Articles

The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v. Italy,* and the "Operational Model"

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Abstract

Available accounts on jurisdiction, effective control, and the reach of human rights protections fail to provide a coherent construction that is principled and applicable across the board, within and beyond territorial borders. The "functional jurisdiction" model posited herein resolves these incongruities by looking at the normative foundation of sovereign authority overall, predicated on an exercise of "public powers" through which State functions are discharged, taking the form of policy delivery and/or operational action, whether inland or offshore, and which translates into "situational" control. Using the pending case of *S.S. and Others v. Italy* as an illustration, the article focuses on the sovereign-authority nexus that unites a specific State with a specific individual in a specific situation, triggering human rights obligations even through mechanisms of "contactless control" exercised via remote management techniques and/or through a proxy third actor. The role of extraterritorial operations, *qua* complex mechanisms of governance that implement broader policies with a planning, rollout and post-implementation phase, is central to this re-conceptualization, as is also the understanding that what makes control "effective" is its capacity to determine the material course of events and the resulting position in which those affected find themselves upon execution of the measure(s) concerned.

Keywords

Functional Jurisdiction; Contactless Control; Public Powers; *S.S. and Others v. Italy*; Operational Model

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A. Introduction

Debates on the extraterritorial reach of human rights are often channeled through debates on jurisdiction. In substance, it is the exercise of jurisdiction that determines whether a state can be held accountable for human rights violations in a specific situation, hence the importance of defining the term and identifying the factors through which it can be ascertained. This is particularly true in the context of the European Convention on Human Rights (ECHR),[1] where the notion is construed as a "threshold" criterion that determines its applicability in concrete cases,[2] but it is a common feature across the field of international human rights instruments.[3] Ultimately, what these discussions reveal is a tension between competing conceptions of the mission and rationale of human rights, whether seen as essentially underpinned by an universalist vocation or as fundamentally constrained by national borders as key delineators of state powers and state obligations.

Adjudicators, particularly at the European Court of Human Rights, have reflected this dialectic in their judgments, expanding the scope of human rights provisions to situations outside national territory, but over which states exhibit high levels of "effective control," adapting the territorial model to extraterritorial settings. Their findings, however, do not follow a straightforward, fundamental tenet, and have generated confusion as for what constitutes "control" that can be deemed "effective" and thus tantamount to an exercise of jurisdiction in the individual circumstances. Rather than "apprais[ing] the facts against [a set of] immutable principles," the Court has been criticized for "fashioning doctrines which somehow seem to accommodate the facts," but reach conclusions in a piecemeal way.[4]

To overcome this limitation, several authors have suggested alternative approaches. Lawson, for instance, has done so by reference to relative control and the cause-and-effect relationship between state action and foreign territory or persons abroad, proposing that states be considered responsible for the consequences of their conduct

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[1] European Convention on Human Rights and Fundamental Freedoms, Nov. 4 1950, C.E.T.S. 5 [hereinafter ECHR].

[2] Al-Skeini and Others v. United Kingdom [GC] 53 E.H.R.R. 18, para. 130 (2011). *See also* Al-Jedda v. United Kingdom, App. No. 27021/08, para. 74 (July 7, 2011), http://hudoc.echr.coe.int/eng?i=001-105612. Speaking of a "necessary condition" instead, see N.D. and N.T. v. Spain [GC], Apps. 8675/15 and 8697/15, para. 102 (Feb. 13, 2020), http://hudoc.echr.coe.int/eng?i=001-201353.

[3] For a thorough discussion and further references, *see* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2011). *See also* Ralph Wilde, *The Extraterritorial Application of International Human Rights Law on Civil and Political Rights*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 635 (Nigel Rodley & Scott Sheeran eds., 2013); GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Malcolm Langford et al. eds., 2013); UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS (Mark Gibney & Sigrun Skogly eds., 2010); MICHAL GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD (2009).

[4] *Al-Skeini*, 53 E.H.R.R. 18, Concurring Opinion of Judge Bonello at para. 8.

wherever performed[5]—somewhat equating the ability to violate rights with the duty not to violate them, without expounding how to avoid the conflation between capability and obligation. Others, like Milanovic, rely on the nature and content of obligations and whether they entail positive or negative duties, presuming that the latter are easier to comply with offshore and should therefore be ubiquitously respected—as if the distinction between positive and negative duties was warranted, as a matter of principle, or easy to operate, as a matter of practice.[6]

These propositions, as plausible as they may be, leave a significant amount of unpredictability, which may lead to unsatisfactory outcomes. They fail to provide a coherent construction of jurisdiction that is applicable across the board, within and beyond borders, and that is principled and non-contingent on levels of physical control or the legal characterization of the nature of obligations (as positive or negative). So, contributing to this discussion, but offering an alternative reading, this article proposes a new conceptualization, taking extraterritorial maritime migration multi-actor interventions as a case in point.

Starting from pronouncements of international human rights courts and treaty bodies, the goal is to distil a principled and workable concept of jurisdiction that reconciles the universal ethos of human rights with the existence of national borders in an inter-dependent, globalized world. With this in mind, the objective is to unpack the normative premise unifying the generally accepted models of extraterritorial jurisdiction (that is, "control over an area," or territorial, and "State agent authority," or personal) and, on that foundation, propose a paradigm that resolves the current difficulties with the appraisal of extraterritorial action.

This model, which I call "functional"—in a sense somewhat different from the one implied by other authors, as discussed in Part D—aspires to provide a more intelligible approach to the establishment of extraterritorial jurisdiction, highlighting the importance of the normative foundation of sovereign authority overall, whether exercised territorially or abroad. It is predicated on the exercise of *public* powers, such as those ordinarily assumed by a territorial sovereign,[7] taking the form of policy delivery and/or operational action translating into "situational control."

Against this background, I will assert that instances of "contactless" control by an ECHR party,[8] exercised through remote management techniques and/or in cooperation with

[5] Rick Lawson, *Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 83 (Fons Coomans & Menno T. Kamminga eds., 2004). *See also* Applicants in Bankovic and Others v. Belgium and Others, 11 B.H.R.C. 435 (2001).

[6] Milanovic, *supra* note 3, at 210 et seq.

[7] *Al-Skeini*, 53 E.H.R.R. 18, para. 149.

[8] The argument will elaborate upon Violeta Moreno-Lax & Mariagiulia Giuffré, *The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows*, *in* RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW 81 (Satvinder S. Juss ed., 2019). For a similar argument on military occupation but without "boots on the ground", *see* Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISRAEL L.REV. 17 (2003–2004); Orna Ben-Naftali,

a local administration acting as a proxy,[9] may nonetheless amount to "effective" control and engage Convention obligations—whether it be exercised over persons, territory, or specific situations abroad. The role of knowledge and the extent of due diligence owed to avoid prospective harm will be considered as well, in view of conduct occurred "during the course of, or contiguous to, security [or equivalent] operations" performed under state direction.[10] Such "operations," *qua* complex mechanisms of governance that implement broader policies, with a planning, rollout and post-implementation phase—rather than random, one-off, haphazard encounters between a state and its potential subjects[11]—are key to the conceptualization of functional jurisdiction posited herein.

The pending case of *S.S. and Others v. Italy*, lodged by the Global Legal Action Network (GLAN), in collaboration with the Italian Association of Immigration Lawyers (ASGI), where I act as lead counsel, will illustrate the argumentation.[12] I will claim that the constellation of events of November 6, 2017, recounted in Part B and contextualized in Part C, falls within Italy's "jurisdiction" under Article 1 ECHR, in a way comparable to the *Hirsi* case.[13] While in *Hirsi* a "push-back" operation was conducted directly by Italian forces, here the same underlying policy was carried out by proxy.[14] As Part E will expound in detail, Italy exercised—though remotely[15]—a sufficient degree of "effective control" over the applicants' fate,[16] reaching the jurisdictional threshold of the Convention.

This will serve to clarify the limits of multi-actor cooperation that contributes, or leads, to human rights violations through capacity building, financial transfers, and/or intervention in the command and control structure of a partner State. It will

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Aeyal Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J.I.L. 551 (2005).

[9] Catan and Others v. Moldova and Russia, Apps. 43370/04, 8252/05, and 18454/06, para. 106 (Oct. 19, 2012), http://hudoc.echr.coe.int/eng?i=001-114082.

[10] *Al-Skeini*, 53 E.H.R.R. 18 at para. 150.

[11] This has been discarded in *Bankovic*, *supra* note 5, para. 75. Further on these "encounters," *see* ITAMAR MANN, HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW (2016).

[12] S.S. and Others v. Italy, App. No. 21660/18, communicated on 26 June 2019 http://hudoc.echr.coe.int/eng?i=001-194748.

[13] Hirsi Jamaa and Others v. Italy, App. No. 27765/09 (Feb. 23, 2012), http://hudoc.echr.coe.int/eng?i=001-109231.

[14] On "pull-backs", *see further* Nora Markard*, The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries*, 27 E.J.I.L. 591 (2016).

[15] Further on techniques of "remote control", *see* David S. FitzGerald, *Remote Control of Migration: Theorising Territoriality, Shared Coercion and Deterrence*, JOURNAL OF ETHNIC AND MIGRATION STUDIES (advance access) (2019), https://doi.org/10.1080/1369183X.2020.1680115.

[16] Ilaşcu v. Moldova and Russia, App. No. 48787/99, para. 392 (July 8, 2004), http://hudoc.echr.coe.int/eng?i=001-61886.

demonstrate that human rights responsibility can be engaged through consensual measures of pre-emption and containment of unwanted migration,[17] challenging systems of "contactless control" of irregular flows, like the one built by Italy with Libya, which impedes access to protection by refugees and others in need. Under the functional approach, the elimination of direct physical contact with the individuals concerned no longer amounts to the severance of a possible jurisdictional link that may trigger human rights obligations. On the contrary, the functional understanding maintains that operational power projected and actioned abroad, like other methods of territorial and/or personal control, amounts to an exercise of jurisdiction.

The wider ramifications of this model for armed conflict, peace building programs, development policies, or democratization efforts, beyond the immediate migration by sea terrain, should be duly considered and problematized in further research. It is anticipated that this new understanding of jurisdiction—which I deem implicit in the existing extraterritorial bases already recognized in international human rights law—can have revolutionary implications and serve to close important accountability gaps,[18] but it will also give rise to new questions around consolidating practices of collaboration in the management of cross-regional challenges, including disaster relief or the consequences of the climate crisis, with an impact throughout the legal sectors implicated in states' international relations. The limits and possible objections to this model will therefore be addressed in Part F.

B. The Events of November 6, 2017

The facts of *S.S.* have been reconstructed in detail by the research hub *Forensic Oceanography*,[19] through evidence collected by the Search and Rescue Observatory for the Mediterranean (SAROBMED),[20] on the basis of materials provided by the search and rescue (SAR) NGO *Sea Watch*. The evidence includes video footage and audio recordings of the event, survivors' testimonies, interviews with key actors, and complementary documentation gathered from a variety of official sources. There is,

[17] *See, e.g.*, Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-refoulement in a World of Cooperative Deterrence*, 53 COLUM.J.TRANSNAT'L LAW 235 (2015).

[18] *Cf.* Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 E.J.I.L. 347 (2018).

[19] *See* Charles Heller & Lorenzo Pezzani, *Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration across the Mediterranean*, FORENSIC OCEANOGRAPHY (May 4, 2018), https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf [hereinafter *Mare Clausum* Report]; for the visual minute-by-minute reconstruction of events, *see* Charles Heller & Lorenzo Pezzani, *Mare Clausum: The Sea Watch v. Libyan Coast Guard Case*, FORENSIC ARCHITECTURE (May 4, 2018), https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard [hereinafter *Mare Clausum* Video].

[20] The Search and Rescue Observatory for the Mediterranean (SAROBMED) is an international, multi-disciplinary consortium of researchers, civil society groups, and other organisations working in the field of cross-border maritime migration, either on the ground, or through advocacy, research and/or strategic litigation that records and documents human rights violations occurring at sea as a result, or in the course, of rescue/interdiction operations and of which the current author is the coordinator, https://sarobmed.org/.

however, no commonly agreed account of how the situation unfolded, since the Italian Government is yet to respond to the applicants' allegations and the Court is still to render a decision on the case. The description below, therefore, presents the facts as they were communicated to Italy.[21]

The case concerns the LYCG's interception/rescue of a migrant dinghy on the high seas, carrying around 150 persons, including the applicants, which had departed the Tripoli area around midnight on November 5, 2017, and began to capsize soon after. The Italian Maritime Rescue Coordination Centre (MRCC) located in Rome was first to receive its distress signal, which it communicated to "all ships transiting in the area," including the *Sea Watch 3* (SW3) and the *Ras Al Jadar* of the LYCG, requesting that the dinghy be assisted.[22] MRCC Rome provided exact coordinates about an hour later.[23] Meanwhile, the dinghy had started sinking.

Survivors recall a Portuguese military aircraft—belonging to the EUNAVFORMED Operation Sophia[24]—overflying and circling them several times, throwing down lifejackets. A French warship, *Premier Maître l'Her*, also under EUNAVFORMED command, and an Italian navy helicopter, within the Italian Operation *Mare Sicuro*,[25] were in close proximity. It was only about another hour later that the SW3 and the LYCG arrived on site. Apparently, the LYCG made it first, but did not assist immediately. By contrast, the SW3 crew started rescue procedures right away, assuming on-scene command (OSC), a role to which the LYCG objected—although the LYCG vessel was initially unresponsive to radio communication and lacked the necessary equipment, including rigid-hulled inflatable boats (RHIBs).[26]

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[21] *See* (only in French) Requête no 21660/18 *S.S. et autres contre l'Italie* introduite le 3 mai 2018, Communiquée le 26 juin 2019, Exposé des faits, http://hudoc.echr.coe.int/eng?i=001-194748.

[22] *See* copy of Inmarsat distress signal received by the SW3, in *Mare Clausum* Report, *supra* note 19, at 89.

[23] *See* copy of Hydrolant message received by the SW3, in *Mare Clausum* Report, *supra* note 19, at 90.

[24] This is the EU maritime security mission tasked with the fight against human trafficking and migrant smuggling from Libya, launched in 2015. Council Decision 2015/778/CFSP of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED), 2015 O.J. (L 122/31). The unpublished EUNAVFORMED documents cited hereinafter have been leaked to the press and are available via Zach Campbell, *Europe's Deadly Migration Strategy: Officials Knew EU Military Operation Made Mediterranean Crossing More Dangerous*, POLITICO (Feb. 28, 2019), https://www.politico.eu/article/europe-deadly-migration-strategy-leaked-documents/.

[25] This is the Italian maritime security operation launched in March 2015, in replacement of the mixed rescue-security mission *Mare Nostrum*. *See* Ministero della Difesa, *Operazione Mare Sicuro* (June 19, 2015), http://www.difesa.it/OperazioniMilitari/NazionaliInCorso/MareSicuro/Pagine/default.aspx.

[26] It was latter claimed by a LYCG spokesman that the LYCG RHIBs are dysfunctional. *See* Steve Scherer & Aidan Lewis, *Exclusive: Italy Plans Big Handover of Sea Rescues to Libyan Coastguard*, REUTERS (Dec. 15, 2017), https://www.reuters.com/article/us-europe-migrants-libya-exclusive/exclusive-italy-plans-big-handover-of-sea-rescues-to-libya-coastguard-idUSKBN1E91SG.

