The Extraterritorial Reach of Positive Obligations: the ECtHR Case of S.S. and Others v. Italy

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Tiivistelmä – Referat – Abstract

The thesis is a study of the communicated case 'S.S. and the Others v. Italy' (application no. 21660/80) of the European Court of Human Rights (ECtHR). The application is on behalf of the victims of an incident in which a migrant boat found itself in distress after having left Libya for Europe. The Libyan Coast Guard failed to rescue all of the migrants and allegedly acted negligently, mistreating those they took onboard, and returned them to Libya, exposing them to continued ill-treatment and some of them also to forced return (*refoulement*) to their countries of origin.

Italy is a State Party to the European Convention on Human Rights (ECHR), and has a bilateral agreement, 'Memorandum of Understanding' (MoU), with Libya (a non-ECHR State). On the basis of the MoU, Italy funds and equips the Libyan Coast Guard. The agreement can be seen as a means to 'outsource' border control and to instruct Libya to intercept migrants before they reach Italy and the European Union (EU), thus effectively circumventing the obligations of the ECHR.

The research question is in two parts. First, I ask whether Italy had extraterritorial jurisdiction as stated in Article 1 ECHR, and second, if it had, has Italy violated its positive obligations to secure the applicants' rights. Jurisdiction is a 'threshold criterium' for the Court to study the merits of an application. As for the violations, the thesis focuses on Article 2 (right to life) and Article 3 (prohibition of torture; includes also the prohibition of forced return, or refoulement).

The methodology is doctrinal in that the thesis aims to examine critically the central features of the relevant legislation and case law in order to create an arguably correct and sufficiently complete statement on the Court's reasoning and outcome. The main sources are the provisions of the ECHR itself and the relevant previous case law of the Court, together with a literature review. Additionally, there are third-party interveners' statements and a video reconstruction of the events. The Court's questions and information requests to the parties, as attached to the application, are used as a starting point. Besides a hypothesis of the argumentation and the decision of the Court, some estimations are made about what could be the consequences of the decision to such bilateral pacts as the MoU between Italy and Libya, and, in general, to 'deals' between the EU Member States and third or transit countries. Finally, the thesis reflects on the eventual repercussions on the topical issue of the EU Commission's 23.9.2020 proposal for the New Pact on Migration and Asylum, which appears to encourage the Member States to maintain and develop outsourcing practices.

Avainsanat – Nyckelord – Keywords

Jurisdiction, responsibility, positive obligations, effective control, decisive influence, extraterritorial, human rights, ECHR, ECtHR, refugees, migration, EU, border control, outsourcing, Italy, Libya

Säilytyspaikka – Förvaringställe – Where deposited

Muita tietoja – Övriga uppgifter – Additional information

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I. Introduction

1. The Topic

In my thesis I study the application *S.S. and Others v. Italy* filed 3.5.2018 with the European Court of Human Rights (the ECtHR, the Court).[1] It concerns an incident of 6.11.2017, in which a migrant boat, headed for Europe, found itself in distress off the coast of Libya. The Libyan Coast Guard failed to rescue all of the migrants from their sinking dinghy, allegedly mistreated those they took onboard, and returned them to Libya, thus exposing them not only to continued ill-treatment but also to forced return (refoulement) to their countries of origin. Some of the migrants lost their lives due to the shortcomings of the rescue operation. The applicants claim that Italy is liable for the violations of their human rights, because Italy has funded, equipped and trained the Libyan Coast Guard. The Application has passed the initial admissibility criteria and has been communicated 26.6.2019 to Italy as the respondent State.

The larger context of the thesis is the tension between the object of the European Union (EU) to create and sustain its 'area of freedom, security and justice' with free movement of people within, and the EU's need to limit the number of immigrants coming from outside of the Union, often termed 'mixed migration'. Migration in its various forms has been and continues to be a contoversial issue ethically, politically and judicially. The thesis pursues to contribute to the discussion by focusing on the recent and topical phenomenon of externalization of border management, which is as ingenious as it is contended.

Fundamentally, the thesis gauges the effectiveness of the European Convention on Human Rights (ECHR) and the Court as protectors of human rights in instances where the States try to circumvent their obligations by 'outsourcing' susceptible tasks to non-Convention actors.

2. Research Questions

My intention is to first estimate whether the Court finds that the condition of jurisdiction as formulated in the Article 1 of the ECHR, and functioning as a 'threshold', is fulfilled, and whether the Application proceeds to merits. Secondly, I try to assess whether Italy can be held liable for violating Article 2 or Article 3 of the ECtHR. A recent judgment of the Court

[1] Application no. 21660/18 to the ECtHR (hereafter 'Application'): *S.S. et Autres c. Italie*, available at http://hudoc.echr.coe.int/eng?i=001-194748; 26.6.2019. – English translation: Appendix 1.

dealing with extraterritorial jurisdiction points out the distinction between the criteria for jurisdiction and responsibility: 'at the outset […] the question whether the facts complained of by the applicant […] fall within the jurisdiction of the respondent State and whether they are attributable to that State and engage its responsibility are separate matters, the latter two having to be determined on an examination on the merits'.[2] I rely on this division, asking first whether the events fall within Italy's jurisdiction, and second, if they trigger Italy's responsibility to fulfil its positive obligations. My research question has thus two parts.

When planning my thesis, I took into account the 'Questions to the Parties' and 'Information Request' to the Parties that the Application contains (see Appendix 1). Within the limited scope of the thesis, I mainly reflect on those that resonate with my focused research interest. While I could use the Court's questions as signposts in my analysis, I did not have access to the answers provided by the Parties. Therefore, it should be kept in mind that I have not seen any counterarguments submitted by the Italian government. This lack of further material obviously emphasizes the tentative and hypothetical nature of my thesis.

3. Methodology and Objective

The thesis is essentially a doctrinal study. It aims to examine critically the central features of the relevant legislation and case law in order to create an arguably correct and sufficiently complete statement on the Court's reasoning.[3] The method is a two-part process, which involves locating the sources of the law and then interpreting and analysing them.[4] Such a doctrinal research process can be described as a qualitative rather than a quantitative one.

The central sources are the provisions of ECHR and the case law of the ECtHR. Additionally, there are the general principles of interpretation of the Court. The study is guided by a literature review, and some references are made to other sources of international and EU law as well as other adjudicating bodies, too. As for the facts of the case, the research is based on the Application itself and the available multimedia reconstruction of the events. A central reference and source for proof and interpretation is the bilateral agreement between Italy and Libya, the so-called Memorandum of Understanding (MoU), included as Appendix 2.

The Court has not previously decided on a similar issue. At the time of writing, the case is still pending. My research method is to create a hypothesis of on what arguments there are

[2] *Case of Georgia v. Russia* (II) 2021, para. 162
[3] *Watkins and Burton* 2017, p. 13
[4] *Hutchinson and Duncan* 2012, p. 110

concerning its further admissibility and merits. I seek advice from recent journal articles with tentative analyses and educated guesses of the outcome of *S.S.* My objective is to learn about how the ECtHR applies its case law and principles to unprecedented claims, and how it develops its argumentation. Of main interest are the concept of jurisdiction and the doctrine of positive obligations such as they are formulated and understood in human rights law.

The thesis is, in a way, a case analysis of a case that has not yet been decided. As said, my method is therefore prone to uncertainties and even misjudgments. At the same time, I deliberately chose this approach exactly because the openness of the case makes it exciting.

I try to concentrate on the legal issues. As doctrinal legal research can be seen to work towards the broader goal of law, which is ultimately justice, I also include some comments on the political or ethical aspects of the law and jurisprudence. Political decisions have led to the incident of *S.S.,* and the Court's decision, in turn, can have a large impact on them.

4. Disposition

This introductory Chapter I outlines the purpose and scope of the thesis and reflects on the choice of research method and on the relevant sources used. The next Chapter II presents the Application and the facts of the case as reported. It also aims to situate the case in the broader context of the EU migration control and, particularly, describe the relationship between Italy and Libya, present their agreements and show the human rights situation in Libya. Chapter III introduces the relevant rules, concentrating on those Articles of the ECHR that were allegedly breached. The main substantive part – the legal analysis – of the thesis consists of the following two chapters. In Chapter IV, I study the question of jurisdiction: how the concept is understood in the ECHR and applied by the ECtHR, and most significantly, how could the Court find Italy's 'extraterritorial' jurisdiction in the *S.S.* case. In Chapter V follows the speculation of the responsibility and the possible violations of the material Articles. The question concerns the positive obligations of Italy: are there violations of the Convention because of omissions of duties? To find out this, I apply various criteria or 'tests' used by the Court: reasonable knowledge and reasonable measures, the condition of proximity and the principle of effectiveness. As much as possible, I try to reflect on the relevant and recent case law. Lastly, in Chapter VI, I sum up my research and present my hypothesis of the Court's judgment. I also make some remarks of the political pressure the Court is under and speculate tentatively on the consequences of the outcome to the EU immigration policy at large.

II. The Case and the Background

1. The Application of S.S. and the Others v. Italy

The application is on behalf of 17 survivors of the incident. The applicants are 16 Nigerian nationals and one Ghanaian national. Two of them are also acting on behalf of their minor children, who died during the events subject of the application. The application is filed by the Global Legal Action Network (GLAN)[5] and the Association for Juridical Studies on Immigration (ASGI),[6] with support from the non-profit Italian Recreative and Cultural Association (Associazione Ricreativa e Culturale Italiana, ARCI) and Yale Law School's Lowenstein International Human Rights Clinic.[7] The applicants are represented by *Violeta Moreno Lax*, *Itamar Mann* and *C.L. Cecchini* and *L. Leo.*

2. The Circumstances and Facts of the Case

The recount of the events is based on the Application[8] and a multimedia reconstruction 'Mare Clausum'[9] created by Forensic Oceanography and Forensic Architecture. It presents the evidence compiled by the Search and Rescue Observatory for the Mediterranean (SAROBMED)[10] of materials provided by the search and rescue (SAR) non-governmental organization (NGO) Sea-Watch's[11] vessel Sea Watch 3.

The reconstruction provides a full timeline of the actions at sea by combining video footage, recordings of the radio messages between the actors on scene, and computer-created dynamic modelling. The footage is from seven wide-angle cameras mounted on the mast and the deck of the Sea Watch 3 vessel and from two cameras mounted on its rigid-hulled inflatable boats (RHIB), with an additional clip recorded with a Libyan crew member's phone. The whole reconstruction is available online.

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[5] GLAN consists of legal practitioners, investigative journalists and academics, who pursue legal actions that promote accountability for human rights violations occurring overseas; https://www.glanlaw.org/about-us
[6] ASGI is a membership-based association of lawyers, academics, consultants and civil society representatives focusing on all legal aspects of immigration; https://www.asgi.it/chi-siamo/english-version/
[7] https://www.glanlaw.org/ss-case
[8] Application, paras 2–12: the circumstances of the case
[9] Mare Clausum. The Sea Watch vs Libyan Coast Guard Case: An Investigation by Forensic Oceanography (directed by Charles Heller and Lorenzo Pezzani) and Forensic Architecture (April 2018), at www.glanlaw.org/ss-case / or at www.forensic-architecture.org/case/sea-watch/
[10] SAROBMED is an international, multi-disciplinary consortium of researchers, civil society groups, and other organisations working in the field of cross-border maritime migration; https://sarobmed.org/
[11] Sea-Watch is a volunteer project financed through donations and trying to fill the gaps left by the institutionalised European sea rescue such as Mare Nostrum; https://sea-watch.org/en/about/

At some point during the night between 5 and 6 November 2017 a rubber dinghy, with approximately 130 to 150 people in it, left Tripoli. By around 6 a.m. 6.11., the sea had got rough, and the craft started taking in water and found itself in distress off the coast of Libya. The passengers contacted the Rome Maritime Coordination and Rescue Center (MRCC) via a satellite phone. There were three ships in the vicinity: the rescue vessel Sea Watch 3 (SW3), the French military vessel Premier Maître l'Her, a part of European Union Naval Force Mediterranean (EUNAVFOR MED), and the Libyan coast guard vessel Ras Jadir.

Patrolling just outside the Libyan contiguous zone, SW3 was closest to the migrants' craft, and was contacted by the Rome MRCC, sending distress signals but no specific location. SW3 received authorization join and rescue the craft. The Rome MRCC also informed the Libyan coast guard (LYCG), and the French ship offered its aid to SW3 and tried repeatedly to contact the LYCG. The Rome MRCC could determine the location through the satellite phone provider and passed it on to SW3 at 6.31. The MRCC alerted SW3 that the LYCG were present within a radius of nine nautical miles from the migrants' craft.

Eventually the LYCG informed SW3 that they would coordinate the rescue on scene, but transmitted no further instructions, leaving SW3 and Ras Jadir on their own to solve their conflicting imperatives of rescue and interception, which were initiated around 8 o'clock. The incidents took place between 20 and 24 nautical miles off the Libyan coast, therefore outside Libyan territorial waters.

The Libyan vessel Ras Jadir sped up in order to intercept the dinghy before SW3, and when it reached the half-sunken craft, it was manoeuvred so that the abrupt water movements threw several people from the dinghy into the water, causing them to drown.

At 8.45 a Portuguese airplane (also a part of EUNAVFOR MED) dropped lifejackets, an inflatable draft and smoke flares to indicate the location of the distressed dinghy.

At 9.07 an Italian military helicopter, deployed by a nearby warship (part of the Mare Sicuro operation), arrived on the scene and offered SW3 assistance. The crew of the helicopter requested SW3 to send a its RHIBs near the migrants' boat so that the helicopter could safely launch its own life raft.

By 9.30 all the migrants had left their sinking dinghy. Several were dragged on board Ras Jadir, but six of them escaped to get to the SW3's RHIBs. The Libyan crew did not provide migrants with life jackets but instead obstructed the rescue operations by throwing objects on them. Once they were on board, the crew beat them and threatened them with weapons.

At 9.36 Ras Jadir suddenly increased its speed in order to rapidly leave the scene. Still, one more person climbed off the board, intending to get to the SW3, and was left hanging on the ladder of the accelerating vessel. The Italian helicopter radioed Ras Jadir pleading them repeatedly to stop the engines and asking them to cooperate with SW3. Ras Jadir refused, claiming to have been designated as the vessel responsible for the on-scene rescue (as the On Scene Commander).

It is estimated that over 20 people died by drowning on scene. Ras Jadir intercepted 47 migrants, who were reportedly taken to a detention camp in Tajura, Libya, where they were subjected to ill-treatment and violence. On a date that has not been specified, they were repatriated to Nigeria as part of the voluntary humanitarian return assistance program of the International Organization for Migration (IOM). SW3 rescued 59 people and brought them to Europe. The crew of SW3 also recovered the bodies of those who died at sea, including the bodies of two children, sons of the applicants S.S. and R.J. respectively.

3. The Claims or Aggrievances

The applicants complain that the Rome Maritime Coordination and Rescue Center, by allowing Ras Jadir to take part in the rescue operations, had exposed them at risk of ill-treatment and of death, and failed in its positive obligations, thus violating the Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment or punishment) of the ECHR. There are also alleged violations of Article 4 (prohibition of slavery and forced labour), Article 13 (right to an effective remedy) and Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens); see in more detail for Appendix 1.

My legal analysis and conclusions will concentrate on Article 2 and Article 3. This is partly due to the limited scope of the thesis but also, and more importantly, due to their centrality in the human rights regime. These articles will be explained first generally in Chapter III and then analysed more closely in Chapter V as well as in Chapter VI.

