

International Human Rights Law and Time-Space at Sea: A Rhythmanalysis of Prosecuting Search and Rescue

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I. INTRODUCTION

THIS CHAPTER DRAWS on Lefebvre's *Rhythmanalysis*¹ and *Production of Space*² as conceptual, political and metaphorical reservoirs to examine the way in which international protection provisions, as enshrined in international human rights law, are challenged and undermined by current EU migration policies of migration deterrence and containment. In the context of socio-spatial practice, Rhythmanalysis focuses on bodies in space and on their patterns of activities and movements, emphasising the co-existence and co-production of the spatial and the social, of time and space and of place and space in the analysis of the everyday. Within this framework, we examine the political nature of the rhythmic entanglements that connect 'bodies at sea' with 'juridical bodies', represented by EU institutions and policies, and the human rights legal measures, limitations and loopholes that they exploit and reproduce. In particular, we highlight the discrepancy between the stated aims of international human rights law (in our case, the protection of lives at sea and the prohibition against refoulement) and the lived experiences of the people targeted by its provisions, as well as the dislocation between the notion of jurisdiction and the abstracted lives of refugees. This theoretical analysis provides a starting point to reflect on the inherent limitations of international human rights law, its spatio-temporal situatedness vis-à-vis the universality of its ambitions and, too often, its inability to overcome the fundamental spatio-temporal mismatch that we outline in this chapter.

To further clarify and lend strength to the analysis, the chapter takes as a case study the arrest and prosecution of Carola Rackete, the captain of the search

¹H Lefebvre, *Rhythmanalysis: Space, Time and Everyday Life* (English translation, Continuum, 2004).

²H Lefebvre, *The Production of Space* (English translation, Blackwell, 1991 [1974]).

and rescue vessel *Sea Watch 3*, by the Italian authorities in July 2019 for rescuing people at sea and disembarking them in Italy despite the government's closure of all ports to rescue ships operated by non-governmental organisations (NGOs). This case study is emblematic of current migration deterrence and containment policies, and it enables us to focus on the fundamental spatio-temporal mismatch that pits the existence of human bodies in time-space against the tempo of the law. To this end we unpack Lefebvre's theorisation of rhythm and draw attention to its historical and conceptual roots in his antecedent conceptualisation of space. Lefebvre's ideas of abstract space, differential space and alienation are brought to bear on the analysis through the case study. As a magnifying glass, they allow us to outline and acknowledge, in section II, the arrhythmia at the heart of EU migration policies and the way in which they are enabled by, and at the same time constitutive of, international human rights law itself. In our analysis, we also highlight affinities between Rhythmanalysis and Critical Phenomenology, testing their theoretical affordances for critical migration studies and international human rights law.

Crucially, the chapter concludes, Rhythmanalysis enables us to look at the notion of jurisdiction from a different perspective, which challenges the traditional spatial and personal modes with which human rights courts have so far approached the jurisdictional threshold in cases of transnational human rights violations.³ In Lefebvrian terms, this case study enables us to trace the ways in which the political manipulation of time, space and energy is carved not only into the body of the legislations aimed at ensuring international protection, but also on the human bodies of people on the move. In this chapter, we ultimately seek to demonstrate that arrhythmia is the symptom of a specific type of governmentality, the consequences of which, far from being unintended, are aimed at the deliberate creation of spatio-temporally suspended 'zones of nonbeing'.⁴

The chapter is organised as follows: in section II, we focus on what Rhythmanalysis enables us to see in terms of bodies in space and the relationship between time, space and abstraction. In doing so, we bring international human rights law to the fore as a 'conceived space' and we outline its harmful, 'lived' consequences for people on the move. Section III applies Rhythmanalysis to current search and rescue situations and disembarkation policies in the Mediterranean. This section juxtaposes the lived experiences of bodies at sea with the 'concrete abstraction'⁵ of EU migration policies of deterrence and

³ Various scholars have addressed jurisdiction and its discontents from theoretical and historical perspectives, examining for instance its roots in colonialism and imperialism and its continued racialised present: see eg A Orford, 'A Jurisprudence of the Limit' in A Orford (ed), *International Law and its Others* (CUP, 2006) 1–32; M Pal, *Jurisdictional Accumulation: An Early Modern History of Law, Empires and Capital* (CUP, 2020) especially chs 6 and 7; S Elden, 'Legal Terrain – The Political Materiality of Territory' (2017) 5 *London Review of International Law* 199–224; and N Tzoulava, *Capitalism as Civilisation: A History of International Law* (CUP, 2020) especially ch 5.

⁴ F Fanon, *Black Skin, White Masks* (Grove Press/Atlantic Monthly Press, 2007 [1952]).

⁵ H Lefebvre, *The Production of Space* (Oxford: Blackwell, 1991 [1974]).

containment. The section also presents the case study of the *Sea Watch 3* to explain the concept of arrhythmia and the political manipulation of time, space and energy. It then uses Rhythmanalysis to outline the limitations of the notion of jurisdiction, as it is currently understood in its spatial and personal modes, insufficient as they are to capture the complexity of current transnational measures of migration deterrence and containment adopted by the EU and its member states. The theoretical framings presented in this chapter are useful to understand the production of time-space and the ‘willed’ abstraction engendered by EU migration measures aimed at continued oppression. Rhythmanalysis is thus ultimately crucial to exposing the spatio-temporal violence of jurisdiction as a key threshold for the applicability of international human rights law.

II. WHAT DOES RHYTHMANALYSIS ENABLE INTERNATIONAL HUMAN RIGHTS LAWYERS TO SEE?

In this section, we situate and contextualise the genesis of Rhythmanalysis within and from Lefebvre’s theory and conceptualisation of *space*. This contextualisation is crucial to understand the theoretical relevance of Rhythmanalysis to socio-legal research and, more specifically, to grasp the crucial meaning of ‘arrhythmia’ that we present as characterising current EU migration policies and the enabling role of international human rights law.

