ISSN 2029-1701
ISSN 2335-2035 (Online)

Mokslinis žurnalas
VISUOMENĖS SAUGUMAS IR VIEŠOJI TVARKA
PUBLIC SECURITY AND PUBLIC ORDER
2020 (25) Research Journal

DRONES, BORDER SURVEILLANCE AND THE PROTECTION OF HUMAN RIGHTS IN THE EUROPEAN UNION

Fernando Val Garijo

National Distance Education University
Calle Obispo Trejo, 2, 28040, Madrid, Spain
Telephone: (+34) 91 398 8068
E-mail: fval@der.uned.es

DOI: 10.13165/PSPO-20-25-09

Abstract. Drones are increasingly used in border management by EU Member States and Frontex. Drones are considered high-performance tools in border surveillance, due to their enhanced capabilities in the area of detection, observation, data collection and information sharing. They are also instrumental in implementing current policies of contention of migration that rely on cooperation with third countries and, at times, on pull-back operations. The use of drones in such operations raises legal problems relating to the observation of the principle of *non-refoulement*, which binds both Member States and Frontex. These problems are explored in the light of the applicable rules of international refugee law and human rights law, EU law, and the case-law of the European Court of Human Rights.

Keywords: drones, border surveillance, Frontex, principle of *non-refoulement,* pull-back policies, migration

INTRODUCTION

During the past decade, managing the external borders of the European Union (EU) has acquired increasing importance for Member States and EU Institutions alike. Article 3.2 of the Treaty of the European Union (TEU) mandates the EU to offer its citizens an area of freedom, security and justice without internal frontiers. Lack of internal frontiers, and the free movement that goes with it, requires that appropriate measures be taken with respect to external border controls, asylum, immigration and the prevention and combating of crime. Moreover, Article 77 of the Treaty on the Functioning of the European Union (TFEU) provides for the gradual introduction of an integrated management system for external borders. As currently understood in the EU, integrated border management (IBM) is a system that goes well beyond mere border checks and monitoring of the crossing of external borders. It includes activities such as prevention of cross-border crime, referral of persons in need of international protection, search

and rescue operations for persons in distress at sea, risk analysis for security, cooperation with third countries and the return of third-country nationals who are subject of return decisions[1].

Some authors contemplate border management as increasingly becoming "an autonomous policy field" (Marin and Krajcíková, 2016). In the EU, it has its own legal framework, established by the EU Treaties. It has its own actors, such as Frontex, the European and Coast Guard Agency, and the national authorities in charge of border management. It has its own material and financial resources. It is based on a preventive approach that encourages the use of the latest technology with various applications to border management, such as biometrics, databases, satellites, sensors, and drones.

The aim of this paper is to highlight the fact that drones are becoming important tools in border management, because drone technology enhances the operational capacity and performance of border surveillance systems. It will then make reference to how border surveillance is currently practiced in the Southern external borders of the EU, with a special focus on migration issues taking place in the Mediterranean Sea. Finally, this contribution will examine some legal issues raised by the migration contention policies embraced by the actors of border surveillance in the Mediterranean. Such policies rely on the cooperation with third countries on the Southern coast of the Mediterranean, which are usually countries of origin or transit of irregular migration. Migration contention policies also rely on the modern technologies of border surveillance, in which drones are playing an ever more prominent role. The current combination of policy, new technologies, and the legal framework, gives rise to problems relating to the protection of human rights and the fulfillment of the legal obligations deriving from the principle of *non-refoulement.* The aim of this study is to address such problems in the light of applicable law, which is EU primary law and secondary legislation, and rules and standards pertaining to international refugee law and human rights law.