The survivors recall the *Ras Al Jadar* did not help them. Instead, the crew "took pictures and cursed."[27] Its entry into the rescue theatre "created a big wave, which made people sink and others drift away,"[28] including the child of one of the applicants. The LYCG crew then "beat people with ropes who were in the water."[29] They also established contact with the SW3, "inviting her to stay away,"[30] and stating that "[w]e are now responsible for this rescue."[31] The SW3 rejected the proposition, informing the LYCG that "[w]e have orders from MRCC [to assist the dinghy in distress]."[32]

It is unclear what the orders were. It appears that MRCC Rome had communicated by phone with the LYCG Joint Operation Room (JOR) in Tripoli.[33] From the transcript of the conversation, it transpires that MRCC Rome had directly asked the official in charge to assume OSC and that he "confirmed 'yes' the LYCG will conduct the operation and assume OSC."[34] Generally, as per the official's account, the LYCG "are in contact 24/7 with MRCC Rome." It is MRCC Rome who "provide[s] all information about SAR', including "all distress signals"—which, as the next section expounds, the LYCG has no infrastructure to systematically register and further disseminate.[35]

While the LYCG vessel approached the dinghy, the SW3 had lowered two of its RHIBs to reach out to migrants scattered around at risk of being lost. The LYCG vessel deployed a rope instead, only after several persons had already passed away, causing

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[27] Testimonies of survivors (on file). Confirming: U.N. Office of the High Comm'r for Human Rights, *Situation of Human Rights in Libya, and the Effectiveness of Technical Assistance and Capacity-Building Measures Received by the Government of Libya – Report of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/37/46, para. 46 (Feb. 21, 2018).

[28] Testimonies of survivors (on file).

[29] *Id.* For similar practices in other incidents, *see, e.g.*, Bel Trew & Tom Kington, *Video Shows Libyan Coastguard Whipping Rescued Migrants*, THE TIMES (Feb. 14, 2017), https://www.thetimes.co.uk/article/video-shows-libyan-coastguard-whipping-rescued-migrants-6d8g2jgz6.

[30] EUNAVOFRMED, *Monitoring Mechanism Libyan Coast Guard and Navy, Monitoring Report October 2017 – January 2018* [hereinafter LYCG Monitoring Report], Annex C, p. 3 (on file).

[31] Audio recording of the SW3's bridge communications (Nov. 6, 2017) (on file).

[32] *Id*.

[33] LYCG Monitoring Report, *supra* note 30, Annex C, at 3.

[34] Transcript of interview with Brigadier Masoud Abdel Samad (Nov. 10, 2017) (on file), also cited in *Mare Clausum* Report, *supra* note 19, at 94.

[35] *Id*. The information has been corroborated in a second interview, undertaken on Mar. 23, 2018 (on file). Confirming, *see also* EUNAVFORMED, *Six-Monthly Report 1 November 2016 – 31 May 2017*, at 8 (on file), reporting how "MRCC [Rome] . . . requested the Libyan Coastguard to assume responsibility for the coordination of the search and rescue operation" of May 10, 2017. *See also* U.N. Support Mission in Libya & U.N. Office of the High Comm'r for Human Rights, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya*, at 17 (Dec. 20, 2018), reporting an interview where a LYCG spokesperson confirmed that coordination of SAR operations takes place "with the support of the MCCR [i.e., Rome MRCC]" and that the distress calls they receive and respond to are "coming through Italy," https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf.

the dinghy to tip and others to fall into the water.[36] Amidst the chaos, some climbed on board the *Ras Al Jadar* unaided, including several of the applicants. Others, fearing for themselves, swam towards the SW3 RHIBs. Video footage shows how the LYCG shouted and threw objects at them, endangering rescue procedures. This caused the SW3 RHIBs to retreat, and several other persons to drift and drown.[37] Regarding those on board the *Ras Al Jadar*, including some of the applicants, LYCG crewmembers used a rope to tie them up and beat them, pointing firearms in their direction.[38] Unable to establish order, the LYCG patrol speeded up abruptly to leave the scene, leaving one person hanging on the flank of the ship, who was only recovered after repeated calls by the Italian military helicopter.[39]

In the interim, six of the applicants managed to jump overboard and regain the SW3, which, in total, rescued 59 of all survivors and took them to Italy. The body of the child of one of the applicants was retrieved too, making it the second infant known to have been lost in the commotion. The remaining two applicants staying on the *Ras Al Jadar* were taken to the Tajura camp in Libya,[40] where they were abused for over a month.[41] From there, they were returned to Nigeria after agreeing to "voluntary repatriation," as the only alternative to indefinite detention they were offered.[42] Two witnesses, who had been pulled back as well, were still in Libya at the time of filing of the complaint.[43]

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[36] *See* Charles Heller, Lorenzo Pezzani, Itamar Mann, Violeta Moreno-Lax & Eyal Weizman, *"It's an Act of Murder": How Europe Outsources Suffering as Migrants Drown*, NEW YORK TIMES (Dec. 26, 2018), https://www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html.

[37] *See* Sea Watch, *Update: Beweismaterial für unverantwortliches Verhalten der Libyschen Küstenwache*, undated, https://sea-watch.org/update-beweise-libysche-kuestenwache/.

[38] U.N. S.C., *Report of the Secretary-General on the United Nations Support Mission in Libya*, U.N. Doc. S/2018/140, para. 49 (Feb. 12, 2018), http://www.securitycouncilreport.org/un-documents/document/s2018140.php.

[39] Sea Watch, *EXKLUSIVE [sic]: Full incident of 06 November 2017 with the Libyan Coast Guard* (Nov. 13, 2017), https://www.youtube.com/watch?v=_phI-f_yFXQ.

[40] U.N. High Comm'r for Refugees, *Libya, Detention Centres* (Jan. 15, 2017), https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=58874a004&skip=0&query=Tajura&coi=LBY.

[41] On the treatment of detainees, *see* among many others U.N. Office of the High Comm'r for Human Rights, *Detained and Dehumanised – Report on Human Rights Abuses Against Migrants in Libya* (Dec. 13, 2016), https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf; Council of Europe Commissioner for Human Rights (CoE CommHR), *EU Agreements with Third Countries Must uphold Human Rights* (Feb. 2, 2017), https://www.coe.int/en/web/commissioner/-/eu-agreements-with-third-countries-must-uphold-human-rights; U.N. Secretary General, *Report of the Secretary-General pursuant to Security Council Resolution 2312* (2016), U.N. Doc. S/2017/761 (Sept. 7, 2017); U.N. Office of the High Comm'r for Human Rights & U.N. Support Mission in Libya, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya* (Apr. 2018), http://www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf.

[42] Izza Leghtas, *"Death Would Have Been Better": Europe Continues to Fail Refugees and Migrants in Libya*, REFUGEES INTERNATIONAL FIELD REPORT, at 14–19 (Apr. 2018), https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5ad3ceae03ce641bc8ac6eb5/1523830448784/2018+Libya+Report+PDF.pdf.

[43] These two persons filed a separate application, once GLAN was able to collect their powers of attorney in Libya. Their case reference is C.O. and A.J. v. Italy, Appl. 40396/18 (not yet communicated).

C. The Bigger Picture of Italy–Libya Relations

The involvement of the LYCG in *S.S.* is not an isolated event and must be appraised against its wider context. It is part of a broader plan, in which Italian (and EU) authorities have invested vastly, to establish a Libyan SAR and interdiction capacity so they can assume responsibility for rescue (and disembarkation) and stymie irregular migration across the Central Mediterranean. Efforts date back to the early 2000s,[44] with the 2008 Treaty of Friendship of the Berlusconi-Gaddafi period marking a particularly significant inflection point.[45] But they have continued in the post-Gaddafi era, with Italy providing key logistic, financial, political, and operative support.

I. The Legal and Political Framework

The 2008 Treaty of Friendship, as developed in the Memorandum of Understanding (MoU) of February 2017,[46] is the pivotal agreement, providing legal coverage to the Italian-Libyan cooperation in the field of irregular migration. It specifically buttresses the re-establishment of a Libyan Navy and Coast Guard (LN/LCG), with Italy assuming "a leading role."[47]

The Treaty contains a provision, in Article 19, calling on both parties to intensify their collaboration in the establishment of an integrated system of frontier surveillance in Libya, for the Italian actors with the requisite technological competence to administer, committing Italy to pay half of the cost, with the EU bearing the other half.[48] The provision also explicitly commits the parties to jointly define actions to "stem irregular migration flows" [49] —with no mention of human rights obligations. While the implementation of the Treaty led to the joint push-back campaign conducted in 2009,

[44] Listing the different documents and reconstructing the history of migration management cooperation during this period, *see* Emanuela Paoletti, *A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU*, RAMSES WORKING PAPER 12/09, European Studies Centre, Oxford (Apr. 2009). For the book-length elaboration, *see* EMANUELA PAOLETTI, THE MIGRATION OF POWER AND NORTH-SOUTH INEQUALITIES: THE CASE OF ITALY AND LIBYA (2010).

[45] *Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista* (Aug. 30, 2008), https://www.gazzettaufficiale.it/eli/id/2009/02/18/009G0015/sg [hereinafter Treaty of Friendship].

[46] *Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontier tra lo Stato della Libia e la Repubblica Italiana* (Feb. 2, 2017), http://www.statewatch.org/news/2017/feb/it-libya-memo-immigration-border-security-2-2-17.pdf [hereinafter MoU].

[47] Ministero degli affari esteri, *La Strategia Italiana Nel Mediterraneo*, at 21 (Dec. 2017), https://www.esteri.it/mae/resource/doc/2017/12/med-maeci-ita.pdf [hereinafter MAE Report].

[48] Treaty of Friendship art. 19.

[49] *Id.* art. 19(3).

and for which Italy was condemned in *Hirsi*,[50] cooperation was halted during the civil war period.

The 2017 MoU has revived the Treaty of Friendship by expanding on its Article 19.[51] It sets up, on that basis, specific structures of collaboration, including a "Joint [Italy-Libya] Commission" charged with the definition of priorities, funding needs, implementation strategies, and monitoring actions.[52] The ultimate goal remains to "stem irregular migrant flows"[53]—again, with no reference to human rights. To that end, the division of labor foresees that Italy provide the financial, technical, technological and other means, specifically to the LYCG.[54] The financing of detention centers, the training of its personnel, and overall support to return and readmission from Libya is also part of the agreement.[55]And Article 4 reiterates that it is for Italy, including via EU funding, to cover the expense.[56]

Regarding political support, Italy has not been alone in sustaining the LYCG and the plan for comprehensive containment of unwanted flows departing from Libya. The EU, besides providing significant financial and logistic assistance, has also celebrated the Italian-Libyan cooperation at the highest political level. Already in January 2017, the EU Commission and the EU High Representative for Foreign Affairs called for the enhancement of support to Libya and the LYCG.[57] And, far from condemning the MoU, the *Malta Declaration*, adopted by all EU Heads of State and Government, "welcomes and . . . support[s] Italy in its implementation," pledging funds and capacity building, with the explicit aim of "preventing departures and managing returns."[58] Despite the wealth of sources denouncing it, the situation facing migrants in Libya—known to

[50] This was the direct result of an (unpublished) Additional Protocol of February 4, 2009, cited in *Hirsi*, *supra* note 13, para. 19.

[51] MoU, *supra* note 46.

[52] *Id.* art. 3.

[53] *Id.* art. 1a.

[54] *Id.* arts. 1b and 1c.

[55] *Id.* art. 2.

[56] *Id.* art. 2. EUNAVFORMED has also delivered training to the LYCG upon extension of its mandate via Council Decision (CFSP) 2016/993 of 20 June 2016 Amending Decision (CFSP) 2015/778 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), 2016 O.J. (L 162/18).

[57] *Joint Communication on Migration on the Central Mediterranean Route: Managing Flows, Saving Lives*, JOIN(2017) 4 final (Jan. 25, 2017), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=en.

[58] European Council, *Malta Declaration*, para. 6(j) (Feb. 3, 2017), http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/.

former Italian Minister of Interior, Minniti[59] and his fellow ministers of the other Member States[60] —has been no impediment to the EU's backing of this cooperation.

II. Funding and Equipment

Capacity-building initiatives within the framework of the Treaty of Friendship and the MoU intensified in the summer of 2017, with Italy creating a dedicated "Africa Fund" and allocating €2.5 million for the maintenance of Libyan boats and the training of their crews.[61] In parallel, Italy also secured EU funding in excess of €160 million for Libya. An EU project was awarded to the Italian Coast Guard, through which €46.3 million have been channeled to border management and migration control in Libya.[62] The project specifically aims at "[s]trengthening the operational capacities of the Libyan coastguards", via "training, equipment . . . repair and maintenance of the existing fleet," so as to "strengthen the authorities' capacities in maritime surveillance and rescuing at sea."[63] The final goal is "to provide the Libyan coast guards with *initial capacity* [absent hitherto] to better organise their control operations" and "coordinate maritime interventions."[64] This, the EU Commission has noted, "will involve the full design of an Interagency National Coordination Centre . . . and a Maritime Rescue Coordination Centre,"[65] which does not yet exist—its completion being "estimated in 2020"[66]—as well as "assistance to the authorities in defining and declaring a Libyan Search and Rescue Region [SRR]"[67]—which was only recognized by the International Maritime Organization (IMO) in June 2018.[68]

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[59] *Migranti, Minniti: "Condizioni di chi è riportato in Libia sono mio assillo",* REPUBBLICA TV (Aug. 15, 2017), https://video.repubblica.it/cronaca/migranti-minniti-condizioni-di-chi-e-riportato-in-libia-sono-mio-assillo/282714/283328.

[60] Amnesty International, *Libya's Dark Web of Collusion: Abuses against Europe-bound Refugees and Migrants*, 56–59 (Dec. 11, 2017), https://www.amnesty.org/en/documents/mde19/7561/2017/en/, counting over 20 reports from reliable monitors, including UN and EU sources. *See* further list of nearly 50 reports by Amnesty International (AI) and Human Rights Watch (HRW) spanning the period 2013 to 2019 appended to their joint Third-Party Intervention in *S.S.*, *Human Rights Watch and Amnesty International Submissions to the European Court of Human Rights*, Annex (Nov. 12, 2019), https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf.

[61] Ministry of Foreign Affairs, Director General for Italians abroad and migration policies, Decree 4110/47 of 28 August 2017.

[62] EU Commission, *EU Trust Fund for Africa Adopts €46 Million Programme to Support Integrated Migration and Border Management in Libya* (July 28, 2017), http://europa.eu/rapid/press-release_IP-17-2187_en.htm.

[63] *Id*.

[64] *Id*. (emphasis added).

[65] *Id*.

[66] EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2017*, EEAS(2017) 1612, at 14 (on file).

[67] EU Commission, Press Release, July 28, 2017, *supra* note 62.

[68] The coordinates were uploaded on June 26, 2018, on IMO's Gisis database, https://gisis.imo.org/Public/COMSAR/NationalAuthority.aspx. *See* the former Ambassador of Italy to Libya,

In terms of equipment, Italy has donated ten fast patrol boats to the LN/LCG,[69] which seem to be "the most effective and reliable ships [in the LYCG inventory]." The best appears to be precisely the *Ras Al Jadar*, which performed "approximately half of all sorties" between October 2017 and January 2018,[70] including the one of November 6, 2017. The vessels were gifted disregarding the widely publicized malpractices of the LYCG—also witnessed in the *S.S.* events—and the series of violent incidents occurred just a few days before the ceremony of award.[71] In one such incident the LYCG had interrupted a rescue, intercepted migrants at gunpoint, and pulled them back to Libya using perilous tactics.[72] Several actors, including the UN Secretary-General, have denounced similarly violent behavior by the LYCG[73]—of which the Italian Coastguard was aware[74]—including the firing of live shots,[75] the intimidation of NGO rescue boats,[76] and the use of force against migrants.[77]

Giuseppe Perrone, congratulating the Libyan authorities via Twitter for completing the procedure on June 28, 2018, https://twitter.com/Assafir_Perrone/status/1012235279141359616. For an elaboration on the declaration process, *see Mare Clausum* Report, *supra* note 19, at 50–52. For the controversies surrounding the process, *see also* Statement by Mr Leggeri, Frontex Executive Director to the European Parliament, LIBE Committee Meeting (Mar. 27, 2018): "Je ne considère pas comme acquise la zone SAR de la Lybie," http://web.ep.streamovations.be/index.php/event/stream/20180327-0900-committee-libe. *Cf*. Parliamentary Questions – Answer given by Mr Avramopoulos on behalf of the European Commission, P-003665/2018(ASW), Sept. 4, 2018, https://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html.

[69] Italian Ministry of Interior, *Contro il traffico dei migranti: consegnate le prime motovedette alla Marina libica* (Apr. 21, 2017), http://www.interno.gov.it/it/notizie/contro-traffico-dei-migranti-consegnate-prime-motovedette-alla-marina-libica; *Minniti in Libia: fronte comune control il traffico di migranti* (May 16, 2017), https://www.interno.gov.it/it/notizie/minniti-libia-fronte-comune-contro-traffico-migranti.