Published posthumously in 1992 and considered de facto the fourth volume of *Critique of Everyday Life*,⁶ Lefebvre’s Rhythmanalysis can be read as a poetic synthesis and intellectual legacy of the philosopher, social theorist and urbanist’s ruminations on space, time and everyday life in modern (Western) societies. It is worth noting how, in Lefebvre’s ambition, the rhythmanalytical project should aspire to acquire the status of a ‘new science’, to be founded on the systematic critique of society – via his trialectic method – and oriented toward the transformation and emancipation of human existence within it. Pivotal in this respect is the understanding of the condition of ‘arrhythmia’ as a disruption of rhythmic flows. It is here construed as a methodological and political category, whereby bodily and societal disruptions and malfunctions can be detected, acknowledged and potentially addressed.

The central ideas of concrete abstraction, abstract space, differential space and alienation are brought to bear on the analysis through the *Sea Watch 3* case study. The chapter, therefore, argues that arrhythmia is the symptom of a specific type of governmentality, aimed at the deliberate creation of spatio-temporally suspended ‘zones of nonbeing’.⁷ This, in turn, renders the intractable confrontation with the ‘approaching stranger’⁸ imperative in its political and humanitarian

⁶ H Lefebvre, *Critique of Everyday Life* (Verso, 2014 [1973]).

⁷ Fanon (n 4).

⁸ K Simonsen and L Koefoed, *Geographies of Embodiment: Critical Phenomenology and the World of Strangers* (SAGE, 2020).

urgency. In this respect, Paolo Novak's work⁹ on border rhythms offers an interesting precedent and point of reference for our work, as it grappled with the complexities and unevenness of international migration as a multi-layered, hierarchical social field, from a spatio-temporal perspective. Novak examined concepts such as time-space compression, border biography and refugee cycles to highlight their dynamic interplay, essentially relying on May and Thrift's notion of *timespace*.¹⁰ Novak engaged meaningfully with Lefebvre's rhythm as a substantial and relational energy field, sensing, in the conclusions, its underexplored yet promising ethical and political potential:

It is thus a concept that allows, in fact forces us, to simultaneously account for the temporalities of borders as depicted above and those of migrants and their journeys (see for example Griffiths et al., 2013). It is the rhythmic encounter between these two sets of temporalities that defines the actual configuration of border openings and closures, of cycles of refugee containment, interdiction and exclusion, of the accelerations and pauses configured by global visa regimes. It is in such encounter that the structural and the experienced mutually configure themselves in discrepant and dynamic ways. It is thus in and through the actual rhythms of such encounter that political action must be conceived and practised, as this is where politics lie.¹¹

The intersection where the 'structural and the experienced' configure their mutual arrhythmic relationship represents the novelty of our analysis in this chapter. In other words, we begin where Novak left us, revealing the locus and urgency of political action by demonstrating how its intrinsic rhythmic nature plays out in the contradictions and loopholes that we detect in international human rights law. Compared to Novak, we fully develop and harness the spatial and temporal potential of Rhythmanalysis as a method, critique and, potentially, as an ethics, offering an avenue for research in the cognate fields of international human rights law and migration that has never been pursued before.

A. Bodies in Time-Space

In this chapter, we propose to test the theoretical purchase and affordances of Lefebvre's Rhythmanalysis for socio-legal research. More specifically, we grapple with the political meaning and implications of 'arrhythmia', here introduced as the temporal horizon that characterises EU migration policies and international human rights law. To do so, it is crucial that we first situate and appraise Rhythmanalysis in relation to Lefebvre's conceptualisation of *space*.¹² In fact, Rhythmanalysis' sensitivity to the temporal dimensions of the everyday subsumes

⁹ P Novak, 'Border Rhythms' in E Mavroudi, B Page and A Christou (eds), *Timespace and International Migration* (Edward Elgar, 2017).

¹⁰ J May and N Thrift (eds), *Timespace. Geographies of Temporality* (Routledge, 2001).

¹¹ Novak (n 9) 74.

¹² Lefebvre (n 5 and n 2).

its spatial counterpart, which is to say that lived time always presupposes and implies lived space. Secondly, as we propose to examine, foregrounding it, the nature of the rhythmic clash that pits ‘bodies at sea’ against juridical bodies, we need to cast them as specific instances and modalities of *co-production of space* endowed with ethical, political and existential implications.

In this respect, Lefebvre’s ideas of space as a concrete abstraction, alienation and differential space acquire particular saliency, not least because they are foundational to his subsequent theorisation of rhythm. The idea of ‘concrete abstraction’ was derived from Hegel’s notion of ‘concrete universal’ and later appropriated and developed by Marx as the dialectical ‘forms’ of labour, commodity, money and markets in the nineteenth-century capitalist economy.¹³ For Marx these are examples of ‘abstractions which became true in practice’¹⁴ through the unfolding of three ‘moments’: universality, particularity and singularity. Concrete abstractions are ‘at the same time a universal medium of production, consumption, and distribution; and a commodity, itself produced, consumed, and distributed’.¹⁵ Together they define the internal principle of development and driving force of capitalism.

Let us consider, by way of example, the historical emergence of the concept of labour in eighteenth century Britain. Here, the nascent industry ‘required labour to be reduced to its bare features and stripped of the personality of the worker’.¹⁶ The industrial machinery needed labour to be ‘malleable, quantifiable, divisible, and measurable by *time*’,¹⁷ for efficiency gains, so that under such economic conditions the abstraction of the category ‘labour’ could become true in practice, separating concrete labour – ‘a productive activity of a definite kind and exercised with a definite aim’ – from abstract labour, defined as the ‘expenditure of human labour in general’.¹⁸ In other words, the abstraction is made (true) in the quotidian process of production. As Marx puts it in the *Contribution to the Critique of Political Economy*:¹⁹

The conversion of all commodities into labour-time is no greater an abstraction, and no less real, than the resolution of all organic bodies into air. Labour, thus measured by time, does not seem, indeed, to be the labour of different persons, but on the contrary the different working individuals seem to be mere organs of this labour.

¹³L Stanek, ‘Space as Concrete Abstraction: Hegel, Marx, and Modern Urbanism in Henri Lefebvre’ in K Goonewardena et al, *Space, Difference, Everyday Life: Reading Henri Lefebvre* (Routledge, 2008).