This paper is based on a review of the literature on drones as devices used in border surveillance, especially when centered on the use of drones by EU Member States and Frontex. The reviewed literature approaches the issue from different perspectives: security, humanitarian concerns, law, policy, and philosophy. This paper draws on all such approaches. The focus of this work, however, is entirely legal. Rules and principles of international law and EU law, and

[1] See "European integrated border management", European Commission, Migration and Home Affairs, Glossary, https://ec.europa.eu/home-affairs/content/european-integrated-border-management_en. Last accessed on 8 November 2020.

the case-law of the European Court of Human Rights, are its primary materials. Accordingly, the chosen methodology is based on legal analysis, case studies, case-law review and the understanding of court rulings.

DRONES IN BORDER SURVEILLANCE

Unmanned Aerial Vehicle, or drones, are becoming important tools in the area of border surveillance, as they enhance performance in border-guarding operations and increase the operational capacity of the surveillance system. Drones are currently understood as valuable resources in the building and management of the so-called smart borders or technological borders. Several authors have underlined the positive aspects of the use of drones in border surveillance, but the debate on the "dronization" of borders and its effects is still ongoing, and the use of drones has drawn criticism, mostly based on humanitarian grounds.

One of the advantages of using drones is that they can be very effective at performing 3D-tasks, that is, tasks that are considered *dull, dirty and dangerous.* Drones can survey vast and remote areas that would be more difficult to cover with other means, including piloted aircrafts. They can also regularly fly and survey for up to 20 hours, a long period of time if compared with a safe performance by human pilots. The increased safety of border surveillance operations is another argument put forward to defend the deployment of drones, as risk elements such as the weather and natural hazards, along with the fatigue of pilots, are almost entirely removed from the picture. Drones, moreover, can be equipped with high-resolution cameras, thermal sensors and some of the latest technology of detection. As a result, drones are also effective at collecting information and data, and transmitting it to databases and networks operated by border surveillance agencies (Marin, 2016).

Their enhanced capabilities in terms of time of flight, detection, and data collection and sharing, make drones a valuable asset for search and rescue operations carried out at sea. Unmanned aerial vehicles can be very effective in detecting and locating persons who are in distress at sea and can assist ships in the tasks of finding and taking such persons to a safe port. Drones can also be used in the fight against the various forms of cross-border crime.

Other reasons to deploy drones, it has been argued, are economic. Drone technology reduces the cost of border surveillance, especially if compared with piloted aircrafts. In the medium term, drones tend to reduce the need for human and material resources, which can then be directed to other activities. The United States experience, however, questions to some extent

this economic argument as some drone acquisition programs have reportedly been cancelled due to unexpected costs in the maintenance of devices (Marin, 2016).

Drone surveillance increases transparency. As some authors have pointed out, this can be an asset in promoting accountability among border guards and border-guarding agencies. Drones can monitor the actual practice of border guards, in particular the use of force and direct means of coercion. Border surveillance agencies can rely on drones to improve the quality of existing accountability mechanisms, which may include the monitoring of border guards by drones operated by other border surveillance agents, and the implementation of video and data reviewing procedures. The transparency provided by drones may also help to protect the security of border guards, as they may provide evidence of attacks against them or images of situations where the use of force was warranted (Koslowski and Schulzke, 2018).

Some authors, for their part, have argued the case against drones or, at least, against how they are actually being used. Thus, drones can certainly increase the effectiveness of search and rescue operations but this may not result in tangible benefits for the migrants that are in distress at sea. The main problem in recent search and rescue operations has revolved around the issue of disembarkation of migrants in a safe port and its practical and legal implications: humanitarian assistance, health care measures, identification and fingerprinting, processing of asylum applications, among other things. The political logic that often complicates or prevents disembarkation is likely to operate again in the near future, thus counteracting the positive effects that drones and other surveillance technologies may have in search and rescue operations.