[70] EUNAVOFRMED, *LYCG Monitoring Report*, *supra* note 30, at 19, 5, raising the number to "75% of [all] LCG&N missions." This continues to be the case. *See* EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2018*, EEAS(2019) 18, Part A, at 13 (on file).

[71] EUNAVFORMED has noted how migrants "rescued" by the LYCG, immediately "mak[e] attempts to escape LCG&N vessels." *See* EUNAVFORMED, *Six-Monthly Report 1 December 2017 – 31 May 2018*, EEAS(2018) 710, at 6 (on file).

[72] Sea Watch, *official Facebook account*, (May 10, 2017), https://www.facebook.com/seawatchprojekt/videos/1865822903635782/.

[73] UNSC, Report S/2018/140, *supra* note 38, para. 49. *See also Mare Clausum* Report, *supra* note 19, at 57–62; *Dark Web of Collusion*, *supra* note 60, at 35–37.

[74] *See, e.g.*, Andrew Rettman, *Italy Backs Libya as NGOs Chased Out of Mediterranean*, EU OBSERVER (Aug. 14, 2017), https://euobserver.com/migration/138736, reporting how MSF had been "warned" by MRCC Rome "about security risks associated with threats publicly issued by the Libyan Coast Guard against humanitarian . . . vessels operating in international waters."

[75] *Migranti. Guardia costiera libica spara contro motovedetta italiana*, AVVENIRE (May 26, 2017), https://www.avvenire.it/attualita/pagine/guardia-costiera-libica-spara-contro-vedetta-italiana.

[76] Steve Scherer, *Rescue Ship Says Libyan Coast Guard Shot at and Boarded It, Seeking Migrants*, REUTERS (Sept. 26, 2017), https://uk.reuters.com/article/uk-europe-migrants-libya-ngo/rescue-ship-says-libyan-coast-guard-shot-at-and-boarded-it-seeking-migrants-idUKKCN1C12LJ.

III. Operational Involvement

For many years, and especially since the Arab Spring, "the only country that provide[d] SAR to the area sitting next to the territorial waters of Libya [was] Italy."[78] After the termination of the *Mare Nostrum* operation in 2014, the Italian Government carried on "coordinat[ing] virtually all rescue operations" in that area[79]—a fact corroborated by EUNAVFORMED, confirming that the "Italian MRCC . . . *continued* to coordinate rescue operations" throughout 2016 and 2017.[80] In fact, LYCG coordination capabilities peaked at a mere "54% of [all] SOLAS events" only in the second semester of 2018[81]—long after the *S.S.* events.

This situation of *de facto* Italian-led Libyan interventions was consolidated in 2017, on the basis of the MoU. Within that framework, not only the establishment of a capable coast guard, but also of a reliable Libyan MRCC became top priorities. The aforementioned EU project awarded to the Italian Coast Guard supported implementation.[82] Completion was planned in consecutive phases, including activities such as "organiz[ing] [LYCG] SAR units" and "develop[ing] SAR SOPs."[83] But the actual creation of the Libyan MRCC only began in December 2018, when the project entered

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[77] *See, e.g.*, Bel Trew & Tom Kington, *Video Shows Libyan Coastguard Whipping Rescued Migrants*, THE TIMES (Feb. 14, 2017), https://www.thetimes.co.uk/article/video-shows-libyan-coastguard-whipping-rescued-migrants-6d8g2jgz6. And this is routine practice. A LYCG commander told HRW that the use of force against migrants during rescues was "necessary to control the situation as you cannot communicate with them." *See* HRW, *EU: Shifting Rescue to Libya Risks Lives, Italy Should Direct Safe Rescues* (June 2017), https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives.

[78] Italian Coalition for Civil Liberties and Rights (CILD), *Guidance on Rescue Operations in the Mediterranean*, at 8 (July 2017), https://cild.eu/wp-content/uploads/2017/07/KYR-Protection-and-Maritime-Safety_EN.pdf.

[79] *Shifting Rescue to Libya, supra* note 77. *See also* Amnesty International, *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean* (Sept. 2014), https://www.amnesty.org/download/Documents/8000/eur050062014en.pdf.

[80] EUNAVFORMED, *Six-Monthly Report 1 January – 31 October 2016* (on file), at 11; and EUNAVFORMED, *Six-Monthly Report 1 November 2016 – 31 May 2017*, *supra* note 35, at 8.

[81] EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part B, at 2. "SOLAS" refers to the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 278 [hereinafter SOLAS Convention].

[82] EU Commission, *Support to Integrated Border and Migration Management in Libya – First Phase* (T05-EUTF-NOA-LY-04) (July 27, 2017), https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-04_fin.pdf.

[83] Italian Coastguard, *LMRCC [Libyan MRCC] Project briefing, Shade Med Presentation, 23–24 November 2017* (on file), mentioned in EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2017*, *supra* note 66, at 22, and reproduced in *Mare Clausum* Report, *supra* note 19, at 11. "SOPs" stands for "standard operating procedures."

its second phase, with the "development of the MRCC Communication network along the coast."[84]

Meanwhile, an incipient LYCG—still "far from being fully operational" by EUNAVFORMED's own admission[85]—started operating with the support of a Joint Operation Room (JOR), consisting of some "basic operational rooms in a joint building in Tripoli" set up in the first phase of the project,[86] but "with limited [space] and communication capabilities [and] relatively equipped to communicate with naval assets at sea."[87] The JOR, involved in the November 6, 2017, events, was and still remains "in a critical infrastructural situation . . . [that] is further adversely conditioned by a limited presence of personnel with insufficient language (English) skills and limited software tools . . . knowledge."[88] In fact, the JOR is incapable of operating at a "self-sustaining level,"[89] and its capacities "do[] not allow properly carrying out the institutional tasks as MRCC,"[90] so that, as per the EUNAVFORMED's assessment, they "still need further sustainment . . . *also in operational terms.*"[91]

Especially, the "lack of effective and reliable communication systems hampers Libyan capacity for the minimum level of execution of command and control [C2], including that necessary to coordinate SAR/SOLAS events,"[92] hence Italy has secured the necessary functions. To this effect, in August 2017, it launched Operation *Nauras*, an extension into Libyan territorial and internal waters of the military mission *Mare Sicuro*,[93] including "a factory vessel" sent to Tripoli with the task "to restore the efficiency of other Libyan naval units, and *coordinate patrol and sea rescue operations.*"[94]

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[84] EU Commission, *Support to Integrated Border and Migration Management in Libya – Second Phase* (T05-EUTF-NOA-LY-07), at 9–12 (Dec. 27, 2018), https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf.

[85] EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2017*, *supra* note 66, at 3.

[86] T05-EUTF-NOA-LY-04, *supra* note 82, at 2.

[87] EUNAVOFRMED, *LYCG Monitoring Report*, *supra* note 30, at 8.

[88] *Id*. at 22.

[89] EUNAVFORMED, *Six-Monthly Report 1 November 2016 – 31 May 2017*, *supra* note 35, at 17. This level has not yet been reached. *See* EUNAVFORMED, *Six-Monthly Report 1 December 2017 – 31 May 2018*, *supra* note 71, at 10; and EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part A, at 13.

[90] EUNAVOFRMED, *LYCG Monitoring Report*, *supra* note 30, Annex C, at 4.

[91] EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part C, at 12 (emphasis added).

[92] EUNAVOFRMED, *LYCG Monitoring Report*, *supra* note 30, at 26.

[93] Italian Chamber of Deputies, *Deliberazione del consiglio dei ministri in merito alla partecipazione dell'Italia alla missione internazionale in supporto alla guardia costiera Libica*, Doc. CCL n. 2 (July 28, 2017), www.camera.it/_dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/002/INTERO.pdf.

[94] MAE Report, *supra* note 47, at 24 (emphasis added).

Operation *Nauras* consists of four ships, four helicopters, and 600 servicemen, of which 70 per cent are deployed at sea, with the remaining 30 per cent staying in Tripoli harbour. Their key mission is, specifically, to "establish [the] operational condition[s] for LN/LNCG assets and develop C2 capabilities."[95] In the interim, their "naval asset in Tripoli Harbour [is] acting as LNCC [i.e., Libyan Navy Communication Centre] and logistic assistance/support hub."[96] This vessel is permanently "in contact with SAR assets and ITCG [i.e. Italian Coast Guard] and MRCC Centres,"[97] thus playing the role of a floating MRCC for Libya. Its function—also at the time of the *S.S*. events[98]—was explicitly "the cooperation and coordination of the joint activities of the Libyan Coast Guard and Navy, with a view to *carrying out their Command and Control (C2) tasks* and maintaining an adequate Maritime Situational Awareness to fight illegal migration."[99]

It is, therefore, via the Italian authorities, within the MRCC Rome and aboard the *Nauras* warship in Tripoli, that the LYCG received distress calls. And, because, on receipt, it lacked the means to further communicate with, let alone coordinate, assets at sea, the LYCG systematically relied on Italian (and EUNAVFORMED[100]) infrastructure to liaise with the relevant actors. A case of 2019, documented by the SAR NGO *Mediterranea*, discloses how, oftentimes, communication is even entirely done by Italian officials supposedly "on behalf of" their absent LYCG counterparts, creating the impression of autonomous Libyan action.[101] A usual mode of engagement—confirmed by the EU Commission—involves the early detection via "sightings" performed by Italian or EUNAVFORMED aerial assets, transmission of the information to the LYCG

[95] Marina Militare Italiana, *Mare Sicuro Briefing, Shade Med Presentation, 23–24 November 2017* (on file), mentioned in EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2017*, *supra* note 66, at 22, reproduced in *Mare Clausum* Report, *supra* note 19, at 10.

[96] *Id.*

[97] *Id. See also* T05-EUTF-NOA-LY-04, *supra* note 82, at 10.

[98] EUNAVOFRMED, *LYCG Monitoring Report*, *supra* note 30, at 26.

[99] Italian Chamber of Deputies, *Relazione analitica sulle missioni internazionali in corso e sullo stato degli interventi di cooperazione allo sviluppo a sostegno dei processi di pace e di stabilizzazione*, Doc. CCL-bis n. 1, at 101 (Dec. 28, 2017), http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf (emphasis added).

[100] EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part A, at 4.

[101] Christin Cappelletti, *La Libia abbandonò un barcone in mezzo al mare: ecco gli audio dell'ultimo salvataggio della Mare Jonio*, OPEN (Apr. 18, 2019), https://www.open.online/2019/04/18/la-libia-abbandono-un-barcone-in-mezzo-al-mare-ecco-gli-audio-dell-ultimo-salvataggio-della-mare-jonio/. *See also* Marco Mensurati & Fabio Tonacci, *Migranti, le carte false sui soccorsi: "I fax dei libici scritti dagli italiani"*, REPUBBLICA (Apr. 17, 2019), https://rep.repubblica.it/pwa/generale/2019/04/17/news/migranti_le_carte_false_sui_soccorsi_i_fax_dei_libici_scritti_dagli_italiani_-224317594/.

through the *Nauras* warship in Tripoli acting "as a "communication relay,"[102] and then further action coordinated by Italy "on behalf of" the LYCG.[103]

This pattern consolidated through sustained practice since August 2017,[104] and has been reinforced with Italy (and the EUNAVFORMED) introducing a post-operation evaluation of the LYCG's conduct, precisely as a consequence of the November 6, 2017, incident. The lack of "professional behaviour" of LYCG personnel was raised through this channel on this occasion and a "basic 'lessons learnt' process" introduced, with disciplinary measures taken "in one specific case."[105] Apparently, the monitoring system in place entails an "*advising role* in order to strengthen accountability and follow up,"[106] including "feedback and recommendations" to which the LYCG has been "receptive" so far.[107]

Accordingly, what the next sections will substantiate is that, from the launch of *Nauras*, it has been Italy, both remotely through its MRCC and via direct military presence in Libya, which has assumed the overall coordination of the LYCG operational response in the Central Mediterranean in a way that amounts to an exercise of extraterritorial jurisdiction. Italy's pervasive political, financial, and operative involvement equates "effective control."

D. Defining (Extraterritorial) Jurisdiction

Before entering into a discussion on what constitutes "effective control" with a view to ascertaining extraterritorial jurisdiction—as I claim Italy exercised in the *S.S.* case—it is worth pausing to reflect on what jurisdiction itself amounts to in the context of human rights. A main contribution this article attempts to make is precisely in regards to the

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[102] *See Letter of Ms Paraskevi Michou, Director-General for Migration and Home Affairs, to Mr Fabrice Leggeri, FRONTEX Executive Director, of 18 March 2019*, Ref. Ares(2019)1755075, http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf.

[103] For the reconstruction of this sequence and evidentiary material, *see* Charles Heller, *The Nivin Case: Migrants' Resistance to Italy's Strategy of Privatized Push-back*, FORENSIC OCEANOGRAPHY, especially at 64 (Dec. 2019), https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf. Confirming: EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part A, at 4.

[104] *Mare Clausum* Report, *supra* note 19, at 57–87.

[105] EUNAVOFRMED, *LYCG Monitoring Report*, *supra* note 30, Annex C, at 4.

[106] EUNAVOFRMED, *Six-monthly Report 1 November 2016 – 31 May 2017*, *supra* note 35, at 18 (emphasis added). EUNAVFORMED monitoring competence is the result of Annex F, added to the bilateral MoU signed with the LYCG on 21 August 2017 alongside Council Decision (CFSP) 2017/1385 of 25 July 2017 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), [2017] OJ L 194/61. *See* EUNAVFORMED, *LYCG Monitoring Report*, *supra* note 30, at 3.

[107] EUNAVOFRMED, *Six-monthly Report 1 June – 30 November 2017*, *supra* note 66, at 4, 14. *Cf.* EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part B, at 8, claiming that the monitoring function "does not entail any form of aid or assistance" nor "any form of direction or control of the LCG&N."

identification of a common thread that runs through territorial and extraterritorial configurations of the term, leading to principled inferences and predictable outcomes.

I. Jurisdiction as Sovereign-authority Nexus

The definition of the concept and its specific role in international human rights law has long attracted doctrinal attention. But there is disagreement as to its utility and its centrality for the establishment of responsibility for human rights violations. Some authors, like Scheinin, argue that "jurisdiction" does not add anything to the key aspects of admissibility within the state responsibility framework and should, therefore, be considered an empty notion for the purposes of substantiating legal accountability. For him, there is apparently no distinction between the attribution of wrongful conduct to the state concerned and the determination of an exercise of its jurisdiction. The two are one and the same. Adding an extra step that functions as a threshold and precludes the establishment of responsibility is, therefore, seen as unhelpful.[108] Another strand of the literature questions the appropriateness of attempting a general synthesis of the concept, in light of the variety of human rights duties and their different manifestations, which would require a more tailored and nuanced approach. Only so can the complexities of (especially positive "facilitation" and "fulfillment") obligations, entailed in particular by economic, social and cultural rights, be adequately reflected.[109]

By contrast, other writers, such as Besson, consider jurisdiction to be fundamental to the proper understanding of the relationship that unites human rights holders and duty bearers.[110] For her, without jurisdiction, the universality of human rights would imply that any state would owe human rights duties to any human rights holder, regardless of any specific political-legal nexus between them. This is why jurisdiction, in this relational sense,[111] has an essential role to play in arbitrating between duty, capability, and desirability of compliance by any specific state vis-à-vis any specific human rights holder. And this is also why jurisdiction should be understood as an "all-or-nothing" condition for the activation of human rights obligations, rather than as gradual or incremental.[112] Either there is a jurisdictional link between the state and the

[108] Martin Scheinin, *Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights*, *in* Langford et al., *supra* note 3, at 212.

[109] For a critique of the use of the notion of "jurisdiction" in the Maastricht Principles, *see* Nienkie van der Have, *The Maastricht Principles on Extraterritorial Obligations in the area of ESC rights – Comments to a Commentary* (Feb. 25, 2013), http://www.sharesproject.nl/the-maastricht-principles-on-extraterritorial-obligations-in-the-area-of-esc-rights-comments-to-a-commentary/.