¹⁴K Marx, *Grundrisse: Foundations of the Critique of Political Economy* (Penguin, 1993) 25.

¹⁵L Stanek (ed), *Henri Lefebvre: Toward an Architecture of Enjoyment* (University of Minnesota Press, 2014); Lefebvre, 1973.

¹⁶Stanek (n 13) 67.

¹⁷ibid.

¹⁸ibid.

¹⁹K Marx, *Contribution to the Critique of Political Economy* (Progress Publisher, 1859), full text available at *Marxist Internet Archive* www.marxists.org/archive/marx/works/sw/index.htm.

Marx's idea of the 'abstraction which became true in practice' was extended by Lefebvre to his conceptualisation of space as another form of concrete abstraction. Space is a concrete, social abstraction with real existence, produced by social relationships and inextricably linked to human practices. In the *Production of Space*,²⁰ Lefebvre distinguishes three spatial 'moments' or overlapping lenses that translate the physical, mental and social dimensions of space.

The space is at once *conceived* (abstract; representation of space); *perceived* (materially produced and reproduced through spatial practices) and *lived* (imbued with, and enriched through meaning; representational). The conceived space embodies the abstract space of planners, of the state, of the law and, by extension, of capital. The abstract space of capital, mobilised by the state, increasingly dominates perceived and lived spaces, exacerbating a sense of human dispossession and alienation, eventually turning living bodies into *lived abstractions*.²¹ To counteract the 'devastating conquest of the lived by the conceived',²² Lefebvre advocates *differential space* as the space of possibility, difference, *autogestion*, dis-alienation, excess and transformation that might arise from the abstract space. The lived space thus re-appropriated by bodies acknowledged in their mutual existence, otherness, human and non-human entanglements would allow (human) flourishing.

Lefebvre's theorisation of space, alienation and fetishism represents thus the core of his thinking in relation to social domination and a fundamental under-current that traverses his subsequent theorisation of rhythm. As previously mentioned, in the first chapter of *Rhythmanalysis*,²³ Lefebvre expresses the ambition that Rhythmanalysis be developed into a new science, with the ultimate aim of subverting the linear rhythms of capital accumulation, exploitation and annihilation via a re-appropriation of the times and spaces of the everyday life and a re-signification of human life as full of meaning and enjoyment.

Both object of the inquiry and instrument for capitalist critique,²⁴ rhythm is introduced as the basis for a non-essentialist, sensory, process-oriented, new materialist philosophical orientation²⁵ and as a methodology that asserts the primacy of the body – qua measuring unit – in its plural (perceptual) inter-relations, multi-layered existence and re-production. Like a living organism whose ill health is signalled by the sudden disruption (arrhythmia) of an otherwise harmonious flow (eurhythmia), the capitalist society, dominated as it is

²⁰ Lefebvre (n 2).

²¹ C O'Kane, 'Fetishistic concrete abstraction, social constitution and social domination in Henri Lefebvre's writings on everyday life, cities and space' (2018) 42 *Capital & Class* 253–71, 264.

²² J Wilson, "'The Devastating Conquest of the Lived by the Conceived': The Concept of Abstract Space in the Work of Henri Lefebvre' (2013) 16(3) *Space and Culture* 364–80.

²³ Lefebvre (n 1).

²⁴ *ibid.*

²⁵ See eg Y Chen, *Practicing Rhythmanalysis: Theories and Methodologies* (Rowman & Littlefield, 2017); and D Lyon, *What is Rhythmanalysis?* (Bloomsbury, 2018).

by the linear rhythms of capital accumulation and consumption is increasingly regulating and colonising the times and spaces of human development by superimposing fetishised forms of concrete abstractions that have come to dominate social relations. This has engendered diffused arrhythmias that need to be ‘politicised’ in order to be effectively counteracted.

For the purposes of our analysis, we set out to demonstrate that the temporal mismatch that pits the human bodies (left) at sea against the tempo of the juridical bodies impeding their rescue, fundamentally subtends – somewhat obfuscating its more nefarious reality – Lefebvrian notions of abstract space and lived abstraction.

In the case study presented later in the chapter, we observe, in the first instance, the political confinement of bodies at sea as a form of triumph of the *conceived space of law over the lived space of human beings*. The obliteration of their human rights effectively maps their juridically suspended space-time (international waters or the rescue ship itself) onto a zone of non-existence.²⁶ The bodies at sea are therefore turned into lived abstractions in the eye of the law/state. Meanwhile, and, significantly, out of sight, ‘bare life’²⁷ and death continue at sea, rendering arrhythmia all the more apparent.

Juridical Body and *Jurisdiction* are here introduced as prime signifiers of the *conceived space*, mobilised by the state as a form of *practical power* that exerts the violence of abstraction over its subjects, dehumanising them. As dehumanised, lived abstractions whose right to reach a place of safety is stalled or denied, the refugees are de facto discarded as not functional to the logic of capital accumulation. Hence, they cannot be assimilated and re-purposed like economic migrants. The production of space and – crucially – its negation is therefore essential to understand the internal reproductive logic of capitalism as one dominated by forms of fetishistic concrete abstractions.²⁸ If, in Lefebvre’s rendition, the social domination of the conceived over the lived is to be understood as the prime source of human alienation and oppression, the homogeneous yet fragmented space of refugees’ confinement (be it the camp or international waters) becomes synonymous with disposability.²⁹

As further discussed in the next section, Rhythmanalysis builds on spatial theory adding a temporal dimension and a phenomenological sensitivity visible in the foregrounding of the bodily experience in space-time. The affinity with Critical Phenomenology³⁰ is further explored to highlight the central role of

²⁶WD Mignolo, ‘Decoloniality and Phenomenology: The Geopolitics of Knowing and Epistemic/Ontological Colonial Differences’ (2018) 32(3) *The Journal of Speculative Philosophy* 360–87. See also WD Mignolo, *The Darker Side of Western Modernity. Global Futures, Decolonial Options* (Duke University Press, 2011).

²⁷G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Meridian, 1998).

²⁸O’Kane (n 21).