From another perspective, it has been claimed that drones introduce a military bias in border management. The dronization of borders reinforces the defensive logic in this policy area, and the dual nature of drone technology tends to blur the limits between the military and non-military realms. These views are accepted and normalized easily since they are part of "the efficiency narrative of drones", which presents them as highly accurate tools for detection, data collection and security, and as a means to rationalize available resources from a cost/benefit perspective. Drones would thus be one more embodiment of the idea of "technological rationality", which tends to transform what is morally and socially acceptable with each new technology that is accepted and normalized. Along these lines, drones are seen as a means to radicalize the notion of *panoptic surveillance,* with the potential, when combined with artificial intelligence, to take detection and security to new, unprecedented levels. They favor a

verticalization of power and conjure up an "above-the-ground omniscient authority" that can survey, detect, monitor, and target anything and everything. Drones are therefore instrumental in creating systems of permanent vigilance which confer on surveillance authorities some of the features of divinity, such as ubiquity, instantaneity, immediacy, omnimode vision and omnipotence (Csernatoni, 2018)[2]. This view no doubt overemphasizes some of the capabilities of unmanned aerial vehicles and, more to the point, overestimates what drones can deliver when used as tools for border surveillance. Nevertheless, it is true that when a system of permanent surveillance is established and normalized for external purposes, it is easier for that system to be accepted for internal surveillance, once the enabling technology on which it relies is perceived as normal and even inevitable.

One of the long-standing traits of borders is that they are visible in some or many of their sectors, depending of the perceived needs of the state managing its own borders. Such visibility, or the need thereof, tends to be reduced by the use of drones. Firstly, because border surveillance authorities may choose to make drones visible and public, in which case they become a physical manifestation of the border. Secondly, because drones, once deployed, may replace other visible signs of the border, such as fences, walls, border guards and vehicles (Koslowski and Schulzke, 2018). In this regard, drones are some of the essential building blocks of the smart, technological borders of today. The visibility of borders, however, is not merely a technical matter. The degree to which borders are visible is also a political issue, which means that drones and other technological resources are not likely to render borders invisible in the near future.

ELEMENTS OF BORDER SURVEILLANCE IN THE EUROPEAN UNION

In the EU, responsibility for the management of external borders lies with Member States. The external borders of the EU are after all state borders, as international organizations are not territorial entities and can have no borders of their own. Nevertheless, in the Area of Freedom, Security and Justice, the management of the external borders is carried out in the interests of all Member States, given the European dimension of these borders. This explains the establishment of an EU policy of border checks in Article 77 TFEU, and the gradual introduction of an integrated management system for external borders based, among other

[2] This author offers an interesting survey of the literature on, and especially against, drone surveillance on which this paper draws.

things, on cooperation between Member States. Frontex, the European Border and Coast Guard Agency, complements the efforts of Member States by reinforcing, assessing and coordinating the actions of the Member States which implement EU measures relating to border management.

Frontex is currently governed by Regulation (EU) 2019/1896 of 13 November 2019, a piece of legislation that increases the competences of the Agency and confers upon it a reinforced mandate. In this new legal basis Frontex is mandated to implement European integrated border management as a shared responsibility of the Agency and of the national authorities in charge of border management, with Member States retaining the primary responsibility for managing their sections of the external borders[3]. Some of the key roles played by Frontex are overseeing the functioning of border control at the external borders, carrying out risk analysis and vulnerability assessments, providing assistance to Member States and third countries through joint operations and rapid border interventions, supporting search and rescue operations for persons in distress at sea, and coordinating and conducting return operations and interventions. Moreover, Frontex is committed to using state-of-the-art technology, including large-scale information systems. In this regard, Frontex has tested different types of drones, launched tenders for drones and started to use drones in border surveillance activities.

The European Border Surveillance System (EUROSUR) is another significant component of the system of border management in the EU. EUROSUR is an integrated framework for the exchange of information and for operational cooperation between Member States and Frontex. It is meant to improve situational awareness and increase reaction capability in border management against illegal immigration and cross-border crime. Among the key components of EUROSUR are national coordination centers (NCCs), national, European and specific situational pictures and fusion services (tracking and detection capabilities, software capabilities for the location of vessels, or optical and radar satellite technology used to detect vessels engaged in migrant smuggling). In this integrated framework different actors play different roles. NCCs collect local information on national borders, create a national situation picture, and share information with other Member States and Frontex. The Agency, in turn, creates a European situational picture with these and other inputs. Interestingly, the European situational picture covers the external borders, the pre-frontier area and unauthorized secondary

[3] Regulation (EU) 2019/1896, Article 7.

movements. The *pre-frontier area* is defined as the "geographical area beyond the external borders which is relevant for managing the external borders through risk analysis and situational awareness"[4]. It is a common intelligence picture covering areas beyond the Schengen Area and the EU external borders, including maritime borders.