[110] Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 L.J.I.L. 857 (2012).

[111] Highlighting this relational nature of jurisdiction, *see* U.N. Human Rights Comm., Lopez Burgos v. Uruguay, U.N. Doc. A/36/40 176, para. 12.1 (July 29, 1981); Celiberti de Casariego v. Uruguay, U.N. Doc. A/36/40 185, para. 10.3. (July 29, 1981).

[112] *Cf*. Argumentation by the applicants in *Bankovic*, *supra* note 5, para. 75. See also Maarten den Heijer and Rick Lawson, *Extraterritorial Human Rights and the Concept of "Jurisdiction"*, *in* Langford et al., *supra* note 3, at 153.

person concerned or there isn't. What may, then, be "divided and tailored" in the specific case, and be proportionate to the level of control applied, are the ensuing obligations, but not jurisdiction *per se*.[113]

From this perspective, the term should best be understood as the "*de facto* political and legal authority" of the sovereign, amounting to more than mere coercion,[114] including a normative dimension that demands compliance. It is not "facticity [that] creates normativity."[115] Normativity must precede and underpin the account of a factual basis *qua* jurisdiction. It is the normative aspect of an exercise of state power that makes its interaction with a particular individual human-rights relevant. In Besson's view—which I espouse—jurisdiction refers to "some kind of normative power" that the sovereign exercises vis-à-vis an individual "with a claim to legitimacy," and that serves to establish the human-rights relevant link between them. Whether the state concerned may have acted *ultra vires* in the specific situation constitutes a separate question. *A priori*, to be an expression of jurisdiction, state actions/omissions do not have to be lawful, but only stem from a "lawfully organized institutional and constitutional order."[116] What matters to characterize state conduct as jurisdiction in the human rights sense is the underlying sovereign-authority nexus that connects the state to those within its might and the control it thereby purports to exercise, whether *de jure* or *de facto*, rather than the legality of its conduct. In this sense—which seems to be the one tacitly embraced by the Strasbourg Court—jurisdiction works as a trigger of human rights obligations.[117]

Without a (pre-existing) jurisdictional link between a State party and a certain individual, no human rights duties can be owed in specific circumstances. Potential or hypothetical connections are hence irrelevant. Also *claimed* connections, which are not effectuated in the real world, are immaterial.[118] Jurisdiction requires an "*external* manifestation of the power of the State"[119]—whether having a legal or factual dimension, or being constituted by a combination of both. So, for instance, simply having the capacity to counter famine in a remote land to which there is no prior public-power relation does not suffice to entail responsibility. Unless there is an underpinning basis of prescriptive, executive and/or adjudicative authority—with or without legal title—through which *actual* state activity has taken place, the jurisdictional link will not be established. If, on the contrary, there is a piece of legislation enacted, a policy plan implemented, and/or a Court decision enforcing the

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[113] *Al-Skeini*, *supra* note 2, para. 137.

[114] *Cf*. Milanovic, *supra* note 3, at 53, reducing jurisdiction to "a question of fact."

[115] *Cf*. Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, *in* Coomans & Kaminga, *supra* note 5, at 73, 81.

[116] Besson, *supra* note 110, at 864–865.

[117] *Catan*, *supra* note 9, para. 103.

[118] Besson, *supra* note 110, at 872.

[119] MARIA GAVOUNELLI, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA 7 (2007) (emphasis added).

legislation or the policy plan in relation to said famine in said remote land, there should be no obstacle to consider such action as one demonstrative of state jurisdiction. Once the sovereign authority-nexus has been ascertained, there seems to be no principled reason justifying a distinction on the basis of the *locus* of such activity in deeming it a manifestation of jurisdiction, whether territorially or extraterritorially exercised. It would be "unconscionable" to create a double standard on that ground alone and, in consequence, "permit a State . . . to perpetrate violations . . . on the territory of another State, which violations it could not perpetrate on its own territory."[120]

To my mind, the role that territoriality plays within this understanding of the concept—in line with the basic tenets of public international law[121]—is to generate a (rebuttable) presumption of the existence of such a link within the national domain, applying "throughout the State's territory".[122] What distinguishes extraterritorial settings is the absence of such a presumption, given the principles of territorial integrity and non-interference in domestic affairs. But that does not alter the fundamental premise on which the concept of jurisdiction rests. As soon as a concrete public-power relation has been established, a jurisdictional connection is activated, triggering the application of human rights obligations. This, however, does not mean that *all* human rights will be owed in *all* situations. For instance, a military surveillance mission over non-national territory will be irrelevant to the right to education of those concerned, but it may engage responsibility from the perspective of the right to privacy, if it entails the collection of personal data.[123]

This approach, therefore, unifies the premise underpinning all forms of jurisdiction *qua* normative power with a claim to legitimacy by a state that, if and when acted upon, establishes a sovereign-authority link with those concerned. It also "normalizes" the possibility of extraterritorial manifestation—just like the Strasbourg organs did before

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[120] *Lopez Burgos v. Uruguay*, *supra* note 111; *Celiberti de Casariego v. Uruguay*, *supra* note 111. See also Issa and Others v. Turkey, App. No. 31821/96 (Nov. 16, 2004), para. 71: "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".

[121] THE OXFORD HANDBOOK OF JURISDICTION IN INTERNATIONAL LAW (Stephen Allen et al. eds., 2019); CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW (2008); Vaughan Lowe, *Jurisdiction*, *in* INTERNATIONAL LAW 335 (Malcolm Evans ed., 2006); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 106 et seq. (6th ed. 2003); Rosalyn Higgins, *The Legal Bases of Jurisdiction*, *in* EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 3 (Cecil J. Olmstead ed., 1984); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 A.J.I.L. 413 (1983); FREDERICK A. MANN, THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW (1964).

[122] *N.D. and N.T.*, *supra* note 2, para. 103. This presumption normally "precludes territorial exclusions". *See N.D. and N.T.*, *supra* note 2, para. 106. But can, however, be rebutted "in exceptional circumstances . . . where a State is prevented from exercising its authority in part of its territory". *See N.D. and N.T.*, *supra* note 2, para. 103. For an example of such exceptional circumstances, *see, e.g.*, Longa v. The Netherlands, App. No. 33917/12 (Oct. 9, 2012), http://hudoc.echr.coe.int/eng?i=001-114056, regarding the detention of a defence witness in a trial before the ICC, within the ICC premises in The Hague, para. 73: "The fact that the applicant is deprived of his liberty on Netherlands soil does not of itself suffice to bring questions touching on the lawfulness of his detention within the 'jurisdiction' of the Netherlands."

[123] *Al-Skeini*, *supra* note 2, para. 137, on the possibility of "divid[ing] and tailor[ing]" ensuing obligations.

Bankovic.[124] Indeed, the now-disappeared European Commission on Human Rights consistently held that the "High Contracting Parties are bound to secure the . . . rights and freedoms [in the Convention] to all persons under their *actual authority and responsibility*, not only when the authority is exercised within their own territory, but also when it is exercised abroad."[125] The Convention was supposed to govern the actions and omissions of Contracting Parties *wherever* they exercised jurisdiction. And jurisdiction, under Article 1 ECHR, was not deemed "equivalent . . . to or limited to the national territory of the High Contracting Party concerned." This was "clear from the language . . . and the object of this Article, and from the purpose of the Convention as a whole . . .." [126] It has been in *Bankovic* that the Court "exceptionalized" extraterritorial jurisdiction and conceptually decoupled it from its territorial counterpart.

II. The "Exceptionalization" of Extraterritorial Jurisdiction

In *Bankovic* the Court likened the term "jurisdiction" to the concept of legal title under international law, thus affirming that "the jurisdictional *competence* of a State is primarily territorial."[127] In fact, "a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State . . .."[128] There must, otherwise, be a legal basis allowing the state to exercise its power extraterritorially, whether "nationality, flag, diplomatic and consular relations, effect, protection, passive personality [or] universality."[129] This understanding, however, conflates jurisdiction under Article 1 ECHR with the existence of a right or prerogative of the state to act, which *a contrario* leads to the absurdity that states operating unlawfully abroad, without legal title conferred by international law, can additionally be human rights exempt.

Even in *Bankovic* did the Court avoid this conclusion and decided, instead, that the implication of "the 'ordinary meaning' of the relevant term in Article 1 of the Convention" was that jurisdiction should be understood as "primarily territorial,"[130] other bases "being exceptional and requiring special justification in the particular circumstances of each case." [131] While it delivered other controversial findings regarding the effect of the so-called "colonial clause" in Article 56 ECHR and the

[124] *Bankovic,* 11 B.H.R.C. 435.

[125] *See*, among others, W v. Ireland, App. No. 9360/81, 5 E.H.R.R. 504, para. 14 (1983) (emphasis added).

[126] Cyprus v. Turkey, App. Nos. 6780/74 and 6950/75, 2 Eur. Comm'n H.R. Dec& Rep. 72, at 136 (1975).

[127] *Bankovic,* 11 B.H.R.C. 435, para. 59 (emphasis added).

[128] *Id*. at para. 60.

[129] *Id*. at para. 59.

[130] *Id*.

[131] *Id*. at para. 61.

"*espace juridique européen*," [132] these have been subsequently overturned in *Al-Skeini*.[133]

What *Al-Skeini* has retained is the notion that extraterritorial jurisdiction is exceptional and, as such, must be demonstrated in the specific instance[134]—an assertion I only partly share: While I accept that jurisdiction should be "presumed to be exercised normally throughout the State's territory,"[135] over which the state is sovereign, that alone does not render extraterritorial jurisdiction exceptional in the material sense, it only requires that proof of an actual sovereign-authority link be produced in the individual situation. The presumption allocates the burden of that proof, but should have no bearing on the substantive finding of whether jurisdiction has indeed been exercised. It is also unclear what "exceptional" refers to in the eyes of the Court: Does it concern frequency or justifiability? The elimination of the presumption does not make the occurrence of extraterritorial exercises of jurisdiction any less frequent, or any less legitimate, *per se*. Questions on the lawfulness of jurisdictional action are separate from whether such jurisdictional action obtains in a particular case.

In any event, this "exceptionalization" has led to a narrow understanding of the material circumstances that can count as an exercise of extraterritorial jurisdiction. Only two models have been accepted: The "State agent authority" or personal model and the "control over an area" or territorial model.[136] In both cases the accent is put on the *factual* dimension of jurisdiction, understood as equivalent to "effective control," but without defining the term or clarifying what "effective" means in this framework.

The territorial model refers to situations in which jurisdiction arises as a consequence of state military action outside national territory, whether lawfully or unlawfully engaged.[137] The obligation to secure Convention rights derives from "the fact of such control," whether exercised directly, by the state's own army, or through a subordinate local administration.[138] In the latter case, if the existence of "overall control" can be established, then it becomes unnecessary to demonstrate that the state exercises *detailed* control over each and every of the policies and actions of the subordinate local administration.[139] And, again, determining whether effective control

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[132] *Id*. at para. 80. Appearing to endorse a revival of these concepts, *see* Concurrent Opinion of Judge Pejchal in *N.D. and N.T.*, *supra* note 2.

[133] *Al-Skeini*, 53 E.H.R.R. 18, paras. 140–142.

[134] *Id*. at para. 131.

[135] *Id*.

[136] *Id*. at paras. 133 et seq. and 138 et seq., respectively.

[137] *Id*. at para. 138.

[138] *Id*. citing Loizidou v. Turkey (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A.), para. 62 (1995); Loizidou v. Turkey (Merits), 23 Eur. Ct. H.R. 513, para. 52 (1996); Cyprus v. Turkey, 35 Eur. Ct. H.R. 967, para. 76 (2001).

[139] *Loizidou (Merits)*, 23 Eur. Ct. H.R. 513 at para. 56; *Cyprus v. Turkey*, 35 Eur. Ct. H.R. 967 at para. 77.

exists in such a situation is deemed a "question of fact," which, according to the Court, must be resolved by reference to the strength of the military deployment in the area or the degree to which military, economic, and political support to the local administration is "decisive" to influence its behavior.[140]

"Overall control" is considered to involve a measure of constant dominium over the foreign area at hand, to a point comparable to state sovereignty. In this sense, "overall control" is the *de facto* counterpart of the *de jure* title entailed by state sovereignty, thus justifying the (re-)emergence of the presumption of jurisdictional authority throughout the area concerned and its transposition to the extraterritorial context. "Overall control" liability becomes equivalent to that of the *de jure* sovereign. Therefore, within the area under its overall control, the controlling state has the responsibility to secure "the entire range of substantive rights set out in the Convention."[141] Otherwise, discrete forms of geographical control give rise to a duty to ensure only the rights that are relevant in the circumstances.[142]

This is also what happens under the personal model, where effective control over an individual also entails a duty to secure only the relevant protections—presumably on consideration that, unlike in situations of overall territorial control, there has not been a replacement of the territorial sovereign. Under this model, the Court operates under the general rule that jurisdiction may extend to acts of state authorities "which produce effects outside its own territory"[143] and distinguishes three cases.

First, the acts of diplomatic and consular agents, "present on foreign territory in accordance with provisions of international law," may count as an exercise of jurisdiction whenever they "exert authority and control over others."[144] Second, state acts that amount to an exercise of "public powers normally to be exercised by [a national] Government" may also reach the threshold, if underpinned by "the consent, invitation or acquiescence" of the territorial sovereign. If such is the case, responsibility may be incurred by the ECHR party "as long as the acts in question are attributable to it rather than to the territorial State."[145]

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[140] *Al-Skeini*, 53 E.H.R.R. 18 at para. 139, citing *Ilaşcu*, App. No. 48787/99 at paras. 387–394. *See also Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 103 et seq.

[141] *Al-Skeini*, 53 E.H.R.R. 18 at para. 138, referring to *Cyprus v. Turkey*, 35 Eur. Ct. H.R. 967 at para. 76–77.

[142] *Al-Skeini*, 53 E.H.R.R. 18 at para. 137.

[143] *Id.* at para. 133, referring, among others, to Drozd & Janousek v. France and Spain, App. No. 12747/87, para. 91 (June 26, 1992), http://hudoc.echr.coe.int/eng?i=001-57774; *Loizidou (Preliminary Objections)*, *supra* note 138, para. 62; *Loizidou (Merits)*, *supra* note 138, para. 52.

[144] *Al-Skeini*, 53 E.H.R.R. 18 at para. 134, citing embassy decisions by the EComHR; X v. Federal Republic of Germany, App. No. 1611/62, 1965 Y.B. Eur. Conv. on H.R. 8 (Eur. Comm'n on H.R.); X v. United Kingdom, App. No. 7547/76 (Dec. 15, 1977); W.M. v. Denmark, App. No. 17392/90 (Oct. 14, 1993).

[145] *Al-Skeini*, 53 E.H.R.R. 18 at para. 135, citing, Gentilhomme v. France, App. Nos. 48205/99, 48207/99 and 48209/99 (May 14, 2002), http://hudoc.echr.coe.int/eng?i=001-60454; X and Y v. Switzerland, App. Nos. 7289/75 and 7349/76 (July 14, 1977).

These first two categories thus appear to attach importance to elements of *de jure* jurisdiction, but the Court has failed to provide a detailed elaboration. In *Hirsi*, it did suggest that legal bases under customary international law, and in particular "the relevant provisions of the law of the sea," are significant, so that "acts carried out on board vessels flying a State's flag" shall be considered "cases of extraterritorial exercise of . . . jurisdiction."[146] But it did not dwell on whether on that ground alone—without additional elements of *de facto* control—Article 1 ECHR could have been engaged.[147]

The Court's attention has rather focused on the third tier of the personal model, concerning the use of force, under which it has concluded that what tends to be "decisive" in this context is "the exercise of physical power" over persons abroad.[148] The circumstances that have been considered to reach the threshold, and that the Court invokes to illustrate its findings, are instances of arrest, detention, abduction, and extradition,[149] thus highlighting forms of *de facto* control. And the same is true on the high seas, where in most cases the Court has ascertained the existence of jurisdiction on account of the "full and exclusive control" exercised "in a continuous and uninterrupted manner" over a foreign vessel or persons apprehended aboard.[150] This was the test applied in *Hirsi*, in the context of the push-back operation of migrants to Libya carried out by Italy, where the Court concluded that, "in the period between boarding the ships of the Italian armed forces" after rescue "and being handed over to the Libyan authorities," the applicants had been subjected to "the continuous and exclusive *de jure* and *de facto* control of the Italian authorities."[151]

However, the Court has also made clear that *direct* physical contact is not always necessary as long as the control thereby exerted is indeed effective. So, in a case involving the maritime blockade of a Dutch vessel by the Portuguese authorities impeding access to Portugal's territorial waters, the jurisdictional link was not contested.[152] In parallel, the rerouting of a foreign ship in *Medvedyev*, imposing a

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[146] *Hirsi*, App. No. 27765/09 at para. 77.

