

Europe's border crimes.

**Bridging the impunity gap for the enforced disappearance of migrants
in the Mediterranean graveyard.**

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‘Borderlands, the ultimate Achilles’ heel
of colonialism and imperialism’.

- Roxanne Dunbar-Ortiz.

‘Where are your monuments, your battles, martyrs?
Where is your tribal memory? Sirs,
in that grey vault. The sea. The sea
has locked them up. The sea is History.’

- Derek Walcott.

ABSTRACT.

On the Italian island of Lampedusa, there is a memorial dedicated to the thousands of migrants who have died or gone missing at sea while trying to reach Europe. The memorial does not list any of the identities of those who died, because they are unknown. This represents both the dimension of the daily tragedy of dead and missing migrants at sea, as well as the non-existent attempts to identify or account for the thousands of persons that have disappeared. This dissertation assesses how criminal liability can help bridge the impunity gap for the death and disappearances of migrants in the Mediterranean, by framing them as enforced disappearances as defined under Article 7 of the Rome Statute of the International Criminal Court.

Mainstream discourses regarding deaths and disappearances at sea uphold the analysis that their fates are the consequences of the migrant's "criminal actions". Border deaths are contextualised as capital punishments and migrants are blamed for their own deaths. However, deaths and disappearances at sea are not consequences of the journey, the waves, or the wind, but outcomes of European policies. Europe has created in the Mediterranean a legally ambiguous space away from the protection of the law and public scrutiny, similar to that in detention sites and carceral facilities. Consequently, Europe has managed to turn the Mediterranean into a mass grave, causing over 30,000 individuals to die and disappear since the end of 1990. The framing of border deaths as 'enforced disappearances' is key in condemning and acknowledging the violence caused not only to the dead and missing migrants but to their families. Persecution for this crime also addresses border violence as a strategy of deterrence and control over certain populations, framing State policies as criminal - not migrants' actions.

INTRODUCTION.

As of May 2021, already over 600 people have died or gone missing in the Mediterranean sea, attempting to reach Europe.^{1 2} Only in the Western Mediterranean route to Spain, over 200 people are estimated to have lost their lives and disappeared at sea.³ In the Central Mediterranean route, over 100 migrants died in a single shipwreck off the Libyan coast on April 23rd.⁴ These are some of the latest victims at Europe's borders, where people on the move continue to die on a daily basis.⁵ However, the accurate number of missing and dead migrants in the deadliest migration route in the world is largely unknown.⁶ According to the International Organisation for Migration (IOM), the true number of fatalities and disappearances is 'undoubtedly higher' as most deaths are not officially recorded.⁷ These numbers and recorded fatalities sometimes obfuscate the fact that the mainstream experience regarding border crossings is one of disappearance rather than documented death.⁸ Behind every disappearance in the Mediterranean entire families and communities are attempting to understand and find out the fate of their loved ones.⁹ However, the impact of these disappearances, both emotional and material, are normally invisibilised from the public eye.¹⁰ These losses and disappearances have not pushed European states to set up policies of justice or reparation, on the contrary, Europe has continued investing in policies of deterrence and mobility control, including the dismantling of sea rescue services.¹¹

¹ IOM, 'Mediterranean Project' (2021) Missing Migrants <https://missingmigrants.iom.int/region/mediterranean>.

² Drawing from Maurice Stierl's book 'Migrant Resistance in Contemporary Europe', this dissertation will be using the terms 'Europe' and 'European border regime' to encompass both, the EU as a supra-national institution as well as the governments of its member states.

³ ANSA, 'Steady increase in migrant deaths at sea, warn UNHCR and IOM' (2021) InfoMigrants <https://www.infomigrants.net/en/post/31926/steady-increase-in-migrant-deaths-at-sea-warn-unhcr-and-iom>.

⁴ The Associated Press, 'More Than 100 Migrants Are Feared Dead as Boat Capsizes in Mediterranean' (2021) The New York Times <https://www.nytimes.com/2021/04/23/world/europe/migrants-dead-mediterranean-libya.html>.

⁵ ANSA, 'Central Mediterranean: Three migrant deaths per day, UN agencies say' (2021) InfoMigrants <https://www.infomigrants.net/en/post/30829/central-mediterranean-three-migrant-deaths-per-day-un-agencies-say>.

⁶ Simona Varrella, 'Deaths of migrants in the Mediterranean Sea 2014-2021' (2021) statista <https://www.statista.com/statistics/1082077/deaths-of-migrants-in-the-mediterranean-sea/>.

⁷ Ottavia Spaggiari, 'When a migrant drowns, a whole community feels the loss' (2021) The New Humanitarian <https://www.thenewhumanitarian.org/news-feature/2021/3/23/When-a-migrant-drowns-a-whole-community-feels-the-loss>.

⁸ Rebecca M. Crocker, Robin C. Reineke & María Elena Ramos Tovar, 'Ambiguous Loss and Embodied Grief Related to Mexican Migrant Disappearances' (2021) Medical Anthropology.

⁹ Ottavia Spaggiari, 'When a migrant drowns, a whole community feels the loss' (2021) The New Humanitarian <https://www.thenewhumanitarian.org/news-feature/2021/3/23/When-a-migrant-drowns-a-whole-community-feels-the-loss>.

¹⁰ *Ibid.*

¹¹ Caminando Fronteras, 'Vida en la necrofrontera' (2020) Caminando Fronteras pag 28 <https://caminandofronteras.org/wp-content/uploads/2020/03/vida-en-la-necrofrontera-interactivo.pdf>.

In February 2021, in the Eastern Mediterranean route, a five-year-old Afghan boy drowned off the Greek island of Samos, as he attempted to reach Europe from Turkey with A.N, his twenty-five-year-old dad.¹² In a shocking turn of events, A.N has been criminally charged for child endangerment.¹³ Notis Mitarakis, the Greek Migration Minister, stressed that ‘if there is the loss of human life, it must be investigated whether some people, through negligence or deliberately, acted outside the limits of the law’.¹⁴ That same day, Mitarakis added that ‘the people who choose to get into boats which are unseaworthy, and are driven by people who have no experience of the sea, obviously put human lives at risk’.¹⁵ In contrast with Mitaraki’s views, A.N’s son’s grave reads ‘he drowned in a shipwreck. It wasn’t the sea, it wasn’t the wind, it is the policies and fear’.¹⁶ As activist, organiser, and author Harsha Walia explains, ‘like rape culture, victim-blaming responses to border deaths put the responsibility on people for “choosing” to make unsafe journeys. But restrictive policies compel irregular migration and coercive state powers - not migrants - are responsible for these deaths. Even the passive terminology of “border deaths” [...] obscures the violent warscape of premeditated fatalities. The doctrine of deterrence requires mass border deaths to instill fear and prevent migration.’¹⁷

Border violence is the worldwide system behind these fatalities. It is a system designed to preserve the privilege of some and restrict access to others, from freedom of movement to resources.¹⁸ This border regime approach, referred to by some as a ‘global apartheid’, is usually represented by the building of physical walls.¹⁹ In Europe, for example, this has partially translated into spending billions of euros in building the equivalent of six Berlin walls, strengthened with surveillance technology and patrols.²⁰ What is more, and serving to maintain the well-earned title of ‘Fortress Europe’, the European Union's proposed budget for migration and border control for 2021-2027 presented an increase from €10 billion from the

¹² Elena Becatoros, 'Migrant father charged with son's death on journey to Greece' (2021) Ekathimerini <https://www.ekathimerini.com/society/1157359/migrant-father-charged-with-son-s-death-on-journey-to-greece/>.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Harsha Walia, 'Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism' (2021) Haymarket Books pag 107.

¹⁸ Reece Jones, 'Violent Borders: Refugees and the Right to Move' (2016) Verso pag 5.

¹⁹ Ainhoa Ruiz Benedicto, Mark Akkerman and Pere Brunet, 'A Walled World: Towards a Global Apartheid' (2020) Centre Delàs d'Estudis per la Pau pag 5.

²⁰ Harsha Walia, 'Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism' (2021) Haymarket Books pag 108.

last period to €31 billion, representing 2.73 percent of the total budget, compared to the 0.93 percent of the weight it had during the 2014-2020 period.²¹

Against this backdrop, the acts of people on the move can only be understood as acts of resistance and mass disobedience effectively challenging and dismantling the hegemonic regime of mobility control.²² In Tunisia, for example, those who attempt the sea crossing are referred to as *harraga*, alluding metaphorically to the ‘burning of borders’.²³ However, those acts of resistance and mass disobedience are met today with unprecedented levels of violence, and Europe is at the forefront. In the past decade, over half of the border deaths, globally, happened in Europe.²⁴ Over 20,000 people have lost their lives attempting to cross the Mediterranean sea, while over 600 have died on land borders since 2014.²⁵ Beyond the encounter with the wall itself, the strategy behind border violence lays in the manufacturing of suffering and the organization of death: from illegal detention centres and camps to deportation schemes.²⁶ These are civilian deaths,²⁷ prompted by the building of walls and borders, but some are also killed by border agents or are left to die by the omission of assistance.²⁸ Why are these atrocities not stirring more anger? How is it possible that the dead and their families are being criminalized for their suffering? How is it that the suffering, drownings, killings, and disappearances of thousands of migrants at Europe’s borders are being enabled and promoted?²⁹

Philosopher and political theorist Achille Mbembe has referred to this way of policing as a ‘necropolitics’ approach, defined by him as ‘contemporary forms of subjugating life to the power of death’,³⁰ or, in simpler words, how state’s policies knowingly set up the killing and

²¹ Pierre Van Wolleghem, 'What does the new EU budget have in store for migration and asylum? The effect of crises on EU spending' (2020) PROTECT <https://protectproject.w.uib.no/what-does-the-new-eu-budget-have-in-store-for-migration-and-asylum/>.

²² Maurice Stierl, 'Migrant Resistance in Contemporary Europe' (2020) Routledge.

²³ Sarah Souli, 'Groups help mothers, families of missing Tunisian migrants' (2018) Al-Monitor <https://www.al-monitor.com/originals/2018/05/tunisia-grou-help-mothers-families-missing-migrants-italy.html>.

²⁴ Reece Jones, 'Violent Borders: Refugees and the Right to Move' (2016) Verso pag 16.

²⁵ IOM, 'Mediterranean Project' (2021) Missing Migrants <https://missingmigrants.iom.int/region/mediterranean>.

²⁶ Achille Mbembe, 'Necropolitics' (2019) Duke University Press pages 5 & 7.

²⁷ Reece Jones, 'Violent Borders: Refugees and the Right to Move' (2016) Verso pag 4.

²⁸ *Id.* at pag 8.

²⁹ Mary Pat Brady, 'The Homoerotics of Immigration Control' (2008) The Scholar and Feminist Online Issue 6.3.

³⁰ Achille Mbembe, 'Necropolitics' (2019) Duke University Press.

suffering of certain populations to enable and maintain the thriving lifestyle of others'.³¹ EUrope serves as a perfect example to illustrate Mbembe's definition. Six years after the long summer of migration, or the so-called 'migration crisis', EUrope has chosen border violence in detriment to the right to a dignified life, or even to life.³² In these past few years, the documentation of widespread and systematic collective expulsions at land and sea borders has soared, as well as, *inter alia*, the implementation of arbitrary detention of migrants and asylum seekers in centres and camps alongside EUrope's borders.³³ In this context of 'premeditated fatalities', the need to go beyond the systems and tactics that EUrope is using in an attempt to hide and/or justify the widespread and orchestrated violence against migrants at its borders has become apparent.³⁴

To counter this victim-blaming construction, a new approach to refer to border deaths and disappearances has been developed, by framing them as 'enforced disappearances'.³⁵ This crime addresses persons who have gone missing 'following displacements, arrests, arbitrary deprivation of liberty, or torture and killings (or any other wrongful act) committed by state officials or third parties who act on behalf of or with the complicit silence of the state. This is followed by state authorities' lack of accountability and their refusal to acknowledge a "disappearance" and hence deliberately denying information to the families and the communities about the fate of those who have "vanished".³⁶ The framing of border deaths as 'enforced disappearances' is key in condemning and acknowledging the violence caused not only to the dead and missing migrant populations, forced to invisibility, but also to their families who are condemned to not knowing the fate of their own.³⁷ Moreover, persecution

³¹ Christoph M Zhang, "Biopolitical and Necropolitical Constructions of the Incarcerated Trans Body" (2019) 37:2 Colum J Gender & L 257 pag 268.

³² Blanca Garcés, 'La frontera descarada' (2020) Barcelona Centre for International Affairs https://www.cidob.org/publicaciones/serie_de_publicacion/opinion_cidob/2020/la_frontera_descarada.

³³ Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311.

³⁴ Maurice Stierl, 'Migrant Resistance in Contemporary Europe' (2020) Routledge pag 21.

³⁵ Emilio Distretti, 'Enforced Disappearances and Border Deaths Along the Migrant Trail' in Paolo Cuttitta and Tamara Last (eds.) 'Border Deaths Causes, Dynamics and Consequences of Migration-related Mortality' (2020) Amsterdam University Press pag 117.

³⁶ *Id.* at pag 118.

³⁷ Brian Finucane, 'Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War' (2010) Yale Journal of International Law Vol. 34 Issue 1 pag 195.

for this crime also addresses border violence as a strategy of deterrence and control over certain populations, by criminalizing the actions by State authorities.³⁸

Reflecting on this regime of widespread impunity regarding border violence, and, specifically, regarding the migrant deaths and disappearances in the Mediterranean frontier, I wonder, would it be possible to reverse our understanding of criminality? As scholar and lawyer Ioannis Kalpouzos proposed: ‘Would it be possible to explore the reversal of this configuration of power and criminalization? Could the labelling power of (international) criminal law be deployed against the (powerful, receiving) state? Could it be marshalled against those that treat migrants like criminals? What would be the value of attempting to articulate a description and assessment of anti-migrant policies and the violence against migrants using the categories of international criminal law?’.³⁹ Intrigued by those questions and encouraged by Mitarakis’ belief in the need for justice,⁴⁰ this dissertation explores, through international criminal law, a way of reclaiming victimhood status for people on the move by demonstrating how EUropean actors are the perpetrators of crimes.