The definition of a pre-frontier area for border surveillance purposes tends to drive the exercise of jurisdiction by Member States and Frontex beyond territorial and jurisdictional waters and into the high seas, which is a maritime area beyond national jurisdiction. This process results in an extraterritorialization of the exercise of jurisdiction for border surveillance purposes that may even reach the territorial waters of third countries, a situation that has recently been taking place in the Southern coasts of the Mediterranean. In this context, agreements with third countries aimed at containing irregular migration are another key component of EU border management in the Mediterranean region.

Some significant elements of border management have been singled out thus far: a) Cooperation between Member States and Frontex through joint operations; b) The use of advanced drone technology for detection and data collection; c) The possibilities of EUROSUR as a framework for information exchange and operational exchange, and its effects in the extraterritorial projection of jurisdiction; and d) cooperation agreements with third countries. If all these factors are combined and used to the full of their possibilities, the result is that Frontex and Member States have an enhanced, first-rate ability to detect migrants at sea and collect and share data relating to the situation. If this information is shared with third countries on the Southern coast of the Mediterranean Sea, the so-called *pull-back policies* can be more easily implemented.

The term pull-back policy refers to a course of action whereby migrants trying to reach the Northern coasts of the Mediterranean are intercepted by the coast guard authorities of the coastal state, normally before they reach the high seas or the search and rescue zone of other states. Interception is enabled by the border surveillance authorities of the states of destination through cooperation, assistance, data sharing and information exchange. Intercepted migrants are then returned to the territory of the state they intended to depart from, hence the term pull-back policy: migrants in the process of leaving the territory and jurisdiction of the coastal state are finally retained as a result of the combined efforts of the intervening states conducting

[4] Regulation (EU) 2019/1896, Article 2 (13).

surveillance and search and rescue operations. Pull-back policies ultimately rely on agreements with third countries. The aim of this cooperation is to involve third countries in containing irregular migration towards EU Member States. When implemented with drones and the advanced technology of data collection and sharing, pull-back policies can be very effective. Yet, they also raise serious legal problems from the perspective of the international protection of human rights and the respect of the obligations derived from the principle of *non-refoulement.*

THE PRINCIPLE OF *NON-REFOULEMENT*

General considerations

The principle of *non-refoulement* is the fundamental international law rule protecting refugees. Its classical treaty-law formulation in international refugee law can be found in Article 33.1 of the Geneva Convention relating to the Status of Refugees (1951). This core principle protects refugees against being expelled or returned to a country where their life or freedom could be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. In international human rights law, *non-refoulement* is a key component of the prohibition of torture and cruel, inhuman or degrading treatment or punishment. This prohibition is enshrined in Article 7 of the International Covenant on Civil and Political Rights (1966) and Article 3 of the Convention against Torture (1984). In addition to treaty law, the principle of *non-refoulement* has become a rule of international customary law and, as a result, part of general international law, binding all states regardless of the particular treaties to which they are parties.

In regional international human rights law the principle of *non-refoulement* also figures prominently in treaty law and case law. Thus, Article 3 of the European Convention of Human Rights (1950, hereinafter ECHR) contains an absolute prohibition of torture not allowing any derogation. This provision does not explicitly mention *non-refoulement*, but the European Court of Human Rights (ECtHR) has ruled that the prohibition established in Article 3 includes the principle of *non-refoulement* as part of its content and standards[5].

