of life and to protect the right to life by law, and a procedural limb, which requires States to respond adequately if the loss of life has occurred.

A first relevant conclusion to be drawn from the Court's case law is that the obligations arising under the right to life apply to all migrants and asylum seekers who are in danger within the State's territorial waters. Furthermore, with respect to the duty to respond adequately, it may firmly be concluded that it applies whenever the body of a person lost at sea is found within the States' territory, irrespective of where the loss of life occurred. In respect of the duty to prevent the loss of life, the conclusion is less firm regarding the question whether it also applies to the loss of life beyond the State's territorial sea. However, the requirement to design the State's legislative and administrative measures in such fashion as to contribute to the overarching aim of preventing the loss of life may reflect beyond the State's territorial waters. In practice, such extraterritorial effect of the State's legislative and administrative measures may be of great importance to the phenomenon of border deaths.

The case analysis has demonstrated that the Court requires States to prevent the loss of life from very differing dangers if the authorities knew or should have known about the threat. Moreover, the Court also requires States to respond adequately in the event that life has been lost. In fact, the duty to respond adequately, too, is designed to prevent the loss of life. With respect to both the duty to prevent the loss of life and the duty to respond adequately, the Court has set a high bar to be met. A State must be able to demonstrate that it has done all that could have reasonably been expected of it to prevent the loss of life. If it is not in a position to do so, it risks being held responsible for the loss of life, even if this occurs without direct influence or interaction of State agents. This is especially so in respect of threats that are very predictable, which allow States to take preparatory measures to mitigate the threat or react to the loss of life. While the Court

acknowledges that State resources are not unlimited, the measures the Court requires States to take can nevertheless be far-reaching and costly, such as the provision of air to land or air to sea search and rescue services.

The same can be said about the standards the Court has set for the reaction to the loss of life. If life is lost, States must investigate the loss of life and the circumstances under which it has occurred, and it must provide the victims or its next of kin with a judicial remedy if appropriate. The investigation must be of such nature, as to provide insights into the circumstances of the individual's death, the identity of the individual as far as possible, and also into the complex and divergent circumstances that have contributed to the loss of life more generally. If the location where investigative measures need to take place, the number of countries involved, or the characteristics of the victims and their next of kin present difficulties for the execution of the investigation, States are nevertheless expected to conduct a thorough and independent investigation. Part of such investigation should also be the identification of the victims.

Overall, the exact measures required are dependent on the specific circumstances in each case. The case analysis has allowed to identify the circumstances that are generally at play withwith respect to border deaths at sea and how they impact the measures that States may reasonably be required to take. The recurring and persistent nature of border deaths at sea over more than two decades renders the threat of such deaths very much foreseeable for State authorities. This means that they are required to try and prevent the loss of life by sea, if they become aware of persons exposed to this danger within their jurisdiction. Furthermore, the right to life requires States not only to investigate individual incidents. Relating to the research question overarching this study, the most pressing insight may be that the hypothesis that the regulatory and legislative framework affecting migrants and asylum seekers on their way to Europe actually contributes to the loss of life must be seriously tested by States. The analysis of the Court's case law has furthermore shown that the fact that migrants and asylum seekers contribute to the dangers arising does not free the State from the obligations it bears under Article 2. In this respect, too, the large number of people affected and lives lost points out that States have not done enough to protect the lives of migrants and asylum seekers trying to reach Europe. Finally, the analysis conducted brought to light that while the Court is generally reluctant to lower the standards under Article 2 by virtue of difficult circumstances of a particular case, it appears willing to do so with respect to migrants and asylum seekers as a group. The reasoning underlying the introduction of this particular and lowered standard, relates to the need to manage limited State resources and a general fear of opening the floodgates. Still, the insight that the Court allows for lower standards to be applied with respect to migrants and asylum seekers does not render the previous insights futile. After all, even such lowered standards require States to take or discontinue certain measures and to be able to demonstrate that they have done everything that could reasonably have been expected under the circumstances to protect the right to life. The question whether States may generally be held to do so, is the subject of the next and final chapter.

Chapter 5

Conclusion

The question central to this study is whether European immigration policies violate the right to life under the ECHR. The introductory chapter points out that a considerable number of academics takes the view that the EU Member States' immigration policies cause border deaths. A connection between policy measures and border deaths is also acknowledged by policy makers. Yet, they often argue that more and new measures are needed to restrict irregular migration and thereby prevent the loss of life. The argument, however, is currently insufficiently supported by relevant data, as detailed information on the number of persons travelling, as well as on the number of persons who have died on the journey is limited. The study is thus conducted with the assumption that there is a causal link between these policies and border deaths. The study begins with a brief discussion of the relevant legal context, namely the rules governing States' powers to regulate activities and to enforce these rules. It has been pointed out that States' powers to do so extraterritorially are wider with respect to activities taking place on the high seas, as the high seas are presumed to be an area beyond the jurisdiction of any State. This allows States greater freedom to regulate and to enforce, without interfering with the sovereignty of other States. This raises the question whether this freedom to act is equally accompanied by the duty to respect the rights laid down in the European Convention on Human Rights. The answer to this question is sought by analysing the Court's case law with respect to two research questions, namely whether the Convention applies to border deaths, and if so, what are the relevant standards laid down in Article 2 ECHR.

1 The Application of the ECHR to Border Deaths

The question whether the ECHR applies to border deaths is the subject of the third chapter of the study, which focusses on the extraterritorial application of the Convention. While it is widely acknowledged that the case law of the Court is conflicting with respect to the question when the Convention applies extraterritorially, the doctrine of effective control has developed as the most prominent conception of the extraterritorial scope of application of the Convention. As its name indicates, effective factual control is often perceived to be central under the doctrine of effective control. If the Convention were only to apply in situations in which State agents exerted factual control over migrants and asylum seekers trying to reach Europe, this would exclude the application of the Convention in many cases of border deaths, which often occur without direct intervention by State agents. However, the study of 219 judgments of which 23 were discussed in depth, has demonstrated that the applicability of the Convention to such extraterritorial border deaths cannot be excluded *a priori*. Firstly, the Court considers that the exercise of flag State jurisdiction gives rise to the application of the Convention, also with respect to private vessels. Furthermore, the cases analysed show that many situations brought before the Court do not fit neatly into a conception of extraterritorial application of the Convention stooled on factual control over territory or over persons by State agents. Nevertheless, the Court has proven willing to employ creative and novel lines of reasoning to argue that the Convention applies to the facts of the case. Some of these may be considered quite far-reaching, such as accepting jurisdiction despite explicitly acknowledging that the State has no control whatsoever over the territory and the persons in question, for example, or

introducing a rebuttable assumption that a State has extraterritorial jurisdiction. Finally, the case analysis demonstrated that the Court attaches weight to normative considerations, such as avoiding a vacuum of protection, when concluding on the applicability of the Convention. Thus, on the basis of the Court's case law concerning the extraterritorial application of the Convention, the study concludes that the Convention surely applies to all border deaths occurring within the State's territorial waters. Furthermore, it may be assumed that the Convention applies to persons on board vessels flying the flag of a member State. With respect to the application of the Convention to border deaths occurring beyond the territorial waters of States, the conclusion is less certain. Nevertheless, the case analysis has brought into view a number of avenues that could be pursued to argue that the Convention applies. In sum, it may be concluded that the ECHR is relevant to border deaths.

2 The Relevant Standards under Article 2 ECHR

The fourth chapter of the study focuses on Article 2 ECHR, which guarantees the right to life. The right to life encompasses three elements relevant to border deaths, namely the duty to prevent the loss of life if the State is in a position to do so, the duty to protect the right to life by law and the duty to respond adequately if the loss of life has occurred. The material scope of application of the article, as well as its material requirements have been discerned from the study of 85 cases concerning the right to life. Regarding the scope of application of the duties contained in Article 2, the study concludes that the lack of a direct encounter between State agents and the persons concerned does not pose a problem for the application of the Article. To the contrary, the right to life obliges States to prevent the loss of life by ensuring that its legislative and administrative system is designed so as to prevent the loss of life in general terms. Possibly therefore, the right to life and the obligations States bear thereunder may reflect across the State's territorial borders. This is to be expected especially if the State is required to discontinue a measure that contributes to the loss of life. In any case, States are required to prevent foreseeable deaths within their territories. The action required to do so depends on the circumstances of the case and may include the discontinuation of measures or the active provision of search and rescue services. Furthermore, States are required to thoroughly investigate every instance of death at sea, whenever a body is found within the State's territory, irrespective of where the person has died. With a view to the obligation to protect the right to life by law, such investigation must be of such nature as to allow insights in the complex circumstances that contribute to border deaths and into the functioning of the regulatory system in place. This must effectively fulfil the purpose of preventing the loss of life. Finally, an important component of the duty to investigate border deaths is the requirement to identify the deceased and the circumstances in which the person perished.

While the study of the Court's case law under Article 2 has demonstrated that the specific measures required depend on the circumstances at hand, it allowed conclusions to be drawn on the relevance of three circumstances that may be said to be relevant in most instances of border deaths. This concerns the structural nature of border deaths, the agency of migrants and asylum seekers deciding to embark upon a dangerous journey, and the fact that migrants and asylum

seekers may be said to be identifiable as a group. The structural nature of border deaths not only requires States to prepare for such deaths, but also to critically analyse whether the measures implemented in the past with the aim to prevent the loss of life actually function to this effect. Furthermore, the continuous occurrence of border deaths indicates that the decision to engage in unsafe behaviour cannot be regarded as an incident and requires State action to prevent further loss of life. Finally, the study of the Court's case law has revealed that the Court allows for lowering the standards to be met under Article 2 ECHR with respect to migrants and asylum seekers, based on the need to manage limited State resources and on the fear of opening the floodgates. This may not be understood to free States from responsibility for border deaths, especially not as the standards to be met under Article 2 can generally be said to be high and the Court has been reluctant in accepting excuses and explanations for not meeting these standards. More specifically, the Court has declared the right to life to be of such fundamental value, that it cannot be subordinated to the need of border protection categorically.
In sum, the study demonstrates the relevance of the Convention as such, as well as Article 2 in particular for border deaths at sea. Even under difficult circumstances, States must show that they have done all that could be reasonably expected under such circumstances to prevent the loss of life.