[147] The Court concluded that "in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive [both] *de jure* and *de facto* control of the Italian authorities." *Hirsi*, *supra* note 13, para. 81. For additional discussion, *see* VIOLETA MORENO-LAX, ACCESSING ASYLUM IN EUROPE 280–281 and 320—333 (2017).

[148] *Al-Skeini*, 53 E.H.R.R. 18 at para. 136.

[149] Öcalan v. Turkey, App. No. 46221/99 (May 12, 2005), http://hudoc.echr.coe.int/eng?i=001-69022 (abduction from Kenya); Al-Saadoon and Mufdhi v. United Kingdom, App. No. 61498/08 (March 2, 2010) (surrender to Iraqi authorities in Iraq); Medvedyev v. France, App. No. 3394/03 (Mar. 29, 2010), http://hudoc.echr.coe.int/eng?i=001-97979 (arrest on the high seas and forcible rerouting to France).

[150] *Medvedyev*, App. No. 3394/03 at para. 67.

[151] *Hirsi*, App. No. 27765/09 at para. 81.

[152] Women on Waves v. Portugal, App. No. 31276/05 (Feb. 3, 2009), http://hudoc.echr.coe.int/eng?i=001-91113.

specific course, but without boarding it, was also deemed to meet the jurisdictional test. Jurisdiction was exercised "from the stopping" of the boat, throughout the period of enforced navigation.[153] This, as the next Part elaborates, opens up a range of possible configurations in which instances of "contactless control" may be seen as an expression of jurisdiction—particularly when exercised against a background of existing legal competence in the relevant domain, lending a *de jure* basis for action.[154]

E. The Functional Approach

What ensues from the discussion so far is that the Court retains an "exceptionalist" approach to extraterritorial jurisdiction; that it does not define what jurisdiction *tout court* entails; and that the prevalent notion of "effective control" is one that attaches importance to physical force, leaving the role of *de jure* factors uncertain. Perhaps, aware of these limitations, the Court can be seen to delineate an alternative approach, which is of particular importance to the *S.S.* events and tallies with the streamlined notion of jurisdiction that I endorse.

In *Al-Skeini*, relying on the second tier of the personal model of extraterritorial jurisdiction, the Court concluded that the UK had exercised "authority and control" over individuals killed during a security operation carried out by British soldiers in Basra. Even the death of the third applicant's spouse, killed during an exchange of fire with a gang, was considered to fall within Article 1 ECHR. The fact that "it [was] not known which side fired the fatal bullet" did not alter this conclusion. Instead, the Court affirmed that, because the death occurred "*in the course of a United Kingdom security operation* . . . there was a jurisdictional link between the United Kingdom and this deceased also."[155] What mattered was the "functional" connection established between the deceased and the British forces through the medium of the security operation's implementation. Also of relevance was the fact that the operation itself entailed an assumption of "public powers," "normally . . . exercised by a sovereign government,"[156] which, in this case, had been sanctioned by UN Security Council Resolutions and regulations of the Coalition Provisional Authority in Iraq. It was arguably on that *de jure* basis that the UK was expected to carry out executive (jurisdictional) "functions" on the territory of Iraq in line with human rights, thus retaining ECHR responsibility for "as long as the acts [and omissions] in question [were] attributable to it rather than to the territorial State".[157]

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[153] *Medvedyev*, App. No. 3394/03, paras. 62—67.

[154] On the importance of the existence of legal competence to extradite under the European Arrest Warrant scheme as sufficient to establish a jurisdictional link between the child of an E.T.A. victim, present in Spain, and Belgium, where the presumptive murderer had taken refuge, in light of Belgium's duty to cooperate in an art. 2 ECHR investigation, *see* Romeo Castaño v. Belgium, App. No. 8351/17, paras. 36–43 (July 9, 2019), http://hudoc.echr.coe.int/eng?i=001-194618.

[155] *Al-Skeini*, 53 E.H.R.R. 18 at para. 150 (emphasis added).

[156] *Id.* at para. 149.

[157] *Id.* at para. 135.

For some commentators, this creates a "sub-heading" under the state agent authority exception, which allows for inclusion of a wider array of factual profiles on account of *de jure* elements.[158] For others, it is a distinct third model—or a "halfway house"[159]—based on a mix of the territorial and personal paradigms, which may have a positive impact in the establishment of extraterritorial jurisdiction.[160] Conversely, another group of scholars thinks this approach can restrict the scope of Article 1 ECHR, if the *de facto* and *de jure* factors are taken to both be jointly necessary for jurisdiction to exist.[161] Still others question the necessity of a legal basis in all cases for "public powers" to be ascertained—for example, in anti-terrorism and drone-strike operations undertaken without the territorial state's authorization.[162]

All these readings are plausible—and denote the strategic ambiguity with which the Court formulates certain doctrines, allowing for adaptation to different scenarios over time. Taken together, what they jointly come to display is the emergence of an incipient functional conception of jurisdiction that can bridge the gap between territorial and extraterritorial conceptualizations. The importance it attaches to the exercise of "public power" for the establishment of a jurisdictional link follows the line of argument advanced above, defining jurisdiction *qua* an exercise of normative power by a state, with a claim to legitimacy, that establishes a sovereign-authority nexus with those concerned through factual or legal means, or a combination of both.

But my understanding of jurisdiction as "functional" differs from interpretations offered by other authors using the same term. For instance, Besson, examining the specific role of Article 1 ECHR within the scheme of the Convention, uses the term to refer to the threshold function that it plays. She infers that what Article 1 ECHR does is to "situate[] human rights within a relationship of jurisdiction and make[] them dependent on it." From this perspective, the criterion within the ECHR "is not territorial . . . but functional," in the sense that "it pertains to the function of jurisdiction."[163] Shany, in turn, employs the term in its capacious meaning, to designate the faculty or "potential" to assume responsibility, requiring states to protect human rights in situations where they can and may reasonably be expected to do so,

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[158] Conall Mallory, *The European Court of Human Rights Al-Skeini Judgment*, 61 I.C.L.Q. 301, 311 (2012).

[159] Anna Cowan, *A New Watershed? Re-evaluating Bankovic in Light of Al-Skeini*, 1 C.J.I.C.L. 213, 224 (2012).

[160] CATHRYN COSTELLO, THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES IN EUROPEAN LAW 241 (2015). *See also* Cathryn Costello, *Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored*, 12 H.R.L.R. 287 (2012).

[161] Stefano P. Bondini, *Fighting Maritime Piracy under the European Convention on Human Rights*, 22 E.J.I.L. 829, 847 (2011).

[162] *See, e.g.*, Liam Halewood, *Avoiding the Legal Black Hole: Re-evaluating the Applicability of the European Convention on Human Rights to the United Kingdom's Targeted Killing Policy*, 9 GO.J.I.L. 301 (2019). *Cf*. Frederik Rosen, *Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility*, 19 J.C.&S.L. 113 (2014).

[163] Besson, *supra* note 110, at 863.

whenever they have the means to prevent harm. What renders such an expectation reasonable, in his view, is the specific context and "the intensity of power relations" or "special legal connections" that put the state in a unique position to afford protection.[164] Finally, the ESCR Committee mentions "functional" in contradistinction to "geographical . . . or personal" versions, as a third variation of jurisdiction.[165]

My reading is closer to Gavounelli's, who, in her discussion of the law of the sea, describes it as a function of state sovereignty.[166] In connection with this, I use "functional" to literally denote the governmental "functions" through which the power of the state finds concrete expression in a given case.[167] This agglutinates the tasks normally conducted by its officials, including those they are legally obliged to undertake. Jurisdiction, from this perspective, is therefore *always* functional and expressed through legislative, executive, and/or adjudicative activity, by which the state exercises its powers, combining personal and geographical aspects. Jurisdiction through this prism is multifactorial and composite.

The implication is that not only effective control over persons or territory matters for the activation of ECHR obligations. Control over (general) policy areas or (individual) tactical operations, performed or producing effects abroad,[168] matters as well. These are the vehicles of the exercise of "public powers" that amounts to jurisdiction. It is through policy measures and operational procedures that states exert personal or spatial control—carried out as claiming legitimacy and expecting compliance by those concerned.[169] In these situations, the jurisdictional nexus between the state and the individual exists prior to any potentially ensuing violations—through the planning and execution of policy and/or operational conduct over which the state exerts effective (if not exclusive) control. Policy implementation and operational action are no accidental events. They manifest a degree of state deliberation and volition that, when actuated, constitute a fundamental expression of its powers as sovereign.

In *Bankovic*—leaving the question aside of whether the designation of a non-military objective respected international humanitarian law standards—if the Court had considered the operational context within which the bombardment took place, rather than examining the attack in isolation, the conclusion could not have been the

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[164] Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 LAW AND ETHICS OF HUMAN RIGHTS 47, 63, 65 et seq (2013). *See also* Bonello, *supra* note 4.

[165] U.N. Comm. on Economic, Social and Cultural Rights, Concluding Observations on Israel, U.N. Doc. E/C.12/1/Add.27, para. 6 (Dec. 4, 1998).

[166] Gavounelli, *supra* note 19. *See also* Efthymios Papastavridis, *Rescuing Migrants at Sea and the Law of International Responsibility*, *in* HUMAN RIGHTS AND THE DARK SIDE OF GLOBALISATION 161 (Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen eds., 2016).

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[167] *Al-Skeini*, *supra* note 2, para. 135.

[168] *Id.* at para. 131; *Bankovic*, 11 B.H.R.C. 435 at para. 67.

[169] Besson, *supra* note 110, at 864–865.

same.[170] Of importance would have been the practical situation on the ground, in terms of the operational powers which the defendant States were actually purporting to exercise, and not the legality or legal basis of their operations. The air strike of the radio-television of Belgrade was the last point in an operational chain of action, undertaken by a military aircraft within a NATO-led mission. It was not a one-off, "instantaneous" actuation of state authority,[171] the immediate consequences of which were unpredictable or irrelevant. It was part and parcel of a pre-planned operation, similar to the one in *Al-Skeini* or in any of the other extraterritorial cases in which the Strasbourg Court has recognised there to be a jurisdictional link.[172] In virtually all cases, including *Loizidou*, *Öcalan*, *Hirsi*, or *Jaloud*, the action considered jurisdictionally relevant was integrated within a wider military, security, or rescue operation through which the state exercised "effective control."[173] So, the conclusion must be that it is the "situational," rather than the personal or spatial, control thereby exerted, executed through operational or policy-implementing action, what triggers the application of the Convention.

"Effective control," in the context of the functional approach to jurisdiction, does not readily amount to direct physical constraint. Control, in this framework, should be deemed effective, not on the basis of the intensity or directness of the physical force it may imply, but when it is determinative of the material course of events unlocked by the exercise of jurisdiction, even when the relevant activity takes place from a distance.[174] In *Bankovic*, the control the military mission exercised through the striking aircraft over its pre-determined operational target was effective, in that it was brought within firing range and subjected to the destructive outcome programmed in the operational plan of which the bombing was part. It is not the act of bombing alone that brought the applicants within the "effective control" of the state concerned, but the wider spectrum of operational action within which the bombing was inscribed—and which should not have omitted to take account of the very predictable consequences the bombing of a civilian target would entail. The effectiveness of control should be judged against its influence on the resulting situation and the position in which those affected by an exercise of public powers find themselves upon execution of the measure concerned. This means that not only *de facto* elements of effective control,

[170] *Bankovic*, 11 B.H.R.C. 435.

[171] Using this vocabulary, see *Hirsi*, App. No. 27765/09 at para. 73.

[172] *Al-Skeini*, 53 E.H.R.R. 18.

[173] *Loizidou (Merits)*, 23 Eur. Ct. H.R. 513; *Öcalan*, App. No. 46221/99; *Hirsi*, App. No. 27765/09; Jaloud v. The Netherlands, App. No. 47708/08 (Nov. 20, 2014), http://hudoc.echr.coe.int/eng?i=001-148367. In the latter case the manning of a checkpoint in Iraq, on the basis of S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003), was equated to an exercise of "elements of governmental authority" by the Netherlands, whereby its art. 1 ECHR jurisdiction was considered to be engaged.

[174] *Cf*. *Hirsi*, App. No. 27765/09 at para. 180.

but also *de jure* factors (that may coalesce with them) should be taken into account in the establishment of functional jurisdiction.[175]

The *Norstar* decision illustrates this proposition.[176] The International Tribunal on the Law of the Sea (ITLOS) considered in this case that the issuance of a decree of seizure vis-à-vis a foreign vessel on the high seas was sufficient to reach the jurisdictional threshold, arguably not because it produced physical control on its own, but because it generated the conditions for its actual enforcement.[177] Admittedly, it was the combination of the issuance of the decree by Italy *and* the accompanying request for its enforcement addressed to Spain, which did subsequently enforce it, that generated the jurisdictional link between the foreign vessel and the Italian State.[178] While the decree alone could be understood as an instance of merely "claimed" jurisdiction, if taken in isolation—particularly on consideration that it was secret and could have remained unknown to those concerned[179]—no enforcement action would have taken place without the related request for its execution, in turn based on the decree itself. The decree is, therefore, the *sine qua non* condition in the sequence of (*de jure* and *de facto*) events that established effective control; it is the "but for" element in the absence of which the jurisdictional chain could not be ascertained. A functional reading, rather than splitting the chain, takes account of both: the prescriptive and enforcement aspects of jurisdiction that, in combination, constitute the expression of the constabulary functions of the Italian State in the particular case—exercised in part directly, by its own authorities, and in part through recourse to Spain.

There seems to be, *a priori*, no good reason to disaggregate or distinguish between the different facets of jurisdiction. They constitute the often inseparable, composite ways in which "public powers" may be expressed.[180] In fact, from the international perspective, the adoption of domestic laws "express[es] the will and constitute[s] the activities of States, in the same manner as do legal decisions or administrative measures."[181] So, instances of legislative, executive, and/or judicial activity should be deemed equally relevant towards the establishment of (functional) jurisdiction. Their occurrence in the specific case, whether jointly or in isolation, must be taken in consideration. If this is true, functional jurisdiction as equivalent to an exercise of

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[175] *See, e.g. Jaloud*, App. No. 47708/08 at para. 141: "For the purposes of establishing jurisdiction . . . the Court takes account of the particular factual context and relevant rules of international law."

[176] M/V Norstar (Panama v. Italy), Case No. 25, Judgment of Apr. 10, 2019, paras. 222–226, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_Judgment_10.04.pdf.

[177] *Cf.* Efthymios Papastavridis, *The European Convention of Human Rights and Migration at Sea: Reading the "jurisdictional threshold" of the Convention under the Law of the Sea Paradigm*, 21 GERMAN L.J. XX, XX (2020).

[178] *Norstar*, *supra* note 176, para. 226, last sentence.

[179] *Id.* at para. 206.

[180] The Case of the S.S. "Lotus" (Fran. v. Turk.), 1927 P.C.I.J. (ser. A), No. 10, at 25 (Sept. 7).

[181] Certain German Interests in Polish Upper Silesia (Germ. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25).

"public powers" can be manifested through different factors of policy-related and/or operational control, not all of which may always be required in the aggregate, but which, as the next section will argue, are present in the *S.S.* case, so that they cumulatively give rise to an Article 1 ECHR claim.