4. The Context: the 'Area of Freedom, Security and Justice' of the EU

4.1. The Concept of Irregular Migration

The *S.S.* case has to be studied, and can only be comprehended, in the context of the EU asylum and migration politics and legislation. In the following, I therefore try to sketch the

main outlines of these. After that I focus on the position of Italy as an EU Member State that bears the brunt of the migration due to its geographic situation and due to the EU law.

As a general rule, States have the undeniable sovereign right, as a matter of well-established international law and subject to their treaty obligations, to control entry, residence and expulsion of non-nationals.[12] However, it is not less certain that such a right is not absolute, because international refugee law and human rights impose limits to the control.[13]

The Member States of the EU have relinquished their sovereignty in various degrees leading to the creation of a common space through the method of differentiated integration or 'variable geometry'.[14] The Union shall offer an 'area of freedom, security and justice' (AFSJ) without internal frontiers in conjunction with appropriate measures with respect to external border controls, asylum and immigration,[15] and frame a common policy on these areas based on solidarity between Member States.[16] According to the Schengen Agreement,[17] the border controls are to be transferred to the common external frontiers.[18]

The European Agenda on Migration 2015[19] makes it clear that the EU should fight criminal smuggling networks. On the other hand, the EU has a duty to help displaced persons in need of international protection. To achieve an optimal level of protection, multidisciplinary and concerted action both at EU level and at national level has been deemed essential.[20]

There are two conflicting sets of rules in the EU law concerning asylum seekers. On the one hand, unrecognized refugees and asylum seekers are assimilated to the generic category of 'third-country nationals', which renders their entry 'irregular' and basically illegal unless they can demonstrate compliance with general admission criteria. On the other hand, the EU border *acquis* contains references to human rights and refugee law, which provide special treatment must be accorded to those in search of international protection even at the pre-entry stage. In reality, refugees are routinely compelled to resort to smuggling and trafficking to access protection in the EU, for lack of legal alternatives.[21] The access to international

[12] ECHR Guide 2020: Immigration, p. 6, para 2; see e.g. *Saadi v. UK 2008*, para. 64
[13] *Peers* et al., 2015, p. 672
[14] *Moreno-Lax* 2017, p. 12
[15] TEU, Article 3(2)
[16] TFEU, Article 67
[17] Schengen Agreement, Article 17
[18] *Moreno-Lax* 2017, p. 20
[19] The European Agenda on Migration, COM(2015) 240 final
[20] *Moreno-Lax* 2017, p. 27
[21] Ibid., p. 44

protection has been made dependent not on the refugee's need for protection, but perversely on the person's ability to enter clandestinely the territory of a Member State.[22]

The Integrated Border Management (IBM) system of the EU comprises a so-called four-tier access control model consisting of measures to be implemented in third countries with their cooperation, border checks at the external frontiers of the Member States, control within the Union, and expulsion upon entry of those without adequate documentation.[23] The IBM system is developed through the Schengen *acquis*, but no channels have been opened, as part of the Common European Asylum System (CEAS), to guarantee legal access for asylum seekers to the EU for the purpose of claiming international protection.[24]

'The external dimension of asylum' was launched by the Hague Programme.[25] According to the European Council, 'the prevention and tackling of irregular migration will help avoid the loss of lives of migrants undertaking hazardous journeys' and therefore, a 'sustainable solution can only be found by intensifying cooperation with countries of origin and transit, including through assistance to strengthen their migration and border management capacity'.[26] The Hague Programme established that it is crucial to strengthen the AFSJ by combining control at the external borders, internal security and the prevention of terrorism.[27]

4.2. Externalization of Borders

Externalization, or outsourcing, of border controls has accompanied immigration enforcement globally.[28] In the European context, the Court of Justice of the European Union (CJEU) has confirmed that such border and migration enforcement activities can stretch beyond the actual territorial borders of the AFSJ.[29]

The EU aims for the externalisation through dedicated financial and technical support to third countries of origin or transit.[30] Often the negotiations involve transit states in the enforcement of extraterritorial controls so as to prevent migrants from getting through these territories en route to the receiving countries, and the agreements between the EU states and

[22] *Moreno-Lax* 2017, p. 4
[23] Ibid., p. 3
[24] *Peers* et al. 2015, p. 618
[25] The European Council doc. 16054/04, 13 Dec. 2004, para. 1.6.
[26] Presidency Conclusions, European Council 26–27 June 2014, para. 8; in *Peers* et al. 2015, p. 619
[27] *Moreno-Lax* 2017, p. 27
[28] *Menjívar* 2014, p. 354
[29] *Herlin-Karnell* 2017, p. 109; see *Melki and Abdeli*, Joined Cases C-188/10 and C-189/10, and *Adil*, Case C-278/12 PPU
[30] *Giuffré* and *Moreno-Lax* 2019, p. 85

the transit states involve the training of personnel and transfers of technical and financial assistance.[31]

Frontex, the European Border and Coast Guard Agency, plays a central role in the efforts to safeguard the AFSJ by its support at the external borders.[32] Frontex operationalizes the link Between IBM and the Global Approach to Migration and Mobility (GAMM). A substantial enhancement of Frontex' powers occurred in the aftermath of the 2015–2016 'migration crisis' and resulted in the adoption of the European Border and Coast Guard Regulation.[33]

In 2019, the Regulation on the European Border and Coast Guard and repealing Regulations (EBCG)[34] was updated. The Regulation defines the components of IBM, one of which is the cooperation with third countries, particularly neighbouring countries and on third countries of origin or transit for illegal immigration.[35] It explicitly encourages the Member States to 'cooperate at an operational level with one or more third countries'[36] by concluding bilateral or multilateral agreements. However, any such agreements shall 'comply with […] law on fundamental rights and on international protection, including the Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the 1951 Convention relating to the Status of Refugees, the 1967 Protocol thereto, and in particular the principle of non-refoulement'.[37]

The EU Commission published in September 2020 the ambitious 'New Pact on Migration and Asylum'. It covers a wide range of issues, but the security of the AFSJ is its strong overall theme. Pursuant to the new EU Action Plan against migrant smuggling, the cooperation between the EU and third countries – countries of origin and of transfer – will be further stimulated and strengthened through targeted partnerships as part of broader partnerships with key third countries. These include support to countries of transit in capacity-building both in terms of law enforcement frameworks and operational capacity, encouraging effective action by police and judicial authorities.[38]

According to the New Pact, the EU aims to prevent dangerous journeys and irregular crossings through 'tailor-made Counter Migrant Smuggling Partnerships' with third

[31] *Menjívar* 2014, p. 358
[32] https://frontex.europa.eu/about-frontex/foreword/
[33] *Moreno-Lax* 2017, p. 153–157
[34] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624
[35] Ibid., Article 3(1)(g)
[36] Ibid., Article 72(1)
[37] Ibid., Article 72(3)
[38] Communication from the Commission on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 16

countries.[39] A critical step forward is the 'swift and full implementation of the new EBCG Regulation'.[40] Because the disembarkation of migrants has a significant impact on asylum, migration and border management, in particular on coastal Member States, it is deemed crucial to develop an even more coordinated EU approach to the search and rescue practices – grounded in solidarity.[41]

The struggle for solidarity in handling the asylum and migration issues has been a consistent challenge for the EU. The increased migration flows of 2015 and 2016 exposed the flaws in the EU rules for asylum procedure, the so-called Dublin system, which places the responsibility for asylum claims on member states of first entry and puts a disproportionally heavy pressure on the institutions of certain southern Member States.[42] This has pushed more people into dangerous irregular migration routes. Besides solidarity among the Member States, the Commission's new plan emphasizes cooperation with third countries by encouraging them to host refugees and migrants, providing them with support to do that, and boosting their own enforcement against smuggling.[43]

A joint statement published soon after the launch of the Pact, signed by nearly one hundred non-governmental organizations (NGOs),[44] contains severe criticism of the proposed regulations, directives and overall policies. According to the statement 'the overriding objective of the Pact is clear: an increase in the number of people who are returned or deported from Europe'. There is a continuing tension between the 'rhetorical commitment to mutually beneficial international partnerships' and attempts to externalise responsibility for asylum. In the opinion of the NGOs, the proposals prioritizes externalisation, deterrence and return over procedural guarantees and fundamental rights. Instead of truly establishing a system of solidarity among the EU Member States, the NGOs fear that the procedural reforms only exacerbate the pressure on Member States at the Union's external border. The NGOs reiterate the concerns about the use of concept of 'safe third country', which has been discussed extensively before.

[39] Communication from the Commission on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 14
[40] Ibid., p. 12
[41] Ibid., p. 13
[42] *Rue* and *Yayboke* 2020
[43] Ibid.
[44] Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded; 6th October 2020. At https://www.ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/

In my final conclusions, I will come back to the New Pact proposed by the EU Commission. I will try to assess the possible impact that the Court's decision in *S.S.* might have on the new and amended legislative framework.

4.3. The Issue of Maritime Borders

The situation at the maritime borders of the European AFSJ has caused trouble for long, and is of acute interest to Italy. Trying to curb the migration flows, the EU and the Member States have resorted to several forceful blocking mechanism, of which maritime interdiction is an explicit example.[45] The focus has been on the Mediterranean, but a recent development – at the time of writing – is the increased number of migrant boats sailing from West Africa to the Canary Islands, a long and perilous route over the Atlantic. Only a fraction of the total unauthorized immigration in the EU is detected at the moment of entry, and the irregular sea crossings represent a relatively small portion of total arrivals, but on the other hand, the majority of border deaths occur at sea.[46]

Three general models of migrant interdiction by the EU Member States can be identified. The first comprises joint operations in territorial waters of a third country. Spain and Italy have concluded agreements with several North African countries which allow them to participate in border patrols in the territorial seas of those third countries.[47] The second group of interdiction practices comprises so-called 'push-backs': the interdiction and summary return of migrants to a third country, often undertaken on the high seas with the presumption that the third state is willing to accept the return of the migrants.[48] These are exemplified by the case of *Hirsi Jamaa and Others v. Italy* discussed below. The *S.S.* case belongs to the third model of interdiction: rescue operations of migrants who are in distress at sea, followed by disembarkation in a third country – 'pull-back' operations, which are by their nature conducted on an *ad hoc* basis.[49]

The EU Member States have concluded amongst themselves and with third countries treaties that are analogical with bilateral treaties concluded for the suppression of drug trafficking. These treaties grant permission for the interdiction of such vessels on the high seas which are suspected of carrying undocumented migrants. The EU Member States have also

[45] *Moreno-Lax* 2017, p. 4
[46] Ibid., p. 188
[47] *Den Heijer* 2012, p. 212
[48] Ibid., p. 213
[49] Ibid., p. 215

circumvented the rule of flag-state consent by interdicting migrant vessels under the pretext of SAR operations, despite the demands of those on board the vessel.[50] An additional problem is posed by the fact that many migrants cross the Mediterranean on board stateless vessels. The European Commission has posited that a the States may prevent the further passage of a stateless vessel, arrest and seize it, or escort it to a port.[51]

According to the Maritime Surveillance Regulation (MSR),[52] the EU States shall cooperate with the responsible Rescue Coordination Centre (RCC) to identify a place of safety and, when the responsible RCC designates such a place of safety, they shall ensure that disembarkation of the rescued persons is carried out rapidly and effectively.[53] The place of safety is defined as 'a location where rescue operations are considered to terminate and where the survivors' safety of life is not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivors' next destination or final destination, taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement'.[54]

However, the principle of non-refoulement is formulated as an exception to the rule of disembarkation 'in the third country from which the vessel is assumed to have departed': only '[i]f that is not possible' (due to legal or factual impediments), will interdicted/ rescued persons be brought to EU territory.[55] Non-rescue episodes and incidents of refoulement take place due to disagreement as to the content and extent of obligations accruing in the maritime context. Interdiction has been conflated with SAR operations, the obligations of which are interpreted as applying independently from human rights.[56]

4.4. Italy and Libya

Italy's geographical position at the border of the EU and right on the Mediterranean have made it one of the most attractive ports of entry to Europe.[57] Italy has been increasingly vocal regarding its need for a solution to the heavy fluxes of migrants crossing the

[50] *Den Heijer* 2012, p. 222
[51] Ibid., p. 224; Article 92(1) UNCLOS: each vessel sailing the high seas must have a nationality and fly a flag
[52] Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (MSR). – See further Chapter III.
[53] MSR, Article 10(1)(c)
[54] Ibid., Article 2(12)
[55] Ibid., Article 10(1); *Moreno-Lax* 2017, p. 198
[56] *Moreno-Lax* 2017, p. 188
[57] *Vari* 2020, p. 108–109

Mediterranean to reach its borders, and continued to stress that it could not bear the burden of helping and taking illegal migrants in such large numbers, and called for the EU to provide a durable solution in many occasions.[58]

Italy colonized Libya for nearly forty years in the early 1900s and left the country in 1951 in dire conditions. The discovery of oil brought more business into Libya, but also corruption and division, which resulted in the 1969 populist revolution led by Colonel *Moammar Gaddafi*. The international community began to see Libya as a sponsor of terrorism, and when the so-called Arab Spring started in 2011, with North Atlantic Treaty Organisation's (NATO) intervention on the side of Libyans, Gaddafi's government was overturned and he was killed shortly thereafter.[59] Following the 42-year-long government of Gaddafi, Libya has been more or less in a status of chaos: armed militias control various cities and regions of the country and engage in contraband, human trafficking, and smuggling of migrants and supplies. The General National Congress (GNC), an Islamist-led administration based in Tripoli challenges the authority of the present Libyan Government of National Accord (GNA), making it difficult for it to gain full control over Libya.[60]

The cooperation and collaboration between Italy and Libya on migration and border control was formalised during the early 2000s, when several agreements focused on curbing migratory flows and enhancing readmission were concluded.[61] In 2008 Italy and Libya signed a Treaty of Friendship, Partnership and Cooperation aimed at preventing irregular migration from Libya to Italy.[62]

The unrest in Libya following the Arab Spring temporarily halted the efforts to partnerships or agreements, and the Treaty was formally suspended in 2012 after the ECtHR decision of *Hirsi Jamaa and Others v. Italy*.[63] This push-back case concerned Somalian and Eritrean migrants, travelling from Libya, who were intercepted at sea by the Italian authorities and

[58] *Vari* 2020, p. 114
[59] Ibid., p. 107–108
[60] Ibid., p. 106, 109
[61] See *Paoletti, E.*: The Migration of Power and North-South Inequalities (2010, Palgrave Macmillan); *Ronzitti, N.:* 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' (2009) 1 Bulletin of Italian Politics 1, 125
[62] Legge 6 febbraio 2009, n. 7 Ratifica ed esecuzione del Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista, fatto a Bengasi il 30 agosto 2008 (GU n. 40 del 18-2-2009); available (in Italian) at https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009;7.
[63] 2012, Application no. 27765/09

sent by an Italian vessel back to Libya in a course of action precisely provided for by the Additional Technical Protocols of the aforementioned 2008 Treaty of Friendship.[64]

The Court held unanimously that the applicants fell within the jurisdiction of Italy for the purposes of Article 1 of the ECHR,[65] and found that Italy had violated the principle of non-refoulement implied in Article 3 and the prohibition of collective expulsion of Article 4 of Protocol 4 of the ECHR. According to the judgment, Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya: even if it such agreements made express provision for the return to Libya of migrants intercepted on the high seas, Italy's responsibility continues after having entered into treaty commitments subsequent to the entry into force of the ECHR.[66] The Court noted that jurisdiction is interpreted to apply also extraterritorially, and because the Convention must be interpreted as a whole, the expulsion can neither be interpreted only territorially.[67]