3 Do EU Immigration Policies Violate Article 2 ECHR?

On the basis of the foregoing, it may thus be concluded that the ECHR is relevant with respect to many instances of border deaths and that the Court has set out standards to be met under Article 2. This raises the question whether the measures taken – or omitted – by EU member States in the past decade as part of EU immigration policies comply with Article 2.

3.1 The Duty to Prevent the Loss of Life

Article 2 requires States to take all measures that may reasonably be expected to prevent the loss of life, if the State is in a position to do so. Which specific measures are required in a given instance will differ according to the circumstances of the situation at hand. Yet, the provision of search and rescue services may be considered one of the most straight forward and effective measures in particular instances in which persons find themselves in a dangerous situation at sea. As the analysis of the Court's case law showed, the Court considers States obliged to provide effective search and rescue services in emergency situations. In addition to Article 2, the maritime tradition and obligation to rescue persons in distress also requires States to be prepared to provide search and rescue services and to oblige ship masters to rescue persons in distress. The duties bearing on States with respect to search and rescue have not been discussed in depth, as the provision of SAR services are not deemed to provide a solution to the structural occurrence of border deaths as they could be witnessed over more than two decades. Nevertheless, so long as the problem of border deaths in the Mediterranean is not solved in a structural manner, the provision of SAR services may be considered a minimum measure of great importance to prevent the loss of life in specific cases.

This is the case, even if one can rightfully point out that, when embarking on a journey to Europe via irregular travel at sea, the persons doing so knowingly put themselves in danger. The analysis of the Court's case law under Article 2 has demonstrated that this circumstance may weigh into the measures a State is required to take, but it does not affect the application of the duty to prevent the loss of life at such. In this regard, it must be noted that the great number of people embarking on such a perilous journey indicates that issuing a warning not to do so is insufficient. In the face of the large number of people who travel irregularly by sea despite knowing of the dangers this bares and the considerable number of people who have lost their life on the journey, States are required to take measures to prevent further deaths. Yet, the way in which States have acted in regard to search and rescue services in recent years demonstrates two particular shortcomings under Article 2 ECHR.
As mentioned in the second chapter of the study, the provision of SAR services has suffered continuously from a number of problems, including the determination of SAR zones, the instalment of well-equipped rescue coordination centres, the lack of a common definition of 'distress', and most importantly, of the reluctance of States to allow disembarkation to rescued migrants and asylum seekers. These problems have been acknowledged for years already, yet, no meaningful changes have been introduced. It does not require an in-depth investigation to conclude that the legislative and regulatory system in the realm of SAR services does not function effectively to realize the goal of preventing the loss of life. In this sense, the unwillingness of States to agree on solutions to the problems identified is by and of itself a shortcoming under Article 2 ECHR.
The fact that solutions to the deficient provision of SAR services remain outstanding, however, is not only to blame on ambiguities in the legal provisions regulating the matter. Most importantly, the stance taken by States in many cases in which rescued persons need to be disembarked give rise to these problems. Many times, it could be witnessed how all States involved, such as relevant coastal States and flag States pass responsibility for disembarkation on among each other. Sometimes, the crew of the vessel and the rescued persons remain in limbo for protracted periods of time, which may also cause humanitarian hardship on board. Not only private vessels who had taken persons in distress aboard fell victim to the stance taken by States, but even government operated vessels have been held at sea.[555] Doing so clearly undermines the effectiveness of the rescue service provided. With respect to such situations in which a State refuses to coordinate rescue measures, contribute to a solution to a specific rescue mission, or to disembark rescued persons, one must conclude that not all measures that may reasonably be expected to prevent the loss of life are taken. This is all the more the case, as the reluctance to take responsibility and provide for swift disembarkation discourages others to undertake rescue operations in the future. Quite possibly, this is even intended to be the case, which is a clear violation of the obligation to take all reasonable measures to prevent the loss of life.

[555] L. Tondo, 'Standoff in Italian Port as Salvini Refuses to Let Refugees Disembark: Interior Minister Wants EU States to Take 177 Refugees and Migrants From Ship' *The Guardian* (21 August 2018) <https://www.theguardian.com/world/2018/aug/21/italy-refugees-salvini-refuses-coastguard-ship-docks-diciotti> accessed 31 July 2019.

The reluctance to take responsibility once migrants have been rescued must be viewed especially critical, against the background that State led efforts to provide SAR services are limited and at times dysfunctional.[556] States' actions in this respect have gone beyond the omission of effective search and rescue services towards the active obstruction of SAR services provided by NGOs. In this regard, it is telling to recall one of the first highly mediatised stand-offs after a rescue operation in July 2004. This concerns the case of the Cap Anamur, which was not only forced to remain at sea with the rescued migrants aboard for almost two weeks, after disembarkation the crew was prosecuted on charges of smuggling migrants. The Italian prosecutor requested the imprisonment of the crew and the seizure of the vessel. The crew was eventually acquitted of all charges in 2009.[557] Fifteen years after the Cap Anamur incident, NGOs committed to providing SAR services are still, or again, faced with severe scrutiny by the authorities, which has resulted in the seizure of several vessels.[558] In some cases, the intent that this may bar them from performing search and rescue missions is not even concealed.[559] Additionally, NGOs committed to search and rescue face increasing criminalization.[560] Against this background, the impression may arise that instead of focussing efforts on the prevention of migrant deaths, State efforts are centred on preventing NGOs from saving lives at sea. It is clear that taking measures intended to obstruct SAR services flies in the face of the duty to take all reasonable measures to prevent the loss of life enshrined in Article 2 ECHR.

The example of the insufficient and deficient provision of SAR services by States, their reluctance to contribute to the effective functioning of SAR services and especially efforts to supress SAR services rendered by private parties shows that in many instances States indisputably fail to take all measures that can reasonably be considered to prevent the loss of life. Worse still, States appear to take measures that actually increase the risk that life is lost,

[556] See Amnesty International (n 162) 16–18, which shows that commercial vessels and NGOs have accounted for at least about a quarter of the total number of rescues undertaken in recent years; see also A. Shalal, *Germany seeks extension of EU's migrant deterrent sea operation* (2019), in which the German minister of defence is cited complaining that Italy had sent the German navy vessel to outlying areas of the Mediterranean for months where neither surveillance nor rescue capacity was needed, rendering the presence of the German nato vessel futile.

[557] For an English summary of the facts of the case and the judgment, see United Nations Office on Drugs and Crime (UNODC), 'Case Law Database: Case N. 3267/04 R.G.N.R Fact Summary' (7 October 2009) <https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/ita/2009/case_n._326704_r.g.n.r.html> accessed 13 March 2019.

[558] See for example European Council on Refugees and Exiles, 'Italy's Supreme Court Rejects Appeal Against the Seizure of NGO Rescue Vessel the Iuventa' (27 April 2018) <https://www.ecre.org/italys-supreme-court-rejects-appeal-against-the-seizure-of-ngo-rescue-vessel-the-iuventa/> accessed 31 July 2019; The Guardian, ''Dark Day': Migrant Rescue Ship Aquarius Ends Operations: Médicins Sans Frontières Says 'Smear Campaign' by European Governments Hampered Work in Mediterranean' *The Guardian* (7 December 2018) <https://www.theguardian.com/world/2018/dec/07/dark-day-migrant-rescue-ship-aquarius-ends-operations-mediterranean> accessed 31 July 2019; European Council on Refugees and Exiles, *Sea Watch 3 Still Held in Catania Port after Being Cleared of Criminal Charges* (2019); L. Tondo, 'Italian Authorities Order Seizure of Migrant Rescue Ship: Volunteers Rescued About 50 People Off Libya on Tuesday in Defiance of Government Order' *The Guardian* (20 March 2019) <https://www.theguardian.com/world/2019/mar/20/italian-authorities-order-seizure-migrant-rescue-ship-mare-jonio> accessed 31 July 2019.

[559] See Dutch government (Rijksoverheid), *Nederland neemt eenmalige verantwoordelijkheid in oplossing NGO-schip Lifeline* (2018), for an example of a statement to this effect.

[560] Council of Europe Commissioner for Human Rights, 'Lives Saved. Rights Protected: Bridging the Protection Gap for Refugees and Migrants in the Mediterranean' (Recommendation 2019) 37–40 <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87> accessed 31 July 2019.

when trying to prevent private parties from rescuing people at sea. In this regard, it may be noted that the argument is sometimes made that by providing SAR services close to North African shores, the risk to life is actually increased, as people are encouraged to try the crossing. Suppressing SAR services, so the logic goes, thus contributes to the safeguarding of life. It is worth pointing out that this logic, suppressing irregular migration as such, if need be by curtailing rescue services, is the logic that is claimed to be pursued with respect to various measures taken regarding irregular migration. Neither the argument that limiting SAR services eventually prevents the loss of life, nor the logic underlying this and other policy measures more generally, however, can be assigned any weight so long as the information needed to support it is not collected. This is not the case, as is discussed in the next section.

3.2 The Duty to Protect the Right to Life by Law

When looking at the phenomenon of border deaths as a structural problem caused by the effects of European immigration policies, the duty to protect the right to life by law is most important. This element of the right to life requires States to put in place a legislative and administrative framework geared towards the safeguarding of life. In fact, many legislative and administrative measures put in place to suppress irregular migration are presented as a means not only to suppress irregular migration, but also as contributing to the prevention of the loss of life. The overall logic is, that if no one travels irregularly by sea, no one is at risk of losing his or her life at sea.