This dissertation aims to assess how criminal liability can help bridge the impunity gap for the death and disappearances of migrants in the Mediterranean, by framing them as enforced disappearances as defined under Article 7 of the Rome Statute of the International Criminal Court (ICC). To answer those questions, the **first chapter** will outline the intent and strategy behind EUrope’s system of border violence as part of a wider international scheme of necropolitics. The **second chapter** will examine how international human rights law and the European Court of Human Rights (ECtHR) are being complicit with EUrope’s border regime, proving to be insufficient in providing accountability and reparations for the victims. The **third chapter** will analyse how migrant death and disappearances at EUrope’s external borders can amount to crimes against humanity, focusing specifically on the category of enforced disappearances. And, finally, the **fourth chapter** will critically analyse the benefits of an international criminal law framework for

³⁸ Emilio Distretti, 'Enforced Disappearances and Border Deaths Along the Migrant Trail' in Paolo Cuttitta and Tamara Last (eds.) 'Border Deaths Causes, Dynamics and Consequences of Migration-related Mortality' (2020) Amsterdam University Press pag 118.

³⁹ Ioannis Kalpouzos, 'International Criminal Law and the Violence against Migrants' (2020) 21(3) German Law Journal (2020) pag 9.

⁴⁰ I thought it was important to address that, even if Mr. Mitarakis and the author hold quite different beliefs, the statement ‘if there is the loss of human life, it must be investigated whether some people, through negligence or deliberately, acted outside the limits of the law’ is extremely inspiring, and I 100% agree with it. That being said, I will be appropriating this statement for the foreseeable future - but with a twist.

border violence in Europe, while discussing its benefits and limitations in terms of effectively bridging the impunity gap for those crimes.

NECROPOLITICS: PROTECTING THE ‘EUROPEAN WAY OF LIFE’.

The justification for the increase in widespread and systematic violations against migrants starts with language, with the process of dehumanisation and criminalisation of migrants and migration.⁴¹ This defining process has managed to construct migrants as ‘illegals and aliens’⁴² to allege that they are carrying out a criminal act.⁴³ This translates today in a view that, in an encounter at the border, the state is the victim of an assault perpetrated by the person attempting to cross it.⁴⁴ In this way, ‘the state becomes a tangible entity, with its own personhood and boundaries that must not be violated. [...] Borders are engendered as needing protection or as [...] vulnerable shores that must be kept intact and secured against the threat of un-negotiated penetration by strangers’.⁴⁵ However, using border violence as an analytical framework flips the fabricated script on borders to describe how they not only do not prevent violence, but they are a manifestation of how violence against migrants is ‘structurally created and maintained’.⁴⁶

This was shockingly acknowledged in 2019, when Ursula Von der Leyen, President of the European Commission, decided to change the title of the migration commissioner to ‘vice-president for protecting *our* European way of life’ - a way to endorse the idea of people on the move being a threat to Europe and the so-called European ‘lifestyle’, and a carefully considered justification for preventing other people access to it.⁴⁷ After changing the title for Margaritis Schinas’ role, in Schinas’ mission letter, Von der Leyen wrote that ‘The European way of life is built around solidarity, peace of mind and security. We must address and allay legitimate fears and concerns about the impact of irregular migration on our economy and society. [...] We must also work more closely together on security, notably on new and

⁴¹ Ioannis Kalpouzos, ‘International Criminal Law and the Violence against Migrants’ (2020) 21(3) German Law Journal (2020).

⁴² Harsha Walia, ‘Undoing Border Imperialism’ (2013) AK Press and The Institute for Anarchist Studies pag 53.

⁴³ *Ibid.*

⁴⁴ *Id.* at pag 54.

⁴⁵ *Ibid.*

⁴⁶ *Id.* at pag 5.

⁴⁷ Nanjala Nyabola, ‘The End of Asylum A Pillar of the Liberal Order Is Collapsing—but Does Anyone Care?’ (2019) Foreign Affairs <https://www.foreignaffairs.com/articles/2019-10-10/end-asylum>.

emerging threats that cut across borders and policies.⁴⁸ This widespread tactic of framing EUrope as the victim of an assault in need of protection from illegals and criminals condemns migrants to a criminalised existence.⁴⁹ At the same time, these narratives never frame government officials, for-profit owners or politicians as the main perpetrators.⁵⁰ The term ‘criminal’ becomes a dehumanising stereotype, as the term ‘illegal’ is imagined exclusively as referring to ‘poor migrants of color, even though many white tourists often illegally overstay their visas’.⁵¹

That is how EUrope attempts to define its community and ‘European way of life’, by designating its ‘others’.⁵² To create a bonded community, EUrope uses xenophobic discourses to fabricate an ‘imagined shared identity’.⁵³ In present-day EUrope, immigrants, refugees, and the poor are the new names we have historically given to the black and people of color, women, slaves, and ethnic minorities that were considered ‘uncivilised’ and ‘unintelligent’, amounting to being framed as not part of humanity or the human family.⁵⁴ With that in mind, one could argue that not-so-old discourses and discriminations based on civilised grounds and the superiority of the ‘white race’ can be compared nowadays with the use and construction of ‘Western culture’.⁵⁵ Disrupting this discourse requires going beyond the way EUrope treats and constructs migrants and refugees today, and tracing back to its historic ties.⁵⁶

The unequal movement of people has been orchestrated by European colonialism for over three centuries, from the transatlantic slave trade to European settlers in the Americas and Oceania, *inter alia*.⁵⁷ However, these ongoing colonial scenes are intentionally left of all

⁴⁸ Ursula von der Leyen, 'Mission Letter to Margaritis Schinas, Vice-President-designate for Protecting our European Way of Life' (2019) European Commission https://ec.europa.eu/info/sites/info/files/mission-letter-margaritis-schinas-2019_en.pdf.

⁴⁹ Harsha Walia, 'Undoing Border Imperialism' (2013) AK Press and The Institute for Anarchist Studies pag 54.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Maurice Stierl, 'Migrant Resistance in Contemporary Europe' (2020) Routledge pag 10.

⁵³ Luisa F. Freier, Matthew D. Bird and Soledad Castillo Jara, “‘Race’, Ethnicity and Forced Displacement’ in Peter Adey et al. eds.), 'The Handbook of Displacement' (2020) Palgrave Macmillan pag 145.

⁵⁴ Conor Gearty and Costas Douzinas (ed.), 'The Cambridge Companion to Human Rights Law' (2012) Cambridge University Press pag 29.

⁵⁵ Luisa F. Freier, Matthew D. Bird and Soledad Castillo Jara, “‘Race’, Ethnicity and Forced Displacement’ in Peter Adey et al. eds.), 'The Handbook of Displacement' (2020) Palgrave Macmillan pag 145.

⁵⁶ Harsha Walia, 'Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism' (2021) Haymarket Books pag 122.

⁵⁷ *Ibid.*

discourses around migration to Europe.⁵⁸ Instead, Europe claims to welcome refugees while exposing Black and racialised lives to structural and widespread violence.⁵⁹ Looking closer, we will be able to see the strategies and intent in Europe's (self-)conception and stubborn promotion as a 'normative power and humanitarian force that leads by example, and as a community where race and racism have no say anymore'.⁶⁰ The European imperialist project recognised no constraints in pursuing power and the rule of the 'white race', justifying massacres by normalising and routinizing the killings of racialised lives.⁶¹ As during colonisation, Europe's border regime thrives in getting rid of those that they categorised as superfluous, especially those deemed criminals, and the poor,⁶² while creating a system that generates a null response to people's suffering and death.⁶³ Those strategies thrive not only on keeping these superfluous beings out of the way but in mastering how to get rid of them.⁶⁴

In the context of deaths and disappearances in the Mediterranean, mainstream discourses continue to uphold the analysis that their fates are a consequence of their criminal actions.⁶⁵ That is why, to challenge the border regime, we must challenge the criminalisation of migrants.⁶⁶ By making them undesirable it renders them as less human and 'less worthy of a life of dignity and justice'.⁶⁷ This has clear consequences, as it has justified state and border violence as both, necessary and innocent.⁶⁸ As Mbembe explains, 'colonial power is in no way structured by the opposition between legal and the illegal. [...] This conception of the law as an absolute instrumentality worked to free power holders of any meaning constraint, whether in the exercise of war, in criminalizing resistance, or in the government of the everyday'.⁶⁹ Not only that, but the lines between victim and criminal or perpetrator, a basic

⁵⁸ Harsha Walia, 'Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism' (2021) Haymarket Books pag 122.

⁵⁹ *Ibid.*

⁶⁰ Maurice Stierl, 'Migrant Resistance in Contemporary Europe' (2020) Routledge pag 10.

⁶¹ Ayten Gündoğdu, 'Ayten Gündoğdu's keynote talk "border deaths and the crisis of human rights"' (2020) University of Helsinki <https://www2.helsinki.fi/en/unitube/video/3492661a-b637-4a22-8945-a5fe061653e1>.

⁶² Achille Mbembe, 'Necropolitics' (2019) Duke University Press pag 10.

⁶³ *Id.* at pag 5.

⁶⁴ *Id.* at pag 18.

⁶⁵ Tryon P. Woods and P. Khalil Saucier, 'Slavery's afterlife in the Euro-Mediterranean basin' (2015) OpenDemocracy <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/slaverys-afterlife-in-euromediterranean-basin/>.

⁶⁶ Harsha Walia, 'Undoing Border Imperialism' (2013) AK Press and The Institute for Anarchist Studies pag 112.

⁶⁷ *Id.* at pag 258.

⁶⁸ Achille Mbembe, 'Necropolitics' (2019) Duke University Press pag 26.

⁶⁹ *Ibid.*

element to achieve justice, are becoming increasingly blurred.⁷⁰ By being seen only as ‘disposable’ and ‘less worthy’, those victims are condemned to non-existence and invisibility.⁷¹ In 2018, at least six people died every day in the Mediterranean,⁷² leaving the families and communities of those who go missing ‘in endless cycles of hope and despair’.⁷³ That is another characteristic of necropolitical power: ‘a generalized cheapening of the price of life and, on the other, habituation to loss.’⁷⁴ In this context, as Hannah Arendt explains, ‘race is, politically speaking, not the beginning of humanity but its end, [...] not the natural birth of man but his unnatural death’.⁷⁵ The result of this is that thousands of racialised persons dying and disappearing at EUrope’s borders do not seem like tragedies we can avoid, creating zero of guilt or remorse.⁷⁶ In addition, all those tragedies, from the shipwrecks in the Mediterranean to the migrants who die or go missing at EUrope’s land borders are constructed as separate phenomena, several small massacres that hold no further meaning.⁷⁷ The death of the constructed ‘enemy’ is not a tragedy, depriving it of all symbolism.⁷⁸

As described by Mbembe, ‘the ultimate expression of sovereignty largely resides in the power and capacity to dictate who is able to live and who must die’.⁷⁹ Before 1900, the number of migrant deaths at EUrope’s borders was lower, since reaching Europe by ‘legal’ means was easier.⁸⁰ However, for the past twenty years, EUrope has started to obsessively focus on managing the movements across its borders.⁸¹ In response to its desire to govern mobilities, EUrope has started enforcing borders ‘through the interplay of a range of

⁷⁰ Achille Mbembe, ‘Necropolitics’ (2019) Duke University Press pag 39.

⁷¹ Tryon P. Woods and P. Khalil Saucier, ‘Slavery’s afterlife in the Euro-Mediterranean basin’ (2015) OpenDemocracy <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/slaverys-afterlife-in-euromediterranean-basin/>.

⁷² The UN Refugee Agency, ‘Six people died each day attempting to cross Mediterranean in 2018, UNHCR report shows’ (2019) UNHCR <https://www.unhcr.org/neu/24018-six-people-died-each-day-attempting-to-cross-mediterranean-in-2018-unhcr-report-shows.html>.

⁷³ Maurice Stierl, ‘Black lives are being lost in the Mediterranean – but the world remains silent’ (2020) The Conversation <https://theconversation.com/black-lives-are-being-lost-in-the-mediterranean-but-the-world-remains-silent-141822>.

⁷⁴ Achille Mbembe, ‘Necropolitics’ (2019) Duke University Press pag 38.

⁷⁵ *Id.* at pag 71.

⁷⁶ *Id.* at pag 39.

⁷⁷ *Id.* at pag 38.

⁷⁸ *Ibid.*

⁷⁹ *Id.* at pag 66.

⁸⁰ Tara Brian and Franck Lackzko, ‘Fatal Journeys. Tracking Lives Lost during Migration’ (2010) IOM pag 90 https://publications.iom.int/system/files/pdf/fataljourneys_countingtheuncounted.pdf.

⁸¹ Reece Jones, ‘Violent Borders: Refugees and the Right to Move’ (2016) Verso pag 88.

institutions, agencies, policies, technologies, regulations, rationales, and agreements'.⁸² This neocolonialist era is characterised by a punitive turn,⁸³ led by anti-migrant discourses and a rhetoric of crisis and insecurity to justify the enforcement of its deterrence strategies and walls.⁸⁴ This violent turn against so-called border transgressions goes hand in hand with EUrope's aim to protect its privileges and prevent people's access to opportunities, meeting anyone who dares to trespass with barbed wire, drones, and armed agents, to name a few.⁸⁵ These rapidly growing restrictions on migration have not put an end to border crossings but have made them deadlier.⁸⁶ These necropolitical policies are forcing migrants to take lengthier journeys, layered with several levels of violence, and contributing to an increase of reliability in human smuggling.⁸⁷ As a result, one could argue that the deadly consequences we see arising from the EUropean border regime are the combination of, mainly, the growing restrictions on movement and the increasing securitization of borders.⁸⁸

This securitisation approach thrives on fomenting the idea of insecurity 'to which it claims to be the solution'.⁸⁹ Or in other words, depicting unauthorized migration as a security threat brings legitimacy to violent policies that would otherwise not be considered legitimate.⁹⁰ In the Mediterranean, the securitization approach has achieved a reduction in migrant crossings in the Mediterranean, at the expense of a higher death rate.⁹¹ The truth is, the problem is neither the unauthorised crossing nor the person seeking asylum or a dignified life.⁹² 'Borders. Everything begins with them, and all the paths lead back to them.'⁹³ Borders are not a natural part of this world and bordering practices are the source of all this widespread and systematic violence, not the answer.⁹⁴ In EUrope, and around the world, border securitisation operates as a system that is reproduced through structures, technology and it spreads across

⁸² Maurice Stierl, 'Migrant Resistance in Contemporary Europe' (2020) Routledge pag 8.

⁸³ Bénédicte Michalon, 'Barbed Displacement: Walls to the Disciplined Migrant' in Peter Adey et al. eds.), 'The Handbook of Displacement' (2020) Palgrave Macmillan pag 218.

⁸⁴ Maurice Stierl, 'Migrant Resistance in Contemporary Europe' (2020) Routledge pag 9.

⁸⁵ Reece Jones, 'Violent Borders: Refugees and the Right to Move' (2016) Verso pag 88.