With regard to EU law, even if the ECHR is not an EU treaty, and ECtHR is not an EU court or body, pursuant to Article 6.3 TEU, fundamental rights as guaranteed by the ECHR (and

[5] Soering v. the United Kingdom, judgement of 7 July 1989, para. 91.

interpreted by the ECtHR) constitute general principles of EU law. Therefore, Strasbourg law is relevant to Frontex and to EU Member States when they apply EU law. Moreover, the EU Charter of Fundamental Rights guarantees in Article 18 the right to asylum in conformity with the rules of the Geneva Convention (1951) and the Protocol of 31 January 1967 relating to the status of refugees, which include the principle of *non-refoulement.* Article 19.2 of the Charter proclaims this principle as a protection against the death penalty, torture or other inhuman or degrading treatment or punishment. The EU Charter of Fundamental Rights has the same legal value as the constitutive treaties of the EU and, as such, is part of EU primary law. To these provisions, Article 78.1 TFEU adds that the EU common policy on asylum, subsidiary protection and temporary protection must comply with the principle of *non-refoulement.* In EU secondary law, apart from the Directives regulating asylum, Regulation 2019/1896 (Frontex specific legal basis) refers to *non-refoulement* in various provisions, establishing the need for Frontex to respect this principle as a general rule in the performance of its tasks (Article 80), in its actions at the EU external borders (Article 36), in return operations (Articles 48 and 50), and in the cooperation of Member States and Frontex with third countries (Article 72 and 73).

The principle of *non-refoulement* is therefore well-established in international law and EU law. It binds both Member States and Frontex when they engage in border surveillance activities, and applies to all persons, regardless of their nationality, statelessness or migration status.

The principle of *non-refoulement* and the practice of border management at sea

In the area of international refugee law, it is understood that the principle of *non-refoulement* applies "both within a State's territory and to rejection at its borders. It also applies outside the territory of States. In essence, it is applicable wherever States act"[6]. This means that the principle also applies when EU Member States decide to refuse entrance to persons at their external borders, or when they act in any maritime area, including the high seas.

With regard to international human rights law, the same conclusion can be reached under the ECHR (1950). In *Hirsi Jamaa and Others v. Italy* (2012), the ECtHR ruled that the principle of *non-refoulement* also applies to interceptions of migrants on the high seas. An account of this case in some detail is interesting for the purposes of this study. The facts of the *Hirsi* case

[6] UNHCR Note on the Principle of Non-Refoulement, 1997, https://www.refworld.org/docid/438c6d972.html#:~:text=Since%20the%20purpose%20of%20the,is%20applicable%20wherever%20States%20act. Last accessed on 8 November 2020.

can be summarized as follows. In May 2009 eleven Somali nationals and thirteen European nationals had left Libya aboard three vessels as part of a larger group of people, and were trying to reach the Italian coast. They were intercepted by ships from the *Guardia di Finanza* and the Italian Coastguard, transferred onto Italian military ships and then returned to Tripoli. The intercepted migrants alleged that Italian authorities did not take steps to identify them and did not inform them of their real destination during the voyage. On arrival in Tripoli they were forced to leave the ships and handed over to the Libyan authorities. Some of the returned migrants lodged an application against Italy before the ECtHR. They acted through legal representatives, who had received powers of attorney that the ECtHR considered to be valid.

Italy alleged that the applicants before the ECtHR had been intercepted in the context of a rescue operation of persons in distress in the high seas. Italian authorities had merely fulfilled the obligations deriving from the UN Convention on the Law of the Sea (1982). The rescue had never been a maritime police operation. Italian authorities had ensured the safety of the persons on board, had provided them with medical and humanitarian assistance, had not boarded the migrants' boats and had not used weapons. They had then accompanied the intercepted migrants to Libya, as provided for in bilateral agreements between the two States. Italy had not exercised absolute and exclusive control over the migrants and, as a result, they had not fallen under Italian jurisdiction. The ECtHR, however, understood that the events took place on board of Italian military ships. Since the moment they boarded these ships to the moment they were handed over to Libyan authorities, the migrants had been "under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities". Therefore, the migrants had been under Italian jurisdiction within the meaning of Article 1 ECHR[7].