The analysis of the Court's case law has demonstrated that merely stating that the administrative and legislative system contributes to the safeguarding of life is not sufficient. The duty to protect the right to life by law requires States to review and monitor the functioning of the system to be sure that it effectively prevents the loss of life. It has been pointed out that a fundamental element in doing so, is to investigate all deaths on the basis of which a clear picture of the number and circumstances of death of the people who lose their lives on their way to Europe can be attained. Also, insight into the routes travelled and whether and how the use of different routes is connected is needed. Given the protracted nature of border deaths for over two decades, such an investigation would have to take into view the long-term development of border deaths to be able to establish causal relationships between measures installed by States and border deaths with more certainty than currently is the case.

Thus, States can only justify that they continue restricting migration as much as possible and the means they employ to do so, if they can convincingly argue that this is the way in which the loss of life among migrants and asylum seekers can be prevented most effectively. However, the first step needed to structurally investigate and monitor the functioning of the administrative and legislative system has not been taken by EU member States so far. As the research of Last et al. collecting data of registered deaths of migrants and asylum seekers dying while crossing borders has shown, the number of border deaths is not centrally and systematically collected in European States, let alone in the EU as a whole.[561] By not accounting for the dead in a

[561] Last and others (n 32), 707. Note that the research was not limited to people dying at sea, but also included border deaths occurring on the Turkish Greek land border.

systematic manner the first step to actually build an argument that the legislative framework meets the standards of Article 2 given the circumstances at hand is not taken. Not counting the dead must be viewed even more critical in light of the protracted nature of border deaths. After all, the loss of life at sea has recurred too persistently and at too large of a scale than to dismiss the hypothesis that European immigration policies contribute to the loss of life without properly investigating it. Additionally, academics have pointed out this possibility for several years.[562] Under these circumstances, turning a blind eye to the possibility that the current immigration policies may contribute to the loss of life cannot be deemed acceptable under Article 2 ECHR. By not accounting for the dead, European States forfeit the possibility to learn lessons from the past, risking to repeat mistakes and to proceed on wrongful assumptions. As the case of *Lopes de Sousa Fernandes v. Portugal* demonstrates, proceeding on this basis may, under specific circumstances, give rise to responsibility of States under the substantive limb of Article 2, if a person dies as a result of a structural deficiency of the State's administrative and legislative system.[563] In this light, too, the deficient search and rescue system in combination with efforts of States to prevent private parties from providing search and rescue services must be viewed very critically. After all, it may be said that obstructing search and rescue services rendered to persons in distress by private parties goes well beyond a mere error or negligence.

In sum, the mere absence of accounting for the dead in a way that enables States to review the functioning of their legislative and administrative framework and adapt if needed, is a violation of the duty to protect the right to life by law by and of itself against the background of protracted border deaths over the past decades. It must therefore be concluded that the duty to investigate with a view to reviewing the proper functioning of the legislative and regulatory framework as required by Article 2 ECHR is not fulfilled.

3.3 The Duty to Respond Adequately to the Loss of Life

Asides the plain counting of victims, another aspect which appears to be greatly absent in the current handling of border deaths is a thorough investigation into the circumstances of death of each individual victim, as well as undertaking steps that would allow identification. In this regard, the investigation into instances of border deaths would primarily require the accurate and complete recording of all available information regarding the victim. Admittedly, the circumstances in which an investigation into border deaths has to take place are not easy. Deaths often occur at sea, outside the direct view of State authorities, sometimes even entirely outside the State's territory. An investigation is likely to require cooperation among States and chances of successful identification will be improved if the countries of origin also take measures to help identify their deceased nationals. And finally, the characteristics of the group concerned and the fact that their next of kin are likely to live abroad, all pose a hurdle to the investigation required and especially to providing the next of kin with a judicial remedy, if appropriate. In this respect, however, it may also be brought to mind that the analysis of the Court's case law has demonstrated that neither the difficult circumstances in which such an investigation would

[562] For a discussion of the position of academics on the matter, see the introductory chapter.
[563] *Lopes de Sousa Fernandes v. Portugal* (n 454).

have to take place nor the particular characteristics of the group of victims themselves can plainly excuse a failure to take measures to prevent the loss of life and to investigate the circumstances that have led to such loss of life. Yet, the information available about the persons who have died trying to travel to Europe, or better said, the lack of such information, shows that the investigation into border deaths falls short of the standards laid down in Article 2 in many instances.

In this regard, it may also be noted that while border deaths have been ongoing for over two decades now, lessons on how best to handle the bodies of dead migrants in a way contributing to their identification seem to be drawn only very slowly or not at all. On the basis of her study of the civil registries in southern European countries, Last has brought into view that the percentage of persons identified among border deaths fluctuates greatly. Yet, neither the overall rate of identification of all cases recorded in the database, nor the rate of identification for bodies found in Greece, Italy, or Spain individually show an upward trend.[564] This indicates that, while in many regions the occurrence of border deaths may by now be considered predictable, few or no measures have been taken to promote identification of the bodies found. A study conducted by the research group *Mediterranean Missing* in Greece and Italy comes to a similar conclusion.[565] While they acknowledge that the authorities are in many cases already overwhelmed with caring for the living, as was the case on Lesbos in 2015, they point out that many means of promoting identification are left unused.[566] This includes the failure to collect personal items such as sim cards, notebooks, and credit cards found along with the bodies, the failure to conduct interviews with survivors of a shipwreck who could help identify the deceased, and an overall lack of reaching out to the families of victims who are often crucial to identification.[567] While in more recent times DNA samples are structurally collected from the bodies, their use is limited, because in many cases the body is subsequently buried without any means of knowing which DNA sample belongs to which gravesite and due to a lack of outreach to the family members, who need to supply sample DNA to actually identify a person.[568] Furthermore, family members often themselves face travel restrictions, barring them from searching for their loved ones, providing information that could help identification and arrange repatriation if possible.[569] It appears therefore that after more than two decades of border deaths, very little progress has been made in identifying the dead. Just how minimal the efforts are, may be taken from the fact that Lampedusa as well as Lesbos – both places in which border

[564] See figures4.1 and 4.4. in T. Last, 'Who is the 'Boat Migrant''? Challenging the Anonymity of Death by Border-Sea' in V. Moreno-Lax and E. Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach.* Integrating Maritime Security with Human Rights (International Refugee Law Series vol 7. Brill/Nijhoff 2016) 82 and 101.
[565] Mediterranean Missing, 'Missing Migrants in the Mediterranean: Addressing the Humanitarian Crisis' (Summary Report 2016) <http://www.mediterraneanmissing.eu/wp-content/uploads/2015/10/Mediterranean-Missing-Summary-report-290816.pdf> accessed 26 September 2018.
[566] ibid 6.
[567] ibid 1 and 6. See Last, who also reports on the immediate segregation of the survivors of a ship wreck from the dead in order to enter the process of status determination, missing the opportunity to have them identify the persons whom they have travelled with. She, too criticizes that personal items are not collected. See Last, 'Who is the 'Boat Migrant''?' (n 564) 91, 104-105.
[568] Mediterranean Missing (n 565) 8–10.
[569] ibid 10.

deaths have occurred numerous times in the past – are not or have only recently been equipped with the means of storing dead bodies in a way that ensures preservation to allow for an investigation of the body to take place.[570] Only in highly mediatised incidents has a real effort been made to recover bodies and identify them, as the *Mediterranean Missing* study notes in reference to the fact that the mandate of Italy's Special Commissioner for Missing Persons was limited to three such events only.[571]

The absence of a structural effort to collect information about the dead has resulted in a great absence of even basic information about the identity of the person's found. While for some cases information presumed to have been available may have been recorded in sources not looked into by Last et al., the figures they have drawn up based on their research are nevertheless telling. To give an impression, an overview is given of the percentage of the 3,188 registered migrant deaths recorded by the research, in which information that may be presumed to be available in most cases was recorded in the documents viewed by the researchers[572]:

Sex	84.6%
Age	30.1%
Estimated_age	37.9%
Descriptions_of_race/ethnicity	26.7%
Personal_items	5.7%
Features	21.3%
Day_died	72.1%
Month_died	83.4%
Year_died	84.8%
Location_of_death	56.7%
Day_found	47.1%
Month_found	47.7%
Year_found	48.1%
Where_found	49.5%
Circumstances	16.8%
How_long_dead	31.0%
Details_of_incident	27.9%

[570] Last, 'Who is the 'Boat Migrant'?' (n 564) 112; Mediterranean Missing (n 565) 8.
[571] Mediterranean Missing (n 565) 10.
[572] For a description of what kind of information the terms used here referred to exactly as well as for a more complete overview see T. Last, 'Metadata for the Deaths at the Borders Database for Southern EU - Public Version' (28 June 2016) 3–9 <http://www.borderdeaths.org/wp-content/uploads/Metadata-for-the-Deaths-at-the-Borders-Database-for-Southern-EU.pdf> accessed 5 September 2018.

The overview shows that in many cases information which may be considered to be available is not recorded. The numbers presented and the picture of a wholly deficient effort to collect information and allow for identification of the bodies found drawn by the *Mediterranean Missing* study show that in many cases the investigation into the death of a migrant or asylum seeker at sea is very likely to fall short of the standard established by Article 2 ECHR. Even very basic information, such as the estimated age, a description of the person's race or ethnicity, personal items or features, and place and date the body was found is not recorded in the majority of cases. It may therefore not come as a surprise that of all the persons included in the count of Last et al. two thirds have not been identified.[573]

In this context, the case of *Tagayeva and others v. Russia* may come to mind, in which the Court considered that the likelihood of large-scale loss of life occurring should have spurred the State to make better preparations for the handling of the bodies and that the fact that the circumstances of death had not been established in one third of all the cases was considered a grave shortcoming.[574] Furthermore, one may also think of the case of *Ranđelović and others v. Montenegro,* in which the Court criticized that only 13 of the 35 bodies had been identified, even though the characteristics of the next of kin, as well as the fact that they mostly lived outside Montenegro had complicated the process of identification.[575] In relation to these two cases, one may therefore assume that identifying only one third of the victims will generally be considered to fall short of the requirements under Article 2. This is even more so, when taking into account that the necessary steps to increase the likelihood of successful identification, such as the complete registration of all available information, is not done. In this regard it is worth repeating the Court's conclusion in the case of *Tagayeva and others v. Russia*:

> To sum up, the Court finds that deficient forensic measures led to a situation where it was impossible to establish, with any degree of certainty, the causes of death of at least a third of all the victims, and the exact circumstances and location of the bodies of many more. An individualised description of their location and a more in-depth examination of the remains should have served as starting points for many of the important conclusions drawn in the course of the investigation. Failure to ensure this basis for subsequent analysis constitutes a major breach of the requirements of an effective investigation.[576]

It may therefore be concluded that in a great number of cases the investigation into the circumstances of death and the identity of individual migrants and asylum seekers falls short of the standards set by Article 2 ECHR.