⁸⁶ Vicki Squire and Maurice Stierl, 'Precarious Migrations and Maritime Displacement' in Peter Adey et al. eds.), 'The Handbook of Displacement' (2020) Palgrave Macmillan pag 349.

⁸⁷ *Id.* at pag 350.

⁸⁸ Reece Jones, 'Violent Borders: Refugees and the Right to Move' (2016) Verso pag 88.

⁸⁹ Achille Mbembe, 'Necropolitics' (2019) Duke University Press pag 54.

⁹⁰ Christina Boswell, 'The Securitisation of Migration: A Risky Strategy for European States' (2007) Danish Institute for International Studies.

⁹¹ *Ibid.*

⁹² Achille Mbembe, 'Necropolitics' (2019) Duke University Press pag 99.

⁹³ *Ibid.*

⁹⁴ Reece Jones, 'Violent Borders: Refugees and the Right to Move' (2016) Verso pag 4.

geographies.⁹⁵ These strategies that aim to hunt down, detain, process, separate, and deport the enemy is based on the only goal of ensuring that resources and privileges, such as the right to free movement, are guaranteed to Europeans alone.⁹⁶ These man-made borders and bordering practices create and separate zones of privilege and opportunity from ‘zones of invisibility, exclusion, and death’.⁹⁷ In that way, in a world in which we should all be entitled to the same rights, border violence is ingrained in all structures and reveals itself as unequal power and life chances.⁹⁸ Violent practices such as arrests without charge, deportation, indefinite and arbitrary detention, torture, and killings have become a norm in Europe’s borderlands.⁹⁹ The more militarised and securitised the border is, the more violence it will exert on people on the move.¹⁰⁰

However, the most troubling part of Europe’s border regime, is how it has managed to erase its complicity and leadership in creating that same displacement ‘through colonial conquest, land theft, slavery, capitalist extraction, labor exploitation, and war profiteering’.¹⁰¹ Europe and other states in the Global North are a driving force behind forced displacement while, at the same time, meeting them with violence when they attempt to escape or build a dignified life.¹⁰² A clear example of this can be found in Western Africa. European fishing agreements with countries such as Senegal and Mauritania have devastated the livelihoods of the local fishermen who then are forced to flee to make a living and provide for their families.¹⁰³ Despite these circumstances, only 3 percent of refugees from Africa make it to Europe.¹⁰⁴ In addition, during their journeys, and after reaching Europe, they continue facing violence.¹⁰⁵ Tais, a Kurdish refugee speaking to the BBC eloquently expressed the feeling: ‘we are

⁹⁵ Harsha Walia, 'Undoing Border Imperialism' (2013) AK Press and The Institute for Anarchist Studies pag 51

⁹⁶ Achille Mbembe, 'Necropolitics' (2019) Duke University Press pag 103.

⁹⁷ Harsha Walia, 'Undoing Border Imperialism' (2013) AK Press and The Institute for Anarchist Studies pag 9.

⁹⁸ Reece Jones, 'Violent Borders: Refugees and the Right to Move' (2016) Verso pag 8.

⁹⁹ Harsha Walia, 'Undoing Border Imperialism' (2013) AK Press and The Institute for Anarchist Studies pag 6.

¹⁰⁰ Dawn Paley, 'Violence doesn't spill over borders, militarized borders create violence' (2012) unembedded <https://dawnpaley.tumblr.com/post/23543672055/violence-doesnt-spill-over-borders-militarized>.

¹⁰¹ Harsha Walia, 'Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism' (2021) Haymarket Books pag 122.

¹⁰² Harsha Walia, 'Undoing Border Imperialism' (2013) AK Press and The Institute for Anarchist Studies pag 5.

¹⁰³ Mar Joaniquet and Iboulaye Ndiaye, '*Mi sueño no es ser mantero: soy pescador*' [My dream is not to be a street vendor: I am a fisherman] (2021) Público <https://blogs.publico.es/conmde/2021/02/22/mantero-pesca-senegal/>.

¹⁰⁴ Harsha Walia, 'Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism' (2021) Haymarket Books pag 125.

¹⁰⁵ Mar Joaniquet and Iboulaye Ndiaye, '*Mi sueño no es ser mantero: soy pescador*' [My dream is not to be a street vendor: I am a fisherman] (2021) Público <https://blogs.publico.es/conmde/2021/02/22/mantero-pesca-senegal/>.

between two deaths'.¹⁰⁶ Staying in one's home country is not an option while 'all journeys are rife with debt extortion, forced invisibility, starvation, assault, incarceration, injuries, and the constant threat of death'.¹⁰⁷

Borders have also different meanings depending on who is encountering them. 'They mean different experiences of the law, the civil administration, the police and elementary rights for different individuals and groups of people, not merely in terms of social class, but also along racialized and gendered lines'.¹⁰⁸ The effects of border violence are not gender-neutral nor blind to social categories such as sexuality, class, race, and ethnicity, *inter alia*.¹⁰⁹ These border violence structures are not exclusive to Europe, but are reproduced in the global North, mostly Australia and North America, but also in settler-colonial states such as Israel, and are also being increasingly adopted by states in Latin America, Asia, and Africa.¹¹⁰ The underlying reality is that borders have managed to mask the violence they exert by passing it as ordinary or by hiding it from the public eye.¹¹¹ The intent behind social control, fuelled by its racist colonial belief, understands those practices as a legitimate response to the actions of people on the move.¹¹² Framing migration and migrants under an illegality framework contextualises border deaths as a kind of a 'passive capital punishment' as 'immigrants have been effectively blamed for their own deaths'.¹¹³ The consequence of the emphasis on legality is that migrant deaths do not mobilise any kind of sympathy.¹¹⁴ The greatest way in which we can challenge this framework is to uncover the violence within these border practices that have managed to pass themselves not only as ordinary but as common sense.¹¹⁵ However, demanding the elimination of border practices is not enough, but we must also

¹⁰⁶ Harsha Walia, 'Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism' (2021) Haymarket Books pag 110.

¹⁰⁷ *Ibid.*

¹⁰⁸ Maurice Stierl, 'Migrant Resistance in Contemporary Europe' (2020) Routledge pag 2.

¹⁰⁹ Katerine Brickell and Jessie Speer, 'Gendered and Feminist Approaches to Displacement' in Peter Adey et al. (eds.), 'The Handbook of Displacement' (2020) Palgrave Macmillan pag 132.

¹¹⁰ Harsha Walia, 'Undoing Border Imperialism' (2013) AK Press and The Institute for Anarchist Studies pag 39.

¹¹¹ Bénédicte Michalon, 'Barbed Displacement: Walls to the Disciplined Migrant' in Peter Adey et al. (eds.), 'The Handbook of Displacement' (2020) Palgrave Macmillan pag 223.

¹¹² Harsha Walia, 'Undoing Border Imperialism' (2013) AK Press and The Institute for Anarchist Studies pag 61.

¹¹³ Mary Pat Brady, 'The Homoerotics of Immigration Control' (2008) The Scholar and Feminist Online Issue 6.3

¹¹⁴ *Ibid.*

¹¹⁵ Achille Mbembe, 'Necropolitics' (2019) Duke University Press pag 27.

focus on abolishing the racist social construction of criminalising migration.¹¹⁶ Only then refugees and migrants will be able to fully enjoy the ultimate form of decolonial reparations: their movement.¹¹⁷

BORDER VIOLENCE THROUGH REGIONAL JURISPRUDENCE.

As outlined in the previous chapter, it is the racist and nationalist rhetoric and logic that enable and justify the existence of those practices and systems that dehumanise and exert violence over migrants.¹¹⁸ Securitisation, new technologies and other violent tactics are the tools used by EUrope to enforce those separating lines, hence, contributing to the increase of deaths at EUrope's borders.¹¹⁹ However, as immigration controls surged during the 20th century, so did the recognition of the rights of migrants.¹²⁰ Even if there is no such thing as international migration law, understood as a set of rights and safeguards solely created for people crossing borders, those who do are protected by a series of recognised rights spread in several sources and bodies of law, including human rights law, criminal law, trade law, maritime law, and refugee law.¹²¹ Nonetheless, human rights law is currently seen as the primary source of protection for migrants,¹²² as it is generally applicable irrespective of the nationality and status of the person.¹²³ This branch of law offers migrants a minimum standard of protection in line with national laws.¹²⁴ Key principles and rights enshrined in human rights law include the principle of non-discrimination and equality before the law, the right to leave any country, due process guarantees governing expulsion, and protection against *refoulement*.¹²⁵ Human rights law also applies in the face of loss of life at the borders, as it places the duty on states to identify the dead and to respect the rights of their families.¹²⁶ In a nutshell, human rights law requires equal treatment for everyone, even in treating the

¹¹⁶ Harsha Walia, 'Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism' (2021) Haymarket Books pag 126.

¹¹⁷ *Id.* at pag 122.

¹¹⁸ Reece Jones, 'Violent Borders: Refugees and the Right to Move' (2016) Verso pag 167.

¹¹⁹ *Ibid.*

¹²⁰ Vincent Chetail, 'International Migration Law' (2019) Oxford University Press page 59.

¹²¹ Margarita Martínez Escamilla, '*Fronteras sin derechos. Las "devoluciones en caliente"* [Borders without rights. Pushbacks] in Ana López-Sala y Dirk Godenau (eds.), '*Estados de contención, estados de detención*' [States of containment, states of detention] (2017) Anthropos pag 56.

¹²² Vincent Chetail, 'International Migration Law' (2019) Oxford University Press page 59.

¹²³ *Id.* at pag 71.

¹²⁴ *Id.* at pag 65.

¹²⁵ *Id.* at pag 71.

¹²⁶ City, University London, International Organization for Migration and The University of York, "'Like a part of a puzzle which is missing": The impact on families of a relative missing in migration across the Mediterranean' (2016) City, University of London Institutional Repository pag 8.

deaths of non-citizens and citizens alike, by preventing them from happening as well as investigating the causes.¹²⁷

In addition, to counter State violence, migrants can bring complaints to several UN treaty bodies and to special procedures established by the Human Rights Council.¹²⁸ Regionally, in Europe, the ECtHR draws judgements that are binding on all Contracting States and it regularly sanctions human rights violations committed against migrants.¹²⁹ However, it has not been sufficient as, in practice, migrants are still deliberately being excluded from protection and violations of fundamental rights such as the right to life, prohibitions of *refoulement*, and inhuman and degrading treatment, *inter alia*, continue to be reported daily.¹³⁰ This is the consequence of the devaluation in the *de jure* and *de facto* protection of migrants, as Europe keeps finding and fabricating legal and structural loopholes to continue deterring the arrival of migrants to the continent.¹³¹ Accessing justice and establishing accountability for human rights violations in Europe is proving to be, more often than not, practically impossible.¹³² Specifically for border violence cases, some violations may appear more mundane and escape effective forms of accountability, even if their cumulative impact may be monumental.¹³³ To illustrate some of the above-mentioned issues and tensions in the framework and applicability of human rights law, the next sections will explore how human rights law is failing to provide accountability for border-related violence in Europe.

a. ‘Contactless control’: Removing jurisdictional triggers.

Since the 1980s, European states have been developing more sophisticated forms of deterrence and control over migration, including a turn into forms of extraterritorial or

¹²⁷ City, University London, International Organization for Migration and The University of York, "Like a part of a puzzle which is missing": The impact on families of a relative missing in migration across the Mediterranean' (2016) City, University of London Institutional Repository pag 8.

¹²⁸ Vincent Chetail, 'International Migration Law' (2019) Oxford University Press page 73.

¹²⁹ *Ibid.*

¹³⁰ Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311.

¹³¹ Margarita Martínez Escamilla, 'Fronteras sin derechos. Las "devoluciones en caliente" [Borders without rights. Pushbacks] in Ana López-Sala y Dirk Godenau (eds.), 'Estados de contención, estados de detención' [States of containment, states of detention] (2017) Anthropos pag 57.

¹³² Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311.

¹³³ *Ibid.*

transnational control.¹³⁴ These policies are put in place to invisibilise the struggle of migrants crossing borders as well as avoiding triggering any human rights obligations for actions outside of the territory.¹³⁵ The externalisation of migration controls aims, *inter alia*, at preventing migrants from entering the legal jurisdiction of their destination countries or regions.¹³⁶ These actions can include unilateral, bilateral, or multilateral agreements with third countries as well as engagement with private actors regarding preventive policies, provision of support or assistance in migration management practices outside of the territory of the country or region of destination.¹³⁷ For example, Europe has put its efforts into cooperation and agreements with key transit countries such as Turkey, Libya, and Morocco.¹³⁸ Regarding migration at sea, all of Europe is unified in expanding its capabilities of externalising maritime interdiction.¹³⁹

This issue is key since, in substance, the notion of jurisdiction is a threshold criterion to determine the applicability of the European Convention on Human Rights (ECHR).¹⁴⁰ In other words, it is through the exercise of jurisdiction that one can determine the responsibility of a state regarding human rights violations.¹⁴¹ In 2012, the ECtHR held in *Hirsi Jamaa v. Italy* that the interdiction by State officials of a boat carrying migrants on the high seas triggers jurisdiction.¹⁴² That means that those interdicted, enjoy the same procedural protections afforded by the ECHR as those who are in the territory of the State.¹⁴³ In this judgement, celebrated by some as ‘ground-breaking’,¹⁴⁴ the ECtHR expanded the scope of human rights law provisions to extraterritorial situations, as long as the case shows evidence

¹³⁴ Thomas Gammeltoft-Hansen, 'Extraterritorial human rights obligations in regard to refugees and migrants' in Gibney, Krajewski and Vandenhole (eds.), 'Routledge Handbook on Extraterritorial Human Rights Obligations' (2021) Routledge [Forthcoming] pag 13-14.

¹³⁵ *Ibid.*

¹³⁶ Bill Frelick, Ian M. Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) *Journal on Migration and Human Security* Vol 4 Num 4 pag 193.

¹³⁷ *Ibid.*

¹³⁸ *Id.* at pag 206.

¹³⁹ Harsha Walia, 'Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism' (2021) Haymarket Books pag 127.

¹⁴⁰ Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model"' (2020) 21 *German Law Journal* 385.

¹⁴¹ *Ibid.*

¹⁴² Moria Paz, 'Legal reconstruction of walls: *N.D. & N.T. v. Spain*, 2017, 2020' (2020) *New York University Journal of Legislation and Public Policy* Vol. 22 Issue 3 pp. 693-724 pag 703.