When the number of migrants reaching Europe increased sharply 2015, the cooperation with the Libyan authorities resumed. The EUNAVFOR MED Operation Sophia was launched in June 2015 under Italian overall command in order to provide training to Libyan Coast Guard (LYCG) personnel.[68] The mission core mandate of Operation Sophia is to 'undertake systematic efforts to identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers'.[69]

In 2016, the Council extended Operation Sophia's mandate reinforcing it by adding the supporting task of training of the Libyan coastguards and navy. The Italian Coast Guard assumed the leadership of a project to establish a Libyan MRCC and support the Libyan authorities in identifying and declaring their Search and Rescue (SAR) Region.[70]

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[64] Protocollo aggiuntivo tecnico-operativo al Protocollo di Cooperazione tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell'immigrazione clandestina, signed on 29.12.2007; available (in Italian) at https://www.meltingpot.org/IMG/pdf/Protocollo_operativo_Italia_Libia_2007.pdf

[65] Press release issued by the Registrar of the Court, ECHR 075 (2012), 23.2.2012

[66] *Hirsi Jamaa and Others v. Italy* 2012, para. 129

[67] Ibid., para. 178

[68] Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), L 122/31

[69] https://www.operationsophia.eu/about-us/

[70] See European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Join Communication to the European Parliament, the European Council and the Council. Migration on the Central Mediterranean route: Managing flows, saving lives' (25.1.2017)

4.5. The Memorandum of Understanding of 2017

A central document for the *S.S.* case is the bilateral agreement titled 'Memorandum of Understanding on Cooperation on Development, Combating Illegal Immigration, Human Trafficking and Smuggling, and on Strengthening Border Security' (MoU; see Appendix 2).[71] The MoU effectively reflects the earlier Treaty of Friendship, Partnership and Cooperation of 2008, highlights the importance of Libyan land and sea borders' control and security, and strengthens the decisive influence of the Italian Government on Libya.[72]

On the eve of the February 2017 EU summit in Malta, the President of the EU Council *Donald Tusk* promised the closure of the Central Mediterranean migration route into Europe. The summit led to the signing of the MoU between the Italian government and the GNA, endorsed by the EU in its Malta Declaration.[73]

In May 2017, Italy provided the LYCG with four fast patrol boats, and a few months later, further six boats, increasing significantly the operational capacity of the LYCG.[74] One of the vessels handed over to Libya by Italy is Ras Jadir, involved in *S.S.*, and eight out of its thirteen crew members on board were trained by the EUNAFVOR MED.[75] In June 2017, the Italian Coast Guard was awarded a € 44 million grant for the assessment of the LYCG legal framework and capability in terms of SAR Services by the European Commission.[76]

Following Italian recommendations, the Libyan authorities unilaterally declared the Libyan SAR zone. Although the Italian Coast Guard indicated that the Libyan Maritime Rescue Coordination Center (MRCC) would not have been fully operational until at least 2020,[77] Italy and the EU have increasingly withdrawn their naval assets from the Central Mediterranean, forcing the LYCG to become the primary responsible actor.[78]

Within the unilaterally declared SAR zone Libya then claimed responsibility to coordinate rescue operations and has since threatened repeatedly NGO vessels to enter it.[79] While in

[71] English translation at https://eumigrationlawblog.eu/wpcontent/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf, see Appendix 2
[72] *Moreno-Lax* 2017, p. 109
[73] *Nakache* and *Losier* 2017; see Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, European Council 3.2.2017, https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/
[74] *Vari* 2020, p. 110
[75] Reconstruction by Forensic Oceanography and Forensic Architecture
[76] Ibid., p. 111
[77] Under the rules of the International Maritime Organization (IMO), a country can assert a SAR region only if it has a 24-hour MRCC staffed by English-speakers.
[78] The New Humanitarian, https://deeply.thenewhumanitarian.org/refugees/executive-summaries/2017/12/14
[79] Reconstruction by Forensic Oceanography and Forensic Architecture

2016 NGOs had been the main search and rescue actor in the Mediterranean, by the end of 2017 the Libyan Coast Guard intercepted more migrants than any other actor.[80] The EU and Italy *de facto* re-established the LYCG, which before was unable or unwilling to intercept migrants leaving the Libyan shores.[81] The search and rescue missions have effectively turned into operations of exit control. In 2017, the LYCG could perform as many as 19,452 pull-backs due to their material contribution and close involvement in the internal command-and-control structure of the Libyan forces.[82]

Especially since the signature of the MoU the delivery of training, equipment, and assets has intensified. Italy has created a dedicated 'Africa Fund', € 2.5 million of which has been allocated to the maintenance of LYCG boats and the training of their crews.[83] The EU has committed € 46 million to prop up Libyan interdiction capacity.[84] It has been calculated that the total combined investment by Italy and the EU will be € 285 million by 2023.[85] In addition, an extension of the Mare Sicuro Operation called NAURAS[86] was approved by the Italian Parliament in August 2017, consisting of four ships, four helicopters, and 600 servicemen deployed at sea or stationed in Tripoli harbour.[87]

There have also been reports that Italy has indirectly paid irregular armed militias to provide control over migration fluxes and negotiated with them through mayors and local leaders in order to gain their support.[88] Italy finances the GNA, but the government makes deals with the militias and pays them to accomplish the goals of the MoU.[89] This might mean that the smugglers who were previously paid by migrants to cross the Mediterranean are instead being indirecty paid by Italy to prevent them from smuggling.[90]

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[80] See IOM data at http://www.globaldtm.info/libya/
[81] Ibid.
[82] *Moreno-Lax* and *Lemberg-Pedersen* 2019, p. 12; source: IOM, Maritime Update Libyan Coast, 25.10.–28.11.2017, www.iom.int/sites/default/files/situation_reports/file/IOM-Libya-Maritime-Update-Libyan-25Oct-28Nov.pdf
[83] *Moreno-Lax* and *Lemberg-Pedersen* 2019, p. 26
[84] European Commission, EU Cooperation on Migration in Libya 8.5.2018, at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eutf-noa-ly-08052018.pdf.
[85] EU and Italy put Aside €285m to Boost Libyan Coast Guard' EU Observer 29.11.2017, at https://euobserver.com/migration/140067
[86] Maritime Rescue Coordination Centre Rome, Guardia Costiera Italiana, Annual Report 2017, at www.guardiacostiera.gov.it/attivita/Documents/attivita-sarimmigrazione-2017/Rapporto_annuale_2017_ENG.pdf
[87] *Moreno-Lax* and *Lemberg-Pedersen* 2019, p. 28
[88] *Vari* 2020, p. 118; see Matthew Herbert and Jalel Harchaoui, 'Italy claims it's found a solution to Europe's migrant problem. Here's why Italy's wrong', Washington Post 26.9.2017, at https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/25/italy-claims-its-founda-solution-to-europes-migrant-problem-heres-why-italys-wrong/?utm_term=.42e3781b8114
[89] *Vari* 2020, p. 120
[90] Ibid., p. 119

The MoU itself is only three pages long and constitutes of eight articles. According to Article 1(B), the Italian party 'provides support and financing to development programs in the regions affected by the illegal immigration phenomenon'.[91] In order to fight illegal immigration, 'the Italian party commits to provide technical and technologic support to the Libyan institutions […] represented by the border guard and the coast guard'.[92] Article 4 states that 'The Italian party provides the financing of the initiatives mentioned in this Memorandum'.

The MoU does not expressly specify that Libyan authorities should intercept migrants already en route to Italy and at sea, but this can be inferred from the text of the Article 1. It is equally likely that Libya will be intercepting boats before they reach Italian territorial waters. By mentioning funding for organizations in Libya that engage in the return – whether voluntary or forcible – of migrants to their country of origin, Article 2 explicitly identifies forcible returns (refoulement) as one of its main goals. The MoU does not mention actions to identify potential refugees among the migrants or to ensure that those returned are headed to a safe country;[93] actually the MoU does not even contain the words 'refugee' or 'legal migration,' but instead only uses the blanket term of illegal immigration.[94]

In Article 5 it is summarily stated that 'The Parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements of which the two Countries are part of'.

All in all, the MoU can be seen as a containment scheme designed to outsource responsibility of controls and to thwart departures or forestall exit. Its ultimate goal can be regarded as an effort to sever the jurisdictional link with the EU and Italy.[95] In my opinion it is a central source of law, or alternatively evidence, for the *S.S.* case.

The outcome of the case at hand notwithstanding, it is not premature to say that the 'more controls' policies exemplified by the MoU have not translated into 'more deterrence': available information suggests that the migrants divert towards more perilous routes where the risk of injury and loss of life multiplies.[96] The MoU has been judged by a national Criminal Court to be not conform to the Italian Constitution and to international laws, and it

[91] MoU Article 1(B), see Appendix 2
[92] Ibid., Article 1(C)
[93] *Vari* 2020, p. 113–114
[94] Ibid., p. 116
[95] *Giuffré* and *Moreno-Lax* 2019, p. 85
[96] *Moreno-Lax* 2017, p. 198–199

has been opposed by numerous associations as well as the Council of Europe Commissioner for Human Rights. Despite this, the MoU was renewed in February 2020.[97]

4.6. Libya is Not a Safe Third Country

The MoU has been compared to the probably better-known agreement between the EU and Turkey.[98] Asylum seekers and irregular migrants who reached Greece could be returned to Turkey for a € 6 billion payment. Turkey has been accused of failing to provide adequate assistance to refugees, and the EU has been engaging in the refoulement of refugees by transferring asylum seekers from Greece to Turkey, justifying its actions by claiming that Turkey is in fact a safe country.[99] Still, in contrast to the MoU, the arrangement with Turkey documents funding amounts, projects and partners in detail, and has included resettlement operations and the active participation of the United Nations Refugee Agency **(**UNHCR).[100]

In the Application, a reference is made to UNHCR's position on returns to Libya from September 2018. Even before the current unrest and insecurity, UNHCR has considered that Libya should not be regarded as a 'safe third country' in light of the absence of a functioning asylum system, the widely reported difficulties and abuses faced by asylum-seekers and refugees, the absence of protection from such abuses, and the lack of protection against refoulement. This is emphasized in the position of 2018 as well as in later updates by UNHCR. Libya is not party to the Convention Relating to the Status of Refugees or its Protocol and, in spite of having ratified the 1969 Organisation of African Unity (OAU) Convention relating to refugees, it does not have a functioning national asylum system. Applicable Libyan laws criminalize all irregular entry, stay or exit,[101] leaving persons in need of international protection without the rights attached to asylum.[102]

The conditions of Libyan detention facilities fail to meet international standards and have been described variously as 'horrendous' or 'cruel, inhuman and degrading'.[103] Asylum-

[97] ASGI, Access to the Territory and Push Backs, 2020. – The sentence of the Criminal Court of Trapani 23.5.2019 states that according to article 80 of the Italian Constitution, political agreements can be signed only with Parliament's authorization; the MoU is also concluded with a party, the Libyan coastguard, repeatedly referred to as responsible for crimes against humanity (available in Italian at: https://bit.ly/3dutMHl)
[98] EU-Turkey statement 18.3.2016, at https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/
[99] *Vari* 2020, p. 115
[100] *Vari* 2020, p. 116
[101] UNHCR: Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea, September 2020, p. 6
[102] Ibid., p. 16. – See also Chapter III.
[103] HRW, Libya: Nightmarish Detention for Migrants, Asylum Seekers, 21 January 2019, https://bit.ly/2SXU3WE

seekers, refugees and migrants, including children, are subjected to torture and other forms of ill-treatment, including rape and other forms of sexual violence, forced labour, forced recruitment, as well as extortion, both in official and unofficial detention facilities. Those detained have no possibility to challenge the legality of their detention or treatment.[104]

In the context of rescue at sea and in line with international maritime law – including the EU Maritime Surveillance Regulation – disembarkation is to occur in a predictable manner in a place of safety and in conditions that uphold respect for the human rights of those who are rescued, including adherence to the principle of non-refoulement.[105] When persons are rescued at sea, including by military and commercial vessels, 'the need to avoid disembarkation in territories where [their] lives and freedoms (…) would be threatened' is relevant in determining what constitutes a place of safety.[106]

In sum, UNHCR does not consider that Libya meets the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea, and therefore calls on States to refrain from returning to Libya any persons rescued at sea and to ensure their timely disembarkation in a place of safety.[107]

Besides by UNHCR, the consequences for migrants who are intercepted, pushed back, pulled back, or otherwise returned to Libya have been continuously documented also by the United Nations Support Mission in Libya (UNSMIL) and the UN Office of the High Commissioner for Human Rights (OHCHR), as well as the UN Secretary General.[108] These views are emphasised by the third-party interveners in the *S.S.* case, too, as explained below in Chapter VI.

[104] UNHCR: Position on the Designations of Libya as a Safe Third Country, p. 7
[105] Ibid., p. 17; see e.g. IMO, Resolutions MSC.155(78) and MSC.167(78) and International Convention on Maritime Search and Rescue 1403 UNTS, Annex, para. 1.3.2.
[106] IMO, Resolution MSC.167(78), para. 6.17
[107] UNHCR: Position on the Designations of Libya as a Safe Third Country, p. 17
[108] See *inter alia* UNSMIL and OHCHR, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya (n 88); United Nations Security Council, 'United Nations Support Mission in Libya, Report of the Secretary-General' (26 August 2019) UN Doc S/2019/682

III. Rules

1. The Relevant International and EU Law

The ECtHR interprets the Articles of the ECHR, of which the thesis focuses on Article 2 and Article 3. Unlike *S.S.*, in many cases the Court's process is preceded by national procedures, in which relevant domestic rules have been applied. This relates also to one of the admissibility criteria stated in Article 34 ECHR, namely that the Court may only deal with a matter after all domestic remedies have been exhausted.

The Court has also consistently held that the Convention does not exist in a vacuum and States necessarily remain bound by and must give effect to their other obligations under international law when implementing the Convention.[109] Thus, other provisions than the ECHR can be invoked by both the applicant(s) and by the respondent government(s), as well as by the third-party interveners, to back up the submissions. I give first an overall picture of such relevant aspects of international and EU law that are referred to in the Application or in the intervener's statements, supplemented by some provisions that the Court has referred to in the important *Hirsi Jamaa* judgment. After this, I move on to the ECHR.