3.4 Conclusion: Many Border Deaths are in Violation of Article 2 ECHR

The above examination of the failure to provide SAR services, the failure to adequately account for border deaths, and the failure to collect information about the deceased paints a bleak picture

[573] Last and others (n 32), 708.
[574] See as quoted above *Tagayeva and others v. Russia* (n 476) [503–509].
[575] *Ranđelović and others v. Montenegro* (n 502) [131].
[576] *Tagayeva and others v. Russia* (n 476) [509].

in respect of the compliance of EU Member States with the standards set by the European Court of Human Rights under the right to life. This is so, even taking into account the difficult circumstances surrounding measures aimed at preventing the loss of life at sea or investigations into the loss of life, and allowing for a lowered standard to be met with respect to migrants and asylum seekers. All three examples show that only minimal efforts have been undertaken to prevent the loss of life or investigate deaths. Worse still, at times measures are pursued knowing they will obstruct efforts to prevent the loss of life. By not collecting the information necessary to properly and reliably analyse the functioning of EU immigration policies, the vital chance to better understand the phenomenon of border deaths and to be in a position to make meaningful policies that can achieve the aim of preventing the loss of life is left unused. Overall, it may therefore be concluded that in regard to many instances of border deaths the State's actions to prevent these, or to investigate them fall short of the standards set in Article 2.

4 Concluding Remarks

The analysis whether the EU immigration policies of the past decades have complied with the standards laid down in Article 2 ECHR, highlight a number of measures that need to be undertaken or discontinued to move towards an EU immigration policy that complies with the ECHR. Quite evidently, efforts to obstruct search and rescue efforts of private parties should be discontinued. Furthermore, so long as irregular travel on the Mediterranean Sea continues, States should provide effective search and rescue services. This does not only require the provision of sufficient SAR capacity, but also requires States to efficiently cooperate on the matter. Given that the disembarkation of rescued people has become an important source of conflict in the past decades, discouraging the provision of SAR services as such, cooperation in regard to disembarkation is especially important. Furthermore, the collection of information both with respect to the phenomenon of border deaths as a whole, as well as in regard to the individuals who have lost their lives attempting to reach Europe is a pressing need to overcome uncertainties relating to the connection between immigration policies and border deaths and in order to investigate circumstances of death, as well as the identity of the victims. Given the transboundary nature of border deaths, these measures will as well require effective cooperation between EU member States, which does not appear forthcoming at the moment. Thus, in a more general fashion, the conclusion to be drawn from this study is that EU immigration policies and their shortcomings under Article 2 bring to light the toxic combination of EU States having been able to cooperate in order to set up an immigration policy that effectively bars safe and regular travel to the EU by unwanted people, but subsequently failing to cooperate to prevent these people from losing their lives. A State's freedom not to cooperate in order to prevent the loss of life appears ever greater, as the effects of its policies are often felt far away from its own territory and partly in an area outside the jurisdiction of any State. Furthermore, the fact that the acts of various EU Member States all feed into the phenomenon of border deaths, allows the passing on of responsibility among States.

While the ECHR allows for lowered standards of protection of migrants, the Court has also made clear that the right to life may not be generally subordinated to the need of border

protection. Acting on this hierarchy of norms will thus require the Court to find ways to deal with effects of policies felt across borders and that are at times hard to assign to a single State. The study has unearthed several innovative and daring approaches the Court has taken to the application of the Convention, as well as to the standards imposed by Article 2 when it needs to bridge a disconnect between the Convention and people in need of protection. Relevant examples include the *Ilaşcu* line of cases, in which the fact that neither of the States concerned exercised effective control over the territory in question contributed to the Court's finding that both States exercised jurisdiction that could form the basis for responsibility. In regard to Article 2, the study has brought to light the Court's capacity of finding judicial answers to the problem that cause and effect are at times far apart or uncertain. The way in which the Court has dealt with repeating cases of disappearance in Chechnya serves as an example. The inability or unwillingness time and again of the Russian State to produce the results of a thorough investigation into the disappearance of a person eventually led the Court to hold that the mere absence of such information in combination with indications that State agents were involved in the disappearance form a sufficient basis for holding the Russian State liable for the disappearance. The study has thus brought into view differing ways in which the Court has been able to bridge the gap between State action and the disperse effects it may have.

At the same time, doing so requires the Court to strike a delicate balance between upholding the standards laid down in the Convention and maintaining its own authority by developing a clear concept of the scope of application of the Convention. Just how delicate this balance is, may be taken from the fact that the extraterritorial scope of application of the Convention was dealt with in the Report of the Steering Committee for Human Rights on the longer-term future of the system of the ECHR and has been on the agenda of the follow-up committee since.[577] In this regard, it is important to realize that the issue of border deaths is just one of many contemporary problems, which are caused and influenced by the actions of many different States and whose effects cross territorial boundaries. Given the increasing interconnectedness and transboundary nature of many societal phenomena, such problems will only increase in number. Thus, preventing that the legal standards agreed on and laid down in the ECHR are hollowed out, will require the Court to continue pushing for our legal system to adapt to such transboundary phenomena. The lines of reasoning employed by the Court to bridge the distance between increasing means to influence and decreasing levels of factual control, between multiple causes and dispersed effects that have been unveiled in this study may therefore be relevant beyond the context of border deaths. In this regard, one may think of environmental policies in general and common fishery and agricultural policies more specifically, as well as policies on the prevention of terrorism. All of them are characterised by the transboundary nature of their effects that are not easily linked to a single State action. The conclusions drawn in this study may therefore also prove relevant to these and other issues characterized by the fact that the acts of several States may bring about diverse effects that may be felt far away from any State actor. Vice versa, looking into judicial responses to other cross border phenomena can prove valuable in further research on responsibility for border deaths. An

[577] Steering Committee on Human Rights (CDDH) (n 176) 61–62; Steering Committee on Human Rights (CDDH) (n 176).

example in point may be recent cases in the field of environmental law. One relevant case in this regard has been briefly discussed in this study. It concerns the case of *Tătar and others v. Romania,* in which the Court recognises the precautionary principle incorporated in environmental law.[578] In short, this requires States to discontinue activities that are likely to have detrimental effects on the environment, even in the absence of scientific certainty with respect to the causal relationship between the action in question and the damage expected. A comparable reasoning could be sensible in relation to potential detrimental effects of State actions on human rights. After all, a violation of the right to life is irreversible, just as many forms of environmental damage. Furthermore, applying a comparable principle allowing for State responsibility in the absence of scientific certainty regarding the causal relationship between an act and its effects, appears even more in place, if the lack of such insights is in great part to blame on the omission of States to collect relevant data. Delving deeper into this and other environmental cases therefore appears promising.

Other examples of innovative legal reasoning can be found at national level. Two cases litigated in Dutch courts may serve as an example. The author was involved in one of the cases in her profession as attorney at law representing Sea-Watch, a non-governmental organization providing search and rescue services in the Mediterranean Sea. It concerned summary proceedings brought by Sea-Watch against the Dutch State. The State had issued a regulation with immediate effect, arguing it was needed to ensure safety on board the vessel of the NGO. Applying the regulation to the vessel without allowing for a transition period, would have resulted in the vessel being unable to sail for several months. The Appeals Court of the Hague held:

> In any case, it is true that the opinion of the State at the time of the establishment of the Scheme shows that in its opinion the transitional period interest of Sea-Watch outweighs the safety interest that the Scheme is intended to serve. In view of this, there is every reason to put into perspective the significance of the safety interest pursued by the State with the immediate effect of the Regulation: the application of the policy change described in consideration 1.b to ships such as the SW3 is not as urgent as the State has made appear after January 2019. Since the transitional period interest of Sea-Watch (also) means that drowning people can be saved (see consideration 4.5), the Court of Appeal is of the opinion that the adverse consequences of omitting a transitional period in the Regulation are disproportionate in relation to the objective to be served, the meaning of which, as has just been determined, must be put into perspective.[579]

The Court thus ruled that the negative effects of applying the regulation without a transition period were disproportionate to the safety interests served by doing so, as it implied that persons in distress at sea could not be rescued by the organisation. The State was consequently ordered to grant the NGO a transition period. The court came to this conclusion despite the fact that the persons who would be negatively affected by the decreased SAR capacity would most likely

[578] *Tătar v. Romania* (n 433).
[579] *Sea-Watch v. The Netherlands* (2019) ECLI:NL:GHDHA:2019:2017 4.15 (The Hague Appeals Court (The Netherlands)).

have never entered Dutch territorial waters or a Dutch flagged ship, nor the jurisdiction of any other EU Member State for that matter. Nevertheless, the court let the extraterritorial detrimental effects of the regulation weigh into its judgment regarding whether a fair balance was struck between the interests affected by the regulation. Another interesting example is a case litigated in the field of environmental law before Dutch Courts. The case was brought by an organization holding that the Dutch government violated the right to life under Article 2 ECHR and the right to private life under Article 8 ECHR by not taking sufficient measures to bring back greenhouse gas emissions.[580] Jurisdiction was not an issue in the case, because the organization filing the case principally represented Dutch citizens. However, the defence of the State is of interest, because the State tried to argue that it could not be obliged to undertake more to mitigate detrimental environmental effects through greenhouse gas emissions, because the transboundary character of such emissions meant that such measures could only be expected to have effect if taken globally, or at least in EU context. In other words, in this case the Dutch State tried to argue that it could not be obliged to undertake mitigating measures, because the inaction of other States also affected Dutch territory. The Dutch court, however, did not accept that the inaction of other States could excuse the Dutch State's failure to take sufficient measures to prevent environmental damage. The logic underlying this reasoning quite evidently is that allowing for the inaction of some to serve as an excuse for others will stand in the way of finding even partial solutions to a transboundary and pressing problem. The same is true for the effects of migration policies. Thus, analysing other fields of law concerning phenomena characterized by such a tragedy of the commons may offer valuable insights with respect to border deaths too. Additionally, the two judgments discussed here demonstrate that examples of how to bridge the gap between State acts and its effects may be found at national level, providing relevant material for further legal research on transboundary phenomena.