¹⁴³ *Ibid.*

¹⁴⁴ Marie-Bénédicte Dembour, 'Interception-at-sea: Illegal as currently practiced – *Hirsi and Others v. Italy*' (2012) *Strasbourg Observers* <https://strasbourgobservers.com/2012/03/01/interception-at-sea-illegal-as-currently-practiced-hirsi-and-others-v-italy/>.

of ‘effective control’ - even if the threshold for its applicability has not been defined per se.¹⁴⁵ In Europe, that meant that, to receive protection, one must first come close to that state and, secondly, come under the state’s effective control.¹⁴⁶

Looking to eclipse the precedent set in *Hirsi*,¹⁴⁷ European states have started to shift enforcement responsibilities to third countries and/or private actors.¹⁴⁸ Violeta Moreno-Lax and Mariagiulia Giuffré referred to these practices as ‘contactless control’, or engaging with transit countries to prevent migrants from accessing or reaching their destination countries.¹⁴⁹ As explained by Moreno-Lax and Guiffré, ‘persuasion, via political and financial promises of fund transfers, visa facilitation, or accession talks, has been mobilised on a grand scale by the EU Member States to ensure the commitment in exchange by key transit countries to the containment of potential asylum seekers within their jurisdictional domain. [...] They are being financed for ‘pull-backs’, detention camps, and pre-emptive rescue at sea, which transform (pre-)entry controls (by destination countries) into exit vetting (by countries of departure) that negates the right to leave and forecloses *refoulement* responsibilities.’¹⁵⁰

To perfectly describe this situation, philosopher Étienne Balibar wrote ‘borders are vacillating [...] they are no longer at the border’.¹⁵¹ State’s jurisdiction is becoming increasingly diffuse while surveillance technology, naval assets, and financing strategies are being deployed to deter migrants from leaving transit and/or home countries.¹⁵² Since a Memorandum of Understanding (MoU) was signed between Libya and Italy in 2019, the so-called Libyan Coast Guard (LCG) has been mandated by Rome to intercept migrant boats in international waters and returning them, without any procedural guarantees, to Libya, a war-

¹⁴⁵ Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) 21 German Law Journal 385.

¹⁴⁶ Moria Paz, 'Legal reconstruction of walls: N.D. & N.T. v. Spain, 2017, 2020' (2020) New York University Journal of Legislation and Public Policy Vol. 22 Issue 3 pp. 693-724 pag 703.

¹⁴⁷ Thomas Gammeltoft-Hansen, 'Extraterritorial human rights obligations in regard to refugees and migrants' in Gibney, Krajewski and Vandenhole (eds.), 'Routledge Handbook on Extraterritorial Human Rights Obligations' (2021) Routledge [Forthcoming] pag 4-5.

¹⁴⁸ *Id.* at pag 8.

¹⁴⁹ Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ in S. Juss (ed.), ‘Research Handbook on International Refugee Law’ (2019) Edward Elgar Publishing pag 3.

¹⁵⁰ *Ibid.*

¹⁵¹ Étienne Balibar, 'The borders of Europe' in Pheng Cheah and Bruce Robbins (eds.), 'Cosmopolitics: Thinking and Feeling beyond the Nation' (1998) University of Minnesota Press pag. 217-218.

¹⁵² Harsha Walia, 'Undoing Border Imperialism' (2013) AK Press and The Institute for Anarchist Studies pag 51.

torn country that is not a party of the 1951 Refugee Convention.¹⁵³ Not only that, in 2019, EUrope ceased all sea rescue operations in the Mediterranean and instead, is focused on coordinating with the so-called LCG to prevent departures and arrivals to EUrope.¹⁵⁴ In the Eastern Mediterranean, Greece and the EU delegated to the Turkish Coast Guard the responsibility of preventing arrivals, even if that meant crossing to Greek waters to intercept migrant vessels.¹⁵⁵ These current schemes are creating a legal loophole as responsibility arising from violations committed by partner States has yet to be applied as a matter of human rights case law.¹⁵⁶ In Itamar Mann's words, 'border enforcement has evolved into a global plot to circumvent basic human rights rules, and create "legal black holes" (to use the term of the day for Guantánamo)'.¹⁵⁷

The direct consequence of EUrope's externalisation of borders, as explained by Maurice Stierl, is the 'growing diversification of border-related forms of violence, experienced by subjects situated throughout and way beyond the territories commonly believed to compose EUrope, which often means that they are hidden from sight, seemingly never of Europe'.¹⁵⁸ This view does very little to challenge the established notion of EUrope as the stronghold of 'democracy, liberty, and universal rights'.¹⁵⁹ Historically, however, this has been a dominant strategy. States have consistently attempted to confine and hide their violence in some faraway place, such as 'the plantation under slavery, the colony, the camp, the compound during apartheid, the ghetto or, [...] the prison', creating what Mbembe referred to as

¹⁵³ Stefanie Grant, 'Irregular migration and frontier deaths: Acknowledging a right to identity' in Marie-Benedicte Dembour and Tobias Kelly (eds.), 'Are Human Rights for Migrants?' (2011) Routledge pag 54.

¹⁵⁴ Sara Creta, Bashar Deeb, Klaas van Dijken, Emmanuel Freudenthal, Steffen Lüdke and Maximilian Popp, 'How Frontex Helps Haul Migrants Back To Libyan Torture Camps' (2021) SPIEGEL International <https://www.spiegel.de/international/europe/libya-how-frontex-helps-haul-migrants-back-to-libyan-torture-camps-a-d62c3960-ece2-499b-8a3f-1ede2eafb83>.

¹⁵⁵ See Statewatch, 'Pullback to Turkey organised by Greek official on German boat as part of Frontex operation' (2020) Statewatch <https://www.statewatch.org/news/2020/november/pullback-to-turkey-organised-by-greek-official-on-german-boat-as-part-of-frontex-operation/>, SAROBMED, 'Refugee Rescue: Pull back by Turkish Coast Guard in Hellenic waters' (2018) Search And Rescue Observatory of the Mediterranean <https://sarobmed.org/incident/refugee-rescue-pull-back-by-turkish-coast-guard-in-hellenic-waters/>, SAROBMED, 'Refugee Rescue: Pullback by Turkish Coast Guard' (2018) Search And Rescue Observatory of the Mediterranean <https://sarobmed.org/incident/refugee-rescue-pullback-by-turkish-coast-guard/>.

¹⁵⁶ Thomas Gammeltoft-Hansen, 'Extraterritorial human rights obligations in regard to refugees and migrants' in Gibney, Krajewski and Vandenhoe (eds.), 'Routledge Handbook on Extraterritorial Human Rights Obligations' (2021) Routledge [Forthcoming] pag 8.

¹⁵⁷ Itamar Mann, 'The New Impunity: Border Violence as Crime' (2020). University of Pennsylvania Journal of International Law, Vol. 42, Forthcoming pag 26.

¹⁵⁸ Maurice Stierl, 'Migrant Resistance in Contemporary Europe' (2020) Routledge pag 9.

¹⁵⁹ Ida Danewid, 'White innocence in the Black Mediterranean: hospitality and the erasure of history' (2017) Third World Quarterly.

‘domination without responsibility’.¹⁶⁰ On the other hand, currently, the ECtHR has only managed to make border control in the Mediterranean more expensive for Europe, as, after every new judgement, European states have adapted and continued developing strategies to overcome any hope for accountability.¹⁶¹

b. Constructing walls and illegality.

Beyond Europe’s efforts to externalise responsibilities and deter migrants from attempting the journey, European states are also systematically expelling migrants from their territories, without any regard for the prohibition of *refoulement*.¹⁶² Together with delegating responsibilities to prevent unauthorised entries, states are increasingly favouring building walls.¹⁶³ In October 2017, the ECtHR made public a widely-celebrated judgement for the case of *N.D. & N.T. v Spain*.¹⁶⁴ The case was filed by N.D. from Mali and N.T. from Ivory Coast, who, after reaching Spain by jumping over and crossing the fence that separates Morocco from the Spanish enclave of Melilla, were apprehended and returned to Morocco by officers of the Spanish *Guardia Civil* (Civil Guard), without any procedural guarantees.¹⁶⁵ As it did with *Hirsi*, the ECtHR held that N.D. and N.T. were under Spanish jurisdiction as the police had exercised ‘continuous and exclusive control’ over them.¹⁶⁶ As such, the Chamber found that their expulsion had been collective and unlawful.¹⁶⁷ In the 2017 judgement, the ECtHR’s Third Section concluded that Spain had violated Article 4 Protocol 4, prohibition of collective expulsions, and Article 13, right to an effective remedy.¹⁶⁸ This judgement was widely celebrated as it created a key precedent in the enforcement of ‘the right to have rights’ of migrants at Europe’s borders.¹⁶⁹ However, shortly after the judgement, Spain asked for the

¹⁶⁰ Achille Mbembe, ‘Necropolitics’ (2019) Duke University Press pag 34.

¹⁶¹ Thomas Gammeltoft-Hansen, ‘Extraterritorial human rights obligations in regard to refugees and migrants’ in Gibney, Krajewski and Vandenhole (eds.), ‘Routledge Handbook on Extraterritorial Human Rights Obligations’ (2021) Routledge [Forthcoming] pag 16.

¹⁶² *Ibid.*

¹⁶³ Moria Paz, ‘Legal reconstruction of walls: *N.D. & N.T. v. Spain*, 2017, 2020’ (2020) New York University Journal of Legislation and Public Policy Vol. 22 Issue 3 pp. 693-724 pag 706.

¹⁶⁴ Annick Pijnenburg, ‘Is *N.D. and N.T. v. Spain* the new *Hirsi*?’ (2017) EJIL: Talk! Blog of the European Journal of International Law.

¹⁶⁵ Case of *N.D. and N.T. v. Spain* (Judgement) ECtHR 8675/15 and 8697/15 (13 February 2020).

¹⁶⁶ Moria Paz, ‘Legal reconstruction of walls: *N.D. & N.T. v. Spain*, 2017, 2020’ (2020) New York University Journal of Legislation and Public Policy Vol. 22 Issue 3 pp. 693-724 pag 709.

¹⁶⁷ *Ibid.*

¹⁶⁸ Case of *N.D. and N.T. v. Spain* (Judgement) ECtHR 8675/15 and 8697/15 (13 February 2020).

¹⁶⁹ European Center for Constitutional and Human Rights (ECCHR) e.V., ‘The Spanish-Moroccan land border in Melilla – A lawless zone of automatic expulsions’ (2020) ECCHR.

case to be referred to the ECtHR's Grand Chamber and, in February 2020, the judgement was overruled.¹⁷⁰

In the 2020 judgement, the ECtHR dismissed the complaint and it argued that the violation of Article 4 Protocol 4 did not apply in this situation because the claimants had willingly put themselves in danger while entering Spain 'illegally' by climbing the fence, instead of using other legal means available to them to lodge asylum claims.¹⁷¹ The applicants had explained how black persons can't lodge asylum requests in the offices habilitated in Morocco by Spain due to racial profiling, however, the Court found that the various reports supporting that claim with evidence were not conclusive.¹⁷² The 2020 Grand Chamber judgement sparked a backlash as, to start with, the impossibility for black persons to not only request asylum in Spain from Morocco but access the border crossing in Melilla is a widely-reported issue.¹⁷³ Not only that, but the fact that the applicants did indeed have the possibility to claim asylum through other means does not dismiss Spain's obligation to examine their individual claims once under their jurisdiction.¹⁷⁴ This judgement created a dangerous precedent as it removed all protections from collective expulsions under the ECHR unless migrants can prove there was no other alternative to the unauthorised crossing.¹⁷⁵ In contrast, in the case of *M.N. and Others v Belgium*, the Grand Chamber refused that applying for a visa for a European country, in this case, Belgium, from a third country did not trigger human rights obligations, by declaring the case inadmissible.¹⁷⁶ Therefore, in two separate judgements in the same year, the Court contradicted itself by saying, on the one hand, that migrants should attempt legal pathways to enter, while, on the other hand, ruling that submitting applications in an embassy does not trigger jurisdiction.

¹⁷⁰ Stavros Papageorgopoulos, '*N.D. and N.T. v. Spain: do hot returns require cold decision-making?*' (2020) European Database of Asylum Law (EDAL).

¹⁷¹ Thomas Gammeltoft-Hansen, 'Extraterritorial human rights obligations in regard to refugees and migrants' in Gibney, Krajewski and Vandenhole (eds.), 'Routledge Handbook on Extraterritorial Human Rights Obligations' (2021) Routledge [Forthcoming] pag 11.

¹⁷² Hanaa Hakiki, '*N.D. and N.T. v. Spain: defining Strasbourg's position on push backs at land borders?*' (2020) Strasbourg Observers.

¹⁷³ *Ibid.*

¹⁷⁴ Maximilian Pichl and Dana Schmalz, "'Unlawful' may not mean rightless. The shocking ECtHR Grand Chamber judgement in case N.D. and N.T.'" (2020) Verfassungsblog on Matters Constitutional.

¹⁷⁵ Giulia Raimondo, '*N.D. and N.T. v Spain: A Slippery Slope for the Protection of Irregular Migrants*' (2020) Border Criminologies blog.

¹⁷⁶ Thomas Gammeltoft-Hansen, 'Extraterritorial human rights obligations in regard to refugees and migrants' in Gibney, Krajewski and Vandenhole (eds.), 'Routledge Handbook on Extraterritorial Human Rights Obligations' (2021) Routledge [Forthcoming] pag 11.

As outlined in *N.D. and N.T.*, the ECtHR and other similar courts accept borders as the ‘definitive jurisdictional line of territorial nature’, which results in access becoming legally consequential.¹⁷⁷ At the same time, scholar Moria Paz predicts that, following this judgement, human rights courts and quasi-judicial bodies will ‘make the allocation of protection dependent on an individual’s ability to penetrate such a fortified barrier’.¹⁷⁸ In this way, European states will continue building walls, possibly in locations that cannot be predicted at this moment, and in a way that becomes more efficient and impenetrable.¹⁷⁹ In the words of Paz, ‘what will then be left of the universality of human rights law will be dependent on one’s location vis-à-vis a fence. Fences are erected by politicians but in *N.D. & N.T.*, it was the ECtHR that assigned these fences their normative essence’.¹⁸⁰ Not only that, but it will make access to human rights protections more exclusionist by nature as only individuals who have the physical ability to scale over set walls or fences will be afforded protection.¹⁸¹ This consequence betrays the universalistic nature and commitment of human rights as, in practice, it is using physical ability to determine entry rights.¹⁸²

As demonstrated, this recent trend in European case law shows an increasingly restrictive turn when dealing with borders and migrants.¹⁸³ At the same time, another worrying trend arising from this judgement is the fact that the Grand Chamber uses the same politically constructed language of ‘illegality’ and ‘unlawfulness’ when discussing the border crossing in *N.D. and N.T.*, which resulted in the deprivation of their rights.¹⁸⁴ This is also a direct consequence of the necropolitics approach. Europe, as well as the Grand Chamber, have denied the legal personhood of migrants and have resigned border crossings as an illegal act against the State’s territorial integrity, further marginalising their status to an object to ‘exploit and dispose’.¹⁸⁵ The judgement in *N.D. and N.T.* upheld Europe’s narrative, being that ‘the violent crossing no longer represents a damage done to the unauthorised immigrant

¹⁷⁷ Moria Paz, 'Legal reconstruction of walls: *N.D. & N.T. v. Spain*, 2017, 2020' (2020) *New York University Journal of Legislation and Public Policy* Vol. 22 Issue 3 pp. 693-724 pag 719.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Id.* at pag 713.