F. A Functional Approach to *S.S.*

S.S. offers a paradigmatic example of the kind of policy and operational control that portrays the functional approach to jurisdiction designed above. It entails a series of elements characteristic of public powers that are exercised by the Italian State—both territorially and extraterritorially; both directly and through the intermediation of the LYCG—that taken together generate overall effective control. The so-called "impact" element, the "decisive influence" element, and the "operative involvement" element considered below have already been recognized by international courts and Treaty bodies, including the Strasbourg Court, to be generative of a jurisdictional link that triggers the applicability of human rights obligations. They can each separately and independently amount to an exercise of (functional) jurisdiction, lending combined force to the activation of Article 1 ECHR in the *S.S.* case, where they occur in conjunction.

I. The Impact Element

Very much in the line of the *Norstar* case,[182] the impact element refers to the "sufficiently proximate repercussions" of state action "on rights guaranteed by the Convention" that the Strasbourg Court has deemed pertinent to the establishment of jurisdiction, "even if those repercussions occur outside" national territory.[183] What is of relevance is their origin in an exercise of public powers by the authorities of the state concerned. Sovereign activity—arguably of whatever nature: legislative, executive, or judicial[184]—with direct and predictable consequences beyond territorial boundaries can thus engage Article 1 ECHR. So, for instance, in *Andreou*, the opening of fire from within state territory on a crowd from close range was deemed to amount to jurisdiction, "even though the applicant sustained her injuries in territory over which Turkey exercised no control," since the shooting by state officials was "the direct and immediate cause of those injuries."[185]

The Inter-American Commission, in a very similar case, concluded the same. In *Brothers to the Rescue*, Cuba was considered to have exerted sufficient control through the shooting down of two aircrafts outside its aerial space, because "the victims died as a consequence of direct actions of agents of the Cuban State" operating

[182] *Norstar*, *supra* note 176.

[183] *Ilaşcu*, App. No. 48787/99 at para. 317.

[184] *Drozd & Janousek*, App. No. 12747/87 at para. 91.

[185] Andreou v. Turkey, App. No. 45653/99, Admissibility Decision (June 3, 2008), http://hudoc.echr.coe.int/eng?i=001-95295.

within Cuban territory.[186] The Inter-American Court has followed suit and declared that "a person is under the jurisdiction of the State . . . if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory."[187] So, the mere fact that the impacted individuals are situated outside national territory does not preclude the engagement of extraterritorial responsibilities. The jurisdictional link is established through the effects of state conduct that is initiated within territorial domain.

However, the significance of the presence of the state authorities exercising jurisdiction within national territory has, subsequently, been downplayed. The Human Rights Committee has inferred that the extraterritorial "impact," which is the "direct and reasonably foreseeable" result of state action, is relevant also vis-à-vis "individuals who find themselves in a situation of distress at sea."[188] Actually, the Committee had already previously held that a State party could be considered responsible for extraterritorial violations of the ICCPR,[189] where there was a "link in the causal chain" that would make possible violations on the territory of another state—wherever the location of state organs.[190] In such situations, the risk of an extraterritorial violation must be a "necessary and foreseeable consequence," judged on the knowledge the state had at the time of events.[191] So, knowledge of the probable result becomes a factor in the jurisdictional analysis, whereas the *locus* of the action is immaterial. In *Munaf*, for instance, the Committee evaluated the conduct of diplomatic staff in the Romanian Embassy in Baghdad applying this paradigm, and implying that only remote and unforeseeable consequences fail the jurisdictional test.[192]

The Strasbourg Court has also endorsed this understanding. In *Loizidou*, it declared that "the responsibility of Contracting Parties can be involved because of acts of their authorities, *whether performed within or outside national boundaries*, which produce effects outside their own territory."[193] And more recently, in *Al-Saadoon*, it applied the

[186] Alejandre v. Cuba, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L./V/II. 106, doc. 3 rev. (1999), paras. 24–25 [hereinafter *Brothers to the Rescue*].

[187] Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am.Ct.H.R. (ser. A) No. 23, para. 74 (Nov. 15, 2017).

[188] U.N. Human Rights Comm., General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), on the Right to Life, U.N. Doc. CCPR/C/GC/36, para. 63 (Sept. 3, 2019) (emphasis added).

[189] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[190] U.N. Human Rights Comm., Mohammad Munaf v. Romania, U.N. Doc. CCPR/C/96/D1539/2006, para. 14.2 (July 30, 2009).

[191] *See, e.g.*, U.N. Human Rights Comm., A.R.J. v. Australia, U.N. Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997); Judge v. Canada, U.N. Doc. CCPR/C/78/D/829/1998 (Aug. 13, 2003); Lichtensztejn v. Uruguay, U.N. Doc. CCPR/C/OP/2/1990 (Mar. 31, 1983); Alzery v. Sweden, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006).

[192] *Munaf*, *supra* note 190, para. 14.2.

[193] *Loizidou v. Turkey (Preliminary Objections)*, 310 Eur. Ct. H.R. (ser. A.) at para. 62.

so-called *Soering* reasoning to an extraterritorial extradition by UK agents of a terrorist suspect in Iraq.[194] Therefore, while pure causation is insufficient to establish jurisdiction in relation to utterly accidental and unpredictable outcomes,[195] the proximate and predictable results must be taken into account when planning and executing state action, whatever the location of its agents and of the action itself.

In the *S.S.* case, the coordination of the rescue/interdiction operation was undertaken by MRCC Rome through a combination of prescriptive and executive action—with knowledge of the likely outcome. The Italian Coast Guard acted territorially, within its Headquarters, taking the decisions of launching the SAR response and delivering instructions to all assets in the SAR theatre on the high seas. This alone, amounting to the "institution of . . . proceedings" extraterritorially by the authorities of an ECHR party, has, in comparable cases, been considered to be "sufficient to establish a jurisdictional link" by the Strasbourg Court.[196] Here, such action "produced effects outside its own territory" with very significant consequences for those concerned,[197] which Italy could and should have taken into account when planning and deploying its intervention. The fact that Italy's conduct "facilitated the whole process" that led to the involvement of the LYCG and "created the conditions" for the several violations complained of to materialize,[198] is a further indication of the existence of jurisdiction under Article 1 ECHR.[199]

This factual dimension of the jurisdictional constellation present in the *S.S.* case is complemented by a *de jure* basis in international law. Indeed, the coordinating role assumed by MRCC Rome could not have been ignored or avoided. It was legally predetermined by the maritime conventions, which, rather than creating any new sovereign entitlements in favor of coastal states, instead produce "area[s] of responsibility" to be overseen (in good faith) in order to preserve the safety of human

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[194] *Al-Saadoon*, App. No. 61498/08. For commentary, *see, e.g.*, Cornelia Janik & Thomas Kleinlein, *When Soering went to Iraq . . .: Problems of Jurisdiction, Extraterritorial Effect and Norm Conflicts in Light of the European Court of Human Rights' Al-Saadoon Case*, 3 GO.J.I.L. 459 (2009). In *Soering*, an extradition case, the Court first deduced a *non-refoulement* obligation from the prohibition of inhuman and degrading treatment in Article 3 ECHR; Soering v. U.K., 11 E.H.R.R. 439 (1989).

[195] *Cf*. *Bankovic*, 11 B.H.R.C. 435 at para. 75.

[196] Güzelyurtlu and Others v. Cyprus and Turkey, App. No. 36925/07, para. 188 (Jan. 29, 2019), http://hudoc.echr.coe.int/eng?i=001-189781.

[197] *Drozd & Janousek*, App. No. 12747/87 at para. 91; *Al-Skeini*, 53 E.H.R.R. 18 at para. 133.

[198] Al-Nashiri v. Poland, App. No. 28761/11, para. 517 (July 24, 2014), http://hudoc.echr.coe.int/eng?i=001-146044. *See* similar extraordinary rendition cases, where the ECtHR has concluded to the existence of state jurisdiction on account of the facilitating role played by the ECHR party in question, e.g., El-Masri v. FYROM, App. No. 39630/09, para. 239 (Dec. 13, 2012), http://hudoc.echr.coe.int/eng?i=001-115621; Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13, para. 512 (July 24, 2014), http://hudoc.echr.coe.int/eng?i=001-146047.

[199] This is the conclusion reached by the Tribunale di Trapani, resolving a similar SAR case, in its Judgment of June 3, 2019, at 27, https://www.asgi.it/wp-content/uploads/2019/06/2019_tribunale_trapani_vos_thalassa.pdf.

life at sea.[200] These conventions stipulate that upon receipt of a distress call, the first MRCC contacted becomes and remains responsible for the coordination of rescue procedures until the MRCC in charge of the SAR region (SRR) within which the incident occurs assumes responsibility.[201] Like Papastavridis argues in this Special Issue, it is the knowledge of the situation of distress that triggers the obligation under the law of the sea, in line with the object and purpose of the maritime conventions. Their objective is to ensure cooperation in completing the rescue and disembarking survivors[202]—a duty that would normally fall on to the MRCC in whose SRR the incident takes place.[203]

However, in the absence of an officially declared SRR and a fully functioning Libyan MRCC, that responsibility could not be validly transferred to the LYCG, and the first MRCC receiving the distress call—and thus with knowledge of the event—remained bound to proceed with the effective coordination of the operation. This responsibility includes making sure that the rescue is conducted safely and in compliance with the relevant rules, bringing survivors to landfall in a place of safety[204]—which Libya is not.[205]

Any information, instructions, and guidance delivered by MRCC Rome must take into account their likely repercussions—bearing in mind that reliance on law of the sea norms does not release from parallel human rights obligations concurrently applying in situations of distress.[206] In particular, an MRCC that coordinates a SAR operation outside its own SRR "should refrain from giving directions or advice which it knows or ought reasonably to know would have negative human rights implications for those

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[200] U.N. Convention on the Law of the Sea, art. 98, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]; SOLAS Convention, Annex, Ch V, Reg 7(1); International Convention on Maritime Search and Rescue, Preamble, Recitals 1 and 3, and Annex, para. 2.1.1, Apr. 27, 1979, 1405 U.N.T.S. 119 [hereinafter SAR Convention]

[201] IMO, Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea* [hereinafter IMO Guidelines], (2004) MSC.167(78), MSC 78/26/Add.2 (Annex 34), para. 6.7. IMO Guidelines are not strictly binding, but must "be taken into account" by SAR and SOLAS Convention parties accepting of the 2004 amendments, as is Italy's case. *See* SAR Convention, Annex, para. 3.1.9. *See also* the U.N. General Assembly urging members to implement them in their domestic procedures in Res. 61/222, U.N. Doc. A/RES/61/222, para. 70 (Dec. 20, 2006).

[202] SAR Convention, Annex, para. 3.1.9.

[203] *Id*. Annex, para. 2.1 and 2.3; SOLAS Convention, Annex, Ch V, Reg 7(1).

[204] SAR Convention, Annex, para. 3.1.9 and IMO Guidelines, paras. 6.12, 6.17, defining "place of safety" as "a location where rescue operations are considered to terminate . . . *where the survivors' safety of life is no longer threatened* and *where their basic human needs (such as food, shelter and medical needs) can be met* . . .," stressing "[t]he need to *avoid disembarkation in territories where the lives and freedoms* of those alleging a well-founded fear of persecution *would be threatened*" (emphases added).

[205] This has been the explicit finding of the Tribunale di Trapani, *supra* note 199, at 32 and 46 et seq.

[206] Confirming: *Hirsi*, *supra* note 13. For commentary, *see* Violeta Moreno-Lax, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, 23 I.J.R.L. 174 (2011).

requiring assistance."[207] This arguably includes the requisitioning of vessels from actors, like the LYCG, which are known for their unsafe, threatening, and abusive conduct towards survivors, invariably leading to their *refoulement*.[208] While "the search and rescue service concerned . . . has the *right* to requisition ships [so that they] render assistance,"[209] it has also the duty to exercise this power in line with "other rules of international law."[210] Arguably, this includes the prerogative to release masters of ships that could potentially be requisitioned from their obligation to render assistance, when they are unsuitable.[211] A shipmaster should only be asked to proceed to the rescue "in so far as such action may be reasonably be expected of him."[212]

The Italian authorities knew or ought to have known that the LYCG was inadequate. They knew or ought to have known that calling upon it to intervene would mean for the survivors to be taken back to Libya,[213] to face "dismal circumstances" amounting to "crimes against humanity," as described in EUNAVFORMED documentation.[214] And this foreseeability of the likely result of their actions was relevant to the establishment of a jurisdictional link with the *S.S.* applicants.

Acting in the knowledge that the life and integrity of the persons in distress will be threatened when delivered to the authorities of an unsafe country[215] amounts to an exercise of jurisdiction under the impact model, which thus suffices to activate the

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[207] U.N. High Comm'r for Refugees, *General Legal Considerations: Search and Rescue Operations Involving Refugees and Migrants at Sea*, para. 20 (Nov. 2017), https://www.refworld.org/docid/5a2e9efd4.html. *See also* CoE CommHR, *Lives Saved, Rights Protected: Bridging the Protection Gap for Refugees and Migrants in the Mediterranean*, at 30, recommendation 9 (June 2019), https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87.

[208] CoE CommHR, Third Party Intervention in Application No. 21660/18, S.S. and Others v. Italy, CommDH(2019)29, para. 30 (Nov. 15, 2019), https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-app/168098dd4d.

[209] SOLAS Convention, Annex, Ch V, Reg 33(2) (emphasis added). *See also* SAR Convention, Annex, para. 5.3.3.5.

[210] UNCLOS arts. 2(3) and 87(1).

[211] SOLAS Convention, Annex, Ch V, Reg 33(3)–(4).

[212] UNCLOS art. 98(1).

[213] EUNAVFORMED has noted that "migrants doesn't [sic] want to be rescued by the Libyan Coast Guard because they *obviously* don't want to go back in Libya." *See* EUNAVFORMED, *LYCG Monitoring Report*, *supra* note 30, Annex C, at 3 (emphasis added).

[214] EUNAVFORMED, *Six-Monthly Report 1 November 2016 – 31 May 2017*, *supra* note 35, at 2, 5–6.

[215] That Libya was unsafe for returns has been well known for a long time. Since the 2011 upraising and civil war, UNHCR's views on the disembarkation of refugees and migrants in Libya have been unequivocal. *See* U.N. High Comm'r for Refugees, *UNHCR Position on Returns to Libya* (Nov. 12 2014), https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Libya_position_on_returns_12_November_2014.pdf, updated in October 2015 (Update I), https://www.refworld.org/docid/561cd8804.html and in September 2018 (Update II), https://www.refworld.org/docid/5b8d02314.html.

positive, due diligence obligations attaching to the rights of the persons directly affected by the action concerned.[216] In the *S.S.* case, SAR duties intersect with human rights responsibilities, which constrain state discretion and limit the options left for choice of action.[217] Italy could, therefore, not legitimately indicate a transfer of responsibility for the survivors to the LYCG, whether directly or indirectly, including through the provisions regulating OSC, without thereby engaging its (functional) jurisdiction and violating its international obligations.[218] MRCC Rome should, instead, have avoided the intervention of the LYCG, by not calling on the *Ras Al Jadar*, as a measure "within the scope of [its] powers which, judged reasonably, might have been expected to avoid [the] risk."[219] Alternatively, at the very least, it should have refrained from asking it to assume OSC, a task that MRCCs must allocate "taking into account the apparent capabilities of the on-scene co-ordinator and operational requirements."[220] Rather, it should have preferred the better alternatives offered by the SW3 and the multiple units readily available within the *Mare Sicuro* and EUNAVFORMED missions present in proximity, which could have completed the rescue safely.

II. The Decisive Influence Element

Besides the impact element, the decisive influence element regards the exercise of functional jurisdiction through indirect means. "Public powers," in this instance, rather than being carried out by the authorities of the state concerned, are deployed through the medium of a local administration in a third country—whether with its legal consent, *de facto* connivance or none of them, as the situation was in *Ilaşcu* and subsequent line of cases.[221]

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[216] M.S.S. v. Belgium and Greece [GC], 53 E.H.R.R. 2, paras. 258–259, 263, 358–359, and 366–367 (2011); and *Hirsi*, App. No. 27765/09 at paras. 118, 123, 125–126, 156–157.

[217] *See, e.g.*, Leray v. France, App. No. 44617/98, (Jan. 16, 2001), http://hudoc.echr.coe.int/eng?i=001-60010, where the Strasbourg court concluded that SAR operations are susceptible of judicial review in light of the right to life. For an elaboration, *see* Lisa-Marie Komp, *The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?*, *in* "BOAT REFUGEES" AND MIGRANTS AT SEA: A COMPREHENSIVE APPROACH 236 (Violeta Moreno-Lax & Efthymios Papastavridis eds., 2016).