When constituting and developing the AFSJ, the EU and its Member States must have respect for fundamental rights.[110] They are expressed in the Charter of the European Union, and they also translate general principles of EU law flowing from the ECHR as well as the relevant international standards concerning asylum formulated in the Convention on the Status of Refugees (CSR).[111] International law as a matter of *jus cogens* or customary norms imposes further obligations on the EU and its Member States. These intertwined sources of law must be taken into account when interpreting, applying, or implementing IBM rules.[112]

With regard to the duty of non-refoulement stipulated by Article 3 ECHR, several other sources can be appraised. Article 33(1) CSR declares that '[n]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. The United Nations

[109] See for example *Pini and Others v. Romania* 2014, para. 138; *Marguš v. Croatia* 2014, para. 129
[110] TEU Article 6(1); TFEU Article 67.1
[111] TFEU Article 78(1); the UN Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees
[112] *Moreno-Lax* 2017, p. 205

Convention against Torture (UNCAT)[113] Article 3(1) expresses the prohibition to expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. A similar duty is codified in Articles 4, 18 and 19 of the Charter of the EU and is 'applicable in all situations governed by European Union law'.[114] Finally, UNHCR recalls that the principle of non-refoulement applies wherever a state exercises jurisdiction, including where it exercises effective control in the context of SAR operations outside its territory.[115]

Another crucial right is the right to leave any country including one's own. It can be seen as complementary to the prohibition of forceful return, and is likewise affirmed by several sources. The provisions include Article 12(2) of the the International Covenant on Civil and Political Rights (ICCPR),[116] Article 13(2) of the Universal Declaration of Human Rights[117] and Article 5 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination[118]. The right is inevitably linked with the right to seek and enjoy asylum, which, in turn, is enshrined in Article 14(1) of the Declaration and in the CSR and its 1967 Protocol. Both rights are arguably norms of customary international law.[119]

The obligation to come to the assistance of those in distress at sea is a general obligation to preserve life at sea regardless of the persons' nationality, legal status, or the circumstances in which they are found.[120] This is evident in the the UN Convention on the Law of the Sea (the Montego Bay Convention / UNCLOS) that was invoked in *Hirsi Jamaa* and is referred to by interveners in *S.S.* In the Application and by the interveners in *S.S.*, references are also made to the International Convention on Maritime Search and Rescue (amended; SAR Convention) and to the International Convention for the Safety of Life at Sea of (amended; SOLAS). In the EU, surveillance and obligations in cases of distress at sea are further stipulated by the MSR. The Regulation has separate provisions for interdiction in the territorial waters or contiguous zone of the EU Member States[121] and for interdiction on the high seas.[122] In the case of SAR situations the Member States are obliged to render assistance

[113] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
[114] *Moreno-Lax* 2017, p. 248
[115] UNHCR 2020, p. 17
[116] The United Nations General Assembly 1966, Treaty Series, vol. 999, p. 171
[117] UN Doc. A/810, 10 December 1948
[118] UN Treaty Series, vol. 660, March 1966, p. 195
[119] See e.g. *Hannum* 1995, p. 323
[120] Annex to the SAR Convention, Chapter 2, para. 2.1.10
[121] MSR, Article 10(1)(a)
[122] MSR, Article 10(1)(b)

to any vessel or person in distress at sea regardless of the nationality or the circumstances in which that person is found.[123]

In *Hirsi Jamaa,* also the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime (the Palermo Protocol) was invoked. Article 19(1) provides that nothing in the Protocol 'shall affect the other rights, obligations and responsibilities of States and individuals under international law […] in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.'

Finally, the Resolution of the Parliamentary Assembly of the Council of Europe[124] can be of relevance. It provides that the Member States, when conducting maritime border surveillance operations in the context of preventing smuggling and trafficking or of border management, be it in the exercise of *de jure* or *de facto* jurisdiction, are requested to (9.1) 'fulfil without exception and without delay their obligation to save people in distress at sea', to (9.2) 'ensure that their border management policies and activities, including interception measures, recognise the mixed make-up of flows of individuals attempting to cross maritime borders'; and (9.3) 'guarantee for all intercepted persons humane treatment and systematic respect for their human rights, including the principle of non-refoulement, regardless of whether interception measures are implemented within their own territorial waters, those of another State on the basis of an *ad hoc* bilateral agreement, or on the high seas'.

2. The ECHR and Asylum Seekers

At the outset, it can be noted that the impact of the ECHR on the Common European Asylum System (CEAS) is probably more incisive than on any other field of EU law.[125] All the EU Member States are parties of the Convention, and the Union has an obligation to accede to the ECHR and subject itself to the oversight of the Court (ECtHR).[126] However, few provisions of the Convention and its Protocols explicitly concern 'aliens' and they do not

[123] MSR, Article 9(1)
[124] Resolution 1821 on the Interception and Rescue at Sea of Asylum-seekers, Refugees and Irregular Migrants, 2011
[125] *Peers et al.* 2015, p. viii
[126] Article 6(2) TEU

contain a right to asylum;[127] nor does the Court examine the actual asylum application or verify how the States honour their obligations under the CSR or the EU law.[128]

Extradition, expulsion and 'any other measure pursuing that aim' may nonetheless amount to refoulement, if the effect of the measure is 'to prevent migrants from reaching the borders of the State', regardless of whether it is initiated 'from the national territory of the States Parties to the Convention'.[129] Thus, the expulsion of an alien by a Contracting State may give rise to an issue under Articles 2 and 3 and engage the responsibility of that State, implying an obligation not to deport the person in question.[130] While the majority of removal cases examined by the Court under Articles 2 or 3 concern removals to the country from which the applicant has fled, such cases may also arise in connection with the applicant's removal to a third country such as a country of transit, as is the case in *S.S.*[131] Additionally, the right to leave one's country is found also in the ECHR as Article 2(2) of Protocol No. 4.

The absence or sparsity of particular provisions concerning asylum seekers notwithstanding, it is important to remember that the 1 Article obliges the Parties to secure the rights *to everyone within their jurisdiction*. This is why the question of jurisdiction is salient in *S.S.*

3. The ECHR Articles Pertaining to the S.S. Case

The Application claims that in *S.S.*, there are violations of Articles 2, 3, 4 and 13 of the ECHR, as well as of Article 4 of Protocol No. 4. I explain all these briefly here, but as I have mentioned, in my legal analysis and conclusions concentrate on Article 2 and Article 3.

The right to life of the Article 2 admits no derogation under peacetime[132] and has express and specific limitation clauses in the second paragraph. There are three narrowly circumscribed exceptions to the right: deprivation of life which is the result of an absolutely necessary use of force in defence of any person from unlawful violence, in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, or in action lawfully taken for the purpose of quelling a riot or insurrection.[133] The enumerated exceptions are primarily concerned with the use of force that is necessary for legitimate ends but that may

[127] ECHR Guide 2020: Immigration, p. 6, para. 2
[128] Ibid., p. 17, para. 27; e.g. *F.G. v. Sweden* 2014, para. 117; *Sufi and Elmi v. the United Kingdom* 2011, paras 212 and 226
[129] *Moreno-Lax* 2017, p. 270; *Hirsi Jamaa and Others v. Italy*, paras 180 and 177
[130] Ibid.; *Soering v. the United Kingdom* 1989; *F.G. v. Sweden*, paras 110–111
[131] ECHR Guide 2020: Immigration, p. 19, para. 32
[132] *Giuliani and Gaggio v. Italy* 2011, para. 174
[133] *Gerards* 2019, p. 24

have deprivation of life as an unintended outcome; otherwise the Article is absolute: if none of the exceptions applies, there is no justification of State acts leading to someone's death.[134]

The prohibition of torture and inhuman or degrading treatment or punishment of Article 3 is a fully non-derogable (an 'absolutely absolute') right. According to the Court, the Convention prohibits such treatment even in extreme emergency situations.[135] *Ratione personae* not only refugees, but everyone is covered by Article 3 regardless of the physical location of the person: in contrast to the CSR, the crossing of an international frontier is not a prerequisite for Article 3 to apply, and limitations as to legal status for the purposes of protection against refoulement under that provision are also forbidden.[136] *Ratione materiae*, again contrary to CSR, the grounds on account of which the proscribed treatment may be inflicted under Article 3 are without consequence, and no particular reason has to be adduced. All kinds of ill-treatment on account of any reason are forbidden without any limitations or derogations.[137] Neither can the applicant's past conduct, however undesirable or dangerous, be a relevant material consideration.[138]

Where the individual has an 'arguable complaint' that his removal would expose him to treatment contrary to Article 2 or 3 of the Convention, he must have an effective remedy, in practice as well as in law. Article 13 imperatively requires, *inter alia*, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Articles 2 or 3 and automatic suspensive effect.[139] Article 13 gives expression to the States' obligation to protect human rights first and foremost within their own legal system and establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights.[140]

In conjunction with or in the light of Article 3, the requirements of Article 13 are broader than a State's obligation under Article 3 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control.[141] Although no express provision exists in the ECHR to proceed to a 'prompt and impartial investigation',[142]

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[134] *Schabas* 2015, p. 122, 132
[135] ECHR Guide 2020: Immigration, p. 20–21
[136] *Moreno-Lax* 2017, p. 268
[137] Ibid., p. 269
[138] *Saadi v. Italy 2008*
[139] ECHR Guide 2020: Immigration, p. 19, para. 34
[140] *Kudła v. Poland 2000*, para. 152
[141] ECHR Guide 2020: Article 13, p. 28, para. 93
[142] Article 12 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

in the Court's view such a requirement is implicit in the notion of an effective remedy under Article 13.[143] Particularly with regard to asylum and expulsion cases, Article 13 sets the requirements for a substantive and rigorous scrutiny as well as effective remedies, given the irreversible nature of the harm that can occur if the alleged risk of ill-treatment materialized.[144]

As for Article 4 on slavery and forced labour, the Court has held that States have positive obligations to put in place a legislative and administrative framework and to take operational measures, as well as the procedural positive obligation to investigate. In the context of migration, of special weight can be regarded the requirement to put in place adequate measures regulating businesses used as a cover for human trafficking.[145]

The 'collective expulsion' of Article 4 of Protocol No. 4 is to be understood as 'any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'.[146] The notion of expulsion, like the concept of jurisdiction, is principally territorial, but where the Court found that a State had, exceptionally, exercised its jurisdiction outside its national territory, it could accept that the exercise of extraterritorial jurisdiction by that State had taken the form of collective expulsion.[147]

Since the first case in which the Court found that there had been a collective expulsion of aliens,[148] a violation of Article 13 in conjunction with Article 4 of Protocol 4 have been present in number of cases.[149] This is an unevitable corollary of the EU policy, which assimilates refugees and asylum seekers to the generic category of third-country nationals.

4. About the Interpretation Principles of the ECtHR

When interpreting and applying the provisions of the Convention, the Court follows certain settled principles. The most significant of them is the *principle of effectiviness* stated in Article 1, requiring the States to secure the Convention rights. This is repeatedly referred to

[143] ECHR Guide 2020: Article 13, p. 28, para. 95; *Aksoy v. Turkey* 1996, para. 98; *mutatis mutandis, Soering v. the United Kingdom* 1989, para. 88
[144] *Grabenwarter* 2014, p. 336
[145] Guide on Article 4 of the Convention: Prohibition of slavery and forced labour
[146] ECHR Guide 2020: Article 4 of Protocol No. 4, p. 5, para 3; see *Khlaifia and Others v. Italy* 2016, para. 237; *Georgia v. Russia 2011*, para. 167; *Andric v. Sweden* 1999 (dec.); *Čonka v. Belgium* 2002, para. 59; *Sultani v. France 2007*, para. 81
[147] Ibid., para. 5; see *Hirsi Jamaa and Others v. Italy* paras 169–182
[148] *Čonka v. Belgium* 2002
[149] ECHR Guide 2020: Article 13, p. 72, para. 281; *Čonka v. Belgium* 2002, para. 79 et seq.

in the thesis. The States have the primary responsibility regarding the effectiveness, whereas the Court functions in a supervisory role according to the *principle of subsidiarity*.

The goal of ensuring the most effective protection of the rights of individuals is pursued by the Court through its evolutive method. A central principle of the ECHR is the Convention as 'a living instrument' that has to be interpreted in 'an *evolutive and dynamic* manner'.[150] The principle of living instrument is based on the tenet of 'European consensus', which in turn, can be seen as anchored to the reality of the Member States of the Council of Europe, in which it applies and reflects the level of uniformity present in their legal frameworks. There is a requirement of legitimacy for the conclusions due to the consensual nature of the human rights protection system established by the Convention. This system needs a constant validation of the direction in which it develops.[151]

The interpretative principles also include the principle that the Convention should be interpreted in line with its *underlying values* in so-called meta-teleological interpretation. This takes into account the 'object and purpose' of the Convention, which is found not only in the specific Articles, but in the Convention as a whole, including its Preamble and additional Protocols. These elements can confirm the meaning drawn from the literal interpretation or, alternatively, disqualify it where another meaning is preferable.[152]

Finally, there is the principle of *autonomous interpretation.*[153] The legal terminology of the ECHR has a meaning that is independent from, or not necessarily consistent with, the meaning of similar or identical terms in the legal systems of the States.[154] By this approach the Court prevents the States from 'escaping' from their obligation to comply with the provisions of the Convention by resorting to their national legal classifications.[155]

All these principles have significance for the *S.S.* case, in which the Court applies the Convention to novel circumstances. They will arise at various points in the following sections: in the penultimate Chapter V, I will return to the alleged violations of Articles 2 and 3, having studied the question of jurisdiction of Article 1 in the following Chapter IV.

[150] The Court applied the evolutive approach for the first time in *Tyrer v. the United Kingdom* 1978.
[151] The Council of Europe: Interpretative Mechanisms of ECHR Case-Law
[152] *Lonati* 2017, p. 62
[153] *Gerards* 2019, p. 46–47
[154] *Lonati* 2017, p. 64
[155] Ibid., p. 68

IV. Jurisdiction

1. Generally of Jurisdiction

The jurisdiction of the Court, as stated in Article 32 ECHR, extends to 'all matters concerning the interpretation and application of the Convention and the Protocols thereto'. The Court has thus jurisdiction to decide complaints, or applications, submitted by individuals – notably also by persons who are not citizens of any State party.[156] What is of central interest of this thesis is the question of the reach of the jurisdiction of the State parties – in the case at hand, that of Italy. As the respondent, Italy can contest the jurisdiction of the Court, and it certainly disputes its own alleged jurisdiction. I will approach my first research question by explaining the concept of state jurisdiction, limiting the study within the human rights regime, and focusing on my main issue of extraterritorial jurisdiction.

A fundamental principle of public international law is that of sovereign equality dictating that assertions of jurisdiction have to be balanced with the sovereign rights of other states. Because territory is inextricably linked to sovereignty, jurisdiction in international law is primarily territorial[157] and the exercise of extraterritorial jurisdiction is considered an exception. This can be expressed by the presumption of jurisdiction over people situated on the official territory of the state party that stems from the division of labour between territorial states, a presumption that has to be rebuttable.[158] Strictly speaking, however, it can be argued that there is no 'territorial jurisdiction' *per se;*[159] rather, title and sovereignty establish the state's right to exercise such authority within a specific territory.[160]

In human rights, jurisdiction is above all a normative relationship between individual subjects as the right-holders and authorities, or institutions, as the duty-bearers. Without state jurisdiction over certain people, those people do not have human rights against that state and that state has no human rights duties towards those people. Jurisdiction requires both the normative condition (the recognition of human rights) and the practical condition (feasibleness of the corresponding duties).[161] Human rights accentuate the legitimate

[156] The International Justice Resource Center, https://ijrcenter.org/european-court-of-human-rights/
[157] *Banković and Others v. Belgium and Others* 2001, para. 59
[158] *Besson* 2012, p. 877
[159] Ibid., p. 876
[160] *Milanovic* 2011, p. 8
[161] *Besson* 2012, p. 860–863

collective interests they seek to protect and challenge the reciprocal system of traditional public international law in the context of extraterritorial human rights breaches.[162]

The jurisdiction of Article 1 ECHR is 'a threshold criterion': a condition necessary for a Contracting State to be held liable for acts and omissions under the Convention.[163] It reflects the aforementioned concept of jurisdiction of public international law[164] and is 'closely linked to that of the international responsibility of the State concerned'.[165] The notion of jurisdiction in Article 1 ECHR applies to States as the duty-bearers.[166]

Although there are different views, today it is commonly held that the obligations ensuing to the State may be proportionate to the level of control applied and be 'divided and tailored' in the specific case, but not jurisdiction *per se*: either there is a jurisdictional link between the State and the person concerned or there is not.[167] Hence, in the *S.S.* case as well, the critical question concerns whether this link exists between Italy and the applicants, or not.