¹⁸⁰ *Ibid.*

¹⁸¹ *Id.* at pag 720.

¹⁸² *Id.* at pag 720-721.

¹⁸³ Thomas Gammeltoft-Hansen, 'Extraterritorial human rights obligations in regard to refugees and migrants' in Gibney, Krajewski and Vandenhole (eds.), 'Routledge Handbook on Extraterritorial Human Rights Obligations' (2021) Routledge [Forthcoming] pag 11.

¹⁸⁴ Maximilian Pichl and Dana Schmalz, "'Unlawful' may not mean rightless. The shocking ECtHR Grand Chamber judgement in case *N.D. and N.T.*' (2020) *Verfassungsblog on Matters Constitutional*

¹⁸⁵ Andrés Fabian Henao Castro, 'From the “Bio” to the “Necro”': The Human at the Border' in S.E. Wilmer and Audronė Žukauskaitė (eds.), 'Resisting Biopolitics' (2015) Routledge pag 244.

from the global organization of political membership in a state-centric system under the conditions imposed by neoliberal globalisation and militarised borderlands, but a damage done by the unauthorised immigrant to the territorial integrity of the sovereign state'.¹⁸⁶ While the human rights framework promised to end any exclusion by attributing personhood to all human beings, linking the protection of human rights to territorial borders creates a hierarchy among human beings, stripping all personhood from those who cross borders unauthorised.¹⁸⁷

Mbembe already warned about how sovereignty places racialised populations beyond the protections of the law and justified any violent actions towards them.¹⁸⁸ 'In denying the legal personality of a person, its humanity is also being denied. The basic founding principle of human rights law is being neglected: namely that humans, simply because they are humans (not refugees), are right holders'.¹⁸⁹ As political theorist Ayten Gündoğdu explains, 'legal interpretation involves not only the imposition of violence on others but also the justification of violence that has already occurred or about to occur'.¹⁹⁰ Through legal interpretation and political strategies, unauthorised migrants have been constructed as illegal.¹⁹¹ Thus, 'criminality is, after the territorial crossing, a sort of existential crime, coloring all actions of unauthorised immigrants for their hostile state of arrival'.¹⁹² In the words of E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, 'international law as a whole still most faithfully reflects the political theory of liberal nationalists, who defend the sovereign right to exclude as existential, making limited exceptions for the admission and gradual inclusion of political strangers who are otherwise at risk of persecution or extreme human rights violations.'¹⁹³

c. Race thinking and the suspension of rights.

¹⁸⁶ Andrés Fabian Henao Castro, 'From the "Bio" to the "Necro": The Human at the Border' in S.E. Wilmer and Audronė Žukauskaitė (eds.), 'Resisting Biopolitics' (2015) Routledge pag 244.

¹⁸⁷ Ayten Gündoğdu, 'Ayten Gündoğdu's keynote talk "border deaths and the crisis of human rights" (2020) University of Helsinki <https://www2.helsinki.fi/en/unitube/video/3492661a-b637-4a22-8945-a5fe061653e1>.

¹⁸⁸ *Ibid.*

¹⁸⁹ Pat Rubio Bertran, 'How International Human Rights Law Produces Rightless Humans' (2020) International Review of Human Rights Law Issue 6 pag 10.

¹⁹⁰ Ayten Gündoğdu, 'Ayten Gündoğdu's keynote talk "border deaths and the crisis of human rights" (2020) University of Helsinki <https://www2.helsinki.fi/en/unitube/video/3492661a-b637-4a22-8945-a5fe061653e1>.

¹⁹¹ Andrés Fabian Henao Castro, 'From the "Bio" to the "Necro": The Human at the Border' in S.E. Wilmer and Audronė Žukauskaitė (eds.), 'Resisting Biopolitics' (2015) Routledge pag 244.

¹⁹² *Ibid.*

¹⁹³ E. Tendayi Achiume, 'Migration as Decolonization' (2019) Stanford Law Review Vol 71 pag 8.

This is a dangerous turn as race thinking is becoming embedded in law in a way that ‘the suspension of rights appears not as violence but as the law itself’.¹⁹⁴ Last year, in a UN Human Rights Council ‘urgent debate’ on racism in the United States, a representative from the Central African Republic, on behalf of the Group of African States, made a comment that is applicable in this context as well: ‘numerous recommendations have been published over the years by various treaty bodies [...] for states, that is, all states without any distinction, to take appropriate measures to meet the concerns about brutality and excessive use of force by law enforcement personnel, as well as numerous allegations of the poor treatment inflicted on people of African descent [...] It is unacceptable that we must still negotiate for the equality of rights of certain people seventy-two years after the adoption of the Universal Declaration of Human Rights, which proclaims that all people are born equal in rights and dignity.’¹⁹⁵ Historically, as noted by Achiume, ‘one of the persisting legacies of slavery and colonialism remains the unequal application of the law to descendants of historically enslaved and colonized peoples.’¹⁹⁶ In this context, even if it is hard to predict the general direction of human rights courts and bodies only through these cases at the ECtHR, case law showcases how migrants were not in consideration when creating this human rights scheme, and how the ECHR was not meant to sustain their rights.¹⁹⁷ As a result, in the specific case of the ECtHR, the court is actively contributing to the perpetuation of widespread and systematic violations by member states.¹⁹⁸

ENFORCED DISAPPEARANCES IN THE MEDITERRANEAN.

While human rights law and the ECtHR have proven to be ineffective in dealing with border-related violence, there are other ways to close the accountability gap.¹⁹⁹ Several scholars have been attempting to establish responsibility for violations arising from border violence through, *inter alia*, public procurement law, the law of the sea, tort law, and constitutional

¹⁹⁴ Sherene H. Razack, “‘Your Client has a Profile:’ Race and National Security in Canada After 9/11” (2007) Emerald Insight pag 9 [https://www.emerald.com/insight/content/doi/10.1016/S1059-4337\(06\)40001-6/full/html](https://www.emerald.com/insight/content/doi/10.1016/S1059-4337(06)40001-6/full/html).

¹⁹⁵ Lawrence Hill-Cawthorne, “‘Racism will not pass’...” (2020) EJIL:Talk! <https://www.ejiltalk.org/racism-will-not-pass/>.

¹⁹⁶ UNGA ‘Report of the Special Rapporteur on Contemporary Forms of Racism’ 74th session (2019) UN Doc A/74/321 para 7.

¹⁹⁷ Thomas Gammeltoft-Hansen, ‘Extraterritorial human rights obligations in regard to refugees and migrants’ in Gibney, Krajewski and Vandenhole (eds.), ‘Routledge Handbook on Extraterritorial Human Rights Obligations’ (2021) Routledge [Forthcoming] pag 11-12.

¹⁹⁸ Charles Heller and Bernd Kasperek, ‘Towards a European pact with migrants, Part Two’ (2020) OpenDemocracy <https://www.opendemocracy.net/en/can-europe-make-it/towards-pact-migrants-part-two/>.

¹⁹⁹ Thomas Gammeltoft-Hansen, ‘Extraterritorial human rights obligations in regard to refugees and migrants’ in Gibney, Krajewski and Vandenhole (eds.), ‘Routledge Handbook on Extraterritorial Human Rights Obligations’ (2021) Routledge [Forthcoming] pag 18.

law.²⁰⁰ One of the widely-explored avenues is the turn to international criminal law, as scholars and lawyers have worked to frame several aspects of migration control and border violence as crimes against humanity, including the Australian offshore detention system, the detention conditions in Greece as well as the EU's complicity with Libya.²⁰¹ This framing suggests these are not simple violations, but they are 'the deepest form of violence in the world' and international criminal law might be specially designed to deal with the issue of accountability.²⁰²

Despite the systematic migrant deaths and disappearances in the Mediterranean, Europe does not attribute importance to this loss of life.²⁰³ In this context, it is key to differentiate between recorded deaths, whose bodies have been found, and those who have disappeared.²⁰⁴ Some victims are identified but the majority remain in morgues, have been buried in nameless tombs, or are lost in the Mediterranean graveyard.²⁰⁵ In 2018, according to the Spanish collective *Caminando Fronteras* (Walking Borders), almost 77 percent of all documented victims recorded in the Western Mediterranean route are missing.²⁰⁶ Among other things, the absence of the bodies and identification of the victims invisibilises the violence exerted that lead to the person's disappearance, while profoundly impacting the lives of their families and communities.²⁰⁷ Against this backdrop, this chapter will attempt to frame migrant disappearances in the Mediterranean sea as enforced disappearances as described in Article 7 of the Rome Statute.

a. The Crime of Enforced Disappearances.

Nobody just disappears or vanishes, and families and communities should not be kept in a limbo of not knowing how their relatives met death.²⁰⁸ In the Mediterranean context,

²⁰⁰ Thomas Gammeltoft-Hansen, 'Extraterritorial human rights obligations in regard to refugees and migrants' in Gibney, Krajewski and Vandenhole (eds.), 'Routledge Handbook on Extraterritorial Human Rights Obligations' (2021) Routledge [Forthcoming] pag 18.

²⁰¹ Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311.

²⁰² *Ibid.*

²⁰³ Sara Lodi, 'The Mediterranean Sea and the Right to Know about the Fate of Missing Relatives: Access to Justice for Families of Missing Migrants' (2016) SOAS Law Journal 3(1) 103-131 pag 103.

²⁰⁴ Caminando Fronteras, 'Vida en la necrofrontera' (2020) Caminando Fronteras pag 45 <https://caminandofronteras.org/wp-content/uploads/2020/03/vida-en-la-necrofrontera-interactivo.pdf>.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ International Center for Transitional Justice, 'The Disappeared: The Right to Justice and the Right to Truth' (2011) ICTJ <https://www.ictj.org/news/disappeared-right-justice-and-right-truth>.

EUropean policies are pushing migrants outside of the protection of the law while making it extremely difficult for their families and communities to locate them.²⁰⁹ Referring to border deaths as ‘enforced disappearances’ has already been used by families of those missing and advocacy groups to hold states accountable for migrant deaths and disappearances.²¹⁰ To prevent enforced disappearances and ensure that the families and communities receive justice, the United Nations (UN) adopted the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED), which entered into force in 2010.²¹¹ Before this, the international community had attempted to combat this issue with instruments such as the Declaration on the Protection of all Persons from Enforced Disappearance (1992), the Inter-American Convention on Forced Disappearance of Persons (1994), and the Rome Statute of the International Criminal Court (1998).²¹² However, the ICPPED provided a universally legally binding instrument that prohibits enforced disappearances and its implementation is monitored by the Committee on Enforced Disappearances (CED).²¹³ Article 4 of the ICPPED states that ‘Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law’,²¹⁴ still, the impunity for enforced disappearances worldwide has not been eradicated.²¹⁵ While victims worldwide have been struggling against these practices since the early 1970s, enforced disappearances were only first codified in international criminal law terms in 1998.²¹⁶ Then, after the adoption of the Rome Statute, the establishment of individual liability in the context of enforced disappearances was celebrated as an ‘important step in the prevention and punishment of this crime.’²¹⁷

²⁰⁹ Ayten Gündoğdu, ‘Ayten Gündoğdu’s keynote talk “border deaths and the crisis of human rights” (2020) University of Helsinki <https://www2.helsinki.fi/en/unitube/video/3492661a-b637-4a22-8945-a5fe061653e1>

²¹⁰ *Ibid.*

²¹¹ Amnesty International, 'Enforced Disappearances' Amnesty International <https://www.amnesty.org/en/what-we-do/disappearances/>.

²¹² Dalia Vitkauskaitė-Meurice and Justinas Žilinskas, 'The Concept of Enforced Disappearances in International Law' (2010) *Jurisprudencija/Jurisprudence* Vol 120 n.2 pag 198.

²¹³ Amnesty International, 'Enforced Disappearances' Amnesty International <https://www.amnesty.org/en/what-we-do/disappearances/>.

²¹⁴ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 177 UNGA 61 (ICPPED) art 4.

²¹⁵ Claudio M. Grossman, 'Disappearances' (2008) *Max Planck Encyclopedias of International Law* para 17.

²¹⁶ Irena Giorgou, 'State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute' (2013) *Journal of International Criminal Justice* Vol 11 Issue 5.

²¹⁷ Claudio M. Grossman, 'Disappearances' (2008) *Max Planck Encyclopedias of International Law* para 17.

The Rome Statute, adopted in 1998 and came into force in 2002, outlined the crime of enforced disappearance in Article 7, paragraph 1(i) and defined the crime in paragraph 2(i) as:

‘the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time’.²¹⁸

Categorised as a crime against humanity, the crime of enforced disappearance must be committed, like any other crime under that category, ‘during a widespread or systematic attack, which is directed against the civilian population, and represents a part of a state or organizational policy’.²¹⁹ On the other hand, it does not require a link between the perpetration of this crime and an armed conflict.²²⁰ By these standards, ‘attack’ is defined as ‘an overall conduct [...] which includes all of the prohibited actions occurred to commit a determined crime’.²²¹ At the same time, under the Rome Statute, the crime of enforced disappearance consists of two types of conduct: the deprivation of liberty and withholding of information.²²² As provided in the Elements of Crimes of the ICC, a person might be liable if they deprived someone of liberty and refused to acknowledge it, or if they refused to disclose information on the fate of those missing.²²³ However, while the perpetrator does not need to fulfil both types of conduct, all of them need to be aware of the context, of the fact that they are acting as part of a ‘widespread or systematic directed attack against a civilian population.’²²⁴ Moreover, if the victims are kept from the protection of the law for a prolonged period, it would qualify as kidnapping.²²⁵

²¹⁸ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 7.