²⁹H Giroux, ‘Reading Hurricane Katrina: Race, Class, and the Biopolitics of Disposability’ (2006) 33(3) *College Literature* 171–96.

³⁰Simonsen and Koefoed (n 8).

embodiment and encounter with the ‘other’ and the world vis-à-vis the abstraction of law and lived abstraction.

B. Rhythmanalysis and Critical Phenomenology: Affinities and Potential for Legal and Political Critique

Lisa Guenther defines Critical Phenomenology as follows:

By critical phenomenology, I mean both a philosophical practice of reflecting on the transcendental and material structures that make experience possible and meaningful, and also a political practice of ‘restructuring the world’ in order to generate new and liberatory possibilities for meaningful experience and existence. (...) As a political practice, critical phenomenology is a struggle for liberation from the structures that privilege, naturalize and normalize certain experiences of the world while marginalising, pathologising and discrediting others.³¹

As such, it is a useful starting point to identify its synergy with the rhythmanalytical approach presented in this chapter. The phenomenological orientation of Rhythmanalysis and, in particular, the affinity with Merleau-Ponty’s embodied phenomenology³² has been duly acknowledged and examined by Chen³³ and is, per se, beyond the scope of this chapter. Rather, we are interested in exploring what a cross-fertilisation between critical phenomenology as a *political practice* and rhythm (arrhythmia) as a political method for subversion could offer for the type of legal and political critique that we are advancing.

Following Simonsen and Koefoed,³⁴ we pay particular attention to three characteristics that define critical phenomenological contributions, in the first place, as critical theories that are centred on *experience*: the emphasis on experiencing the structures of the world, including and especially the oppressive ones, *from within*, and the radical intersubjectivity of our lived experiences find resonance in the rhythmanalytical consideration for the body as a perceptual, metronomic device that orients our existence and lifeworld.

Secondly, critical phenomenology is sensitive to *embodied difference*.³⁵ Here the debate centres on the idea of self and other as both entangled and divergent, pointing to a *relative* alterity that is always created and revealed in the encounter. This chimes with the deep relationality that characterises Lefebvre’s theory

³¹ L Guenther, ‘A critical phenomenology of solidarity and resistance in the 2013 California prison hunger strikes’ in L Dolezal and D Petherbridge (eds), *Body/Self/Other: The Phenomenology of Social Encounters* (State University of New York Press, 2017) 47–74, 49.

³² See eg M Merleau-Ponty, *The Primacy of Perception* (Northwestern University Press, 1964); M Merleau-Ponty, *The Visible and the Invisible* (Northwestern University Press, 1968); and M Merleau-Ponty, *Humanism and Terror* (Beacon Press, 1969).

³³ Chen (n 25).

³⁴ Simonsen and Koefoed (n 8).

³⁵ *ibid* 10.

of moments, defined as ‘a higher form of repetition, renewal and reappearance, and of the recognition of certain determinable relations with otherness (or the other) and the self’.³⁶

Finally, and crucially for this analysis, critical phenomenology poses the question of *human co-existence* as a political one that ‘ineluctably involves power and conflict as well as reason and communication’.³⁷ If alterity and plurality constitute the polyrhythmic ensemble of the social, the management of conflict (arrhythmias) and the ensuing question of ethical-political responsibility bring the radical encounter with ‘other’ and ‘otherness’ back to the fore. In particular, when lived experience, difference and (human) co-existence are respectively abstracted, suppressed and denied, what forms of (political) action and resistance can be activated to counteract the calculated delay, (deliberate) inaction and/or criminalisation of human solidarity? As the case study in section III will illustrate, the chronography and geography of power³⁸ that the conceived space of law and jurisdiction produce, essentially aggravate the human condition of people in acute distress while claiming to initiate legal proceedings aimed at ensuring a ‘place of safety’. As a result, the tension between stated intentions of the law and practical outcomes that Rhythmanalysis discloses in the *methodological* form of arrhythmia is inevitably transferred and transposed to arrhythmia as a counter-hegemonic project. As we shall see, this explains forms of resistance that act both *within* existing and available ‘interstices of law’ (eg, the refusal by the judge in the preliminary investigation in Agrigento to confirm Rackete’s arrest on the basis of Article 98 of 1982 UNCLOS and the Italian Court of Cassation supporting his decision) and *without*, turning legal breaches into acts of deliberate, political rupture (Rackete’s decision to violate the ban to fulfil her duty to rescue people at sea).

That is why introducing Simone De Beauvoir’s reasoning on difference and *ambiguity* might help us refine and recalibrate our understanding of legal and political critique. Beauvoir defines the body as a (phenomenal) *situation*: ‘it is our grasp of the world and the outline of our projects’.³⁹ If the body is not a thing (that can be kept at bay or out of sight), but a relation that implies the encounter with the world and the other through the potentiality of action (the outline of our projects), to reject the situation amounts to a nihilistic negation/abstraction of all human existence. And if ‘the world is made of the same stuff of the body’,⁴⁰ the projection of the bodies *onto* the world will determine the agentic capacity of human beings. However, according to De Beauvoir, when considering human efforts, we should start from a philosophical position that acknowledges

³⁶ Lefebvre (n 5) 638.

³⁷ Simonsen and Koefoed (n 8) 12.

³⁸ See eg S Sharma, *In the Meantime. Temporality and Cultural Politics* (Duke University Press, 2014). See also D Massey, *For Space* (SAGE, 2005).

³⁹ S De Beauvoir, *The Ethics of Ambiguity* (Citadell Press, 1948) 46.