According to the Article 1 ECHR, the Convention Parties must provide protection 'to everyone within their jurisdiction', thus extending the protection beyond the geographical territory of the State to such settings as a temporarily leased or occupied territory, or to situations in which the State is engaged in activities inside another state.[168] An important limitation, expressed in the *Soering v. the United Kingdom* judgment, is that 'the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States'.[169] In *S.S.*, this obviously means that Libya cannot be held liable under the ECHR.

In the words of the Guide on Article 1 of the ECHR,[170] Article 1 of the Convention 'must be considered to reflect the ordinary and essentially territorial notion of jurisdiction' – the presumption of jurisdiction – 'other bases of jurisdiction requiring special justification in the particular circumstances of each case'.[171] Thus, outside the domestic territory and outside the cases of lawful territorial control beyond the State's borders, jurisdiction has to be

[162] *Tzevelekos* 2014, p. 130
[163] *Al-Skeini and Others v. United Kingdom* 2011, para. 130; *Ilaşcu and Others v. Moldova and Russia* 2004, para. 311
[164] Ibid., paras 59–61
[165] Ibid., para. 312
[166] *Schabas* 2017, p. 92
[167] *Al-Skeini and Others v. United Kingdom* 2011, para. 137
[168] *Klabbers* 2013, p. 96
[169] *Soering v. the United Kingdom* 1989, para. 86
[170] ECHR Guide 2019: Article 1, p. 7, para. 11
[171] *Banković and Others v. Belgium and Others* 2001, paras 61, 67, 71; *Catan and Others v. Moldova and Russia* 2012, para. 104, and the references therein

established in each concrete case by reference to its circumstances.[172] The Court has stressed this factual appraisal in the detection of jurisdiction, which must be determined 'with reference to the particular facts'.[173] I assume that this approach is inevitable in *S.S.*

2. The Traditional Categories of Extraterritorial Jurisdiction

In *S.S.* the Court could draw on various strands of its case law in order to enable it to find that Italy exercised jurisdiction.[174] To start with, in the *Banković* judgment,[175] the Court has invoked the traditional bases for extraterritorial jurisdiction in international law and identified four categories of exceptions to the rule of territoriality by classifying previous exceptions articulated in the Court's case law. Although in *Banković* the Court specified these in comprehensive manner for the first time, it essentially reaffirmed and refined the categories set out in the earlier Loizidou decision[176] – emphasizing that they should remain as exceptional.[177]

In the *Loizidou* case, the central issue was whether Turkey as a Contracting State to the ECHR had jurisdiction in the Northern part of Cyprus because of the existence of the Turkish Republic of Northern Cyprus (TRNC). Following the process of Turkish occupation of Northern Cyprus, *Titina Loizidou* had been deprived of her right to 'peacefully enjoy her property', which the TRNC had then confiscated. Turkey recognized the TRNC as an independent state, which was not a party to the ECHR and could therefore legally confiscate the property, whereas the UN Security Council refused the recognition.

In *Loizidou*, the court was faced with two separate but interconnected preliminary questions: (1) Whether the wrongful conduct at issue was attributable to its actual perpetrator, the Turkish Republic of Northern Cyprus (TRNC) or to the state that exercises effective control over the TRNC, i.e. Turkey; and (2) if, because Turkey was a signatory party to the ECHR and the TRNC, being a non-state entity, was not, the Court was competent to examine the case on its merits. The first question of attribution was condition for the second question concerning the Court's jurisdiction.[178]

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[172] *Besson* 2012, p. 877
[173] *Moreno-Lax* 2017, p. 274–275, see *Al-Skeini and Others v. United Kingdom* 2011, para. 140
[174] *Pijnenburg* 2018, p. 426
[175] *Banković and Others v. Belgium and Others* 2001
[176] *Loizidou v. Turkey* 1998; Loizidou v. Turkey (Preliminary Objections) 1995, para. 62
[177] *Miller* 2009, p. 1226–1227
[178] *Tzevelekos* 2014, p. 136

However, it is important to note that whether all of the acts of the TRNC were attributable to Turkey was not the crucial issue. Instead, the Court established that Turkey, by virtue of its 'effective overall control' over Northern Cyprus, had the positive obligation to prevent human rights violations, regardless of by whom they were committed.[179] So, even though the Court used the language of principles of State responsibility and attribution of public international law, it still adjudicated along the autonomous concept of jurisdiction of the ECHR. Despite, or because of, this ambivalent attitude to the concept of attribution, some writers have proposed that Italy's *responsibility* in *S.S.* could be constructed using the articles International Law Commission's (ILC) Articles on State Responsibility (ASR) that pertain to aid and attribution. I will return to this briefly at the end of this Chapter (p. 45).

The *Banković* case concerned the bombing by the NATO of the Radio Televizije Srbije headquarters (RTS) in Belgrade as part of campaign of air strikes against the Federal Republic of Yugoslavia (FRY) during the Kosovo conflict. When a RTS building was hit by a missile launched from a NATO aircraft, 16 people were killed, including *Ksenija Banković*. The case was brought against Member States of NATO, which are also Contracting States to the ECHR, and could thus have jurisdiction.

The four categories of extraterritorial jurisdiction established in *Banković* are (1) *Extradition or expulsion cases,*[180] which involve the extradition or expulsion of an individual from a Member State's territory, giving rise to concerns about possible mistreatment or death in the receiving country under Article 2 or 3 or, in extreme cases, the conditions of detention or trial under Article 5 or 6; (2) *Extraterritorial effects cases,*[181] in which the acts of State authorities produced effects or were performed outside their own territory; (3) *Effective control cases,*[182] in which, as a consequence of a lawful or an unlawful military action a State exercised effective control of an area outside its national territory; and (4) *Consular or diplomatic cases and flag jurisdiction cases*[183] involving the activities of State's diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state.

[179] *Milanovic* 2011, p 47
[180] *Banković and Others v. Belgium and Others* 2001, para. 68
[181] Ibid., para. 69
[182] Ibid., para. 70
[183] Ibid., para. 73

3. The Traditional Categories Applied to the S.S. Case

I approach the question of jurisdiction in the *S.S.* case firstly by looking at the alternative categories elaborated in the *Banković* judgment. The Application states that 'Relying on Articles 2 and 3 of the Convention, read in conjunction with Article 1 of the Convention, the applicants complained that the Rome MRCC, by allowing Ras Jadir to take part in the rescue operations, had exposed them at risk of ill-treatment and at risk of death'.[184] Apparently, Italy's involvement consists of (i) the presence of an Italian navy helicopter, (ii) partly coordinating the intervention through the MRCC, and (iii) the equipping, funding and training of the LYCG, perhaps especially the donation of the vessel Ras Jadir.[185]

The flag jurisdiction (4) cannot be applied in *S.S.*, as Ras Jadir was flying the Libyan flag. Rather, the presumption of Libya's jurisdiction[186] – based on the very rule of flag jurisdiction – has to be overturned or at least complemented by Italy's jurisdiction. Neither does the category of extradition (1) seem suitable, because the applicants were not extradited from Italy's territory. Instead, it can be argued that Italy both caused 'extraterritorial effects' and professed 'effective control' (2, 3).

The (i) role of the Italian military helicopter seems rather minor. It certainly does not belong to the category of extraterritorial effects, and it is also unlikely that its presence would amount to such 'full and exclusive control' as that of the boats in *Medvedyev* (see below) or *Hirsi Jamaa*. Based on the evidence provided by the reconstruction of the events, the helicopter apparently did not make physical contact with the migrants or their boat. The crew of the helicopter asked repeatedly Ras Jadir to stop when the vessel sped from the scene with a person hanging dangerously from its side. It appears that the crew of Ras Jadir deliberately ignored the communication.

As to the (ii) coordinating the intervention, the Court could probably conceive of the Rome-based MRCC's instructions as an act of the Italian State taking place on Italian territory, which had 'extraterritorial effects' on the migrant boat that was at the high sea and outside of the Italian territorial waters. For this, a sufficiently close causal link between the instructions and the rights violations would have to be established. Italy would likely argue that instead of instructing the LYCG to mistreat the migrants or expose them to a risk of ill-

[184] Application 21660, p. 18, Grievances
[185] *Pijnenburg* 2018, p. 402
[186] See also above, the Montego Bay Convention, Article 92(1)

treatment in Libya, it only instructed Ras Jadir to rescue them.[187] It is also unclear what the exact orders were. From the reconstruction it appears that MRCC Rome had communicated by phone with the LYCG Joint Operation Room (JOR) in Tripoli and asked the official in charge to assume the On Scene Coordinator (OSC) role, which the official had accepted and confirmed.[188]

What might back up this argument is the premature transfer of the Maritime Coordination and Rescue Center responsibilities to Libya as explained in Chapter II. The Commissioner for Human Rights of the Council of Europe has recommended that the Member States should only transfer coordination to the RCC responsible for the Search and Rescue Region if that RCC is able to fully meet its obligations under international maritime law and human rights law, including with regard to safe disembarkation.[189] As reported above, the Libyan authorities unilaterally declared the Libyan SAR zone, and the Libyan Maritime Rescue Coordination Center, although not fully operational, together with the LYCG became the primary actors. And even in cases of joint operations, the MRCC of the Member State retains fully its own responsibility for the preservation of life at sea and the respect of the non-refoulement obligation.[190] The Commissioner has also urged that the coordinating authorities should ensure instructions given in the course of rescue operations fully respect the human rights of rescued migrants, including by preventing them from being put in situations where their right to life would be threatened, or where they would be subjected to torture, inhuman or degrading treatment, or to arbitrary deprivation of liberty.[191]

The transfer of the MRCC responsibilities can also be seen as a part of the larger scheme of the EU and Italy building up Libya's capacities of external border control. Thus, the most interesting question regarding jurisdiction probably concerns the role of the systematic funding and training by Italy (iii), which could be argued to amount to overall 'effective control'.

[187] *Pijnenburg* 2018, p. 423
[188] *Moreno-Lax* 2020, p. 389
[189] The Council of Europe's Commissioner for Human Rights, Recommendation, Lives Saved. Rights Protected, Recommendations nos. 4–6, p. 22
[190] Ibid.
[191] Ibid., Recommendations 9–10, p. 30

4. The Test of Effective Control and the Criticism of Banković

Various international courts have developed and applied their 'tests' in order to establish whether a secessionist entity has been under 'effective control', 'overall control' or 'effective overall control' of an outside power.[192] Before the ECtHR, the International Court of Justice (ICJ) formulated its two-part test in *Nicaragua v. United States of America.*[193] The ICJ's first assessment of *complete dependence or control*[194] gauges generally whether the relationship between a state and non-state actor is so much of control on the one side and dependence on the other that the non-state actor has to be equated for legal purposes with an organ of the state. The second test of *effective control*[195] is applied only when the first test is not satisfied: it asks whether a specific operation of a non-state actor which is neither a *de jure* nor a *de facto* organ of the state was indeed conducted under the state's control.[196]

The ECtHR developed its own test of 'effective control' in *Loizidou* in order to find out whether a 'subordinate local administration'[197] is an entity under 'the effective authority, or at the very least under the decisive influence, of' an outside power, and 'in any event survives by virtue of the military, economic, financial and political support given to it'[198] by the outside power.[199] Even if the Court did not adjudicate based on the attribution doctrine, it linked the effective control to attribution as the condition for establishing jurisdiction.[200] Here, the Court resorted to the theory of *de facto* organ, under which conduct is not attributed to its actual wrongdoer, but rather to the state that exercises effective control over the wrongdoer.[201] And in *Banković*, the Court reasoned that the State's responsibility cannot be confined to the acts of its own agents but is also engaged by the acts of such local administration that survives by virtue of the State's support.[202]

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[192] *Talmon* 2009, p. 3
[193] *Nicaragua v. United States of America* 1986
[194] Ibid., para. 109
[195] Ibid., para. 115
[196] *Milanovic* 2011, p. 43–44
[197] *Loizidou v. Turkey* 1998, paras 52, 56
[198] *Ilaşcu and Others v. Moldova and Russia* 2004, para. 392, also paras 316, 341, 382; *Loizidou v. Turkey* para. 77
[199] *Talmon* 2009, p. 14
[200] ILC Articles on State Responsibility 2001, Article 8: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.
[201] *Tzevelekos* 2014, p. 137
[202] *Banković and Others v. Belgium and Others* 2001, para. 70

According to the Guide on Article 1 of the ECHR,[203] 'the question whether a Contracting State is genuinely exercising effective control over a territory outside its borders is one of fact' regarding primarily two criteria: (i) *the number of soldiers* deployed by the State in the territory in question:[204] (ii) the extent to which the State's *military, economic and political support* for the local subordinate administration provides it with influence and control over the region.[205] Obviously, the first – and more often invoked criterium by the Court –, is not applicable in the *S.S.* case, as there is no question of Italian soldiers deployed in the Libyan territory or at the high sea. Therefore, there remains the alternative of military, economic and political support.

The categories of extraterritorial jurisdiction remain the clearest articulation of the exceptional ambit of the State's jurisdiction.[206] However, the argumentation of the Court in *Banković* has raised a lot of criticism. Although it is undisputed, and presumed, that the jurisdictional competence of states is primarily territorial, it is questionable whether territoriality constitutes, in the first place, the essence of the concept of jurisdiction in Article 1 ECHR.[207] The main weakness of the Court's argumentation in *Banković,* based on state practice and the *travaux préparatoires* of the ECHR, is to interpret jurisdiction in the sense of public international law, restrictively and without taking sufficiently into account the object and purpose of Article 1.[208] The Court determined that jurisdiction could only apply extraterritorially when the state exercises 'public powers', disregarding the evidentiary and procedural/substantive law distinctions determined in *Loizidou*.[209] The judgment seems to cause confusion by somewhat tautologically stating that only extraterritorial acts which 'constitute an exercise of jurisdiction' can engage the protection of the ECHR; in other words that it is the nature of the act that is decisive in establishing the jurisdictional link.[210]

It can be argued that in *Banković,* the Court likened the term jurisdiction to the concept of legal title under international law and by doing so conflated jurisdiction under Article 1 ECHR with the prerogative of the state to act – which *a contrario* would lead to the absurdity that states operating abroad without legal title conferred by international law can also be

[203] ECHR Guide 2019: Article 1, p. 17, para. 50
[204] *Loizidou v. Turkey* 1998, paras 16 and 56; *Ilaşcu and Others v. Moldova and Russia* 2004, para. 387
[205] *Ilaşcu and Others v. Moldova and Russia* 2004, paras 388–394; *Al-Skeini and Others v. the UK* 2011, para 139
[206] *Miller* 2009, p. 1229
[207] *Gondek* 2005, p. 360
[208] Ibid., p. 361; see *Banković and Others v. Belgium and Others* 2001, para. 59
[209] *Banković and Others v. Belgium and Others* 2001, paras 61–69
[210] *Den Heijer* 2012, p. 28; *Banković and Others v. Belgium and Others* 2001, para. 67

human rights exempt.[211] The outcome of the judgment, that the Contracting States to the ECHR were free from the responsibility of the bombing because they acted under NATO, has been described as unfortunate and even catastrophic.