²¹⁹ Gabriel Webber Ziero, ‘The Crime of Enforced Disappearance under the Rome Statute: The Possibility for Prosecution of the Crimes Committed During the Brazilian Dictatorship’ (2015) *Sistema Penal & Violência*, Porto Alegre, Vol. 7, No. 1, p. 162-177, pag 166.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² Dalia Vitkauskaitė-Meurice and Justinas Žilinskas, ‘The Concept of Enforced Disappearances in International Law’ (2010) *Jurisprudencija/Jurisprudence* Vol 120 n.2 pag 205.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

To qualify as a crime against humanity, three main elements must be fulfilled: being part of a state policy, the attacks must be directed against a civilian population and they must be of a widespread or systematic nature.²²⁶ By those elements, a single enforced disappearance can be considered a crime against humanity, as long as it is in the context of a widespread or systematic attack against a civilian population.²²⁷ Enforced disappearances do not need to be carried out on a widespread or systematic basis.²²⁸ Regarding the last element, the Rome Statute went beyond the state-oriented concept of enforced disappearance, as it added the term ‘political organisation’, going beyond the ‘organisational policy’ term used in international human rights law definitions of the crime.²²⁹ That means that the widespread or systematic nature of the attack against a civilian population is not an accident, but it occurs as a result of an ‘organized plan based in common directives (policy) for its continuous perpetration’.²³⁰ In addition, the configuration of this crime under the Rome Statute included criminal liability for non-state actors as perpetrators.²³¹ The use of the term ‘policy’ in the description is thus related to the capacity that an organisation or actor should have to ‘commit, promote or encourage an attack against the civilian population to perpetrate crimes against humanity’.²³² What remains non-negotiable is the *mens rea* element of the crime, or, the fact that the perpetrator(s) should be aware of the result of their actions in the context of an attack against a civilian population.²³³

In 2019, the CED highlighted in a report the increased risk of the enforced disappearances of migrants.²³⁴ The report highlighted the many obstacles that the families and communities face to access justice, including the consequences of holding an undocumented status, language barriers, being far away from where the disappearance occurred, or ‘state authorities evading

²²⁶ Dalia Vitkauskaitė-Meurice and Justinas Žilinskas, 'The Concept of Enforced Disappearances in International Law' (2010) *Jurisprudencija/Jurisprudence* Vol 120 n.2 pag 205.

²²⁷ Amnesty International, 'No impunity for enforced disappearances' (2011) Amnesty International pag 8 <https://www.amnesty.org/download/Documents/32000/ior510062011en.pdf>.

²²⁸ Dalia Vitkauskaitė-Meurice and Justinas Žilinskas, 'The Concept of Enforced Disappearances in International Law' (2010) *Jurisprudencija/Jurisprudence* Vol 120 n.2 pag 205.

²²⁹ *Id.* at pag 207.

²³⁰ Gabriel Webber Ziero, 'The Crime of Enforced Disappearance under the Rome Statute: The Possibility for Prosecution of the Crimes Committed During the Brazilian Dictatorship' (2015) *Sistema Penal & Violência*, Porto Alegre, Vol. 7, No. 1, p. 162-177, pag 167.

²³¹ *Ibid.*

²³² *Id.* at pag 168.

²³³ *Ibid.*

²³⁴ Grażyna Baranowska, 'Disappeared Migrants and Refugees: The relevance of the International Convention on Enforced Disappearance in their search and protection' (2020) German Institute for Human Rights pag 5.

their responsibilities'.²³⁵ In addition, the United Nations High Commissioner for Refugees (UNHCR) referred to the deprivation of liberty of migrants as 'one of the most opaque areas of public administration',²³⁶ where major human rights violations occur.²³⁷ This deprivation of liberty of migrants can take many forms, as the victims are not always deprived of liberty in official places, but can be held in unofficial sites.²³⁸ Not only that, migrants can also qualify for enforced disappearances once they are released, for example when authorities deprive them of their liberty and disappear after they are abandoned in the desert or at sea.²³⁹ This deprivation of liberty, as the first element of the crime of enforced disappearances is defined in the Rome Statute as the result of an 'arrest, detention or abduction'.²⁴⁰ However, the doctrine as well as the ICPPED, *inter alia*, have recognised that 'the deprivation of liberty, which leads to enforced disappearance can take place in any form' and it does not matter if the act of depriving someone of its liberty was lawful.²⁴¹ The only requirement is an 'objective nexus between the deprivation of freedom and the refusal to give information about the victim'.²⁴²

That same year, in 2019, the UN General Assembly adopted a resolution calling on States to adhere to their obligation of protecting the human rights of migrants as well as, *inter alia*, to cooperate to prevent their deaths and injuries, to identify those found dead or missing and to improve and facilitate communication with the victim's families and communities.²⁴³ So far, however, the international community has failed to prevent the disappearance of migrants, even if both the causes and consequences of those tragedies have been widely documented worldwide, from the United States/Mexico border to Europe's borderlands.²⁴⁴ Even if the

²³⁵ Grażyna Baranowska, 'Disappeared Migrants and Refugees: The relevance of the International Convention on Enforced Disappearance in their search and protection' (2020) German Institute for Human Rights pag 5.

²³⁶ UN High Commissioner for Refugees (UNHCR), Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), 'Monitoring Immigration Detention: Practical Manual' (2014) UNHCR pag 21.

²³⁷ Grażyna Baranowska, 'Disappeared Migrants and Refugees: The relevance of the International Convention on Enforced Disappearance in their search and protection' (2020) German Institute for Human Rights pag 14.

²³⁸ *Id.* at pag 15.

²³⁹ *Ibid.*

²⁴⁰ Gabriel Webber Ziero, 'The Crime of Enforced Disappearance under the Rome Statute: The Possibility for Prosecution of the Crimes Committed During the Brazilian Dictatorship' (2015) Sistema Penal & Violência, Porto Alegre, Vol. 7, No. 1, p. 162-177, pag 167.

²⁴¹ *Ibid.*

²⁴² *Id.* at pag 167.

²⁴³ Grażyna Baranowska, 'Disappeared Migrants and Refugees: The relevance of the International Convention on Enforced Disappearance in their search and protection' (2020) German Institute for Human Rights pag 5.

²⁴⁴ Bernard Duhaime and Andréanne Thibault, 'Protection of migrants from enforced disappearance: A human rights perspective' (2017) International Review of the Red Cross pag 570.

context and how forced disappearances occurred in Argentina and other Latin American countries in the 1970s and the disappearances happening along Europe's borders are different, the main similarity is that those tragedies are 'preventable, predictable, and violent.'²⁴⁵ Similar to what migrants attempting to reach Europe face today, the enforced disappearances in Argentina were used as a tool targeting not only their victims and families but the whole community.²⁴⁶ That culture of terror was built to control massive populations through the production of fear.²⁴⁷ As researcher Robin Reineke explains, 'regimes built on terror count on the fear and submission of those who perceive themselves as not so different from the dead and disappeared'.²⁴⁸ Both the silence and the widespread impunity surrounding the deaths and disappearances in the Mediterranean and other borderlands are part of this same regime of terror.²⁴⁹ That experience of fear is not limited to migrants themselves but it extends beyond geography to their communities.²⁵⁰ Mbembe explains how, through the spread and fabrication of terror, the sovereign delineates the difference between the citizens versus the disposable ones, those who commit 'crimes'.²⁵¹

Borderisation practices that can be considered enforced disappearances involve, *inter alia*, state officials taking migrants to remote places and releasing them without ensuring their safety, as well as so-called 'push-backs' or violations of the principle of *non-refoulement*.²⁵² Beyond the direct actions of state officials, enforced disappearances are more often than not perpetrated with the direct or indirect support, consent, and/or knowledge of State agents.²⁵³ Deprivations of liberty carried out by private actors can be attributed to the State if government officials have authorised those actions.²⁵⁴ In addition, according to Bernard Duhaime and Andréanne Thibault, 'systematic situations of impunity in cases of missing migrants, owing to omissions by the State or the lack or inadequacy of investigations or legal

²⁴⁵ Robin Reineke, 'Los desaparecidos de la frontera (The disappeared on the border)' in Raquel Rubio-Goldsmith, et al. (eds.) 'Migrant Deaths in the Arizona Desert: La Vida No Vale Nada' (2016) University of Arizona Press pag 134.

²⁴⁶ *Id.* at pag 145.

²⁴⁷ *Ibid.*

²⁴⁸ Robin Reineke, 'Los desaparecidos de la frontera (The disappeared on the border)' in Raquel Rubio-Goldsmith, et al. (eds.) 'Migrant Deaths in the Arizona Desert: La Vida No Vale Nada' (2016) University of Arizona Press pag 145.

²⁴⁹ *Id.* at pag 145-146.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² Bernard Duhaime and Andréanne Thibault, 'Protection of migrants from enforced disappearance: A human rights perspective' (2017) International Review of the Red Cross pag 582.

²⁵³ *Id.* at pag 584.

²⁵⁴ *Id.* at pag 586.

proceedings, could also be considered a form of implicit authorization or acquiescence by the State within the meaning of the Declaration and Convention. [...] Additionally, the failure to conduct investigations and adopt appropriate measures to identify the remains of migrants found in common graves or at sea, for example, contributes to impunity and in itself constitutes an obstacle to tracing migrants who are still missing'.²⁵⁵ As outlined, the death and disappearances along the borderlands are part of a State-led strategy to install fear and gain control over a specific civil population.²⁵⁶ Disappearances have been used by many regimes of terror, as a tool to silence and intimidate those who revolted against the oppressor.²⁵⁷ By that, the state assigns, in this case to migrants, a status that is way below personhood.²⁵⁸ According to Reineke, 'in the border context, the physical disappearance of migrants as they attempt to travel through the desert borderlands is a continuation of the disappearance of personhood [...]'.²⁵⁹

a. The Mediterranean graveyard.

On the Italian island of Lampedusa, there is a memorial dedicated to the thousands of migrants who have died or gone missing at sea, while trying to reach Italy.²⁶⁰ The memorial, in the shape of a door facing the sea, does not list any of the identities of those who died, because they are unknown.²⁶¹ This memorial is a representation of both, the dimension of the daily tragedy of dead and missing migrants at sea, as well as the non-existent attempt to identify or account for the thousands of persons that have died or gone missing in the Mediterranean graveyard.²⁶² In this section, I will outline some of how Europe's strategies to 'deter, capture, and contain' migrants have turned the Mediterranean Sea into what Stierl refers to as a 'carceral seascape', where migrants disappear and die.²⁶³ This showcases how

²⁵⁵ Bernard Duhaime and Andréanne Thibault, 'Protection of migrants from enforced disappearance: A human rights perspective' (2017) *International Review of the Red Cross* pag 586.

²⁵⁶ Robin Reineke, 'Los desaparecidos de la frontera (The disappeared on the border)' in Raquel Rubio-Goldsmith, et al. (eds.) 'Migrant Deaths in the Arizona Desert: La Vida No Vale Nada' (2016) University of Arizona Press pag 147.

²⁵⁷ *Ibid.*

²⁵⁸ Simon Robins & Iosif Kovras, 'Missing Migrants: Deaths at Sea and Unidentified Bodies on Lesbos' in H Donnan, M Hurd & C Leutloff-Grandits (eds), 'Migrating borders and moving times: Temporality and the crossing of borders in Europe' (2017) Manchester University Press pag 160.

²⁵⁹ Robin Reineke, 'Los desaparecidos de la frontera (The disappeared on the border)' in Raquel Rubio-Goldsmith, et al. (eds.) 'Migrant Deaths in the Arizona Desert: La Vida No Vale Nada' (2016) University of Arizona Press pag 147.

²⁶⁰ Stefanie Grant, 'Irregular migration and frontier deaths: Acknowledging a right to identity' in Marie-Benedicte Dembour and Tobias Kelly (eds.), 'Are Human Rights for Migrants?' (2011) Routledge pag 48.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ Maurice Stierl, 'The Mediterranean as a Carceral Seascape' (2021) *Political Geography* [Forthcoming] pag 2.

migrant death and disappearances are not just consequences of the journey, the currents, waves, or the wind, but ‘a complex and often conflictual interplay between a range of actors, situated in often confusing and disputed sovereign and jurisdictional contexts’.²⁶⁴

As discussed in the previous chapter, for many years, EUrope has attempted to diffuse its jurisdiction regarding migration control to avoid triggering any legal responsibilities.²⁶⁵ This strategy, known as ‘jurisdiction shopping’, has externalised EUrope’s responsibilities to other States, mediums (such as the Sea), and non-state actors.²⁶⁶ From 2014-2015, for example, EUrope withdrew most coastguard services in the Central Mediterranean route while shifting responsibilities to LGC.²⁶⁷ The impact was outstanding as, only in 2019, the death rate in the Mediterranean rose from 2 to 14 percent that year.²⁶⁸ However, trusting the death counts of official sources is hard as many shipwrecks are invisibilized in the Mediterranean graveyard.²⁶⁹ Even if the ECtHR ruled in *Hirsi* that migrants intercepted at sea cannot be brought back to Libya because of the ongoing reports of torture and death, that is exactly what EUrope agreed on with the North African country.²⁷⁰ Not only that, but recent reports have shown how Frontex, the European Border and Coast Guard Agency, has been playing an active role in assisting the Libyans with interceptions.²⁷¹ According to the research, Frontex planes have flown over migrant boats on over 20 occasions since the start of 2020 and then proceeded to alert the LCG, which sometimes crossed over the Maltese Search and Rescue Zone, under EUropean jurisdiction.²⁷² The same research alerted that over 90 migrants died or went missing during those interceptions, as this system led by EUrope has

²⁶⁴ Maurice Stierl, 'The Mediterranean as a Carceral Seascape' (2021) Political Geography [Forthcoming] pag 2.

²⁶⁵ Ana López-Sala and Dirk Godenau, ‘*El estudio del control migratorio en España*’ [The study of migration control in Spain] in Ana López-Sala y Dirk Godenau (coord.), ‘*Estados de contención, estados de detención*’ [States of containment, states of detention] (2017) Anthropos pag 7.

²⁶⁶ *Ibid.*

²⁶⁷ Maurice Stierl, 'The Mediterranean as a Carceral Seascape' (2021) Political Geography pag 4 [Forthcoming].

²⁶⁸ Daniel Howden, Apostolis Fotiadis and Antony Loewenstein, 'Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over' (2019) The Guardian

<https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu>.

²⁶⁹ Deanna Dadusc and Maurice Stierl, 'Call it what it is, a massacre at Europe’s doorstep' (2020) Al Jazeera <https://www.aljazeera.com/opinions/2020/11/21/call-it-what-it-is-a-massacre-at-europes-doorstep>.