⁴⁰ Merleau-Ponty (n 32) (1964) 163.

ambiguity and *failure* as intrinsic to human existence and (political) action.⁴¹ Embodiment and consciousness carry with them irresolvable tensions. Conflict, separation, and relation; violence and the capacity for solidarity co-exist.⁴² As the following section III will demonstrate, this condition is mirrored both in the ambiguous perimeter of international human rights law, with its loopholes, and in the unresolved, haunted, Western collective consciousness. The tension between the principle of non-refoulement and the duty to rescue lives at sea, on the one hand, and the threshold and limits of jurisdiction, on the other, clearly encapsulates this ambiguity: while juridically recognising the gravity of the humanitarian emergency and the need for resolute action, the states' failure to assume individual or collective responsibility *de facto* condemns the 'others' at sea (or in the camp) to a condition of 'absolute otherness'.⁴³

III. JURIDICAL BODIES: EU MIGRATION POLICIES OF DETERRENCE AND CONTAINMENT

In this section, we turn to challenge the policies of deterrence and containment that Italy and other EU member states have implemented to criminalise humanitarian organisations assisting migrants, including NGOs carrying out search and rescue operations at sea. It is important to note that this criminalisation of solidarity is by no means isolated in nature, nor the only means through which member states have sought to prevent people on the move from reaching or remaining on the territory of the EU.⁴⁴ Similarly, other states in the Global North have pursued similar policies which significantly undermine or circumvent international human rights provisions. By focusing on the case of the *Sea Watch 3* and the arrest of its Captain, Carola Rackete in 2019, we examine the political nature of the rhythmic entanglements that connect 'bodies at sea' with juridical bodies and the policies that they produce.⁴⁵ As mentioned above, the *Sea Watch 3* case enables us to focus on the fundamental spatio-temporal mismatch that pits the existence of human bodies in time-space against the tempo of law, making visible the arrhythmia at the heart of such policies of containment and deterrence and, indirectly, of international human rights law itself. As further examined in this section, this case clearly shows the political

⁴¹ De Beauvoir (n 39).

⁴² S Kruks, *Simone de Beauvoir and the Politics of Ambiguity* (OUP, 2012).

⁴³ E Levinas, *Otherwise than Being or Beyond Essence* (Kluwer, 1991).

⁴⁴ Push-back and pull-back at sea and on land have been long used by EU member states to prevent arrivals. See eg V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S and Others v Italy*, and the Operational Model' (2020) 21(3) *German Law Journal* 385–416. See also I Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (CUP, 2016).

⁴⁵ For further insightful reflections on rights, sovereignty and nationhood, see L Stonebridge, *Placeless People: Writing, Rights, and Refugees* (OUP, 2018).

manipulation of space-time and the intrinsic ambiguity of the applicable laws, which simultaneously protect and enable the abandonment of people at sea.

A. The Italian Policy of ‘Closed Ports’ and the *Sea Watch 3* Case

On 29 June 2019, the 31-year-old Captain of the humanitarian rescue ship *Sea Watch 3*,⁴⁶ Carola Rackete, guided the ship into the Italian port of Lampedusa. In so doing, to avoid being stopped by the Italian authorities, the *Sea Watch 3* hit an Italian finance police patrol and drove it against the quay. Rackete contravened the express ban to access Italian territorial waters and the order to stop imparted by the Italian authorities. Rackete’s decision came after two weeks in international and Italian territorial waters, waiting for being assigned a place of safety (POS) which she had requested from various territorial authorities, to bring to safety approximately 50 migrants that the *Sea Watch 3* had rescued from a drifting rubber dinghy on 12 June 2019. The rescue operation had taken place in Libyan Search and Rescue (SAR), waters 47 miles to the South of the coast of Libya, from where the dinghy had set out. The vessel in distress had been spotted by a French plane of another humanitarian non-governmental organisation, which had proceeded to alert the *Sea Watch 3* as it found itself in close proximity. The Libyan coastguard had immediately declared responsibility for coordinating the rescue mission, but the *Sea Watch 3* had reached the dinghy first and proceeded to transferring the people rescued on board of the humanitarian rescue ship. After requesting to be assigned a POS, the Libyan authorities replied that the *Sea Watch 3* should take the rescued passenger to the port of Tripoli, in Libya. Rackete declined to do so, stating that Tripoli could not be considered a POS. She thus proceeded to request an alternative POS whilst heading North, towards Italy and Malta, the closest ports of safety. Considering Malta’s long track record of refusing disembarkation of migrants, the *Sea Watch 3* headed towards Italian territorial waters.

Italy, however, had just adopted new security measures, through decree no. 53 of 14 June 2019, the so-called *decreto sicurezza-bis*.⁴⁷ Crucially, the decree introduced two fundamental changes in Italian immigration law. First, it conferred direct powers to the Minister of Interior to issue, in agreement with the Minister of Defence and the Minister of Transport, measures aimed at limiting or banning transit, entry or permanence of vessels in Italian territorial waters for reasons of public order and national security. The new decree was also aimed at

⁴⁶ Sea Watch is a German non-governmental organisation (NGO) but at the moment of the events which led to Rackete’s arrest the *Sea Watch 3* was carrying a Dutch flag. Under international law, therefore, the responsibility for the conduct of the vessel and its crew, including fulfilling the obligation of rescuing people in distress at sea, was vested upon The Netherlands.

⁴⁷ www.giurisprudenzapenale.com/2019/06/18/in-vigore-dal-15-giugno-il-decreto-legge-14-giugno-2019-n-53-cd-decreto-sicurezza-bis/.

preventing foreign vessels seeking to ‘load or unload people who are in breach of immigration laws currently in force in the coastal state’ (Article 11(1)(3)). Furthermore, the decree amended the Italian immigration law and introduced harsher penalties for vessels that entered Italian territorial waters in breach of an entry ban. The new measures envisaged an administrative sanction of between 150,000 euros and 1 million euros, as well as the immediate confiscation of the vessel after the first breach.