Several recent cases undermine *Banković's* central proposition – that jurisdiction is primarily territorial – in favour of initially more expansive interpretations.[212] Partly the Court has returned to the doctrine present in *Loizidou*, and partly readjusted its reasoning in line with the principles of the ECHR being 'a living instrument' that has to be interpreted in 'an evolutive and dynamic manner. The subsequent case law proves that the Court is willing to accept that the notion of jurisdiction need not necessarily preclude a conclusion that positive obligations not accompanied by the exercise of 'effective control' over persons abroad can nonetheless bring those persons within the jurisdiction of the State.[213]

5. The S.S. in the Light of Later Case Law

In *Al-Skeini* the Court declared that through its 'consent, acquiescence, or invitation of the territorial sovereign, a State may also exercise *de jure* jurisdiction not only within its own national waters or on the high seas, but also in the territorial sea of a third country'.[214] *Al-Skeini* concerned the killing of Iraqi civilians by British soldiers in southern Iraq. Based on the fact that the United Kingdom (UK) had assumed responsibility for the maintenance of security in Southern Iraq, the question was whether the UK was exercising 'control and authority' over Iraqi civilians and whether the UK Government therefore had a duty to conduct an effective investigation into the deaths of the civilians killed by British soldiers, whether or not they were within the confines of a UK military base. One of the victims was killed by a stray bullet resulting from an exchange of fire in which British troops were engaged. Although it could not be established which side fired the bullet, the Court found that since that death, too, occurred in the course of the UK security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the UK and the victim.[215]

The Court identified and elaborated in *Al-Skeini* three constitutive elements of jurisdiction: effective power, overall control and normative guidance. The element of (i) effective power

[211] *Moreno-Lax* 2020, p. 398
[212] *Miller* 2009, p. 1227
[213] *Den Heijer* 2012, p. 46
[214] *Al-Skeini and Others v. the UK* 2011, para. 135; *Moreno-Lax* 2017, p. 321
[215] *Al-Skeini and Others v. the UK* 2011, para. 150

was already articulated in *Loizidou*, when the Court stated 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'.[216] This led to the 'effective control of an area' jurisdiction. The element of (ii) 'overall' control, confirmed by *Banković*, was corroborated by *Al-Skeini*. It emanates from exercising 'all or some of the public powers normally to be exercised' by that the local government, which excludes instantaneous and singular exercises of power.[217] The (iii) normative–guidance element of authority is described in *Al-Skeini* followingly: 'In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq […] exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom'.[218] – It is widely held that the Court adjusted its line of interpretation in *Al-Skeini* by correcting the departure from *Loizidou* that it had made in *Banković*.

As under public international law, not only *de jure* but also *de facto* control is relevant in the determination of legal responsibility. The three constitutive elements identified in *Al-Skeini* seem to reflect the interplay of *de jure* and *de facto* control. In the realm of human rights law jurisdiction is pronouncedly a question of whether *de facto* power gives rise to an obligation vis-à-vis a specific territory or individual.[219] It can be said that in the presence of *de facto* control, no *de jure* basis is normally needed to trigger Article 1 ECHR; respectively, in the presence of *de jure* jurisdiction, no particular amount of *de facto* power is required, but the 'threshold condition' is met through even a minimal *de jure* jurisdictional link.[220] In a sense, it can also be formulated so that 'overall control' is the *de facto* counterpart of the *de jure* title entailed by the (territorial) state sovereignty.[221]

In *Medvedyev and Others v. France*, the Court considered that France exercised 'full and exclusive control' over the Cambodian vessel Winner, without boarding it, and over its crew at least *de facto* in a continuous and uninterrupted manner so that until the applicants were tried in France, they were effectively within France's jurisdiction for the purposes of Article 1 of the Convention.[222] Like that of *Al-Skeini*, the outcome is in contrast to the *Banković*

[216] *Loizidou v. Turkey* (Preliminary Objections) 1995, para. 62
[217] *Banković and Others v. Belgium and Others* 2001, para. 71
[218] *Al-Skeini and Others v. the UK* 2011, para. 149
[219] *Moreno-Lax* 2017, p. 274–275
[220] Ibid., p. 280–281
[221] *Moreno-Lax* 2020, p. 399–400
[222] *Medvedyev and Others v. France* 2010, paras 66–67

decision. The vessel was interdicted due to a suspicion of drug smuggling, and the crew were convicted in France. They brought proceedings before the ECtHR challenging the legality of their detention at sea and the delay in bringing them before a court under Articles 5(1) and (3) ECHR. The Court found a violation of Article 5(1) that secures the right to liberty and security of person.

That direct physical contact is not necessary as long as the control thereby exerted is effective was shown also in the *Women on Waves v. Portugal* case, in which a Portuguese military ship blockaded the access of a Dutch vessel Borndiep to Portugal's territorial waters.[223] Three associations had sent Borndiep to Portugal, where abortion was illegal, in order to stage activities promoting the decriminalization of abortion. Borndiep did not fly the Portuguese flag, was outside Portuguese territorial waters, and the associations were not Portuguese, but the Court assumed jurisdiction, and found a violation of Article 10 (freedom of expression), but not of the alleged violation of Article 11 (freedom of assembly).

In *Hirsi Jamaa*, the Court opined that 'the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'.[224] The Court acknowledged the application of the Convention when the alleged violation took place on board military ships flying the Italian flag, observing that 'by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying'[225] and that 'the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel'.[226] That Italy could not avoid jurisdiction under the Convention is an application of the general rule of public international law that States exercise jurisdiction over vessels sailing on the high seas flying their flag.[227] Customary international law recognizes the validity of the exercise of universal jurisdiction on board such vessels, both ships and aircraft.[228] The special nature of the maritime environment could not exclude Italy's jurisdiction.[229]

In the case of *Ilaşcu and Others v. Moldova and Russia*, together with the other litigants *Ilie Ilaşcu* argued that the Moldovan authorities were responsible for the alleged infringements

[223] *Moreno-Lax* 2020, p. 401; *Women on Waves v. Portugal* 2009
[224] *Hirsi Jamaa and Others v. Italy* 2012, para. 81
[225] Ibid., para. 77
[226] Ibid., para. 81
[227] See e.g. *König, Doris*: Flag of Ships, in Rüdiger Wolfrum, The Max Planck Encyclopedia of Public International Law, Vol. IV, Oxford: Oxford University Press, 2012, pp. 98–116
[228] *Schabas* 2015, p. 102; see *Banković and Others v. Belgium and Others* 2001 para. 73
[229] *Grabenwarter* 2014, p. 422

of the rights secured to them, since they had not taken any appropriate steps to put an end to them, and that the Russian Federation shared responsibility since the territory of Transdniestria was and is under *de facto* Russian control on account of the Russian troops and military equipment stationed there and the support allegedly given to the separatist regime by the Russian Federation. The Court held that the Transdniestrian region in question remained under Russia's effective authority or at least under its decisive influence, and at any event the Moldovan Republic of Transdniestria (MRT) survived due to the military, economic, financial and political support provided by Russia, so that the applicants were within the 'jurisdiction' of Russia.[230]

The Court reached the conclusion on account of persisting military influence of the Russian forces in the area, the fact that the Russian Federation enabled the MRT to acquire the infrastructure and weapons belonging to the Russian armed forces, and various examples of Russian economic support given to the breakaway region.[231] As to the jurisdiction of Moldova, it was also established – although disputed in dissenting opinions – but is left out of the scope of this study, as it is of territorial nature.

The outcome of *Ilaşcu* is not unproblematic, though. If the Court is interpreted to hold that the actions of the MRT were *at all times* attributable to Russia, it is clear that Russia had jurisdiction and control over the territory of Transdniestria. However, if the acts of the MRT were not generally attributable to Russia, but Russia was being held responsible for its failure to comply with its positive obligations, the standard of 'decisive influence' is set much lower than the requirement of exercise of public powers or a *de facto* government or administration of the territory in the previous cases of *Loizidou*, *Bankovic* or *Al-Skeini*.

In a Dissenting Opinion, Judge *A. Kovler* argues that the Court should declare the application inadmissible both *ratione loci* and *ratione personae* as regards Russia. The alleged military actions by Russia did not amount to the standard set by *Loizidou* (occupation through targeted military action of the territory of the other State), and even if they were, the Court proceeded in wrong order by holding that there was Russia's jurisdiction because there was responsibility ('While the responsibility of a Contracting Party may be engaged as a consequence of military action outside its territory, this does not imply exercise of its jurisdiction').[232] According to *Kovler*, there was no military invasion from outside, because

[230] *Ilaşcu and Others v. Moldova and Russia* 2004, para. 64, para. 377–394
[231] *Gondek* 2005, p. 372
[232] *Loizidou v. Turkey* (Preliminary Objections) 1995, para. 35

the Russian troops (who had only just ceased to be Soviet troops)[233] were 'caught out' by events in the place where they had been stationed for many years without interfering in administrative matters nor engaging in any 'active duties'.[234]

The permissive approach that the majority took regarding Russia's jurisdiction can be justified, on one hand, by referring to Russia's involvement in the initial *creation* of the MRT. On the other hand, Russia's *potential* for effective overall control can be emphasized: a power that remained and meant that Russia *could* be said to exercise effective overall control over Transdniestria, because if it wanted to it could easily make its power felt more overtly.[235]

The ECtHR has followed these lines of reasoning in Transdniestria cases,[236] and in its very recent judgment *Georgia v. Russia* the Court referred to both *Loizidou* and *Ilaşcu*. The Court reiterated that 'the question whether or not a Contracting State exercises effective control over an area outside its own territory is a question of fact', and held relevant such indicators as 'the extent to which [the State's] military, economic and political support for the local subordinate administration provides it with influence and control over the region'.[237]

This might offer a plausible way to find Italy's jurisdiction in *S.S.* It can be argued that the funds, training, and capacity-building activities delivered to Libya are for the explicit purpose of 'significantly reducing migratory flows' and 'preventing departures'. Reflecting on *Ilaşcu* and the other Transdniestria cases, the Court could argue that there is 'a continuous and uninterrupted link of responsibility', holding that the Libyan state organ of LYCG is analogical to the self-proclaimed republic of the MRT.[238] Similarly to *Ilaşcu*, the role of Italy in creating or building up LYCG as well as the 'potential' of Italy could be emphasised.

The *Ilaşcu* decision seems additionally to confirm that jurisdiction is a flexible concept and that depending on the extent of State control, the person can be within the jurisdiction to a certain extent, but not necessarily with regard to all Convention rights and full scale of state human rights obligations.[239] Thus, the applicants need not to be under continuous or exclusive control – an interpretation which is broader or more permissive than the

[233] The case deals with an intricate state succession issue as well.
[234] *Ilaşcu and Others v. Moldova and Russia* 2004, Dissenting Opinion of Judge Kovler, p. 143–158
[235] *Milanovic* 2011, p. 140 (emphasis added)
[236] *Ivanţoc and Others v. the Republic of Moldova and Russia* 2011; *Catan and Others v. the Republic of Moldova and Russia* 2012
[237] *Case of Georgia v. Russia* (II) 2021, para. 164
[238] See *Pijnenburg* 2018, p. 414–415
[239] *Gondek* 2005, p. 369

aforementioned dichotomy of *Al-Skeini* that either there is a jurisdictional link or there is not. In the Transdniestria cases the jurisdiction is 'shared', which must influence how much effective control either of the two States on has in practice over the persons of the rights-holders. This is the case even if the jurisdiction is presumed (as Moldova's is), because that presumption may be rebutted in practice.[240]

Jurisdiction in the sense of Article 1 ECHR cannot be shared between Italy and Libya, because the latter is not party to the Convention. Italy does not need to be the active party, though, as according to the Guide on Article 1 of the ECHR the Contracting State's responsibility may be also engaged by the acquiescence or connivance of the State's authorities in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction.[241] This is an important issue, as the alleged violations of Italy concern its positive obligations (see more below in Chapter V).

6. A Recourse to the UN Human Rights Committee

Although the Court mainly refers to its own case law in its argumentation, the applicability of the jurisprudence of other international authorities in relation to Member States is not excluded.[242] As external sources count not only such provisions of international law as mentioned in Chapter III, but also judgments of other international and regional tribunals. The Human Rights Committee that monitors implementation of the ICCPR has also competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the First Optional Protocol.[243] Although the Committee is not a Court proper in the sense that the ECtHR is, it deals with similar human rights issues, and it seems relevant and justifiable to include its case law in the thesis.

The Committee holds that a State party may be responsible for extraterritorial violations of the Covenant, if the State is a *link in the causal chain* that would make possible violations on the territory of another State. The risk of an extra-territorial violation must be a necessary and foreseeable consequence of the State's actions or omissions, which must be judged on the knowledge the State had at the time.[244]

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[240] *Besson* 2012, p. 879
[241] ECHR Guide 2019: Article 1, p. 22, para. 60
[242] Article 53 ECHR
[243] https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx
[244] *Mohammad Munaf v. Romania* 2009, para. 14(2) (emphasis added)

It has been suggested that the UN Human Rights Committee has both expressed and applied a concept of 'functional jurisdiction'.[245] This can be described as an 'impact model', in which sufficiently proximate and foreseeable impact is constitutive of jurisdiction for the purpose of the extraterritorial application of the ICCPR. General Comment 36 on Article 6 of the ICCPR requires the States to ensure that all activities taking place not only within their territory, but also 'in other places subject to their jurisdiction' that have 'a direct and reasonably foreseeable impact on the right to life of individuals outside their territory', are consistent with Article 6.[246] What is of importance for the *S.S.* case is that within the State's jurisdiction are even 'persons located *outside any territory effectively controlled by the State*, whose right to life is nonetheless impacted by its military *or other activities* in a direct and reasonably foreseeable manner', and that 'States also have obligations under international law *not to aid or assist* activities undertaken by other States and non-State actors'.[247]

Article 6 on the right to life is parallel to Article 2 of the ECHR. For the *S.S.* case, the analogy can therefore be seen as limited to the alleged violations of that Article only. The reach of jurisdiction can, in my opinion, yet be studied analogically and independently of the material Articles. The Committee has applied its concept of jurisdiction in two recent cases very similar to *S.S.*, which are brought against Malta and Italy and concern the States' failure to rescue a group of more than 200 migrants whose vessel sank in the Mediterranean in 2013.[248]

In the case against Italy, the authors claim that the Italian and Maltese rescue centres passed responsibility for the rescue operation to one another instead of intervening promptly[249] – resembling the lack of clear command between the Rome MRCC and LYCG in *S.S.* The Committee notes that it is undisputed that the shipwreck occurred outside the State party's territory, as it did in *S.S.,* and that none of the alleged violations occurred on board a vessel flying an Italian flag.[250] However, according to the Committee, 'in the *particular circumstances* of the case, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy'. This relationship consists of several *factual* elements. These include (i) the initial contact made by the vessel in distress with the MRCC, (ii) the close proximity of an Italian ship ITS Libra to the vessel and

[245] *Milanovic, Marko:* Amicus Curiae Brief re MH17; Human Rights Committee on Search and Rescue at Sea, 29.1.2021; at https://www.ejiltalk.org/amicus-curiae-brief-re-mh17-human-rights-committee-on-search-and-rescue-at-sea/
[246] The UN Human Rights Committee, General comment No. 36 (2018) on Article 6, para. 22, p. 5
[247] Ibid., para. 63, p. 15 (emphasis added)
[248] CCPR/C/128/D/3043/2017 and CCPR/C/130/DR/3042/2017
[249] CCPR/C/130/DR/3042/2017, para. 2.4, p. 3
[250] Ibid., para. 7.7, p. 11

(iii) the ongoing involvement of the MRCC in the rescue operation. The *legal* obligations, in turn, are stipulated by the international law of the sea, and include the duty to respond in a reasonable manner to calls of distress pursuant to SOLAS Regulations and to appropriately cooperate with other states undertaking rescue operations pursuant to the International Convention on Maritime Search and Rescue.[251]

Echoing its General Comment 36, the Committee considered that the victims were *directly* affected by the decisions taken by the Italian authorities in a manner that was *reasonably foreseeable* in light of the relevant legal obligations of Italy. The fact that they were within the Maltese SAR region does not exclude Italy's jurisdiction, but posits them *concurrently* within the jurisdiction of Malta.[252] As to the responsibility, the question was of omission: if Italian authorities had directed ITS Libra and other coast guard boats earlier to the rescue, they would have reached the vessel before it sank.[253]