[218] The CoE CommHR wrote a letter to the Italian authorities making clear that, in his view, and in light of the *Hirsi* judgment, *supra* note 13, "handing over individuals [in any way whatsoever] to the Libyan authorities or other groups in Libya would expose them to a real risk of torture or inhuman or degrading treatment or punishment." *See Letter from Nils Muiznieks, Commissioner for Human Rights, to the Italian Minister of the Interior, Marco Minniti*, CommHR/INM/sf 0345-2017 (Sept. 28, 2017), https://rm.coe.int/letter-to-the-minister-of-interior-of-italy-regarding-government-s-res/168075baea. Expressing similar concerns, *see* U.N. Comm. Against Torture, Concluding Observations on the Fifth and Sixth Periodic Reports of Italy, U.N. Doc. CAT/C/ITA/CO/5-6 (Dec. 17, 2017).

[219] Osman v. United Kingdom, App. No. 87/1997, para. 11 (Oct. 28, 1998), http://hudoc.echr.coe.int/eng?i=001-58257.

[220] SAR Convention, Annex, para. 4.7.2.

[221] *Ilaşcu*, App. No. 48787/99. *See also Catan*, Apps. 43370/04, 8252/05, and 18454/06; Ivantoc and Others v. Moldova and Russia, App. No. 23687/05 (Nov. 15, 2011), http://hudoc.echr.coe.int/eng?i=001-107480; Mozer v. Moldova and Russia, App. No. 11138/10 (Feb. 23, 2016), http://hudoc.echr.coe.int/eng?i=001-161055; Turturica and Casian v. Moldova and Russia, App. Nos. 28648/06 and 18832/07 (Aug. 30, 2016),

The Strasbourg Court has maintained in this constant jurisprudence, regarding Russian and Moldovan (co-)responsibility for the violations perpetrated by the separatist government of Transdniestria, that an ECHR party engages its jurisdiction for the actions and (crucially also for the) omissions of a third actor, when the latter comes under its "decisive influence." [222] Such "decisive influence" can lead to the establishment of functional jurisdiction on account of the degree of dependency of the third actor in question on the support received by the ECHR party. Where the third actor survives "by virtue of the military, economic, financial and political support given to it" by the ECHR party,[223] this entails "that [same ECHR party's] responsibility *for its policies* and actions."[224] The reason is that this kind of critical support engenders a "continuous and uninterrupted link of responsibility . . . for the applicants' fate."[225] And this is true even when there may not be any "direct involvement" of the influencing ECHR party in the specific human rights violations alleged.[226] What is more, such a "continuous and uninterrupted link of responsibility" is considered to give rise to positive obligations to prevent human rights violations in the area controlled by the dependent third actor over which the ECHR party exercises "decisive influence."[227]

Although the Court designed this paradigm with a geographical rather than a functional area of control in mind, the parallels with *S.S.* are paramount, considering the multiple ways in which Italy has influenced Libya's policy and practice in the Central Mediterranean, entailing control over a wide range of interdependent stakes, as Part C demonstrates. In November 2017, Libya lacked an SRR, an MRCC, and a coastguard function capable of receiving and responding to distress calls autonomously, which is why Italy's input was essential.[228]

In 2016, the LYCG was barely functional, due to vital assets and equipment having been destroyed by the NATO's offensive during 2011–12.[229] For the former Italian

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http://hudoc.echr.coe.int/eng?i=001-166480; Paduret v. the Republic of Moldova and Russia, App. No. 26626/11 (May 9, 2017), http://hudoc.echr.coe.int/eng?i=001-173464; Cotofan v. Moldova and Russia, App. No. 5659/07 (June 18, 2019), http://hudoc.echr.coe.int/eng?i=001-193871.

[222] *Ilaşcu*, App. No. 48787/99 at paras. 392–394.

[223] *Id*. at para. 392.

[224] *See* ECtHR, *Guide on Article 1 of the ECHR*, para. 47 and authorities cited therein (Aug. 31, 2019), https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf (emphasis added).

[225] *Ilaşcu*, App. No. 48787/99 at para. 392.

[226] *See Mozer*, App. No. 11138/10 at para. 101, where the Court admits there is "no evidence of any direct involvement of Russian agents in the applicant's detention and treatment."

[227] *See Ivantoc*, App. No. 23687/05 at para. 119, where the Court condemns Russia for "continu[ing] to do nothing . . . to prevent the violations of the Convention allegedly committed . . .."

[228] Confirming, *see* T05-EUTF-NOA-LY-07, *supra* note 84, at 2.

[229] *See, e.g.*, Joint Task Force Odyssey Dawn Public Affairs, *US Navy P-3C, USAF A-10 and USS Barry Engage Libyan Vessels*, U.S. NAVY (March 29, 2011), https://www.navy.mil/submit/display.asp?story_id=59406. *See*

Minister of Interior, Minniti, prior to 2017, "when we said we had to re-launch the Libyan coastguard, it seemed like a daydream."[230] Plans to develop a system of border surveillance in Libya, in general, and a functioning LN/LCG, in particular, as Part C has shown, were entirely "dependent" on Italy's (and EU's) assistance.[231] It was only after the MoU, and the related financial, logistic, and operative support provided by Italy, that the LYCG performed 19,452 pullbacks in 2017,[232] up from 800 in 2015.[233]

However, rather than contributing to diminishing the "horrific abuses" faced by migrants,[234] in accordance with the due diligence obligations attached to (an exercise of functional jurisdiction taking the form of) decisive influence,[235] the Italian plan deliberately led to their containment in Libya. Its interventions so far "have done nothing . . . to reduce the level of ill-treatment suffered by migrants" in the country. On the contrary, UN monitoring "shows a fast deterioration of their situation,"[236] including at the hands of the LYCG and after being pulled back.[237]

What is clear and the European authorities have recognized is that the "increased performance of the Libyan Coast Guard [is a] *direct consequence* of the support . . . provided."[238] "[T]here could not be a sufficient operational capability [of

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also European External Action Service, *EUBAM Libya Initial Mapping Report Executive Summary*, EEAS(2017) 0109, at 41 (Jan. 18, 2017), https://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf.

[230] Giulia Paravicini, *Italy's Libyan "Vision" Pays off as Migrant Flows Drop*, POLITICO (Aug. 10, 2017), https://www.politico.eu/article/italy-libya-vision-migrant-flows-drop-mediterranean-sea/.

[231] *Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 121.

[232] Int'l Org. for Migration, *Maritime Update Libyan Coast: 25 October–28 November 2017*, https://www.iom.int/sites/default/files/situation_reports/file/IOM-Libya-Maritime-Update-Libyan-25Oct-28Nov.pdf.

[233] EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2017*, *supra* note 66, at 3. *Cf*. EUNAVFORMED, *Six-Monthly Report 1 January – 31 October 2016*, p. 7 (on file), according to which 2015 interdictions totalled 600 only.

[234] U.N. High Comm'r for Refugees, Opening Statement by Zeid Ra'ad Al Hussein (Sept. 11, 2017), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22044&LangID=E.

[235] *Ivantoc*, App. No. 23687/05 at para. 119.

[236] U.N. Office of the High Comm'r for Human Rights, *UN Human Rights Chief: Suffering of Migrants in Libya Outrage of Conscience of Humanity* (Nov. 14, 2017), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393. Confirming: *Frontex Consultative Forum on Fundamental Rights Sixth Annual Report – 2018*, at 37 (March 2019), *available at* https://frontex.europa.eu/media-centre/news-release/frontex-consultative-forum-publishes-annual-report-MgLqPI.

[237] Amnesty International, *Between the Devil and the Deep Blue Sea: Europe Fails Refugees and Migrants in the Central Mediterranean*, at 17–18 (Aug. 2018), https://www.amnesty.org/en/documents/eur30/8906/2018/en/.

[238] *See* Letter Ref. Ares(2019)1755075, *supra* note 102. This correlation has also been noted by the EUNAVFORMED, in its *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part C, at 11.

the LYCG] without . . . [the] training [and] equipment" delivered.[239] As the Italian Ministry of Foreign Affairs acknowledged in a public report, it is their "partnership with Tripoli which . . . has . . . produced [these] important results."[240] It is "thanks" to Italy,[241] rather than to Libya's independent efforts,[242] that there has been a near 90 per cent decrease in the number of arrivals at Italian shores by mid-2018.[243]

These results are not accidental, unforeseen or unintended. They are planned and expected. They stem from the direct application of the Treaty of Friendship and the 2017 MoU. They constitute the concrete realization of their object and purpose. Indeed, Italy's support has specifically been targeted at "reinforcing the autonomy of [Libyan] operational capacities,"[244] with a view to transferring coordination responsibilities for rescue and interdiction in what was to become the Libyan SRR. And that investment in capacity building of the LYCG is not unconditional. In the words of the EUNAVFORMED command, it is provided "in exchange for [Libyan] cooperation in tackling the irregular migration issue."[245] So, the support lent to the LYCG has explicitly been understood as a *quid pro quo*, in a bid to exert influence over the manner in which Libyan constabulary functions are implemented at sea, in order to achieve the desired outcome of foreclosing maritime crossings towards Italy. Accordingly, it has only been "under pressure" from Italy (and the EU) that "Libyan authorities [have] increased their efforts to address the irregular flow of migrants."[246]

The pressure has come from different directions, not only from the political and operational spheres, but also from the dedicated Italian-Libyan Joint Commission created by the MoU.[247] In accordance with its mandate, the Joint Commission has formulated the "strategic priorities" of the Italian-Libyan collaboration pursuant to which Italy has delivered funding, training, equipment, and the main patrol vessels in the Libyan fleet. So, the definition of such "strategic priorities" and their practical implementation are key towards the establishment and full capacitation of the LYCG.

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[239] EUNAVFORMED, *LYCG Monitoring Report*, *supra* note 30, at 29.

[240] MAE Report, *supra* note 47, at 21.

[241] EUNAVOFRMED, *LYCG Monitoring Report*, *supra* note 30, at 29.

[242] In this sense, *see* Chiragov and Others v. Armenia, App. No. 13216/05, para. 178 (June 16, 2015), http://hudoc.echr.coe.int/eng?i=001-155353. *See also* Sargsyan v. Azerbaijan, App. No. 40167/06 (June 16, 2015), http://hudoc.echr.coe.int/eng?i=001-155662.

[243] EUNAVOFRMED, *LYCG Monitoring Report*, *supra* note 30, at 29. *See also* EUNAVFORMED, *Six-Monthly Report 1 December 2017 – 31 May 2018*, *supra* note 71, at 4.

[244] *Letter from Marco Minniti, former Minister of Interior of Italy, to the Council of Europe Commissioner for Human Rights*, Ref. 0921 (Oct. 11 2017), https://rm.coe.int/reply-of-the-minister-of-interior-to-the-commissioner-s-letter-regardi/168075dd2d.

[245] EUNAVFORMED, *Sophia End of Month 6 Report – January–December 2015*, EEAS(2016) 126, at 3 (on file).

[246] EUNAVFORMED, *Six-Monthly Report 1 June – 30 November 2017*, *supra* note 66, at 6.

[247] MoU art. 3.

They are, arguably, tantamount to "the formulation of essential policy," as defined by the Strasbourg Court in *Jaloud*,[248] further supporting the conclusion that Italy, although not directly involved in each and every individual action of the LYCG, did not merely exert pressure, but "decisive influence" in the overall implementation of the plan to stem irregular migration across the Central Mediterranean. It is Italy's comprehensive investment that made pull-backs a reality in the course of 2017, thus providing "a strong indication" that it exercised decisive influence over the LYCG in a way such as to trigger Article 1 ECHR.[249]

III. The Operative Involvement Element

Beyond its implication from a distance, through the "impact" and "decisive influence" elements identified in the previous Parts, Italy's involvement in the operative capacities of the LYCG, especially in the course of 2017, has been very direct too—so much so that it fits the "public powers" doctrine to the letter, as formulated in *Al-Skeini*. To be sure, not only did Italy assume state functions of those normally pertaining to the territorial sovereign, but it did so on the grounds of the MoU and related decisions of the Joint Commission established by it—therefore, with "the consent, invitation, or acquiescence of the state concerned."[250]

As elaborated upon in Part C, November 6, 2017, was not an isolated occurrence, in terms of the overall functional authority undertaken by Italy in the coordination of SAR in the waters off Libya. Although Libya had ratified the SAR Convention, it had not officially declared an SRR according to the applicable formalities at the time of the *S.S.* events. An information document submitted by Italy (not Libya) to the IMO in December 2017 reveals that the process of "assist[ing] the relevant Libyan authorities in identifying and declaring their SRR" was still ongoing.[251]

Actually, for the declaration of an SRR to be valid, the SAR Convention foresees that there be an agreement among the Parties concerned (usually including all neighboring coastal states) to be notified to the IMO for dissemination,[252] and that SAR services be fully operational within the SRR being declared, so that they "are able to give prompt response to distress calls."[253] That the existence of a functioning MRCC is "a prerequisite for efficiently coordinate [sic] search and rescue within the Libyan search

[248] *Jaloud*, App. No. 47708/08 at para. 63.

[249] *Catan*, Apps. 43370/04, 8252/05, and 18454/06 at paras. 122–123; *Chiragov*, App. No. 13216/05 at para. 186.

[250] *Al-Skeini*, 53 E.H.R.R. 18 at para. 149. *See also* Aliyeva and Aliyev v. Azerbaijan, App. No. 35587/08, paras. 56–57 (July 31, 2014), http://hudoc.echr.coe.int/eng?i=001-145782.

[251] IMO Sub-Committee on Navigation, *Communications and Search and Rescue, Libyan MRCC Project – Submitted by Italy, NCSR 5/INF.17*, at 3 (Dec. 15, 2017), https://www.transportstyrelsen.se/contentassets/3aba2639739e4e53afd3c7eb22f82ed6/5-inf17.pdf.

[252] SAR Convention, Annex, paras. 2.1.4, 2.1.6.

[253] *Id.* Annex, para. 2.1.8.

and rescue zone, in line with international legislation," has been jointly declared by the EU Commission and the EU High Representative for Foreign Affairs.[254]

The obligation on coastal states is to run "an adequate and effective" SAR service.[255] To that end, parties responsible for an SRR normally undertake "overall coordination of SAR operations," [256] for which purpose they "shall make provision for the coordination facilities required to provide SAR services round their coasts" and "shall establish a national machinery for the overall coordination of SAR services,"[257] in the form of rescue coordination centers.[258] Above all, MRCCs "shall have adequate means for the receipt of distress communications" and "adequate means for communication with its rescue units and with MRCCs in adjacent areas."[259] And rescue units attached to them must, in turn, be "suitably . . . equipped," staffed and managed, with appropriate "facilities and equipment" that allow for an effective response[260]—all of which was, and still is, lacking in the Libyan case.

As shown in Part C, Libyan MRCC functions have, instead, been secured by Italy, arranging for the dispatch and coordination of resources within SAR missions, ascertaining the movement and location of vessels in distress, developing rescue plans, designating OSC, communicating with rescue assets at sea, coordinating their action, and even arranging for briefing and debriefing of LYCG personnel.[261] Italy should, therefore, be considered to have assumed "overall control," in the functional sense, of this Libyan competence,[262] which it exercises both "directly, through its [own naval] forces"—deployed in Libya and at sea, within Operation *Nauras*, and within its own Coastguard and MRCC—as well as "through a subordinate local administration" embodied in the LYCG.[263] It is Italy (also with the EU's input) that has put in place the whole technical and material infrastructure (not only the ships and the equipment, but also the whole detection and communication apparatus) that enables the interception and return of migrants back to Libya. And it is Italy that has assumed "effective authority" over individual SAR operations,[264] including the one it deployed in *S.S.* As a

[254] Joint Communication, *supra* note 57.

[255] UNCLOS art. 98(2).

[256] SAR Convention, Annex, para. 2.1.9.

[257] *Id.* Annex, paras. 2.2.1, 2.2.2.