With regard to the merits of the case, the ECtHR held that Italy had violated Article 3 ECHR because the returned migrants had been exposed to the risk of ill-treatment in Libya, and also because they had been exposed to the risk of being repatriated to Somalia and Eritrea. The fact that no immigrants had intended to apply for international protection while on board the Italian ships did not exempt Italy from inquiring into the treatment they would receive in Libya, as this was notoriously a country where systematic violations of human rights were taking place, and the risk of suffering such violations was sufficiently real and probable. Compliance with the obligations deriving from the principle of *non-refoulement* does not depend on the actual

[7] Hirsi Jamaa and Others v. Italy, judgment of 23 February of 2012, para. 81-82.

filing of formal asylum applications by asylum-seekers. The ECtHR ruled that Italy had also violated Article 4 of Protocol No. 4 to the ECHR that prohibits the collective expulsion of aliens (no individual inquiry had been conducted with respect to any migrant), and Article 13 ECHR (right to an effective remedy).

In *Hirsi*, the ECtHR interpreted the principle of *non-refoulement* as applicable under Strasbourg law even when States parties to the ECHR act in the high seas, an area beyond national jurisdiction from the territorial point of view in which, nonetheless, jurisdiction over individuals is actually exercised if certain conditions are met. Yet, according to some authors (Pijnenburg, 2020), the lessons of *Hirsi* inspired EU Member States and third countries to develop pull-back policies, a variety of cooperation which also conflicts with *non-refoulement* obligations.

PULL-BACK POLICIES, DRONES AND THE CONTENTION OF MIGRATION

One of the key ideas of the ruling of the ECtHR in *Hirsi* is that Italy had exercised continuous and exclusive *de jure* and *de facto* control over migrants taken on board Italian military ships, which amounted to an exercise of state jurisdiction that triggered the application of the ECHR. Conversely, without a control of that nature it could be understood that jurisdiction is not being exercised and the principle of *non-refoulement* and other human rights rules and standards do not apply.

Cooperation between EU Member States and the states of origin or transit of irregular migration seems, to a certain extent, to have learned from the previous ideas. A well-documented case in point is the Memorandum of Understanding signed between Italy and Libya in 2017, which has been extended for another three-year period (Olivito, 2020)[8]. This agreement provides for the Italian financial support of Libyan measures of migration control and of development programs in regions affected by irregular migration. It also provides for technical and technological support to Libyan border and coast guard authorities. The agreement paves the way for Libyan coast guards to intercept migrants who take a maritime route to the Northern coasts of the Mediterranean before they reach the high seas, with Italy contributing to the direction and coordination of these pull-back operations. The policy of support to the contention of migration in Libya is not an Italian, but an EU policy, as can be seen in the *Malta Declaration*

[8] A detailed analysis of this agreement can be found in the work of this author.

by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route (3 February 2017). The Libyan Coastguard and Navy have also received support in the form of training from the EU CSDP Operation EURONAVFOR MED (Sophia) since at least 2016[9].

Operational and technological support to pull-back operations can be given in various forms: ships and aircraft can be sent to the area under surveillance, border guards can travel on board Libyan coastguard ships, data can be collected and information exchanged. The current trend is to avoid, or reduce to a minimum, contact with migrants detected at sea. In this context, the use of drones by Member States and Frontex, already a fact, raises new questions. The effective use of drone technology in border surveillance requires minimum contact between the detecting and observing device and the individuals detected and observed.

A situation in which Member States or Frontex use drones in surveillance operations over the territorial sea of a third country in the framework of an common agreement is now perfectly possible. Drones could collect data and information relating to migrants travelling in unsound boats and exchange it with other Member States, Frontex and the authorities of the third country, a State of origin or transit of irregular migration. Using that information, and in coordination with Member States and Frontex, the coastguard of the third country would then intercept and "rescue" the migrants and return them to the coast from which they departed. Would the use of drones by Member States and Frontex constitute an exercise of jurisdiction in this situation? Would detection, observation, data collection and information exchange via drones be an exercise of jurisdiction over the migrants? And, if so, would this type of jurisdiction fall within the meaning of Article 1 ECHR? To answer these questions we must once more turn to the case-law of the ECtHR.