²⁷⁰ Sara Creta, Bashar Deeb, Klaas van Dijken, Emmanuel Freudenthal, Steffen Lüdke and Maximilian Popp, 'How Frontex Helps Haul Migrants Back To Libyan Torture Camps' (2021) SPIEGEL International <https://www.spiegel.de/international/europe/libya-how-frontex-helps-haul-migrants-back-to-libyan-torture-camps-a-d62c3960-ece2-499b-8a3f-1ede2eaefb83>.

²⁷¹ *Ibid.*

²⁷² *Ibid.*

caused significant delays in responding to distress cases at sea.²⁷³ The result of these policies in the Central Mediterranean route has translated into an unaccounted number of daily tragedies at sea.²⁷⁴ Seeking to put an end to the mass deaths and disappearances in the Mediterranean, civil search and rescue NGOs, commercial vessels, and fishermen have taken it upon themselves to conduct rescues.²⁷⁵ However, in most distress cases in which merchant and civil search and rescue vessels could have reached the migrant boats quicker, they were not alerted by Frontex.²⁷⁶ While NGO ships are trained and have rescue capacity, most merchant vessel crews lack adequate training and equipment.²⁷⁷ The fact that private vessels have had to attempt to close the gap for state rescue has led to some of the largest shipwrecks in recent history.²⁷⁸ On 18 April 2015, 1,000 persons died while a merchant's vessel assisted a distress case, as told by some of the 28 survivors of the tragedy.²⁷⁹ At the same, while diluting its responsibility for saving lives, EUrope started a campaign to criminalise NGOs that have attempted to assume its responsibility of assisting distress at sea.²⁸⁰ A similar attempt is being carried out in the Western Mediterranean route. Spain has been slowly trying to dismantle *Salvamento Marítimo*, the country's public search and rescue institution, by reducing staff, approving budget cuts, and transferring the responsibility of coordinating search and rescue operations to the *Guardia Civil*, the Spanish police force organised along military lines.²⁸¹ EUrope's tactics in the Central Mediterranean have proven to be effective

²⁷³ Sara Creta, Bashar Deeb, Klaas van Dijken, Emmanuel Freudenthal, Steffen Lüdke and Maximilian Popp, 'How Frontex Helps Haul Migrants Back To Libyan Torture Camps' (2021) SPIEGEL International <https://www.spiegel.de/international/europe/libya-how-frontex-helps-haul-migrants-back-to-libyan-torture-camps-a-d62c3960-ece2-499b-8a3f-1ede2eaeafb83>.

²⁷⁴ Caminando Fronteras, 'Vida en la necrofrontera' (2020) Caminando Fronteras pag 35

<https://caminandofronteras.org/wp-content/uploads/2020/03/vida-en-la-necrofrontera-interactivo.pdf>.

²⁷⁵ Maurice Stierl, 'The Mediterranean as a Carceral Seascape' (2021) Political Geography [Forthcoming] pag 4.

²⁷⁶ Sara Creta, Bashar Deeb, Klaas van Dijken, Emmanuel Freudenthal, Steffen Lüdke and Maximilian Popp, 'How Frontex Helps Haul Migrants Back To Libyan Torture Camps' (2021) SPIEGEL International <https://www.spiegel.de/international/europe/libya-how-frontex-helps-haul-migrants-back-to-libyan-torture-camps-a-d62c3960-ece2-499b-8a3f-1ede2eaeafb83>

²⁷⁷ Maurice Stierl, 'The Mediterranean as a Carceral Seascape' (2021) Political Geography [Forthcoming] pag 5.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ Caminando Fronteras, 'Vida en la necrofrontera' (2020) Caminando Fronteras pag 35

<https://caminandofronteras.org/wp-content/uploads/2020/03/vida-en-la-necrofrontera-interactivo.pdf>.

²⁸¹ Natalia G. Vargas, 'Un tripulante para salvar más de 50 vidas: recortes en Salvamento Marítimo en pleno repunte de llegada de pateras a Canarias' ['One crew member to save more than 50 lives: cuts in Maritime Rescue amid an increase in migrant arrivals by sea to the Canary Islands] (2020) elDiario.es

https://www.eldiario.es/canariasahora/365-dias-de-migraciones/tripulante-recortes-salvamento-maritimo-canarias_132_1218051.html and Irene Ruano Blanco, '¿Hacia el desmantelamiento de Salvamento Marítimo?' [Towards the dismantling of Maritime Rescue?] (2018) El Salto <https://www.elsaltodiario.com/refugiados/hacia-el-desmantelamiento-de-salvamento-maritimo>.

since deaths and disappearances continue happening daily but completely off the public radar and any official system of justice or accountability.’²⁸²

While a lot of attention has been given to the way State forces kill, through direct violence, less is being discussed about states of terror based on the State’s power to let die or to make disappear.²⁸³ This is exactly the case for enforced disappearances in the Mediterranean sea, where a state of terror, in which all forms of violence flourish, is being created and maintained.²⁸⁴ According to Reineke, ‘what has been constructed at the border is a space of terror that would-be migrants must pass through in a grotesque rite of passage.’²⁸⁵ This necropolitical aim is at the core of EUrope’s border management.²⁸⁶ Then, it was not surprising when EUrope, through Frontex, decided to not only leave unmanned what is considered to be the deadliest border in the world but to replace its ships with airborne operations and surveillance drones, which live-stream images to their Warsaw headquarters.²⁸⁷ These data-gathering and surveillance operations suggest that EUrope is fully aware of most migrant boats leaving the coast of Africa.²⁸⁸ At the same time, not only is there no official data being made public, but EUropean states are not intervening to rescue.²⁸⁹ The Mediterranean graveyard not only hides human bodies but also invisibilises EUropean violence.²⁹⁰ It is EUrope who holds the monopoly on ‘what is visible, by whom and under what conditions’.²⁹¹ In this context, survivor testimonies are of key importance, since EUrope is turning the Mediterranean into a ‘black box’, and they are the only ones able to account for

²⁸² Caminando Fronteras, 'Vida en la necrofrontera' (2020) Caminando Fronteras pag 35

<https://caminandofronteras.org/wp-content/uploads/2020/03/vida-en-la-necrofrontera-interactivo.pdf>.

²⁸³ Robin Reineke, 'Los desaparecidos de la frontera (The disappeared on the border)' in Raquel Rubio-Goldsmith, et al. (eds.) 'Migrant Deaths in the Arizona Desert: La Vida No Vale Nada' (2016) University of Arizona Press pag 140.

²⁸⁴ *Id.* at pag 141.

²⁸⁵ *Ibid.*

²⁸⁶ Caminando Fronteras, 'Vida en la necrofrontera' (2020) Caminando Fronteras pag 32

<https://caminandofronteras.org/wp-content/uploads/2020/03/vida-en-la-necrofrontera-interactivo.pdf>.

²⁸⁷ Daniel Howden, Apostolis Fotiadis and Antony Loewenstein, 'Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over' (2019) The Guardian

<https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu>.

²⁸⁸ Reece Jones, 'Violent Borders: Refugees and the Right to Move' (2016) Verso pag 24.

²⁸⁹ *Ibid.*

²⁹⁰ Deanna Dadusc and Maurice Stierl, 'Call it what it is, a massacre at Europe’s doorstep' (2020) Al Jazeera

<https://www.aljazeera.com/opinions/2020/11/21/call-it-what-it-is-a-massacre-at-europes-doorstep>.

²⁹¹ Deanna Dadusc and Chiara Denaro, 'Criminalising Solidarity: Silencing Critical Voices and Erasing the Critical Gaze on Border Violence' (2021) Border Criminologies <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/04/criminalising>.

the events that occurred in the hands of State actors.²⁹² What survivor testimonies continuously indicate is an increasing trend of non-assistance.²⁹³ For example, Stierl shares the following survivor testimony from the Central Mediterranean:

‘Running out of fuel, it became clear to those on board that their journey would not continue. While drifting precariously, the distressed noticed aerial activities. As K. reported: “We saw an Italian plane, the flag was Italian. We saw them 12-13 times. Then the plane left.”. The migrant group was detected by the Maridive 601, a 76-meter-long vessel sailing under the flag of Belize that services offshore oil platforms and is owned by the Egyptian company Maridive Group. According to survivors, it took a long time until a rescue operation was initiated. Only when several people went overboard and swam to the Maridive were also the remaining people rescued, on 31 May 2019.’²⁹⁴

According to Stierl, ‘the withdrawal of EUropean (supra-)state actors from SAR operations and a shift toward surveillance from the sky has further turned the maritime expanse off Libya’s coast into a carceral seascape, with practices of migrant capture and offshore containment multiplying’.²⁹⁵ For example, last year, on April 16, the Maltese authorities orchestrated a secret operation to push back to Libya a group of 63 people after they had been stranded for several days with an engine failure.²⁹⁶ Some of them had already drowned.²⁹⁷ European authorities had been informed about this distress case and a Frontex plane flew over them, but only a few days later the Maltese led a fleet of private fishing trawlers to push them back.²⁹⁸ During that journey, three other persons died, according to the survivors, leaving the number of fatalities to 12.²⁹⁹ In this way, EUrope has created in the Mediterranean a legally ambiguous space, a medium away from the protection of the law and

²⁹² Charles Heller and Lorenzo Pezzani, ‘Intervention: Forensic Oceanography - Tracing Violence Within and Against the Mediterranean Frontier’s Aesthetic Regime’ in Peter Adey et al. (eds.), ‘The Handbook of Displacement’ (2020) Palgrave Macmillan pag 454.

²⁹³ *Ibid.*

²⁹⁴ Maurice Stierl, ‘The Mediterranean as a Carceral Seascape’ (2021) Political Geography [Forthcoming] pag 9.

²⁹⁵ *Ibid.*

²⁹⁶ AlarmPhone, ‘Twelve Deaths and a Secret Push-Back to Libya’ (2020) AlarmPhone <https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/>.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

public scrutiny, similar to that in detention sites and carceral facilities.³⁰⁰ As a result, border disappearances do not receive the same acknowledgement to other mass disappearances, leaving families and communities with no means of even ‘social reparations’.³⁰¹ Migrant disappearances in the Mediterranean experience at least two different layers of structural violence: their disappearances and the refusal of authorities to disclose any details or even account for their deaths.³⁰² This lack of accountability delegitimises the pain and lived experiences of the victim’s families and communities.³⁰³

Still, even if the link between EUrope’s migration policies and the death and disappearance of migrants at sea is well documented, the identification of those who go missing or the retrieved bodies is hindered by the lack of official EUropean search and rescue response and policies.³⁰⁴ The information on shipwrecks in the Mediterranean is scarce and inconsistent, as EUrope has not set up an official system for collecting and publishing accurate data on the tragedy in the Mediterranean.³⁰⁵ However, there is a legal responsibility to carry out investigations in an attempt to identify the dead and inform their families.³⁰⁶ Most families of missing migrants experience what has been defined as an ‘ambiguous loss’, in which the ‘loved one is physically absent but psychologically present.’³⁰⁷ When a family does not hear from a relative that has left for weeks to years, they are left to presume the worst.³⁰⁸ ‘The bodies of those who perish are never returned. They disappear below the waves, disintegrate into the sand, or end up interred in distant cemeteries beneath a plaque bearing no name. Without a body, without definitive answers, there is nothing to make the deaths concrete. As a result, the tangible benefits of migration continue to outweigh the abstract risks for those who want to leave’.³⁰⁹ At the same time, even migrant disappearances are susceptible to

³⁰⁰ Maurice Stierl, 'The Mediterranean as a Carceral Seascape' (2021) *Political Geography* [Forthcoming] pag 13.

³⁰¹ Rebecca M. Crocker, Robin C. Reineke & María Elena Ramos Tovar, 'Ambiguous Loss and Embodied Grief Related to Mexican Migrant Disappearances' (2021) *Medical Anthropology*.

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ Stefanie Grant, 'Irregular migration and frontier deaths: Acknowledging a right to identity' in Marie-Benedicte Dembour and Tobias Kelly (eds.), 'Are Human Rights for Migrants?' (2011) Routledge pag 49.

³⁰⁶ Sara Lodi, 'The Mediterranean Sea and the Right to Know about the Fate of Missing Relatives: Access to Justice for Families of Missing Migrants' (2016) *SOAS Law Journal* 3(1) 103-131 pag 110.

³⁰⁷ Rebecca M. Crocker, Robin C. Reineke and María Elena Ramos Tovar, 'Ambiguous Loss and Embodied Grief Related to Mexican Migrant Disappearances' (2021) *Medical Anthropology*.

³⁰⁸ Ottavia Spaggiari, 'When a migrant drowns, a whole community feels the loss' (2021) *The New Humanitarian* <https://www.thenewhumanitarian.org/news-feature/2021/3/23/When-a-migrant-drowns-a-whole-community-feels-the-loss>.

³⁰⁹ *Ibid.*

gendered connotations. Women who are missing tend to be considered by their families as dead, even if their death has not been confirmed, in contrast to what happens when male missing migrants.³¹⁰ That means that efforts to identify or find them are almost non-existent in comparison to when a man is missing, all consequences of social transgressions.³¹¹ Europe then has not only failed to account for the number of dead and missing migrants, but it also refuses to do its best to identify the bodies.³¹² Europe has ‘denied the one thing that could humanise them: states have abandoned responsibility for either the life or death of the victim’.³¹³ Such tactics not only contribute to failing to count these deaths and disappearances as crimes but even to count them as deaths.³¹⁴ Thus, the border is created and maintained as an instrument to deny both, the death of the person as well as a dignified and decent goodbye for their families and communities.³¹⁵

INTERNATIONAL CRIMINAL LAW AS A REMEDY FOR BORDER VIOLENCE.

International criminal law (henceforth ‘criminal law’) is the legal branch that offers accountability for gross human rights violations.³¹⁶ At the heart of this project lie three main aims: ending impunity by punishing perpetrators, consoling victims, and responding to an abstract ‘conscience of mankind’ by punishing those seen as ‘enemies of mankind’.³¹⁷ Due to the widespread impunity for violence against migrants, scholars and practitioners alike have turned to criminal law as a potential way to defend migrants from border violence, by also extending responsibility to individuals beyond the State, such as other non-state actors and private corporations.³¹⁸ Framing border violence as an international crime can present an opportunity to document the ‘systematic and structural effects of transnational migration

³¹⁰ Marta Sánchez Dionis and Gabriella Sanchez, 'The Search for Their Missing Loved Ones: Migrant Communities in Southern Spain' (2020) IOM Blog <https://weblog.iom.int/search-their-missing-loved-ones-migrant-communities-southern-spain>.