[258] *Id.* Annex, para. 2.3.1.

[259] *Id.* Annex, para. 2.3.3.

[260] *Id.* Annex, paras. 2.4.1.1, 2.5.

[261] For the full list of MRCC responsibilities, *see* IMO, *Amendments to International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual*, MSC.1/Circ.1594 (May 25, 2018), Annex, at 169 et seq.

[262] *Ilaşcu*, App. No. 48787/99 at paras. 315–316. *Cf. Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 106, using the word "domination" instead.

[263] *Ilaşcu*, App. No. 48787/99 at para. 314.

[264] *Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 111.

result, Italy should be considered responsible to "secure, *within the [policy] area under its control*, the entire range of substantive rights set out in the Convention" that arise in SAR and interdiction situations.[265]

The nature of the LYCG as a subrogate Italian proxy for interdiction and pull-back at sea has been confirmed by the Tribunal of Catania adjudicating on a related case concerning the rescue ship *Open Arms* of the NGO *Proactiva.* In his decision, the judge takes as proven the crucial role played by the Italian *Nauras* assets in detecting migrant boats off the Libyan coast and in leading LYCG operations.[266] The judge goes as far as to affirm that the interventions of Libyan patrol vessels happen "under the aegis of the Italian navy" and that the coordination of SAR missions is "essentially entrusted to the Italian Navy, with its own naval assets and with those provided to the Libyans."[267] The phone number of the LYCG, as provided in their official headed paper, at least until the spring of 2018, corresponded to the phone number of the Italian *Nauras* vessel docked in Tripoli,[268] which further corroborates the "high degree of integration" between the two.[269] Ayoub Qassem, a spokesperson for the LYCG Tripoli sector, back in November 2017, had already confirmed this *modus operandi*. He explained how the LYCG uses "the information [delivered by Italy] to intercept people and return them to Libya, even if they are apprehended [rather than rescued] in international waters."[270]

Italy *de facto* commands the SAR and interdiction response of the LYCG. In these circumstances, it should not be able to "evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya."[271] It should, instead, be considered that the practice it promotes of *refoulement* by proxy, employing the LYCG to that end, amounts to an "exercise of [Italy's] sovereign authority, the effect of

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[265] *Id*. at para. 106 (emphasis added).

[266] Tribunale di Catania, Case No. 3476/18 R.G.N.R and Case No. 2474/18 R.G.GIP, at 3–4 (Mar. 27, 2018) on the flow of communications between the Italian navy assets in Libya, MRCC Rome, and the LYCG, https://www.statewatch.org/news/2018/apr/it-open-arms-sequestration-judicial-order-tribunale-catania.pdf.

[267] *Id.* at 21–22. *See also*, Tribunale di Ragusa, Case No. 1216 – 1282/18 R.G.N.R. and Case No. 1182/18 R.G.GIP (Apr. 16, 2018), http://www.questionegiustizia.it/doc/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_gip.pdf.

[268] Andrea di Palladino, *Cercate i guardacoste libici? Telefonate a Roma: 06/…,* IL FATTO QUOTIDIANO, (Apr. 28, 2018), https://www.ilfattoquotidiano.it/premium/articoli/cercate-i-guardacoste-libici-telefonate-a-roma-06/. Only recently have Libyan phone numbers been provided to the IMO and uploaded onto its Gisis database, most of which are however inoperative or answered by non-English speaking operators. *See Migranti, il telefono dei soccorsi libici squilla a vuoto: ecco cosa succede se si prova a chiamare,* REPUBBLICA TV (Jan. 22, 2019), https://www.youtube.com/watch?v=lJWlYn-dTTs.

[269] *Chiragov*, App. No. 13216/05 at paras. 176, 186.

[270] Zach Campbell, *Europe's Plan to Close its Sea Borders Relies on Libya's Coast Guard Doing Its Dirty Work, Abusing Migrants*, THE INTERCEPT (Nov. 25, 2017), https://theintercept.com/2017/11/25/libya-coast-guard-europe-refugees/.

[271] *Hirsi*, App. No. 27765/09 at para. 129.

which is to prevent migrants from reaching [its] borders," thus engaging ECHR responsibility.[272]

On November 6, 2017, the measure of comprehensive dominium that Italy exercised over Libya's SAR and interdiction functions was similar to that recognized by the Strasbourg Court in relation to occupied areas of territory of a foreign country in its case law.[273] Against this background, it should not be necessary to determine whether Italy exercised "detailed control" over every individual action of the LYCG.[274] Italy's significant naval presence, through its *Nauras* and *Mare Sicuro* missions, as well as its all-encompassing provision to the LYCG—which only "survives as a result of [that] support"[275]—determine that it exercised "effective control" over the *S.S*. applicants throughout the chain of events of November 6, 2017. This includes those who drown or were injured at sea, alongside those who were maltreated by LYCG officers and/or pulled back to Libya, "during the course of or contiguous to [SAR/interdiction] operations" carried out under Italy's direction.[276]

F. Conclusions, Limits, and Implications of the Functional Model

When jurisdiction is understood in a functional sense, as an expression of public powers that may combine elements of legislative, executive and/or judicial action, there is no longer a need for unjustified distinctions between territorial and extraterritorial, or between personal and spatial manifestations. Ultimately, what underpins the various jurisdictional models accepted by the Strasbourg Court and other adjudicators of international human rights law is the sovereign-authority nexus established between the state and the individual in a specific situation through an exercise of "public powers." And in extraterritorial settings, like in territorial locations, this can be ascertained not only through the exertion of direct physical constraint, but also through indirect forms of control. What makes control "effective" under the functional reading of jurisdiction is its capacity to determine a change in the real and/or legal position of those concerned with human rights-relevant implications. The isolation of particular segments of that control is not warranted, however. I posit that the evaluation of a concrete situation requires that attention be paid to the entire constellation of all the relevant channels through which state functions are exercised, be they factual, legal or both at the same time. Rather than insulating supposedly prevalent *de facto* elements, the proposition is to appraise situations *in toto*, taking account of *de jure* factors that may concur with exercises of physical force.

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[272] *Id.* at para. 180.

[273] Starting with the judgments in *Loizidou*, 310 Eur. Ct. H.R. (ser. A.), 23 Eur. Ct. H.R. 513, and *Cyprus v. Turkey*, 35 Eur. Ct. H.R. 967.

[274] *Ilaşcu*, App. No. 48787/99 at para. 315.

[275] *Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 106.

[276] *Al-Skeini*, 53 E.H.R.R. 18 at para. 150.

This approach allows for contextualized applications and principled outcomes. Under this paradigm, the very act of bombing taken in isolation or the absence of comprehensive control over the air space above the TV station in Belgrade would not have been the only elements considered to assess jurisdiction in *Bankovic*. The entire operation of which the bombing was but one part would also have been taken into account. It would not have been the power to kill or its random occurrence, but the orchestration of a military mission with a specific target and its implementation through deliberate recourse to lethal force that would have counted as an exercise of jurisdiction. State operations—military or otherwise—are multi-staged processes, entailing elements of prescriptive and enforcement action, comprising a sequence of planning, launching, and completion phases. Isolating one of them, or selecting a single factor detaching it from the rest, misses the wider structure to which it belongs and through which it articulates itself. It is arbitrary and—as in *Bankovic*—it leads to arbitrary findings.

If what is significant is not one part but the whole of the operation, its foreseeable impact and the knowledge of likely consequences of operational action are relevant and come to inform the jurisdictional analysis. Planning and deployment must be considered together as part of the same continuum. They must take account of predictable results and be undertaken in a human-rights compliant fashion. This applies both when state intervention is carried out directly, through its own organs and agents acting or producing effects abroad, and when it is undertaken indirectly, by a proxy third actor.

Italy's actions and those it orchestrated in Libya should, therefore, be taken as a whole, rather than disaggregated. When taken as a whole, its sovereign decisions (adopted territorially, but producing effects abroad) together with the comprehensive support lent to the LN/LCG (including through direct involvement in their command and control capabilities) create a system of contactless, yet effective, control of the SAR and interdiction functions of Libya that amounts to an exercise of functional jurisdiction. Taking together the "impact," "decisive influence" and "operative involvement" factors through which its public powers materialized, the conclusion should be that, on November 6, 2017, Italy triggered Article 1 ECHR. Through its pervasive investment in the LYCG, it created the fiction of Libya's "ownership" of its intervention at sea,[277] achieving, by proxy, the same result for which it was condemned in *Hirsi*, accomplishing through another state what it was forbidden from doing itself.[278] And, like in *Hirsi*, it should be condemned in *S.S.* as well, for its "recourse to practices which are not compatible with [its] obligations under the [European Human Rights] Convention."[279]

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[277] The creation of such "ownership" is the ultimate goal of bilateral efforts as well as efforts pursued through the EUNAVFORMED. *See* EUNAVFORMED, *Six-Monthly Report 1 December 2017 – 31 May 2018*, *supra* note 71, at 15, 32.

[278] U.N. Int'l Law Comm., *Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts*, Y.I.L.C., Vol. II, Part 2, Ch IV, at 66, para. 6 (2001) [hereinafter ARSIWA Commentary].

[279] *Hirsi*, App. No. 27765/09 at para. 179.

One of the implications of the functional jurisdiction model, as posited herein, is the potential chilling effect it may have on joint efforts to administer migration, and on international cooperation more broadly. Since it requires that the human rights repercussions of state action be taken into account when planning and rolling out operations, this may be seen as overburdening states and rendering collaborative projects more difficult. Nonetheless, this difficulty is not tantamount to inapplicability. Even in (extraterritorial) situations of armed conflict has the ICJ affirmed that the application of human rights is not suspended,[280] also in the most atypical of circumstances, when the use of nuclear weapons is being contemplated.[281]

This conclusion that human rights obligations continue to bind when states cooperate with one another has been embraced within the ECHR domain. In several cases has the Strasbourg Court concluded that the Convention imposes obligations on ECHR parties that these cannot evade through collaboration *inter se* or with other entities. It is not that the Convention prohibits international cooperation. It just conditions the conclusion of international agreements (in whatever form), and any cooperation based thereupon, on the continued observance of human rights commitments.[282] When this is not possible, ECHR parties cannot see themselves as relieved from their obligations. On the contrary, they become precluded from "enter[ing] into an agreement with another state which conflicts with its obligations under the Convention," with the principle carrying "all the more force" in the case of absolute and non-derogable rights—such as those at stake in *S.S.*[283]

Due diligence is required too, so that ECHR parties' conduct, on the basis of such agreements, does not contribute (directly or indirectly) to the perpetration of human rights violations. What is more, faced with a risk of irreversible harm, the Convention "places a number of positive obligations . . . designed to prevent and provide redress" for any ill-treatment that may eventually occur.[284] And in situations where a country—like Libya—is perpetrating "a serious breach" of "an obligation arising under a peremptory norm of general international law,"[285] a migration management

[280] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, [2005] ICJ Rep. 116. For the interaction between international human rights law, international humanitarian law, and international refugee law, *see* Violeta Moreno-Lax, *Systematising Systemic Integration: "War Refugees", Regime Relations and A Proposal for a Cumulative Approach to International Commitments*, 12 J.I.C.J. 907 (2014).

[281] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (July 8).

[282] *Al-Skeini*, 53 E.H.R.R. 18 at para. 138; *Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 106.

[283] *Al-Saadoon*, App. No. 61498/08 at para. 138; and *Hirsi*, App. No. 27765/09 at para. 129.

[284] *Id.*

[285] U.N. Int'l Law Comm., *Articles on the Responsibility of States for Internationally Wrongful Acts*, UNGA A/56/10 and A/56/49(Vol.I)/Corr.4 (2001) [hereinafter ARSIWA], arts. 41(1) and 41(2). These provisions are considered to reflect the current state of customary law. *See, e.g.*, Application of the Convention on the

agreement, conflicting with *jus cogens* norms—like the prohibition of torture, slavery, or arbitrary deprivation of life[286]—becomes invalid outright.[287] In such circumstances, states must not only refrain from cooperation, but must also proactively engage in collaboration with others "to bring an end [to the violations in question] through lawful means."[288] Italy, in a situation like the one in *S.S.*, rather than facilitating abuse by the LYCG, is "required by *its own international obligations* to prevent certain conduct by another state, or at least to prevent the harm that would flow from such conduct,"[289] and to take the necessary steps to mitigate any related foreseeable damage.

I understand there can be a potential backlash, if the Strasbourg Court follows my reasoning, embraces the functional conception of jurisdiction and the operational model, and finds in favor of the *S.S.* applicants.[290] At the most extreme, countries could menace withdrawal from the ECHR.[291] Another possibility is that the ruling precipitates a counter-reaction by State parties that is worse than the pull-back policy the ruling may illegalize—like the shift from the US extraordinary rendition program, comprising indefinite offshore detention and "enhanced" interrogation techniques in Guantanamo, to targeted killings via drone strikes.[292] However, these shifts are already taking place.[293] They will not be changes that *S.S.* might instigate. Blocking strategies of potential migration flows are already happening further down the line, and ever

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Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, paras. 173, 385, 388 (Feb. 26).

[286] The Tribunale di Trapani, *supra* note 199, at 32, has included the principle of *non-refoulement* in this list.

[287] *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 53. *See also* Tribunale di Trapani, *supra* note 199, at 38, declaring the 2017 MoU invalid on this ground.

[288] ARSIWA art. 41(1).

[289] ARSIWA Commentary at 64, para. 4 (emphasis added). *See also* Corfu Channel, (U.K. v. Albania), Judgment, 1949 I.C.J. 4, at 22 (Apr. 9).

[290] Moritz Baumgärtel, *High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan "Pullback" Policies to the European Court of Human Rights*, EJIL:TALK! (May 14, 2018), https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys-involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights/.

[291] Like U.K. Conservative governments have threatened to do at different points in time. *See, e.g.*, Conservative Party in the Run Up to the May 2015 General Election, *Protecting Human Rights in the UK*, undated, https://www.conservatives.com/~/media/files/downloadable%20files/human_rights.pdf. *See also* Rob Merrick, *Theresa May to Consider Axeing Human Rights Act after Brexit, Minister Reveals*, THE INDEPENDENT (Jan. 18, 2019), https://www.independent.co.uk/news/uk/politics/theresa-may-human-rights-act-repeal-brexit-echr-commons-parliament-conservatives-a8734886.html.

[292] Alerting to this, *see* Ralph Wilde, *The Unintended Consequences of Expanding Human Rights Protections*, AJIL UNBOUND (Mar. 12, 2018), https://www.cambridge.org/core/journals/american-journal-of-international-law/article/unintended-consequences-of-expanding-migrant-rights-protections/3F2C1AFDBFF42E08DD6F226DF55FDE6E.

[293] *See, e.g.*, U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Unlawful Death of Refugees and Migrants*, U.N. Doc. A/72/335 (Aug. 15, 2017).

closer, if not directly within, countries of origin of potential refugees, like Sudan or Afghanistan.[294] The apparatus of border coercion and extraterritorial containment has deep roots and has been forming for decades now, containing the movement of those most needing to move.[295]

To my mind, there is more to gain than there is to lose with *S.S*. Just like a positive decision in *Al-Skeini* helped build the case in *Hirsi*, a positive finding in *S.S*. will, in incremental fashion, provide tools to counter the changing means through which states perpetrate violations offshore. *S.S*. can, therefore, make a crucial contribution to close the gap between *extraterritorial* interventions and the traditional, and still predominantly *territorial*, mechanisms of legal accountability, giving teeth to ECHR guarantees, and bringing borders and globalization closer to human rights.

[294] EEAS, *Joint Way Forward on Migration Issues between Afghanistan and the EU* (Oct. 4, 2016), https://eeas.europa.eu/headquarters/headquarters-Homepage/11107/node/11107_nl; Arthur Nestlen, *EU Urged to End Cooperation with Sudan after Refugees Whipped and Deported*, THE GUARDIAN (Feb. 27, 2017), https://www.theguardian.com/global-development/2017/feb/27/eu-urged-to-end-cooperation-with-sudan-after-refugees-whipped-and-deported.

[295] For analysis of the main measures in the EU, *see* Moreno-Lax, *supra* note 147, especially Part I, chs 2 to 6.