In more general terms, increasing interconnectedness and possibilities to influence matters far outside the own borders means that phenomena with comparable characteristics as migration policies or environmental pollution will be seen more rather than less in the future. Preserving the relevance of human rights law and fundamental values in the light of these developments, will require courts to find new ways to ensure that responsibility moves along with the exercise of powers with transboundary effects.

[580] *The Netherlands v. Stichting Urgenda* (2018) ECLI:NL:GHDHA:2018:2591 (The Hague Appeals Court (The Netherlands)); Upheld by *The Netherlands v. Stichting Urgenda* (2019) ECLI:NL:HR:2019:2006 (Court of Cassation (The Netherlands)).

Abbreviations

CJEU or the Court of Justice	Court of Justice of the European Union
ECHR or the Convention	European Convention on Human Rights
ECtHR or the Court	European Court of Human Rights
EU Charter	Charter of Fundamental Rights of the European Union
EU	European Union
Frontex	European Border and Coast Guard Agency
GDR	German Democratic Republic
IMO	International Maritime Organization
IOM	International Organization for Migration
MRT	Moldovan Republic of Transdniestria
NGO	Non-governmental organization
NKR	Nagorno-Karabakh Republic
RCC	Rescue Coordination Centres
Salvage Convention	International Convention on Salvage
SAR Convention	International Convention on Maritime Search and Rescue
SGSSI	South Georgia and South Sandwich Islands
Smuggling Protocol	Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime
SOLAS	International Convention for the Safety of Life at Sea
TRNC	Turkish Republic of Northern Cyprus
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
USSR	Union of Soviet Socialist Republics
WTO	World Trade Organization

Table of Cases

Öneryildiz v. Turkey (2004) 48939/99 (European Court of Human Rights).

Makaratzis v. Greece (2004) 50385/99 (European Court of Human Rights).

Bone v. France (2005) 69869/01 (European Court of Human Rights).

Manoilescu and Dobrescu v. Romania and Russia (2005) 60861/00 (European Court of Human Rights).

Bosphorus v. Ireland (2005) 45036/98 (European Court of Human Rights).

Haydarie v. The Netherlands (2005) 8876/04 (European Court of Human Rights).

Treska v. Albania and Italy (2006) 26937/04 (European Court of Human Rights).

Quark Fishing Ltd. v. United Kingdom (2006) 15305/06 (European Court of Human Rights).

Ben el Mahi and others v. Denmark (2006) 5853/06 (European Court of Human Rights).

Ramsahai and others v. The Netherlands (2007) 52391/99 (European Court of Human Rights).

Kontrová v. Slovakia (2007) 7510/04 (European Court of Human Rights).

Pad and others v. Turkey (2007) 60167/00 (European Court of Human Rights).

Tătar v. Romania (2007) 67021/01 (European Court of Human Rights).

Musayeva and others v. Russia (2007) 57941/00; 58699/00; 60403/00 (European Court of Human Rights).

Budayeva and others v. Russia (2008) 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (European Court of Human Rights).

Andreou v. Turkey (2008) 45653/99 (European Court of Human Rights).

Isaak v. Turkey (2008) 44587/98 (European Court of Human Rights).

Kovačić and others v. Slovenia (2008) 44574/98, 45133/98 and 48316/99 (European Court of Human Rights).

Furdik v. Slovakia (2008) 42994/05 (European Court of Human Rights).

Shakhgiriyeva and others v. Russia (2009) 27251/03 (European Court of Human Rights).

Tătar v. Romania (2009) 67021/01 (European Court of Human Rights).

Stephens v. Malta (no.1) (2009) 11956/07 (European Court of Human Rights).

Kallis and Androulla Panayi v. Turkey (2009) 45388/99 (European Court of Human Rights).

Kalender v. Turkey (2009) 4314/02 (European Court of Human Rights).

Medvedyev and others v. France (2010) 3394/03 (European Court of Human Rights).

Dink v. Turkey (2010) 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (European Court of Human Rights).

M.S.S. v. Belgium and Greece (2011) 30696/09 (European Court of Human Rights).

Al-Skeini and others v. The United Kingdom (2011) 55721/07 (European Court of Human Rights).

Ivanţoc and others v. Moldova and Russia (2011) 23687/05 (European Court of Human Rights).

Sargsyan v. Azerbaijan (2011) 40167/06 (European Court of Human Rights).

Česnulevičius v. Lithuania (2012) 13462/06 (European Court of Human Rights).

Hirsi Jamaa and others v. Italy (2012) 27765/09 (European Court of Human Rights).

Catan and others v. Moldova and Russia (2012) 43370/04, 8252/05 and 18454/06 (European Court of Human Rights).

Hristozov and others v. Bulgaria (2012) 47039/11; 358/12 (European Court of Human Rights).

R.R. and others v. Hungary (2012) 19400/11 (European Court of Human Rights).

Chagos Islanders v. United Kingdom (2012) 35622/04 (European Court of Human Rights).

Volk v. Slovenia (2012) 13/12/2012 (European Court of Human Rights).

Mitić v. Serbia (2013) 31963/08 (European Court of Human Rights).

Avkhadova and others v. Russia (2013) 47215/07 (European Court of Human Rights).

Mehmet Şentürk and Bekir Şentürk v. Turkey (2013) 13423/09 (European Court of Human Rights).

Banel v. Lithuania (2013) 14326/11 (European Court of Human Rights).

Turluyeva v. Russia (2013) 63638/09 (European Court of Human Rights).

Keller v. Russia (2013) 26824/04 (European Court of Human Rights).

Janowiec and others v. Russia (2013) 55508/07 and 29520/09 (European Court of Human Rights).

Marina Alekseyeva v. Russia (2013) 22490/05 (European Court of Human Rights).

Kasap and others v. Turkey (2014) 8656/10 (European Court of Human Rights).

Abdul Wahab Khan v. The United Kingdom (2014) 11987/11 (European Court of Human Rights).

Marro and others v. Italy (2014) 29100/07 (European Court of Human Rights).

Perevedentsevy v. Russia (2014) 39583/05 (European Court of Human Rights).

Tikhonova v. Russia (2014) 13596/05 (European Court of Human Rights).

Bljakaj and others v. Croatia (2014) 74448/12 (European Court of Human Rights).

Makayeva v. Russia (2014) 37287/09 (European Court of Human Rights).

Starčević v. Croatia (2014) 80909/12 (European Court of Human Rights).

Jaloud v. The Netherlands (2014) 47708/08 (European Court of Human Rights).

Karsakova v. Russia (2014) 1157/10 (European Court of Human Rights).

Prilutskiy v. Ukraine (2015) 40429/08 (European Court of Human Rights).

Mustafa Tunç and Fecire Tunç v. Turkey (2015) 24014/05 (European Court of Human Rights).

Chiragov and others v. Armenia (2015) 13216/05 (European Court of Human Rights).

Sargsyan v. Azerbaijan (2015) 40167/06 (European Court of Human Rights).

Metin Gültekin and others v. Turkey (2015) 17081/06 (European Court of Human Rights).

M. Özel and others v. Turkey (2015) 14350/05; 15245/05; 16051/05 (European Court of Human Rights).

Mozer v. Moldova and Russia (2016) 11138/10 (European Court of Human Rights).

Gaysanova v. Russia (2016) 62235/09 (European Court of Human Rights).

Bakanova v. Lithuania (2016) 11167/12 (European Court of Human Rights).

Turturica and Casian v. The Republic of Moldova and Russia (2016) 28648/06 and 18832/07 (European Court of Human Rights).

Svitlana Atamanyuk and others v. Ukraine (2016) 36314/06; 36285/06; 36290/06; 36311/06 (European Court of Human Rights).

Cevrioğlu v. Turkey (2016) 69546/12 (European Court of Human Rights).

Kitanovska Stanojkovic and others v. "The Former Yugoslav Republic of Macedonia" (2016) 2319/14 (European Court of Human Rights).

Hiller v. Austria (2016) 1967/14 (European Court of Human Rights).

Muradyan v. Armenia (2016) 11275/07 (European Court of Human Rights).

Gerasimenko and others v. Russia (2016) 5821/10; 65523/12 (European Court of Human Rights).

Kebe and others v. Ukraine (2017) 12552/12 (European Court of Human Rights).

Talpis v. Italy (2017) 41237/14 (European Court of Human Rights).

Fernandes de Oliveira v. Portugal (2017) 78103/14 (European Court of Human Rights).

Güzelyurtlu and others v. Cyprus and Turkey (2017) 36925/07 (European Court of Human Rights).

Huseynova v. Azerbaijan (2017) 10653/10 (European Court of Human Rights).

Tagayeva and others v. Russia (2017) 26562/07; 14755/08; 49339/08; 49380/08; 51313/08; 21294/11; 37096/11 (European Court of Human Rights).

Paduret v. The Republic of Moldova and Russia (2017) 26626/11 (European Court of Human Rights).

Apcov v. The Republic of Moldova and Russia (2017) 13463/07 (European Court of Human Rights).

Soyma v. The Republic of Moldova, Russia and Ukraine (2017) 1203/05 (European Court of Human Rights).