³¹¹ *Ibid.*

³¹² Simon Robins & Iosif Kovras, 'Missing Migrants: Deaths at Sea and Unidentified Bodies on Lesbos' in H. Donnan, M. Hurd & C. Leutloff-Grandits (eds), 'Migrating borders and moving times: Temporality and the crossing of borders in Europe' (2017) Manchester University Press pag 161.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Id.* at pag 171.

³¹⁶ Itamar Mann, 'The new impunity: Border violence as a crime' (2020) University of Pennsylvania Journal of International Law Volume 42 pag 2.

³¹⁷ Gerry Simpson, 'The conscience of civilisation and its discontents' in Phillippp Kastner (ed.), 'International Criminal Law in Context' (2018) Routledge pag 11-12.

³¹⁸ Itamar Mann, 'The new impunity: Border violence as a crime' (2020) University of Pennsylvania Journal of International Law Volume 42 pag 9.

control'.³¹⁹ However, criminal law seems to be split between its pretensions to end impunity and its ability to do so.³²⁰

a. Benefits.

Criminal law was consolidated based on a need to hold perpetrators of the most serious crimes accountable for their actions.³²¹ The establishment of the ICC came with promises of convicting perpetrators, absolving the innocent, enabling specific and general deterrence, honoring the dead, alleviating the suffering of victims and survivors, and preserving collective memory, *inter alia*.³²² Because of the seriousness and high degree of selectivity of cases, the Prosecutor of the ICC can shape narratives about accountability and justice by linking a specific situation or conduct with a serious crime, while identifying potential perpetrators and victims.³²³ Not only that, but labelling conducts as international crimes can demonstrate the illegitimacy of a government's actions because of the weight of its application as 'the most serious crimes of concern to the international community as a whole'.³²⁴ While it is true that criminal law has historically been applied to crimes committed in armed conflict or instability, many have tried to associate this criminal labelling with the current democratic state's practices in times of peace.³²⁵ However, in the context in discussion, as these crimes are committed as part of larger structures, as part of a 'state policy',³²⁶ holding individuals accountable for their violations can help shift the state of impunity while also shifting the inherently violent institutional culture of border agents and other actors involved in the enforcement of border policies.³²⁷ The individual responsibility characteristic of criminal law can, therefore, encourage State agents to be more attuned to the

³¹⁹ Thomas Gammeltoft-Hansen, 'Extraterritorial human rights obligations in regard to refugees and migrants' in Gibney, Krajewski and Vandenhoe (eds.), 'Routledge Handbook on Extraterritorial Human Rights Obligations' (2021) Routledge [Forthcoming] pag 18.

³²⁰ Gerry Simpson, 'Atrocity, law, humanity: punishing human rights violators' in Conor Gearty and Costas Douzinas (eds.), 'Human Rights Law' (2012) Cambridge University Press pag 128.

³²¹ Gabriel Webber Ziero, 'The Crime of Enforced Disappearance under the Rome Statute: The Possibility for Prosecution of the Crimes Committed During the Brazilian Dictatorship' (2015) Sistema Penal & Violência, Porto Alegre, Vol. 7, No. 1, p. 162-177, pag 174-175.

³²² José Enrique Alvarez, 'Mythic Courts' (2020) iCourts Working Paper Series No. 214 pag 7.

³²³ Natalie Hodgson, 'International criminal law and civil society resistance to offshore detention' (2021) Australian Journal of Human Rights pag 5.

³²⁴ *Id.* at pag 7.

³²⁵ *Id.* at pag 8.

³²⁶ Frédéric Mégret, 'The subjects of international criminal law' in Phillipp Kastner (ed.), 'International Criminal Law in Context' (2018) Routledge pag 38.

³²⁷ Gabriel Webber Ziero, 'The Crime of Enforced Disappearance under the Rome Statute: The Possibility for Prosecution of the Crimes Committed During the Brazilian Dictatorship' (2015) Sistema Penal & Violência, Porto Alegre, Vol. 7, No. 1, p. 162-177, pag 176.

consequences of their actions even if operating without larger State structures.³²⁸ Individual criminal responsibility can help make obvious the specific responsibility of all individuals working for States, against their attempts to deny their blame.³²⁹ As Frédéric Mégret explains, ‘obedience to state laws and orders, simply being an agent of the state or even having the state endorse one’s acts are not defences for the individual subject’.³³⁰

In the context of migration and border violence, the turn to criminal law has also intended to shed light on the different non-state actors at play in enforcing this system, including for-profit corporations.³³¹ Past submissions and communications to the ICC prosecutor relating crimes against humanity and migration policies have started to use criminal law alongside tort law, for example.³³² As shown through extensive research, border deaths and disappearances are part of the industry of movement control, tied to the security and war industries.³³³ In these borderlands, migrant bodies become goods.³³⁴ The collaboration of State actors, governments, and for-profit organisations has created a whole new market in the enforcement of border violence.³³⁵ Under the Rome Statute, company directors, executives, and employees could be prosecuted, making for-profit industry workers responsible for international crimes.³³⁶ The enlistment of private actors as part of migration control is not only characteristic of modern-day migration management attempts, but it has grown to perform and be responsible for many of the aspects of these strategies, including operating offshore detention centres and manufacturing surveillance technology, *inter alia*.³³⁷

³²⁸ Frédéric Mégret, ‘The subjects of international criminal law’ in Phillipp Kastner (ed.), ‘International Criminal Law in Context’ (2018) Routledge pag 36.

³²⁹ *Id.* at pag 35.

³³⁰ *Id.* at pag 37.

³³¹ Itamar Mann, ‘The new impunity: Border violence as a crime’ (2020) University of Pennsylvania Journal of International Law Volume 42 pag 41-42.

³³² *Ibid.*

³³³ Caminando Fronteras, ‘Vida en la necrofrontera’ (2020) Caminando Fronteras pag 34
<https://caminandofronteras.org/wp-content/uploads/2020/03/vida-en-la-necrofrontera-interactivo.pdf>.

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ Natalie Hodgson, ‘International criminal law and civil society resistance to offshore detention’ (2021) Australian Journal of Human Rights pag 11.

³³⁷ Thomas Gammeltoft-Hansen, ‘Extraterritorial human rights obligations in regard to refugees and migrants’ in Gibney, Krajewski and Vandenhole (eds.), ‘Routledge Handbook on Extraterritorial Human Rights Obligations’ (2021) Routledge [Forthcoming] pag 6.

Framing border violence to fit criminal law's definitions can manage to shift the criminality rhetoric of migration to bordering practices.³³⁸ Civil society has, for a while, attempted to engage in these kinds of exercises to engage in strategic resistance to border violence.³³⁹ At the same time, while this dissertation has focused on the role of criminal law in the case of enforced disappearances, one thing I have learned during this research has been that the strategic application of this strand of law needs to be accompanied by other legal and non-legal strategies.³⁴⁰ To fight impunity for border violence in a holistic way, and holding both state and individuals accountable for their violations, the complementary role of the ICC can be a powerful tool, as it can allow us to engage with other relevant areas of law, such as international human rights law or even private law.³⁴¹ In other words, the need to address such a structural issue can benefit from criminal law, not in isolation, but accompanied by other programs, setting up a pluralist legal strategy.³⁴²

a. Limitations

While the benefits of using criminal law to fight impunity for border violence are many, the prosecution by the ICC in cases of atrocity is low.³⁴³ At the same time, the ICC's focus on instances of exceptional mass violence, excluding those that are less spectacular or more 'routine harms', can frustrate the legal responses to border crimes committed in the Global North.³⁴⁴ Strategic litigation can also be dangerous as what is criminalised is as important as what is not criminalised. If the Prosecutor decided that a situation is not sufficiently grave to be declared admissible, that decision can have great consequences, such as damaging the victims' confidence.³⁴⁵ Moreover, the remit of the ICC is limited as it depends on the cooperation of states, its response is retroactive and its deterrence power might be elusive.³⁴⁶ At the same time, the UN Security Council has the right to veto and can request, under

³³⁸ Natalie Hodgson, 'International criminal law and civil society resistance to offshore detention' (2021) *Australian Journal of Human Rights* pag 14.

³³⁹ *Ibid.*

³⁴⁰ *Id.* at pag 4.

³⁴¹ Gabriel Webber Ziero, 'The Crime of Enforced Disappearance under the Rome Statute: The Possibility for Prosecution of the Crimes Committed During the Brazilian Dictatorship' (2015) *Sistema Penal & Violência*, Porto Alegre, Vol. 7, No. 1, p. 162-177, pag 176.

³⁴² Itamar Mann, 'The new impunity: Border violence as a crime' (2020) *University of Pennsylvania Journal of International Law* Volume 42 pag 41-42.

³⁴³ Mark A. Drumbl, "'And where the offence is, let the great axe fall'" in Phillip Kastner (ed.), 'International Criminal Law in Context' (2018) Routledge pag 315.

³⁴⁴ Natalie Hodgson, 'International criminal law and civil society resistance to offshore detention' (2021) *Australian Journal of Human Rights* pag 13.

³⁴⁵ *Id.* at pag 6.

³⁴⁶ Gerd Oberleitner, 'Does enforcement matter?' in Conor Gearty and Costas Douzinas (eds.), 'Human Rights Law' (2012) Cambridge University Press pag 262.

Article 16 of the Rome Statute, that the Court refrain from an investigation or from prosecuting a crime for a year, renewable.³⁴⁷

There are many criticisms towards the ICC. For example, how lengthy and costly is trials are, as only five trials have been completed until now.³⁴⁸ Moreover, since its inception, the ICC has mostly been concerned with Africa.³⁴⁹ The ICC has, so far, indicted 39 individuals, all of them African, while failing to address ‘the forms of economic culpability that surrounded the violence being adjudicated’.³⁵⁰ A former minister from The Gambia, referred to the court as an ‘International Caucasian Court for the persecution and humiliation of people of color’.³⁵¹ Beyond his allegations, many critical scholars have also denounced these racial biases, referring to it as ‘a function of the Court’s role as an institutional vessel to control and maintain the political and economic interests of Western states’.³⁵² These statements showcase yet another communication regarding the exceptionalism reserved for countries in the Global North for grave violations in the form of ‘quotidian brutality’ towards Black people.³⁵³ International law is known for the role it has played in maintaining systems of racial domination and imperialism, in that sense, justice can only be achieved through a decolonial project, ‘envisioning new legal principles capable of achieving reparations’.³⁵⁴ As such, the international law system needs to be mobilised in a way that brings us closer to a solution to systemic racial injustice, not further from the goal.³⁵⁵ A system that shields the Global North from accountability is not just an obstacle to racial justice, but a system that ‘embodies and perpetuates structural racism.’³⁵⁶ Against this backdrop, there is no way of knowing if the threshold set by the ICC will be crossed in the future, but, in the meantime,

³⁴⁷ Raphaëlle Nollez-Goldbach, ‘Crimes against humanity’ in Phillipp Kastner (ed.), ‘International Criminal Law in Context’ (2018) Routledge pag 106.

³⁴⁸ Christian M. De Vos, ‘The International Criminal Court’ in Phillipp Kastner (ed.), ‘International Criminal Law in Context’ (2018) Routledge pag 253.

³⁴⁹ *Ibid.*

³⁵⁰ Kamari Maxine Clarke, ‘Rethinking liberal legality through the African Court of Justice and Human Rights’ in Phillipp Kastner (ed.), ‘International Criminal Law in Context’ (2018) Routledge pag 175

³⁵¹ Christian M. De Vos, ‘The International Criminal Court’ in Phillipp Kastner (ed.), ‘International Criminal Law in Context’ (2018) Routledge pag 254.

³⁵² *Ibid.*

³⁵³ E. Tendayi Achiume, ‘Black Lives Matter and the UN Human Rights System: Reflections on the Human Rights Council Urgent Debate’ (2020) EJIL:Talk! <https://www.ejiltalk.org/black-lives-matter-and-the-un-human-rights-system-reflections-on-the-human-rights-council-urgent-debate/>.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

the current state of affairs suggests that border violence will continue to harm migrants around the world.³⁵⁷

CONCLUSION

The Mediterranean Sea is a complex space, in which a variety of State and non-state actors operate and monitor it.³⁵⁸ While the logic of deterrence and regaining control over migrant mobilities has created this carceral seascape in the Mediterranean,³⁵⁹ only the understanding of this border as yet another ‘colour line’ will allow us to understand the fact that EEurope has actively managed to turn the Mediterranean into a mass grave with full impunity.³⁶⁰ This widespread and systematic attack on a civilian population has caused over 30,000 individuals to die or disappear at sea since the end of 1990.³⁶¹ The objective of this dissertation was to make the violence of enforced disappearances in the Mediterranean visible, while attempting to bridge the impunity gap in which it is being perpetrated daily. The death and disappearance of migrants, as well as all the overarching system of border violence, need to be understood as part of Europe’s past, present, and future of ‘empire, colonial conquest, and slavery’.³⁶² Survivors and their families play an important role, using memory to challenge state authorities, by defying what EEurope is imposing as the definitive ‘truth’ of what the Mediterranean graveyard is hiding.³⁶³ While criminal law does not hold the answers nor ultimate solution to bridge the impunity gap for border violence, we must continue exploring the questions of responsibility, guilt, and restitution.

³⁵⁷ Thomas Gammeltoft-Hansen, 'Extraterritorial human rights obligations in regard to refugees and migrants' in Gibney, Krajewski and Vandenhole (eds.), 'Routledge Handbook on Extraterritorial Human Rights Obligations' (2021) Routledge [Forthcoming] pag 19.

³⁵⁸ Maurice Stierl, 'The Mediterranean as a Carceral Seascape' (2021) Political Geography [Forthcoming] pag 16.

³⁵⁹ *Id.* at pag 15.

³⁶⁰ Nicholas De Genova, 'The “migrant crisis” as racial crisis: do Black Lives Matter in Europe?' (2018) Ethnic and Racial Studies.

³⁶¹ Charles Heller and Lorenzo Pezzani, 'Intervention: Forensic Oceanography - Tracing Violence Within and Against the Mediterranean Frontier’s Aesthetic Regime' in Peter Adey et al. (eds.), 'The Handbook of Displacement' (2020) Palgrave Macmillan pag 453.

³⁶² Ida Danewid, 'White innocence in the Black Mediterranean: hospitality and the erasure of history' (2017) Third World Quarterly

³⁶³ International Center for Transitional Justice, 'The Disappeared: The Right to Justice and the Right to Truth' (2011) ICTJ <https://www.ictj.org/news/disappeared-right-justice-and-right-truth>.

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