It was on the basis of these new security measures that, on 15 June 2019, the Italian Minister of Interior denied entry to the *Sea Watch 3* which thus remained in international territorial waters adjacent to Italian territorial waters, repeating its request to be assigned a POS. Italian authorities continued to refuse entry but proceeded to evacuate passengers in need of medical care. On 26 June 2019, the *Sea Watch 3* disregarded the orders by the patrol boats of the Italian *Guardia di Finanza* (the Italian finance authority) and, invoking the state of necessity, entered Italian waters directed towards the port of Lampedusa. The NGO ship stopped in the port awaiting authorisation to disembark its passengers, an authorisation that however was not forthcoming. Three days later, on 29 June 2019, the situation on board was rapidly deteriorating and some passengers had started to self-harm. At night, in the absence of a positive response from the Italian authorities and after a failure to obtain an interim measure by the European Court of Human Rights requiring that the applicants be authorised to disembark (*Rackete and Others v Italy*, 32969/19), the *Sea Watch 3* drove to the commercial quay of the port and docked, hitting an Italian patrol in the process as mentioned earlier in this section. Following disembarkation, Rackete was arrested on charges of resisting public authorities (Article 337 of the Italian criminal code) and for resisting and attacking a war ship (Article 1100 of the Italian naval code). The latter charges were based on the aggravating fact that Rackete had repeatedly ignored the explicit orders by the Italian authorities not to enter Italian territorial waters. In what became rapidly a media frenzy, the NGO *Sea Watch* repeatedly issued statements saying that ‘forcibly taking rescued people back to a war-torn country, having them imprisoned and tortured, is a crime that we will never commit’.⁴⁸

On 2 July 2019, the judge in the preliminary investigation (the GIP of Agrigento) refused to confirm the arrest and rejected the request for precautionary measures,⁴⁹ put forward by the prosecutor,⁵⁰ that Rackete be banned from

⁴⁸R Hughes, ‘Carola Rackete: How a ship captain took on Italy’s Salvini’, *BBC News*, (6 July 2019) www.bbc.com/news/world-europe-48853050.

⁴⁹Ordinanza sulla richiesta di convalida di arresto e di applicazione della misura cautelare, document number N. 3169/19 R.G.N.R. and 2592/19 R.G.GIP, www.giurisprudenzapenale.com/wp-content/uploads/2019/07/Rachete-Carola-Ordinanza-sulla-richiesta-di-convalida-di-arresto.pdf.

⁵⁰Richiesta di convalida dell’arresto e di applicazione di misura cautelare, N.3169/19 R.G.N.R. Mod. 21, 30 June 2019, www.giurisprudenzapenale.com/wp-content/uploads/2019/07/Richiesta-convalida-arresto-RACKETE.pdf.

residing in the province. In relation to the charges of resisting and attacking a war ship, the GIP of Agrigento referred to the Constitutional Court's decision n. 35/2000 in which it held that patrol boats by the Italian *Guardia di Finanza* can only be considered war ships when they operate in international waters or in foreign ports where no consular authority is otherwise present. Since the patrol boat hit by the *Sea Watch 3* when entering the port of Lampedusa was not operating in such circumstances, it could not be considered a war ship. In relation to the charge of resisting a public authority, the GIP of Agrigento acknowledged that, as per Article 19 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), states are free to adopt measure to contrast irregular migration by sea. He found, however, that these powers of the state are limited by the duty to rescue vessels and people at sea (Article 18 UNCLOS), a duty that was vested upon Rackete (Article 98 UNCLOS) in relation to the passengers she had rescued and was subsequently requesting to disembark. Her conduct could therefore not be considered criminal in nature since it was carried out while fulfilling such duty of rescue at sea, a duty which could not be considered fulfilled by the captain of a ship until rescued people were disembarked. In this regard, the GIP of Agrigento also noted that under the Search and Rescue 1979 (SAR Convention), coastal states were also under an obligation to collaborate to ensure that the rescue operations are safely completed in the shortest time possible, including by taking the rescued people on board and taking them to a port of safety.

The Court of Cassation, the highest Italian court, was called to consider the prosecutor's appeal that the GIP's decision be annulled, and on 20 February 2020,⁵¹ it rejected the prosecutor's appeal and agreed with the GIP on justifying Rackete's actions because of the obligations vested upon her, including the obligation to deliver the people rescued at sea to a place of safety. The Court of Cassation also confirmed the rejection of the precautionary measures requested against Rackete, reiterating that restrictions to an individual's personal freedom can only be implemented in very exceptional circumstances, not applicable to Rackete's situation. For the purposes of our application of Rhythmanalysis, this case is of significance to highlight the limitations of viewing international human rights law, and relevant notions of jurisdiction and of the right to seek asylum, as linear, progressive and predictable,⁵² rather than capable of evolving to respond to developments that are, by their very nature, mutable, unexpected and/or uncontrollable. As further explained in the next section, it is in circumstances like those of the *Sea Watch 3* case that the Lefebvrian notions of abstract space and lived abstraction manifest themselves, in a perverse and ambiguous

⁵¹ Sentenza n. 112 della Corte Suprema di Cassazione, CC – 16/01/2020, registered 20 February 2020, at www.sistemapenale.it/pdf_contenuti/1582492635_sea-watch-rackete-cass-2022020-arresto.pdf.

⁵² K McNeilly, 'Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change' (2019) 28 *Social & Legal Studies* 817–38.

game of delayed disembarkation and non-acceptance of responsibility played by EU institutions and member states.

B. *Sea Watch 3*: Arrhythmia and the Political Manipulation of Space-Time

Through the *Sea Watch 3* it becomes possible to make visible and acknowledge the arrhythmia at the heart of EU migration policies and of international human rights law itself. Through this emblematic case, we can examine the political manipulation of space-time and its intrinsic ambiguity as they manifest themselves not only into the juridical body – of the applicable laws, simultaneously protecting people at sea and denying them of protection – but also on the human bodies of people rescued at sea. As mentioned earlier in this chapter, the political confinement of bodies at sea and on board of the *Sea Watch 3* represents a form of triumph of the *conceived space of law over the lived space of human beings*. The obliteration of refugees' human rights, any time states refuse to take responsibility for their rescue and for even processing their asylum claims, maps their inhabiting of a legally suspended space (be it international waters or the *Sea Watch 3* vessel while waiting disembarkation) onto a zone of non-existence. The bodies at sea are turned into *lived abstractions* in the eyes of both the law and of the EU institutions and member states. During the *Sea Watch 3* standstill, the refugees awaiting disembarkation were portrayed as a risk, a burden and a threat by both the media and relevant politicians, but their continued living and suffering on board of the vessel was never fully reported or discussed. The decision to keep their lives significantly and deliberately out of sight renders the condition of political arrhythmia apparent in its existential urgency. The juridical body of contradicting legal norms, related for instance to jurisdiction in situations of transnational human rights violations such as the ones continually perpetuated by the Libyan coastguard on behalf of the EU and its member states, is a prime signifier of the *conceived space*, mobilised by the EU and its member states as a form of *practical power* that exerts the violence of abstraction over its subjects by denying their humanity. Within the heightened security context of the current COVID-19 pandemic, these people were presented simultaneously as a health risk and an economic burden, who could not be assimilated and transformed into 'productive subjects'.⁵³