Vardanean v. The Republic of Moldova and Russia (2017) 22200/10 (European Court of Human Rights).

Ranđelović and others v. Montenegro (2017) 66641/10 (European Court of Human Rights).

Braga v. The Republic of Moldova and Russia (2017) 76957/01 (European Court of Human Rights).

Lopes de Sousa Fernandes v. Portugal (2017) 56080/13 (European Court of Human Rights).

Front Populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union (2015) T-512/12 (General Court of the European Union).

Asylum Case (Colombia/Peru) (1950) ICJ Reports 266 (International Court of Justice).

Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgent of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case (1995) ICJ Reports 288 (International Court of Justice).

Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) (1997) ICJ Reports 7 (International Court of Justice).

Naim Molvan v. Attorney General for Palestine (The "Aysa") (1948) 81 LI L Rep 277 (Judicial Committee of the Privy Council of the United Kingdom).

The Netherlands v. Stichting Urgenda (2018) ECLI:NL:GHDHA:2018:2591 (The Hague Appeals Court (The Netherlands)).

The Netherlands v. Stichting Urgenda (2019) ECLI:NL:HR:2019:2006 (Court of Cassation (The Netherlands)).

Sea-Watch v. The Netherlands (2019) ECLI:NL:GHDHA:2019:2017 (The Hague Appeals Court (The Netherlands)).

Pamuk and others (2001) 84 Rivista di Diritto Internazionale 1155 (Tribunale di Crotone (Italy)).

United States v. Marino-Garcia (1982) 679 F.2D 1373 (United States Court of Appeals Eleventh Circuit).

United States v. Caicedo (1995) 47 F.3d 370 (United States Court of Appeals Ninth Circuit).

Statutes, Regulations and Interpretive Guides

European Convention on Human Rights and Fundamental Freedoms 1950, ECHR (Council of Europe).

Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EC) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC 14 September 2016, Regulation of the European Border and Coast Guard (European Parliament and the Council).

Charter of Fundamental Rights of the European Union (European Union).

Consolidated Version of the Treaty on the European Union, TEU (European Union).

Explanations Relating to the Charter of Fundamental Rights 14 December 2007 (European Union).

Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 15 May 2014, EU Sea Borders Regulation (European Union).

International Convention for the Safety of Life at Sea 1974, SOLAS (International Maritime Organization).

International Convention on Search and Rescue 1979, SAR Convention (International Maritime Organization).

International Convention on Salvage 1989, Salvage Convention (International Maritime Organization).

Guidelines on the Treatment of Persons Rescued at Sea 20 May 2004 (International Maritime Organization).

International Aeronautical and Maritime Search and Rescue Manual - Mission co-ordination 2008, IAMSAR Vol II (International Maritime Organization; International Civil Aviation Organization).

International Aeronautical and Maritime Search and Rescue Manual Vol. I-III 2008, IAMSAR (International Maritime Organization; International Civil Aviation Organization).

Arab Charter on Human Rights 2004 (League of Arab States).

American Convention on Human Rights 1969, ACHR (Organization of American States).

Practical Guide on Admissibility Criteria of the European Court of Human Rights 2019.

Vienna Convention on the Law of Treaties 1969, VCLT (United Nations).

United Nations Convention on the Law of the Sea 1982, UNCLOS (United Nations).

Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment 1984, CAT (United Nations).

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 15 November 2000, Migrant Smuggling Protocol (United Nations).

United Nations Convention against Transnational Organized Crime 8 January 2001 (United Nations).

Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto 2004 (United Nations Office on Drugs and Crime).

References

Al Jazeera, ‘Refugee Crisis: EU and Turkey reach 'breakthrough' deal’ (8 March 2016) <http://www.aljazeera.com/news/2016/03/refugee-crisis-eu-turkey-agree-proposal-160308021149403.html> accessed 7 April 2017.

—— ‘EU leaders ink deal to stem refugee flow from Libya: Aids groups warn against curbing migrant influx before providing safe passage to those fleeing war and persecution’ (4 February 2017) <http://www.aljazeera.com/news/2017/02/eu-leaders-ink-deal-stem-refugee-flow-libya-170203151643286.html> accessed 7 April 2017.

Amnesty International, ‘A Perfect Storm: The Failure of European Policies in the Central Mediterranean’ (6 July 2017) <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF> accessed 13 March 2019.

Anderson AW, ‘Jurisdiction over Stateless Vessels on the High Seas: an Appraisal under Domestic and International Law’ (1982) 13(3) Journal of Maritime Law and Commerce 323.

Barnes R, ‘Refugee Law at Sea’ (2004) 53(1) International and Comparative Law Quarterly 47.

—— ‘The International Law of the Sea and Migration Control’ in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Koninklijke Brill NV 2010).

Bartels L, ‘The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2015) 25(4) The European Journal of International Law 1071.

Battjes H, ‘Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses’ in M. Kuijer and W. Werner (eds), *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law* (Netherlands Yearbook of International Law vol 47. T.M.C. Asser Press 2017).

BBC News, ‘Italy boat sinking: Hundreds feared dead off Lampedusa’ (3 October 2013) <http://www.bbc.com/news/world-europe-24380247> accessed 7 April 2017.

—— ‘Migrant Crisis: Photo of drowned boy sparks outcry’ (3 September 2015) <http://www.bbc.com/news/world-europe-34133210> accessed 7 April 2017.

Besson S, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25 Leiden Journal of International Law 857.

Borowsky M, ‘Artikel 51 Anwendungsbereich’ in J. Meyer (ed), *Charta der Grundrechte der Europäischen Union* (4th edn. Nomos 2014).

Brouwer E, ‘Extraterritorial Migration Control and Human Rights: Preserving the responsibility of the EU and its Member States’ in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Koninklijke Brill NV 2010).

Butha N, ‘The Frontiers of Extraterritoriality - Human Rights Law as Global Law’ in N. Butha (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (The Collected Courses of the Academy of European Law XXIV/1. University Press 2016).

Campbell Z, ‘Shoot First: Coast Guard Fired at Migrant Boats, European Border Agency Documents Show’ (22 August 2016) <https://theintercept.com/2016/08/22/coast-guard-fired-at-migrant-boats-european-border-agency-documents-show/> accessed 4 April 2020.

Cannizzaro E, ‘The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels’ (2015) 25(4) The European Journal of International Law 1093.

Carens JH, ‘Aliens and Citizens: The Case for Open Borders’ (1987) 49(2) Review of Politics 251.

Carling J, ‘Migration Control and Migrant Fatalities at the Spanish-African Borders’ (2007) 41(2) International Migration Review 316.

Churchill R and Lowe A, *The Law of the Sea* (3rd, Manchester University Press 1999).

Commission of the European Communities (COM), ‘Commission Staff Working Document: Study on the International Law Instruments in Relation to Illegal Immigration by Sea’ (15 May 2007) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/pdf/irregular-immigration/sec_2007_691_en.pdf> accessed 11 May 2017.

Coppens J and Somers E, ‘Towards New Rules on Disembarkation of Persons Rescued at Sea?’ (2010) 25(3) The International Journal of Marine and Coastal Law 377.

Costello C, ‘The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6(1) Human Rights Law Review 87.

Council of Europe, ‘Manual on Human Rights and the Environment’ (2012) <https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf> accessed 19 June 2019.

Council of Europe Commissioner for Human Rights, ‘Lives Saved. Rights Protected: Bridging the Protection Gap for Refugees and Migrants in the Mediterranean’ (Recommendation 2019) <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87> accessed 31 July 2019.

Council of the European Union, ‘Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route’ (3 February 2017) <http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/> accessed 7 April 2017.

Crawford J, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012).

—— *State Responsibility: The General Part* (Cambridge Studies in International and Comparative Law, University Press 2013).

Crawford J and Olleson S, ‘The Nature and Forms of International Responsibility’ in M. D Evans (ed), *International Law* (Oxford University Press 2010).

Curtis K, ‘The Tangled Politics of Search and Rescue Operations in the Mediterranean’ (21 July 2017) <https://www.undispatch.com/tangled-politics-search-rescue-operations-mediterranean/> accessed 13 March 2019.

Cuttita P, ‘Mare Nostrum, Humaitarianism and Human Rights Exclusion and Inclusion at the Mediterranean Humanitarian Border: Paper for the 22nd CES (Council for European Studies) conference “Contradictions: Envisioning European Futures” Paris, 8-10 July 2014’ (2014) <https://core.ac.uk/download/pdf/43409484.pdf> accessed 21 February 2019.

Da Costa K, *The Extraterritorial Application of Selected Human Rights Treaties* (Graduate Intsitute of International and Development Studies vol 11, Martinus Nijhoff Publishers 2012).

Di Filippo M, ‘Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea’ [2013] Paix et Sécurité Internationales 53 <http://www.statewatch.org/news/2014/jan/psi-01-etudes-di-filippo-irregular-migration.pdf> accessed 24 February 2015.

Dupuy R-J and Vignes D (eds), *A Handbook on the New Law of the Sea* (1, Martinus Nijhoff Publishers 1991).

Dutch government (Rijksoverheid), Nederland neemt eenmalige verantwoordelijkheid in oplossing NGO-schip Lifeline (2018).

Ebert FC and Sijniensky RI, ‘Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?’ (2015) 15 Human Rights Law Review 343.

European Commission (COM), ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration’ (13 May 2015) <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf> accessed 23 November 2016.

European Council on Refugees and Exiles, ‘Italy's Supreme Court Rejects Appeal Against the Seizure of NGO Rescue Vessel the Iuventa’ (27 April 2018) <https://www.ecre.org/italys-supreme-court-rejects-appeal-against-the-seizure-of-ngo-rescue-vessel-the-iuventa/> accessed 31 July 2019.

—— Sea Watch 3 Still Held in Catania Port after Being Cleared of Criminal Charges (2019).

European Public Affairs, ‘Frontex's new mandate, a controversial EU approach to the refugee crisis’ (26 October 2016) <http://www.europeanpublicaffairs.eu/frontexs-new-mandate-a-controversial-eu-approach-to-the-refugee-crisis/> accessed 7 April 2017.