The *Hirsi* test refers to continuous or exclusive control *de jure* and *de facto* as the benchmark or criterion for deciding if state jurisdiction has been set in motion. It seems clear that, when detected and observed by a drone, individuals are not under such form of effective, all-encompassing control. However, the ECtHR has construed other criteria for determining when jurisdiction is being exercised. Also in *Hirsi* the ECtHR[10], invoking its previous case-

[9] https://www.operationsophia.eu/about-us/, last accessed on 8 November 2020.

[10] Hirsi Jamaa and Others v. Italy, judgment of 23 February of 2012, para. 72. See also Bankovic and Others v. Belgium and Others, Admissibility, 12 December 2001, para. 167 and Al Skeini and Others v. United Kingdom, judgement of 7 July 2011.

law, recalled that even if jurisdiction is essentially a territorial notion, acts performed, or *producing effects,* outside the territory of the State can constitute an exercise of jurisdiction, although only in exceptional cases. This criterion could lead to the conclusion that detection, observation and data transmission by drones implies an actual exercise of jurisdiction, since that activity has the extraterritorial effect of setting in motion the jurisdiction of the State of origin or transit of migrants, which may then proceed to launch an interception and rescue operation in its territorial sea. *Ilascu v. Moldavia and Russia* (2004) offers yet another potentially applicable criterion. The ECtHR found that Russia had been exercising its jurisdiction over the Moldavian Republic of Transnistria because the latter had been held under the effective authority, or at least under the *decisive influence,* of the Russian Federation[11]. The decisive influence test could also apply to pull-back operations supported by drones and, more broadly, to the policy of consensual contention of migration, especially when third countries on the Southern Mediterranean coasts cannot perform interception and rescue operations, or fulfill the cooperation agreements, without the technical and financial assistance of Member States and the EU. Admittedly, the forms of control of, and interaction with, the migrants on which these two criteria are based (production of effects and decisive influence) are lighter and less direct than when the exclusive and continuous control criterion is employed. But the use of drones and, more generally, aircraft, pulls legal considerations in this more abstract, impersonal direction. The reason is that the relation between authorities and migrants involves two levels (the air, the sea) and is characterized by distance, one-way contact, and a degree of depersonalization dehumanization unknown in maritime interception and rescue operations.

The other problematic element in pull-back operations revolves around the fact that drones operated by Frontex or Member States may engage in the surveillance of areas belonging to the territorial sea of third countries. The territorial sea, a marine area extending up to 12 nautical miles from the coast, is part of the territory of the coastal State and, as a result, is under the sovereignty of said State, a sovereignty that extends to the air space over the territorial sea. Therefore, drones operated by EU Member States or Frontex fly across this area with the consent of the coastal State. They intervene as a form of cooperating with States that lack the necessary resources to contain migration and fight cross-border crime. It could be argued that the only jurisdiction being exercised is that of the coastal State when its ships finally intercept,

[11] Ilascu and Others v. Moldova and Russia, judgement of 8 July 2004, para. 392.

rescue and returned the migrants located by drones. It could also be argued that two state jurisdictions have been exercised, that of the coastal State and that of the Member State or Agency operating the drones. In this context of concurring jurisdictions, that of the coastal State would prevail, as territorial jurisdiction is the rule, and extraterritorial jurisdiction the exception. A counter-argument would be that Member States and Frontex maintain their obligations under international refugee and human rights law even when they act, or deploy drones, in the territory of other States, whether they act under the authority of the third State or under their own authority. These situations could be subject to joint or shared jurisdictions (European Agency of Fundamental Rights, 2016), but not to a system of prevailing jurisdictions preventing the ECtHR from ensuring the observance of Strasbourg law by EU Member States that are parties to the ECHR (all of them at the time of writing). The EU Court of Justice, for its part, could in some cases also review the conduct of Frontex and EU Member States with regard to pull-back operations using drones.