To make matters more complicated, the jurisdiction of Italy is refuted in a dissenting opinion – as it was in the ECtHR case of *Ilaşcu*. The accident is described as a situation in which States have only 'potential to place under their effective control individuals who are found outside their territory or areas already subject to their effective control' as distinguished from a situation in which the individuals are actually placed under effective control.[254] The dissenting opinion argues that mere *potentiality* never establishes jurisdiction – which equals *mutatis mutandis* the refuting of Russia's potential for control in the dissenting opinion in *Ilaşcu*. In the Committee case, the dissenting opinion also repudiates the sufficiency of the facts 'in the absence of additional information showing acceptance of legal responsibility', questioning what the majority holds for the legal obligations incurred by the SOLAS and SAR Convention.[255] The dissenting opinion concludes that Malta alone, and not Italy, was responsible *de jure* or *de facto* for the overall conduct of the operation.[256]

The 'impact model' is invoked in another recent Committee case that is even more similar to *S.S.* than the one above. Like *S.S.,* the case of *SDG* is also on the communication stage.[257] In an alleged refoulement operation 7.–8.11.2018, the Rome MRCC directed a private

[251] CCPR/C/130/DR/3042/2017, para. 7.8, p. 12 (emphasis added)
[252] Ibid. (emphasis added)
[253] Ibid., para. 8.4, p. 13
[254] Ibid., Annex 1, Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis, para. 2, p. 16
[255] Ibid., para. 4, p.16–17
[256] Ibid., para. 5, p. 17
[257] Communication to the United Nations Human Rights Committee in the case of SDG against Italy (Anonymized version), cited as SDG Communication, available at https://www.academia.edu/41462159/Communication_to_the_United_Nations_Human_Rights_Committee_In_the_case_of_SDG_v_Italy

merchant vessel to rescue a migrant boat adrift on the high seas in the Mediterranean and to liaise with the LYCG, resulting in the forceful return of migrants to Libya. The Italian MRCC was *de facto* acting as coordinator of the SAR operation knew or should have known this outcome.[258] It is argued that the Italian Coast Guard communicated 'on behalf of the LYCG', which then assumed coordination and communicated with the merchant vessel from the Libyan Naval Coordination Centre (LNCC) held on board an Italian Navy ship docked in Tripoli harbour, deployed in Libya as part of the Italian Navy Operation Nauras.[259] Although the victim *SDG* was located outside of any territory effectively controlled by Italy, his rights were *decisively impacted* by the activities of Italian authorities in a direct and foreseeable manner.[260] The jurisdiction is 'functional' in the sense of being constituted of various factors (rather than presumed by territory, for instance).

7. The Concept of Functional Jurisdiction Applied to *S.S.*

In a concurring opinion to *Al-Skeini*, judge *Bonello* outlined the 'functional' jurisdiction for the purposes of the ECtHR. Instead of applying 'an obvious functional test', the Court has adopted 'a handful of sub-tests, some of which may have served defilers of Convention values far better than they have the Convention itself'.[261] In *Bonello's* words, jurisdiction means 'no less and no more than "authority over" and "control of"', and it 'ought to be functional'.[262] Therefore, the only 'honest test' should ask whether it *depended* on the agents of the State whether the alleged violation would be committed or not.[263]

In a recent article *Violeta Moreno-Lax* studies the *S.S.* case, which 'offers a paradigmatic example of the kind of policy and operational control that portrays the functional approach to jurisdiction'.[264] With the concept of functional jurisdiction, the territorial/extraterritorial dyad could be avoided altogether by focusing on the 'normative foundation of sovereign authority overall'.[265] According to *Moreno-Lax*, the evaluation of jurisdiction in a concrete situation requires that attention be paid to 'the entire constellation of all the relevant channels through which factual and/or legal state functions are exercised'. Italy's actions and those of Libya that it instructed should be seen as a whole, creating 'a system of contactless, yet

[258] SDG Communication, para. 5
[259] Ibid., para. 9
[260] Ibid., para. 17 (emphasis added)
[261] *Al-Skeini and Others v. the UK* 2011, Concurring opinion of judge Bonello, para. 17
[262] Ibid., para. 12
[263] Ibid., para. 16 (emphasis added)
[264] *Moreno-Lax* 2020, p. 404. It can be noted that *Moreno-Lax* is involved as lawyer both in *S.S.* and *SDG*.
[265] Ibid., p. 387

effective, control of the SAR and interdiction functions of Libya that amounts to an exercise of functional jurisdiction'.[266] The applicants need not have been *directly* affected or placed under the effective control of Italy, but 'the relationship of the situation with a particular set of circumstances of a special nature' is decisive in enlivening Italy's positive obligations.[267]

In both the Committee's General Comment 36 and the case involving the Italian ship ITS Libra there is the condition of 'direct impact', whereas in the later *SDG* application the wording is 'decisive impact'. The 'functional jurisdiction' invoked by *Moreno-Lax* for the *S.S.* seems to be congruent with this permissive version of 'impact model' of jurisdiction.

The available case law is scant and there is no well-elaborated doctrine of functional jurisdiction yet. On the other hand, the concept of functional jurisdiction and the 'normative foundation of sovereign authority overall' proposed by *Moreno-Lax* seems to reflect the three constitutive elements of jurisdiction already pointed out in *Al-Skeini*: effective power, overall control and normative guidance. The 'decisive impact' cannot be too far, either, from the 'decisive influence' of *Ilaşcu.* The criterion for the ECHR to apply has never been essentially territorial, as mentioned, but pertained precisely to the 'function' of jurisdiction, which has territorial, temporal, and personal 'dimensions' (or 'consequences' of jurisdiction).

In noble terms, the functional approach to jurisdiction that *Bonello* and *Moreno-Lax* take can be seen as a testimony to the core idea of human rights that emerged after the Second World War: the securing of a political membership and hence the position in a political community that guarantees a minimal level of protection of international human rights.[268]

8. From Jurisdiction to Responsibility for Positive Obligations

As it has become clear, to adjudicate in the unprecedented extraterritorial and 'indirect' or 'contactless' issue of *S.S.,* the Court must study the particular circumstances of the case and proceed with reference to particular facts. It has to take into account both the role that Italy played in the incident itself – the instructions by the Rome MRCC or the lack thereof – and the multiform support and coordination resulting from the MoU. Unlike in *Hirsi Jamaa*, the pull-back operation in *S.S.* was carried out by Libya, and unlike *Al-Skeini* or *Ilaşcu*, where there were the troops of an ECHR Member States present, in *S.S.* there were no Italian authorities on scene. Besides the factual links, the Court needs to establish a sufficient legal

[266] Ibid., p. 414
[267] *den Heijer* 2012, p. 48
[268] *Besson* 2012, p. 863

nexus – *de jure* jurisdiction, or normative element – between Italy and the applicants. Italy cannot probably incur responsibility for its actions, but only for its omissions, which leads to the doctrine of positive obligations. Before moving on to Chapter V, I cast a brief look at the junction of the jurisdiction and the responsibility of the State.

I have proceeded assuming, firstly, that there is a clear enough separation between the question of the respondent State's jurisdiction and the question of its responsibility.[269] Secondly, I have learnt to understand that the jurisdiction as a specific rule of the ECtHR is an autonomous concept, which does not refer to the principles of State responsibility in international law, and to which the question whether extra-territorial acts are attributable to the State is irrelevant.[270] Thus, it should not be relevant whether the State has legal title to act but whether there *pre-exists* a link or nexus between the individual affected and the State to secure that individual's rights.[271]

However, the Court has the option to consider admissibility and merits concurrently, having to notify the parties if it plans to do this.[272] To me, there seems to be an inescapable and to a degree perplexing connection between the concepts of, or criteria for, jurisdiction and responsibility – a connection, or an overlap, that appears especially acute when the issue concerns the positive obligations of the State. For instance, when I read that 'in the context of migration the relatively open nature of the positive obligations can make it difficult to identify just what specific conduct of the State will engender the jurisdictional link between the State and the individual',[273] I hear the echo of *Banković*: is it the nature of the act that is decisive in establishing the jurisdictional link? And did not the Court 'proceed in wrong order' in *Ilaşcu,* if it held that 'there was jurisdiction *because* there was responsibility'?

In recent journal articles on the *S.S.* case by *Annick Pijnenburg*[274] and *Elisa Vari*[275] the authors propose that Italy could incur responsibility under the international state responsibility rules because of 'the extent of the assistance given'.[276] The ILC has affirmed that Article 16 ASR applies to human rights treaties,[277] and the ECtHR has referred to it in rendition cases and in a separate opinion in *Hirsi Jamaa*. So, hypothetically, the notion of

[269] *Case of Georgia v. Russia* (II) 2021, para. 162
[270] *Grabenwarter* 2014, p. 13
[271] *Den Heijer* 2012, p. 27 (emphasis added)
[272] The International Justice Resource Center, https://ijrcenter.org/european-court-of-human-rights/
[273] *Den Heijer* 2012, p. 45
[274] *Pijnenburg* 2018
[275] *Vari* 2020
[276] Ibid., p. 131
[277] *Den Heijer* 2012, p. 98

'aid and assistance' stipulated in Article 16 ASR could 'flesh out' the nature of the relationship between the act of facilitation and the eventual wrongful act.[278] The conditions for the responsibility are that the State has knowledge of the circumstances of the internationally wrongful act, and it would be wrongful if committed by that State.[279]

If the Court followed the reasoning suggested by *Pijnenburg*, it should start by determining that the ill-treatment by the LYCG constitutes an internationally wrongful act as defined by Article 2 ASR.[280] The Court could read Article 16 ASR into Article 3 ECHR, by interpreting the latter as including a prohibition of aiding or assisting another State in breaching the prohibition of ill-treatment. If Libya can be said to breach Article 3, and Italy is responsible under Article 16 ASR for aiding or assisting the violation, the Court could hold that Italy breached its positive obligations under Article 3 ECHR, and the aid and assistance would discharge Italy's jurisdiction.[281]

However, as mentioned earlier, the jurisdiction of the Court is limited to the responsibility of State Parties under the ECHR, and it should not rule on the lawfulness of activities of non-State parties.[282] Therefore, not only would the Court be unable to find a violation of the ECHR by the non-State party Libya, neither could it determine that the ill-treatment by the LYCG constitutes a violation of a provision of another treaty that Libya has ratified – for example the Article 7 of the ICCPR – or the *jus cogens* prohibition of torture.[283]

The Court has never applied the Article 16 ASR in practice.[284] Instead, it has interpreted complicity scenarios in the norms of the ECHR[285] and construed inter-state removal and indirect refoulement cases as giving rise to the independent responsibility of the States without the concepts of reciprocity, attribution or the 'aid or assistance' of the Article 16.[286] Neither in the *Ilaşcu* case did the Court deal with the question of attribution of the conduct of the Transdniestrian authorities to the Russian Federation, but seized on the acts committed by the Russian themselves, including the applicants' transfer to the regime where they were

[278] *Den Heijer* 2012, p. 101
[279] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001, Article 16
[280] ASR Article 2(b): 'a breach of an international obligation'
[281] *Pijnenburg* 2018, p. 421 (emphasis added)
[282] *Soering v United Kingdom*, para. 91: 'there is no question of adjudicating on or establishing the responsibility of the destination country, whether under general international law, under the Convention or otherwise'.
[283] *Pijnenburg* 2018, p. 420
[284] *Schabas* 2015, p. 96–97
[285] *Pijnenburg* 2018, p. 416
[286] *Den Heijer* 2013, p. 415

ill-treated.[287] The jurisdiction requirement as a primary norm obstructs the application of the secondary norms on attribution and distributing responsibility such as drafted by the ILC.[288]

One of the few human rights aid and assistance cases has been *Tugar v. Italy*, which concerned an Iraqi mine cleaner who stepped on a mine laid by Iraq but illegally sold to the Iraqi government by a Italian company. The complaint was phrased in terms of complicity, but the European Commission of Human Rights understood it as one relating to a lack of protection of right to life and Italy's positive obligation to protect it, and eventually found the complaint inadmissible, because the adverse consequences of the failure of Italy to regulate arms transfers to Iraq were too remote.[289] The Commission referred to the *Soering* judgment[290] and recalled that the ECHR does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States, and attributed the applicant's injuries exclusively to Iraq.

In the case of *S.S.,* yet another twist to the question of Italy's jurisdiction is added by the fact that it has been brought only against Italy, although there is a considerable involvement by the EU as an international organization in the border control management.[291] The EU is legally bound to accede to the ECHR, but it has not yet done so. In *Al-Jedda v. the United Kingdom,*[292] the Court acknowledges the possibility of the dual attribution of conduct of an international organization and a State, which could apply to *S.S.*, too. However, the Court would not necessarily need to be burdened with determining the responsibility of the EU, because it can be assessed separately.[293] Even if Italy was only partially in control, it can yet be fully responsible, because each actor's responsibility is assessed independently – corroborated *inter alia* by *Ilaşcu*.[294] Still, it is important to keep in mind the dissenting opinions expressed in *Ilaşcu* and in the UN Human Rights Committee case against Italy.

I will now leave the issue of jurisdiction in order to turn to my second research question concerning Italy's responsibility for its positive obligations in the following Chapter V.

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[287] *Talmon* 2009, p. 14
[288] *Den Heijer* 2013, p. 436
[289] *Den Heijer* 2012, p. 99–100; *Rasheed Haje Tugar v. Italy*, EComHR 1995
[290] *Soering v. the United Kingdom* 1998, para. 86
[291] *Pijnenburg* 2018, p. 406
[292] Al-Jedda v. the United Kingdom 2011, application no. 27021/08
[293] *Den Heijer* 2013, p. 430; Al-Jedda v. the United Kingdom 2011, para 80: 'The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multinational Force became attributable to the United Nations or – more importantly, for the purposes of this case – *ceased to be attributable to the troop-contributing nations*.' (Emphasis added)
[294] *Den Heijer* 2013, p. 416

V. Responsibility

1. Generally of Positive Obligations

If the Court finds Italy's jurisdiction in *S.S.*, it is likely to focus on Italy's omissions of its positive obligations to protect the Convention rights. In this Chapter, I outline the doctrine of positive obligations and the various criteria, requirements or 'tests' which the Court has developed and which it applies. Italy, in its submission, most probably argues that these criteria, or some of them, are not fulfilled in *S.S.*

At the outset, the obligation to respect human rights has both negative and positive dimensions. In a negative sense, States are under an obligation not to violate Articles 2 to 14, as well as the substantive provisions of the Protocols to the extent these have been ratified. The positive dimension means that they must also ensure respect for the Convention and the Protocols through, for example, establishing a legal framework for the protection of these rights and enforcing measures to ensure its observance.[295]

Stated in the Article 1, it is the Court's fundamental task to *effectively* protect human rights. To do this in the light of present-day conditions by interpreting and applying the Convention, the object and purpose of the Convention requires the Court to interpret the Convention so as to contain positive obligations.[296]

As it has emerged above in the discussion of the norms on attribution and distributing responsibility of the ASR, unlike most international treaties the ECHR is not founded on reciprocity.[297] Thus, instead of requiring the States to comply with the Convention provided that and until the other parties do the same, it constitutes an objective human rights legal order. Within this order, the breaches of positive obligations – either of result or of conduct – take the form of unlawful omission: an action that is required by the Convention was not done. Because omissions do not 'materialise' and are more difficult to identify than actions, it remains often context-dependent whose abstention from what action – which authority should have done what – constitutes a violation of a right.[298]

[295] *Schabas* 2015, p. 91; see *Marckx v. Belgium* 1979, para 31
[296] *Keller and Walther* 2020, p. 960
[297] Ibid., p. 959
[298] Ibid.