Fink M, Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law (Oxford Studies in European Law, University Press 2018).

Frontex, ‘Annual Risk Analysis 2012’ <http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2012.pdf> accessed 27 August 2013.

Gallagher AT and David F, *The International Law of Migrant Smuggling* (Cambridge University Press 2014).

Gammeltoft-Hansen T, ‘The Refugee, the Sovereign, and the Sea: European Union Interdiction Policies’ in R. Adler-Nissen and T. Gammeltoft-Hansen (eds), *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (Governance, Security and Development. Palgrave MacMillan 2008).

—— Access to Asylum: International Refugee Law and the Globalisation of Migration Control (Cambridge Studies in International and Comparative Law, University Press 2011).

General Assembly, ‘Report of the International Law Commission, Fifty-eighth Session (1 May - 9 June and 3 July - 11 August 2006): General Assembly Official Records, Sixty-first Session’ (2006-2007) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/636/20/PDF/G0663620.pdf?OpenElement> accessed 28 July 2015.

Gerards J, ‘Right to Life (Article 2)’ in Dijk, van, P. and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn. Intersentia 2018).

Ghandi S, ‘Al-Skeini and the Extraterritorial Application of the European Convention on Human Rights’ in A. Burrows, D. Johnston and R. Zimmermann (eds), *Judge and Jurist: Essays in memory of Lord Rodger of Earlsferry* (University Press 2013).

Gibney M, International Human Rights Law: Returning to Universal Principles (2nd edn, Rowman & Littlefield 2016).

Gidel M, Cours de Droit International Publique Rédigé d´Après la Sténographie et Avec l´Autorisation de M. Gidel I: Le Droit International Public des Espaces Maritimes en Temps de Paix (Cours de Droit 1945-1946).

Giuffré M, ‘Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to extraterritorial Human Rights Obligations’ in V. Moreno-Lax and E. Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach.* Integrating Maritime Security with Human Rights (International Refugee Law Series vol 7. Brill/Nijhoff 2016).

Gondek M, ‘Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?’ (2005) 52 Netherlands International Law Review 349-387.

—— The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties (Intersentia 2009).

Goodwin-Gill GS, ‘The Extraterritorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction’ in L. Boisson de Chazournes and M. G Kohen (eds), *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowland-Debbas = Le Droit International et la Quête de sa Mise en Oeuvre* (Brill 2010).

Grande, del, G. ‘Fortress Europe’ <http://fortresseurope.blogspot.nl/> accessed 25 April 2017.

Hampson F, ‘The Scope of the Extra-territorial Applicability of International Human Rights Law’ in G. Gilbert, F. Hampson and C. Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge 2011).

Hayter T, Open Borders: The Case Against Immigration Controls (second edition, Pluto Press 2004).

Heijer, den, M. ‘Europe and Extraterritorial Asylum’ (2011) <https://openaccess.leidenuniv.nl/bitstream/handle/1887/16699/000-Heijer-07-03-2011.pdf?sequence=1> accessed 7 February 2014.

Heijer, den, M. and Lawson R, ‘Extraterritorial Human Rights and the Concept of 'Jurisdiction'’ in M. Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (University Press 2013).

Heller C and Pezzani L, ‘Death by Rescue’ <https://deathbyrescue.org/report/narrative/> accessed 20 September 2016.

—— ‘Forensic Oceanography: Report on the "Left-to-Die Boat"’ (11 April 2012) <http://www.forensic-architecture.org/wp-content/uploads/2014/05/FO-report.pdf> accessed 13 March 2019.

—— ‘Forensic Oceanography: Addendum to the "Report on the Left-to-Die Boat"’ (16 June 2013) <http://www.forensic-architecture.org/wp-content/uploads/2014/05/FO_report-addendum.pdf> accessed 13 March 2019.

—— ‘Ebbing and Flowing: The EU's Shifting Practices of (Non-)Assistance and Bordering in a Time of Crisis’ (2016) <file:///C:/Users/Lisa/Downloads/Heller_Pezzani_Ebbing_2016.pdf> accessed 20 September 2018.

Houtum, van, H. and Ferrer-Gallardo X, ‘The Not so Collateral Damage Politics of Deadly EU Border Control’ (2014) 13(2) ACME: An International E-Journal for Critical Geographies 295.

Huemer A, ‘Safety and Rescue at Sea: Contentious Legal Issues and Their Potential Detrimental Effect on Boat People’ in V. Dzihic and T. Schmidinger (eds), *Looming Shadows: Migration and Integration at a Time of Upheaval.* European and American Perspectives (Center for Transatlantic Relations 2011).

Human Rights Committee, ‘General Comment No. 6: Article 6 (Right to Life)’ (30 April 1982) <http://www.refworld.org/docid/45388400a.html> accessed 22 May 2014.

Human Rights Watch, ‘Q&A: Why the EU-Turkey Migration Deal is No Blueprint’ (14 November 2016) <https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint> accessed 7 April 2017.

IOM, ‘Missing Migrants: Tracking Deaths Along Migratory Routes’ <https://missingmigrants.iom.int/> accessed 14 October 2018.

Italian Ministry of Defence, ‘Mare Nostrum Operation’ <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx> accessed 26 January 2016.

Jennings R and Watts A, *Oppenheim's International Law Volume I: Peace* (9th edn, Oxford University Press 2008).

Kämmerer JA, ‘Comity’ in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press).

Kingsley P, Stranded Migrants Are Finally Brought to Shore After 19 Days (2019).

Koh T, ‘The Territorial Sea, Contiguous Zone, Straits and Archipelagos Under the 1982 Convention on the Law of the Sea’ (1987) 29(2) Malaya Law Review 163.

Komp L, ‘The Duty to Assist Persons in Distress at Sea: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?’ in V. Moreno-Lax and E. Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach.* Integrating Maritime Security with Human Rights (International Refugee Law Series vol 7. Brill/Nijhoff 2016).

Kukathas C, ‘Why Open Borders?’ (2012) 19(4) Ethical Perspectives 649.

Langer L, *Religious Offence and Human Rights: The Implications of Defamation of Religions* (Cambridge Studies in International and Comparative Law no. 106, Cambridge University Press 2014).

Last T, ‘Death at the Borders: Database for the Southern EU’ (2015) <http://www.borderdeaths.org/?page_id=425> accessed 22 February 2020.

—— ‘Who is the 'Boat Migrant'? Challenging the Anonymity of Death by Border-Sea’ in V. Moreno-Lax and E. Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach.* Integrating Maritime Security with Human Rights (International Refugee Law Series vol 7. Brill/Nijhoff 2016).

—— ‘Metadata for the Deaths at the Borders Database for Southern EU - Public Version’ (28 June 2016) <http://www.borderdeaths.org/wp-content/uploads/Metadata-for-the-Deaths-at-the-Borders-Database-for-Southern-EU.pdf> accessed 5 September 2018.

Last T and others, ‘Deaths at the Borders Database: evidence of deceased migrants’ bodies found along the southern external borders of the European Union’ (2017) 43(5) Journal of Ethnic and Migration Studies 693.

Last T, ‘Deaths Along Southern EU Borders’ (PhD, VU University 2018).

Last T, Spijkerboer T and Ulusoy O, ‘Deaths at the Borders: Evidence from the Southern External Borders of the EU’ (2016) 1 HIJRA La Revue Marocaine de Droit d'Asile et Migration 5.

Lavrysen L, Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights (Intersentia 2016).

Lawson R, ‘Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights’ in F. Coomans and M. T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Maastricht Series in Human Rights vol 2. Intersentia 2004).

Liguori A, ‘Some Observations on the Legal Responsibility of States and International Organizations in the Extraterritorial Processing of Asylum Claims’ (2015) 25 The Italian Yearbook of International Law 135.

Lock T, ‘Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights’ (2010) 10(3) Human Rights Law Review 529.

Lowe A, ‘The Right of Entry into Maritime Ports in International Law’ (1977) 14 San Diego Law Review 597.

Lowe A and Staker C, ‘Jurisdiction’ in M. D Evans (ed), *International Law* (Oxford University Press 2010).

Lutterbeck D, ‘Policing Migration in the Mediterranean’ (2006) 11(1) Mediterranean Politics 59.

Mallia P, Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework (Publications on Ocean Development vol 66, Martinus Nijhoff Publishers 2010).

—— ‘The Challenges of Irregular Maritime Migration’ (2013) <https://www.um.edu.mt/__data/assets/pdf_file/0006/228039/JM_Occasional_Paper_no._4_final_as_re-uploaded.pdf> accessed 10 September 2015.

Mann I, Humanity at Sea: Maritime Migration and the Foundations of International Law (Cambridge University Press 2016).

Mantouvalou V, ‘Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality’ (2005) 9(2) The International Journal of Human Rights 147.

Medicins Sans Frontieres, ‘EU: your fences kill. Provide safe and legal passage’ (Mediterranean Migration: Open letter to European leaders; Copies sent to Switzerland, Norway, FYROM, Serbia and the President of the European Commission 11 September 2015) <http://www.msf.org/en/article/eu-your-fences-kill-provide-safe-and-legal-passage> accessed 7 April 2017.

Mediterranean Missing, ‘Missing Migrants in the Mediterranean: Addressing the Humanitarian Crisis’ (Summary Report 2016) <http://www.mediterraneanmissing.eu/wp-content/uploads/2015/10/Mediterranean-Missing-Summary-report-290816.pdf> accessed 26 September 2018.

Meijers H, *The Nationality of Ships* (Martinus Nijhoff Publishers 1967).

Meilaender PC, *Toward A Theory of Immigration* (Palgrave MacMillan 2001).

Milanovic M, Extraterritorial Application of Human Rights: Law, Principles, and Policy (Oxford University Press 2011).

—— ‘European Court Decides Al-Skeini and Al-Jedda’ (7 July 2011) <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/> accessed 17 February 2016.