⁵³ See eg A Bhagat, 'Governing Refugees in Raced Markets: Displacement and Disposability from Europe's Frontier to the Streets of Paris' (2020) *Review of International Political Economy*, at doi.org/10.1080/09692290.2020.1844781; L. Turner, "'#Refugees can be entrepreneurs too!' Humanitarianism, race, and the marketing of Syrian refugees' (2020) 46 *Review of International Studies* 137–55; PK Rajaram, 'Refugees as Surplus Population: Race, Migration and Capitalist Value Regimes' (2018) 23 *New Political Economy* 627–39. See also U Krause and H Schmidt, 'Refugees as Actors? Critical Reflections on Global Refugee Policies on Self-Reliance and Resilience' (2020) 33 *Journal of Refugee Studies* 22–41.

The production of space and, crucially, its negation are evident in this case study. The sea and the *Sea Watch 3* itself become a space where the legal obligations pertaining search and rescue are affirmed but also simultaneously negated by a denial of a place of safety and a refusal to disembarkation. At sea and on board of the vessel, however, people continue to live, give birth, hug, fear and die. However denied, the pulsating rhythms of their human existence carry the visible mark of enduring Western colonial practices, placing the West in front of the indicting gaze of the disposable 'Other'.⁵⁴

In the *Sea Watch 3* case, Carola Rackete was criminalised for breaching the ban to access Italian territorial waters, explicitly contravening the order to stop imparted by the Italian authorities. Yet Rackete's decision was justified by a duty to rescue people at sea (Article 18 UNCLOS). In Lefebvrian terms, this not only epitomises the contradictory nature of abstract space, but signals the possibility for a differential space emerging from it. As Wilson aptly observes,

In Lefebvre's opinion, the increasing political significance of the state-led production of space necessitates a form of revolutionary action that is explicitly oriented against the state and toward the subversion of abstract space, based on the contradiction internal to it. (Wilson 2013, p. 372)

In other words, Rackete's 'revolutionary action' reaffirms the value of the *lived* (bodies) over the violence of the *conceived* (the EU institutions, the member states, the law). Conceptually, this passage can be identified as the trait-de-union between Lefebvre's theorisation of space and his later work on Rhythmanalysis. Arrhythmia, as it delineates itself in the *Sea Watch 3* case, is symptomatic of a very specific type of EU governmentality, aimed at the willful creation of spatio-temporally suspended zones. Against the background of continued criminalisation of humanitarian NGOs and their workers, prolonged stalling in situations of disembarkation, and the presentation of the New Pact on Migration and Asylum in September 2020 (confirming a doubling down of deterrence and containment measures), the identification and subsequent politicisation of arrhythmia remains a key tool for social, legal and political critique. Through it, we can unpack and examine the ethical and political dimension that underpin the spatial and temporal mismatch, in a bid to reaffirm the centrality of the bodily experience of people rescued at sea *against* the violent and ambiguous abstraction of international human rights law. As a clear example of this abstraction, in the next section we focus on the notion of jurisdiction and we examine, in more detail, the need for overcoming this violent positioning of the law.

⁵⁴See eg ET Achiume, 'Migration as Decolonization' (2019) 71 *Stanford Law Review* 1509; LA Flores, *Deportable and Disposable: Public Rhetoric and the Making of the "Illegal" Immigrant* (Pennsylvania State University Press, 2020) especially ch 3; ET Achiume and A Bâli, 'Race and Empire: Legal Theory Within, Through and Across National Borders' (2021) 67 *UCLA Law Review* 1386.

C. Jurisdiction, the Production of Time-space and Violent Abstraction

The importance of reconnecting time and space, and of understanding the production of time-space and abstraction, become crucial to exposing the spatio-temporal violence of a specific legal notion relevant to the *Sea Watch 3* case: the notion of jurisdiction. Jurisdiction is relevant to our case study because much of the contention on disembarkation is due to increased attempts by EU member states to avoid being legally responsible for the rights of people rescued at sea, especially in terms of granting them access to EU territory and to a fair refugee status determination procedure. According to current state practice, this shirking of responsibility seems best achieved by avoiding situations in which state organs come into contact with the migrants⁵⁵ and by ensuring that the migrants do not enter the state territory. If we look at migration control in Australia and the United States, we can see that this contactless approach to migration control is not unique to the EU migration context,⁵⁶ and relates to the fact that the obligations by state parties to a human rights treaty that contains a jurisdiction clause, such as the European Convention on Human Rights, may also extend to transnational contexts, that is to say outside of a state parties' territory, as long as the threshold criterion for jurisdiction is met.

Whilst the general approach states that jurisdiction is 'primarily territorial' in nature,⁵⁷ the threshold criterion for jurisdiction has also been met when states have exercised effective control over a territory (also known as the spatial mode of jurisdiction) or over a person (the personal mode of jurisdiction).⁵⁸ A new approach to jurisdiction, however, suggesting that jurisdiction be triggered when the state has 'control over a situation'⁵⁹ has been put forward in the case of *SS v Italy*⁶⁰ in relation to Italy's collaboration with the Libyan coast-guard on migrants' pullbacks at sea.⁶¹ The traditional modes of jurisdiction,

⁵⁵This is also referred to as 'contactless control', see eg M Giuffrè and V Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in SS Juss (ed), *Research Handbooks on International Refugee Law* (Edward Elgar, 2019) 82–108.

⁵⁶D Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP, 2019) especially chs 4 and 5.

⁵⁷*Banković and Others v Belgium*, European Court of Human Rights, Grand Chamber (Admissibility) Application no. 52207/99 (12 December 2001) at hudoc.echr.coe.int. Even more controversially, see *Georgia v Russia (II)*, European Court of Human Rights, Grand Chamber (Merits) Application no. 38263/08 (21 January 2021) paras 81–84.