CONCLUSIONS

The use of drones in border surveillance is a reality in the EU, which compels lawyers, scholars and practitioners to explore the legal problems raised, or aggravated, by the introduction of this advanced technology in the field of border management. One of the problems requiring a specific study is the need to fulfill the obligations of the principle of *non-refoulement,* a cornerstone of international refugee law and human rights law. The narrative of effectiveness, technological innovation and high performance surrounding the use of drones in border surveillance is powerful and engaging. But certain features introduced or developed by drones, such as depersonalization, reduction of human contact, distance, and enhanced capabilities to detect, collect, and share information relating to migrants and potential asylum seekers, do not eliminate the refugee and human rights dimension- or tragedy- of many recent search and rescue operations at sea. There is a real risk of contemplating interceptions of irregular migrants that try to flee their State of origin for fear of persecution, torture, or inhuman or degrading treatment or punishment, as mere search and rescue operations, as activities that are human-rights-neutral and tragedy-free. The use of advanced technology in border surveillance should not be allowed to have this numbing effect on the moral conscience and legal awareness of lawyers, scholars and policy-makers. One way to prevent it is to assert the applicability, and adapt our understanding, of the principle of *non-refoulement.*

REFERENCES

1. Csernatoni, R.: "Constructing the EU's high-tech borders: FRONTEX and dual-use drones for border management", *European Security*, Vol. 27, No. 2, pp. 175-200.
2. EUNAVFOR MED Operation SOPHIA,
3. https://www.operationsophia.eu/about-us/
4. European Commission, Migration and Home Affairs, Glossary, "European integrated border management",
5. https://ec.europa.eu/home-affairs/content/european-integrated-border-management_en
6. European Court of Human Rights, Al Skeini and Others v. United Kingdom, Application no. 55721/07, judgment of 7 July 2011.
7. European Court of Human Rights, Bankovic and Others v. Belgium and Others, Application no. 52207/99, admissibility, 12 December 2001.
8. European Court of Human Rights. Hirsi Jamaa and Others v. Italy, Application no. 27765/09, judgment of 23 February of 2012.
9. European Court of Human Rights, Ilascu and Others v. Moldova and Russia, Application no. 23687/05, judgment of 8 July 2004.
10. European Court of Human Rights, Soering v. the United Kingdom, Application no. 14038/88, judgment of 7 July 1989.
11. European Union Agency for Fundamental Rights, *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*, 2016, p. 29-30.
12. Koslowski, R. and Schulzke, M.: "Drones along Borders; Border Security UAVs in the United States and the European Union", *International Studies Perspectives*, 19, 2018, pp. 305-324.
13. Marin, L., "The deployment of drone technology in border surveillance, between techno-securitization and challenges to privacy and data protection", *Special Issue: Crimmigration and Human Rights in Europe: Exclusion, Alternatives and Resistance, European Journal of Migration and Law*, 2-2016.
14. Marin, L. and Krajcíková, "Deploying Drones in Policing Southern European Borders: Constraints and Challenges for Data Protection and Human Rights", Zavrsnik, A. (ed.) *Drones and Unmanned Aerial Systems*, Springer International Publishing Switzerland, 2016, p. 101
15. Olivito: "The Constitutional Fallouts of Border Management through Informal and Deformalized External Action: the Case of Italy and the EU", *Diritto, Immigrazione e Citadinanza*, 2, 2020, p. 123 ff.
16. Pijnenburg, A.: "Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?" *Human Rights Law Review*, 20, 2020, pp. 306-332.
17. Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, *OJ L 295/1 14.11.2019*
18. UNHCR Note on the Principle of Non-Refoulement, 1997, https://www.refworld.org/docid/438c6d972.html#:~:text=Since%20the%20purpose%20of%20the,is%20applicable%20wherever%20States%20act