—— ‘Extraterritoriality and Human Rights: Prospects and Challenges’ in T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge Human Rights series. Routledge 2017).

Miller D, ‘Immigration: The Case for Limits’ in A. I Cohen and C. H Wellman (eds), *Contemporary Debates in Applied Ethics* (Blackwell Publishing 2005).

Mills A, ‘Rethinking Jurisdiction in International Law’ (2014) 84(1) The British Yearbook of International Law 187.

Mole N, ‘Issa v Turkey: Delineating the Extra-territorial Effect of the European Convention on Human Rights?’ (2005) 1 European Human Rights Law Review 86.

Moreno-Lax V, ‘The EU Regime on Interdiction, Search and Rescue, and Disembarkation: The Frontex Guidelines for Intervention at Sea’ (2010) 25 The International Journal of Marine and Coastal Law 621.

Moreno-Lax V and Costello C, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model’ in S. Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos/C.H. Beck/Hart Publishing 2014).

Ngantcha F, The Right of Innocent Passage and the Evolution of the International Law of the Sea (Printer Publishers 1990).

Nigro R, ‘Notion of Jurisdiction in Article 1: Future Scenarios for the Extra-Territorial Application of the European Convention on Human Rights’ (2010) 20 Italian Yearbook of International Law 11.

Nordquist MH (ed), United Nations Convention on the Law of the Sea 1982: A Commentary (III, Kluwer Law International 1995).

Nowak M, ‘Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective’ in M. Gibney and S. Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (Pennsylvania studies in human rights. University of Pennsylvania Press 2010).

O'Boyle M, ‘The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic'’ in F. Coomans and M. T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Maastricht Series in Human Rights vol 2. Intersentia 2004).

O'Brien KS, ‘Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem’ (2011) 3 Goettingen Journal of International Law 715.

Oda S, ‘The Concept of the Contiguous Zone’ (1962) 11(1) International and Comparative Law Quarterly 131.

Ohler C, ‘Unilateral Trade Measures’ in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press).

Oxfam, ‘The migrants' winter walk: Oxfam calls for safe passage of refugees to Europe’ <https://www.oxfamireland.org/blog/migrants-winter-walk> accessed 7 April 2017.

Oxman BH, ‘Jurisdiction of States’ in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press).

Papastavridis E, ‘Extraterritorial Immigration Control: The Responsibility of States for Human Rights Violations’ (2011) 6 Annuaire International des Droits de l'Homme 315.

—— The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans (Hart 2013).

Poulantzas NM, *The Right of Hot Pursuit in International Law* (2nd, Martinus Nijhoff Publishers 2002).

Rah S, Asylsuchende und Migranten auf See: Staatliche Rechten und Pflichten aus völkerrechtlicher Sicht (Hamburg Studies on Maritime Affairs vol 15, Springer 2009).

Ravasi E, Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine (Brill Nijhoff 2017).

Redelbach A, ‘Protection of the Right to Life by Law and by Other Means’ in B. G Ramcharan (ed), *The Right to Life in International Law* (International Studies in Human Rights. Martinus Nijhoff Publishers 1985).

Redgwell C, ‘International Environmental Law’ in M. D Evans (ed), *International Law* (Oxford University Press 2010).

Ress G, ‘State Responsibility for Extraterritorial Human Rights Violations: The Case of Banković’ (2003) 6(1) Zeitschrift für Europarechtliche Studien 73.

Reuters, ‘How Europe built fences to keep people out’ (4 April 2016) <http://www.reuters.com/article/us-europe-migrants-fences-insight-idUSKCN0X10U7> accessed 7 April 2017.

—— ‘Hungary builds new high-tech border fence - with few migrants in sight’ (2 March 2017) <http://www.reuters.com/article/us-europe-migrants-hungary-fence-idUSKBN1692MH> accessed 7 April 2017.

Rothwell D and Stephens T, *The International Law of the Sea* (Hart 2010).

Satlanis CN, Fundamental Notions and Principles of Public International Law (with Elements of International Criminal Law and Procedure) (Ant. N. Sakkoulas Verlag 2010).

Scholten S, The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control (Immigration and Asylum Law and Policy in Europe vol 38, Brill/Nijhoff 2015).

Shalal A, Germany seeks extension of EU's migrant deterrent sea operation (2019).

Spijkerboer T, 'The Human Costs of Border Control' (2007) 9 European Journal of Migration and Law 127.

—— 'Moving Migrants, States, and Rights: Human Rights and Border Deaths' (2013) 7(2) Law and Ethics of Human Rights 213.

—— 'Wasted Lives. Borders and the Right to Life of People Crossing Them' (2017) 86 Nordic Journal of International Law 1.

Steering Committee on Human Rights (CDDH), 'The longer-term future of the system of the European Convention on Human Rights' (11 December 2015) <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> accessed 20 June 2019.

—— 'Outline of the Future Report of the CDDH on the Place of the Convention in the European and International Legal Order' (31 July 2017) <https://rm.coe.int/draft-outline/168073ebd3> accessed 20 June 2019.

Stoyanova V, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18(2) Human Rights Law Review 309.

Strik T, 'Lives Lost in the Mediterranean Sea: Who is Responsible?' (5 April 2012) <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18095&lang=en> accessed 4 February 2014.

Sunde KH, 'What can Europe do to welcome refugees?' (11 September 2015) <https://www.amnesty.org/en/latest/campaigns/2015/09/what-can-europe-do-to-welcome-refugees/> accessed 7 April 2017.

Szydlo M, 'Extra-Territorial Application of the European Convention on Human Rights after Al-Skeini and Al-Jedda' (2012) 12 International Criminal Law Review 271.

Tanaka Y, *The International Law of the Sea* (University Press 2012).

The Guardian, ''Dark Day': Migrant Rescue Ship Aquarius Ends Operations: Médicins Sans Frontières Says 'Smear Campaign' by European Governments Hampered Work in Mediterranean' *The Guardian* (7 December 2018) <https://www.theguardian.com/world/2018/dec/07/dark-day-migrant-rescue-ship-aquarius-ends-operations-mediterranean> accessed 31 July 2019.

The Irish Times, Migrant ship docks in Malta after standoff with Italy: Mission Lifeline vessel carrying 230 rescuees had been refused entry to Italian ports (2018).

The Telegraph, Italy orders seizure of migrant rescue ship Aquarius for 'illegal waste treatment' (2018).

Tomuschat C, *Human Rights: Between Idealism and Realism* (Oxford University Press 2008).

Tondo L, 'Standoff in Italian Port as Salvini Refuses to Let Refugees Disembark: Interior Minister Wants EU States to Take 177 Refugees and Migrants From Ship' *The Guardian* (21 August 2018) <https://www.theguardian.com/world/2018/aug/21/italy-refugees-salvini-refuses-coastguard-ship-docks-diciotti> accessed 31 July 2019.

—— 'Italian Authorities Order Seizure of Migrant Rescue Ship: Volunteers Rescued About 50 People Off Libya on Tuesday in Defiance of Government Order' *The Guardian* (20 March 2019) <https://www.theguardian.com/world/2019/mar/20/italian-authorities-order-seizure-migrant-rescue-ship-mare-jonio> accessed 31 July 2019.

Treves T and Pitea C, 'Piracy, International Law and Human Rights' in N. Butha (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (The Collected Courses of the Academy of European Law XXIV/1. University Press 2016).

Trevisanut S, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 The International Journal of Marine and Coastal Law 523.

—— Immigrazione Irregulare Via Mare: Diritto Internazionale e Diritto dell'Unione Europea (Jovene 2012).

Tzevelekos V, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36(1) Michigan Journal of International Law 129.

UNHCR, 'Operational Portal - Refugee Situations: Medtierranean Situation' <https://data2.unhcr.org/en/situations/mediterranean> accessed 14 October 2018.

—— 'UNHCR urges countries to enable safe passage, keep borders open for Syrian refugees' (18 October 2013) <http://www.unhcr.org/news/briefing/2013/10/526108d89/unhcr-urges-countries-enable-safe-passage-keep-borders-open-syrian-refugees.html> accessed 7 April 2017.

United Against Racism, 'List of Deaths' (5 May 2018) <http://unitedagainstrefugeedeaths.eu/about-the-campaign/about-the-united-list-of-deaths/> accessed 14 October 2018.

United Nations High Commissioner for Refugees (UNHCR), 'Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea' (Final Version as discussed at the expert roundtable Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees, held in Lisbon, Portugal on 25-26 March, 2002 18 March 2002) <http://www.unhcr.org/3e5f35e94.html> accessed 24 January 2014.

United Nations Office on Drugs and Crime (UNODC), 'Case Law Database: Case N. 3267/04 R.G.N.R Fact Summary' (7 October 2009) <https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/ita/2009/case_n._326704_r.g.n.r.html> accessed 13 March 2019.

—— 'Issue Paper: Smuggling of Migrants by Sea' (2011) <http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf> accessed 19 August 2013.

United Nations Security Council, 'Resolution 2240' (2015) <http://unscr.com/en/resolutions/doc/2240> accessed 7 March 2020.

Uzun A, 'Extraterritorial Application of the European Convention on Human Rights: An Overview of the Strasbourg Case-law' in Société Internationale de Droit Militaire et de Droit de la Guerre (ed), *La Règle de Droit Dans Les Opérations de la Paix: Dix-septième Congrès International, Scheveningen (Pays-Bas), 16-21 Mai 2006* (Recueils de la Société Internationale de Droit Militaire et de Droit de la Guerre vol 17. Société Internationale de Droit Militaire et de Droit de la Guerre).

Vervliet J, 'General Introduction' in R. Feenstra (ed), *Hugo Grotius Mare Liberum 1609-2009* (Brill 2009).

Watts A, 'The Protection of Merchant Ships' (1957) 33 British Yearbook of International Law 52.

Weber L, 'Knowing-and-yet-not-knowing about European Border Deaths' (2010) 15(2) Australian Journal of Human Rights 35.

Wilde R, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in S. Scott and Rodley, N. Sir (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013).