⁵⁸M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP, 2011).

⁵⁹T Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 *European Journal of International Law* 581–606, 590. See also D Davitti, *Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection* (Hart Publishing, 2019) especially ch 5.

⁶⁰V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v Italy, and the "Operational Model"' (2020) 21(3) *German Law Journal* 385–416.

⁶¹A Farahat and N Markard, 'Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility' (2020) Heinrich Böll Stiftung Brussels, eu.boell.org/sites/default/

based on control over a territory or over a person, are clearly limited in terms of reflecting the reality on the ground, when states cooperate in carrying out human right violations by proxy, to exploit the legal loophole created when the violation is carried out transnationally by a state on behalf of and with the support of another state.⁶² Such approaches to jurisdiction are equally limited in terms of reflecting the lived abstraction experienced by the people rescued at sea and warehoused on board of the *Sea Watch 3* while waiting to be assigned a place of safety. Whilst it will take a few years to know whether the European Court of Human Rights will accept the emergence of a functional approach to jurisdiction in *SS v Italy*, territorial and personal modes of jurisdiction continue to enable egregious violations across the Mediterranean and beyond. In these migration control contexts, the sea becomes an abstract space in which refugees and migrants are kept at a distance and out of sight. Temporally, this deliberate manipulation confirms Sara Sharma's argument that 'the temporal operates as a form of social power and a type of social difference'⁶³ and that we ought to develop a 'power chronography' that unveils the temporal dimension of power by rendering visible how differentiations operate at a subjective, embodied level.

The spatio-temporal violence of jurisdiction is apparent in the *Sea Watch 3* case, as well as in all the other cases of refused disembarkation and of NGO criminalisation which continue to occur as part of the EU migration control context. The sea and the vessel carrying people rescued at sea, in Lefebvrian terms, are simultaneously conceived (turned into lived abstractions); perceived (materially produced and reproduced through the spatial practice of refused disembarkation) and lived (still imbued with the meanings and hopes shared by the people on board). The conceived space, which embodies the abstract space of the EU member states and the ambiguity of international law on matters of both jurisdiction and disembarkation, is by extension also the space of capital and of human dispossession. This abstract space of capital is enabled by the ambiguity of the law, which facilitates the transnational flow of goods, services and certain 'productive' actors (such as foreign investors and specialised workers), whilst struggling to make sense of situations of transnational human rights harm. By adding a temporal layer to the analysis of space, we make visible the continued violence⁶⁴ which take place as part of the stretching of time, intrinsic in the disembarkation debacles played at sea when EU member states claim to uphold the rule of law whilst at the same time refusing disembarkation.

files/2020-02/HBS-POS%20brochure%20web-200219.pdf. See also N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27(3) *European Journal of International Law* 591–616.

⁶² Gammeltoft Hansen and Hathaway (2015); Costello and Mann (2020).

⁶³ Sharma as cited in E Harris and R Coleman, 'The Social Life of Time and Methods: Studying London's Temporal Architectures' (2020) 29 *Time & Society* 604, 606.

⁶⁴ On race, jurisdiction and the concept of free sea, see further R Mawani, *Across the Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (Duke University Press, 2018) 231–40.

Through these games of delays and rejections, we see at play the temporal suspension of jurisdiction and the politics of ambiguity depicted by De Beauvoir.⁶⁵ The non-disembarkation of people rescued at sea exploits the gaps and silences of international human rights law – demonstrating its spatio-temporal unfitness – as well as situations of legal ambiguity which are functional to the creation of architectures of oppression. EU member states, backed by the deliberate silences and constitutive inaction of EU institutions, purport to uphold international human rights law, whilst skilfully taking advantage of its limitations to rely on these architectures of oppression. These in turn, emblematically represent the systems of abstraction at the core of Lefebvre’s life-long critique of capital: whilst people rescued at sea are kept out of sight, so that the materiality of their bodies is abstracted and the time-space in which they live is deliberately ignored, their lives continue throughout and in spite of this suspension of time.

IV. CONCLUSION

In this chapter, we have reappraised Lefebvre’s theorisation of space and rhythm as political, conceptual and methodological tools to examine and critique current EU migration policies of deterrence and containment. We have contextualised Rhythmanalysis by examining its roots in spatial analysis using Lefebvre’s ideas of concrete abstraction, abstract space and differential space to signal the discrepancy and contradictory nature that characterises the stated aims of the EU migration policies and the lived experiences of people targeted by them. We have theoretically grounded, significantly advancing it, Novak’s argument that the arrhythmic encounter between the tempo of international human rights law and the lived experience of the refugees at sea has an ambiguous political quality to it, thus introducing a novel way of approaching the fields of international human rights law and migration. One that organically integrates the spatio-temporal dimension of social (re)production, rather than ‘cosmetically’ applying it.

To theoretically strengthen this position, we have explored the affinities and potential synergies between Rhythmanalysis and Critical Phenomenology *qua* political practices and methodological orientations centred on lived experience, human co-existence and difference. Crucially, we then considered the role of ambiguity and failure that according to De Beauvoir is intrinsic to all human and political existence/action, as the starting point for a resemanticisation of political and legal critique, away from the violence of abstraction associated with the ‘certainty’ of law.

⁶⁵ De Beauvoir (n 39).

To substantiate our claims, we used as illustrative case the arrest and prosecution of the captain of the *Sea Watch 3* by the Italian authorities in July 2019 for rescuing people at sea and disembarking them in Italy despite the government's closure of all ports to rescue ships operated by NGOs. We focussed on the fundamental spatio-temporal mismatch that pits the existence of human bodies in time-space *against* the tempo of law highlighting, in particular, the ambiguous and contradictory remit of jurisdiction. Lefebvre's ideas of abstract space, differential space and oppression were evoked and invoked to demonstrate that the arrhythmia and ambiguity at the heart of EU migration policies and of international human rights law, far from being unintended, are deliberate political aims. On the same basis we invite further reflection to explore novel ways in which arrhythmia and ambiguity could be harnessed, within political and legal research, as counter-hegemonic projects.