Sometimes the Court has disagreed whether to examine a case from the perspective of negative or positive obligations,[299] even to the extent of a considerable debate.[300] The Court is left with some latitude, which can enable it to pre-empt questions of attribution.[301] If there is misconduct by an officer, the Court can focus either on the action that directly caused the alleged harm, or on an omission that made the harmful action possible, *i.e*. the lack of some preventive measure. For example, if a teacher causes bodily harm to a pupil by punishing, the Court may find a state responsible for the harm suffered by the pupil irrespective of whether the physical misconduct is attributable to the State. This is legally unproblematic, because negative and positive state duties as well as active and omissive State conduct can co-exist and co-apply.[302]

The scope of positive obligations under Article 1 of the Convention rights relates to a content of protection that can *realistically* be secured by the State's resources. Where the protection of a human right cannot be guaranteed, positive obligations may not arise for reasons of impracticality. If at least some form of protection is possible – provided that it satisfies the minimum level of effectiveness – a positive obligation will arise in relation to that form of protection. Thus, although the extent of protection may vary from one context to another and with the circumstances of each particular case, it is essential to establish a minimum content of protection.[303]

Traditionally the Court can be seen as favouring negative over positive obligations by constructing the former type as 'archetypical' human rights obligations and the latter as more exceptional ones. The case of *Marckx* that is crucial for the development of the doctrine of positive obligations has also contributed to their status as something exceptional.[304] Regarding even the 'absolute' Article 3, the Court has held that the provision 'may be described in general terms as imposing *a primarily negative obligation* on States to refrain from inflicting serious harm on persons within their jurisdiction'.[305] By considering positive obligations as something 'additional' that 'may' be read into the Convention rights, the Court has suggested that the existence of such obligations is not taken for granted, but rather is

[299] *Keller and Walther* 2019, p. 965
[300] *Schabas* 2015, p. 91; see e.g. Mouvement *Raëlien Suisse v. Switzerland* 2012, concurring Opinion of Judge *Bratza*, para 3: 'the boundaries between the negative and positive obligations under the Convention do not lend themselves to precise definition and that in both circumstances States enjoy a certain margin of appreciation'.
[301] *Keller and Walther* 2019, p. 959
[302] Ibid., p. 965
[303] *Xenos* 2011, p. 106 (emphasis added)
[304] *Lavrysen* 2016, p. 214
[305] *Pretty v. the United Kingdom* 2002, para. 50 (emphasis added)

something that must be justified in each particular case.[306] This, I think, echoes the emphasis on the particular circumstances and facts when deciding on the extraterritorial jurisdiction.

In addition to reactive responses, practical protection can be defined in the form of precautionary measures where contextual knowledge suffices per se to establish the need for protection of human rights. Such a content of protection is justified by the principal aim of prevention of human rights violations that is central to the nature of positive obligations.[307]

The Court's case law on protective duties in the context of the conduct of a foreign state is probably best developed in expulsion and extradition cases.[308] In those, however, the individuals are at the material time within the State's territory and therefore indisputably within its jurisdiction.[309] In the context of extraterritorial migration control of the *S.S.* case, their applicability might therefore be limited.

In following I aim to present the criteria that the Court applies in order to find out whether the State in question could be held responsible for a violation of its positive obligation. Their application to the *S.S.* case I will study in the next Chapter VI.

2. Reasonable Knowledge

The Court has developed a 'reasonable knowledge and means' test in in relation to the use of lethal violence or ill-treatment by third parties and applies it to alleged violations of Articles 2 and 3 ECHR.[310] In *Osman v. the United Kingdom*[311] the Court evaluated the reach and content of protective measures.

In relation to Article 2, the Court declared that 'where there is an allegation that the authorities have violated their positive obligation to protect the right to life' by preventing and suppressing offences against the person, 'it must be established to [the Court's] satisfaction that the authorities *knew or ought to have known* at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they *failed to take measures within the scope of their powers* which, judged *reasonably*, might have been expected to avoid that risk.'[312] This so-

[306] *Lavrysen* 2016, p. 215
[307] *Xenos* 2011, p. 117
[308] *Den Heijer* 2013, p. 422
[309] Ibid., p. 423
[310] *Gerards* 2019, p. 110
[311] *Osman v. the United Kingdom* 1998
[312] Ibid., para 115

called Osman test can be used as a 'causal test' in every context when Article 2 is concerned, 'because life is not less valuable in some situations than in others.'[313]

When knowledge is established from the presence of a known context of private parties' interaction, then both the source of the threat to human rights and the individuals who are likely to be affected can reasonably be identified.[314] In other cases, the Court can imply the element of knowledge from previous incidents, which was established in the *Marckx* case.[315] The knowledge can also be implied from the practices of the States, and even those of non-member states, in which similar human right issues have already been dealt with under a proven record of effectiveness.[316]

So, for example, in *Ilaşcu* the agents of the Russian Government knew, or at least should have known, the fate which awaited the applicants.[317] The Russian Federation was held responsible for its omissions, as it made no attempt to put an end to the applicants' situation brought about by its agents.[318] By the 'reasonable knowledge' condition the Court thus means that the preventive positive obligation arises if the State's authorities *knew or ought to have known* of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party.[319]

It can be recalled that the reasoning of the UN Human Rights Committee concerning jurisdiction contains similar elements. If the risk of an extra-territorial violation of human rights is necessary and *foreseeable* – and there is a causal link – the jurisdiction can be found.

3. Reasonable Means

Because contextual differences regarding i.e. public funds and administrative resources exist and must be taken into account, the positive obligations should be interpreted in a way which does not impose an impossible or disproportionate burden on state authorities. In this respect, the Court determines or delimitates the scope of positive obligations using a variety of qualifying terms. Depending on the formulation, the State must take adequate, appropriate, necessary, sufficient, requisite or reasonable measures. These terms are also used in several

[313] *Xenos* 2011, p. 111
[314] Ibid., p. 83
[315] *Marckx v. Belgium* 1979
[316] *Xenos* 2011, p. 84; see e.g. *Pretty v. the United Kingdom* 2002
[317] *Ilaşcu and Others v. Moldova and Russia* 2004, para. 384
[318] Ibid. paras 392, 393; *Talmon* 2009, p. 14
[319] *Gerards* 2019, p. 116–117

combinations, such as reasonable and appropriate, adequate and reasonable, adequate and effective, adequate and sufficient or necessary and sufficient, and the terms can be used interchangeably within the same judgment.[320]

For the purposes of this thesis, I use the established wording 'reasonable means'. This condition stands for such measures that were within the scope of the authorities' powers and might have been expected to avoid that risk, but the authorities failed to take.[321] After *Osman*, the Court has refined the test so that there is not always a need of a concrete risk, but there may be more general obligations to afford protection. According to *Bljakaj and Others v. Croatia*, 'the positive obligation covers a wide range of sectors and, in principle, will arise in the context of any activity, whether public or not, in which the right to life may be at stake'.[322] The central question in *Bljakaj* was whether violations of Article 2 had been caused by a failure on the part of the domestic authorities to take all necessary measures to afford protection from the violent acts of a mentally ill armed perpetrator.[323]

In *Bljakaj* the Court noted that there were several measures that the authorities could 'reasonably have been expected to take to avoid the risk'.[324] It could not have been possible to 'conclude with certainty that matters would have turned out differently if the authorities had acted otherwise', but 'what is important, and sufficient to engage the responsibility of the State […], is that reasonable measures the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm'.[325]

4. The Requirement of Proximity

In *Bljakaj,* Article 2 in question 'does not require it to be shown that *but for* the failing or omission of the authorities the killing would not have occurred'.[326] In other words, the causal link between the imagined action which would have been 'proper and possible' and the outcome does not need to be determined by the *conditio sine qua non* formula of the necessary condition.[327] Rather, the Court can be seen as using a 'proximity test' in order to assess the nexus between the State's conduct and the harm inflicted on the human right.

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[320] *Lavrysen* 2016, p. 161–164
[321] Ibid., p. 154
[322] *Bljakaj and Others v. Croatia* 2014, para. 108
[323] Ibid., para. 89
[324] Ibid., para. 124
[325] Ibid.
[326] Ibid., reiterating *Opuz v. Turkey* 2009, para. 136
[327] *Fenyves* et al. 201, p. 73–74

In cases of negative obligations, there is usually a relationship of directness or immediacy between the act of the State and the harm. Although in cases of positive obligations such relationship is less straightforward, the Court still requires a degree of proximity between the State omission and the harm suffered.[328] In the aforementioned *Tugar v. Italy* the Commission explicitly applied a proximity or causality test reminiscent of the 'proximate' cause test of tort law that limits responsibility to those causes that have 'sufficiently directly' contributed to the infliction of harm.[329]

Considerations of proximity typically arise in the context of linking an alleged failure to comply with a positive obligation to a particular harm, rather than in the broader context of determining whether such positive obligations exist in the first place. Therefore the application of the reasonable means test depends on the *specific circumstances* of the case, and the Court applies 'contingent' tests, which take account of both the need for effective protection and what can be reasonably expected from the State.[330] When weighing the circumstances, the overarching principle of effectiveness should be utilized to guide the determination of the content of positive obligations.[331]

In a way, proximity seems to be analogical to the 'directness' that could be held decisive for the existence of jurisdiction. Likewise, I think, there are similarities to the Human Rights Committee's conditions for jurisdiction, which require the State to be a 'link in the causal chain' without presupposing a *sine qua non* causation.

5. The Requirement of Effectiveness

The principle of effectiveness, referred to repeatedly in the thesis, is the primary rationale for the development of positive obligations under almost every Convention article. It was established by the Court in the *Marckx* judgment.[332] The principle delineates a range of means that are capable of protecting or ensuring human rights. If the State fails to use a means at its disposal or applies a means that is not capable of sufficiently protecting or ensuring the right concerned in practice, it must provide an adequate justification for its omission.[333]

[328] *Lavrysen* 2016, p. 137
[329] Ibid., p. 143
[330] *Gerards* 2019, p. 116–118 (emphasis added)
[331] *Xenos* 2011, p. 91
[332] *Lavrysen* 2016, p. 147
[333] Ibid., p. 154

A test or assessment of effectiveness as well as of reasonable means and proximity is exemplified in a recent judgment, which found that Finland had violated Article 2 by omission of its positive obligations. The case of *Kotilainen and Others v. Finland* concerns a school shooting in Kauhajoki in 2008. The tragedy took place, according to the applicants, because the police authorities had not confiscated the perpetrator's weapon, thereby neglecting their positive obligation. In the decision, the Court first emphasizes the fundamental nature of Articles 2 and 3. It reminds that '[t]he object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective'[334], obliging the State 'not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'.[335]

However, the Court adds that '[t]he positive obligation is to be interpreted in such a way as *not to impose an excessive burden* on the authorities'.[336] Rephrasing *Osman*, the Court concludes that '[t]he crucial question is whether there were measures which the domestic authorities might *reasonably have been expected to take* to avoid the risk to life arising'.[337]

The facts, circumstances and the context of the protection of public safety in the *Kotilainen* case are reminiscent of *Bljakaj,* albeit rather different from the *S.S.* case. One possibly relevant discussion for the case at hand can be found in the partly dissenting opinion of Judge *Tim Eicke*. He agrees with the majority in that 'the judgment positively (and rightly in my view) concludes that the authorities did not know and could not reasonably have known of the existence of a real and immediate risk to life',[338] but claims that the Court created 'a further obligation' called additional 'duty of diligence', which is 'over and above the duty to protect an identified individual as laid down in the Court's *Osman* jurisprudence'.[339]

It seems that *Eicke* criticizes the quantitative expansion of the ambit of the State's positive obligations rather than suggesting the fabrication of a qualitatively novel concept, for the Court has referred to the doctrine of 'due diligence' in a number of earlier decisions in several different contexts.[340] Although worded differently, 'duty of diligence' appears

[334] *Case of Kotilainen and Others v. Finland* 2020, para. 65
[335] Ibid., para. 66
[336] Ibid., para. 67 (emphasis added)
[337] Ibid., para. 87 (emphasis added)
[338] Ibid., partly dissenting opinion para. 15
[339] Ibid., para. 10
[340] Criminal investigation: *Nachova and Others v. Bulgaria* 2005, para. 77; deportation proceedings: *Slivenko v. Latvia* 2003, para. 146; review of detention: *Yankov v. Bulgaria* 2003, para. 174; armed robbery, shooting: *Mastromatteo v. Italy* 2002, para. 74

similar to it. Be this as it may, including such a concept in the argumentation in the *S.S.* case is plausible and potentially cogent notwithstanding *Eicke's* criticism in *Kotilainen*.

6. Proportionality: Margin of Appreciation, Fair Balance

In addition to the tests or assessments applied to the positive obligations, the core principle of subsidiarity allows the States a certain amount of discretion in their duty to protect the Convention rights. When judging the actions and omissions of a State, some 'margin' for interpretation also follows from the legal, moral and cultural divergence of the States Parties and the needed 'European consensus'.[341] For these reasons the ECtHR has developed its 'margin of appreciation' doctrine.[342] In *Handyside v. the United Kingdom*, the Court expressly noted that the States are in a better position than the Court is itself to assess the necessity of restrictive measures.[343]

The Court has affirmed that the applicable principles of the doctrine are broadly similar whether the basis of the analysis is a negative duty upon a public authority not to interfere or a positive duty to take measures to secure the rights of the individual. In both contexts 'a fair balance' has to be struck between the competing interests of the individual and of the community as a whole, and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.[344] In *Women on Waves,* however, the Court explicitly stated that if the obligation is positive rather than negative, the margin of appreciation granted to the State can be larger.[345]

It is important to note that the doctrine of proportionality – in the form of margin of appreciation and fair balance – plays only a very limited role in relation to positive obligations arising from the Articles 2 and 3 ECHR. When allegations are made under those provisions, the Court's scrutiny is therefore thorough and the review is strict,[346] because a high level of protection has to be prescribed due to their semi-absolute and absolute status.[347] Nonetheless, even in some cases concerning the Articles 2 and 3 the Court can apply a test that allows some leeway and implies judicial restraint.

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[341] *Lemmens* 2018, p. 92; see also Chapter III, p. 26
[342] *Gerards* 2019, p. 161–163
[343] Handyside v. the United Kingdom 1976, paras 48–50
[344] *Schabas* 2015 p. 91; Case of Hatton and Others v. The United Kingdom 2003, para. 98
[345] *Lavrysen* 2016, p. 226; *Women on Waves and Others v. Portugal*, para. 40
[346] *Gerards* 2019, p. 168–169, 172
[347] *Xenos* 2011, p. 93

7. Of Evidence and Proof

When there is an alleged violation of either Article 2 or 3, the Court needs to assess the factual evidence carefully. The Court has adopted, and confirmed in its case law, the standard of proof 'beyond reasonable doubt', which may follow from 'the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'.[348] Besides the right at stake and the nature of the allegation made, even the conduct of the parties when evidence is being obtained can be taken into account, and 'the Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights'.[349]

Within the context of migration, asylum-seeking and forced returns, the Court has underlined that the Convention requires that the victim not be removed to the country in question, where 'substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3'.[350] The assessment of the risk depends upon all of the circumstances[351] and it must be rigorous, a *heavy burden being placed upon the applicant* to demonstrate the real risk of ill-treatment constituting substantial grounds.[352] However, exactly because of the special circumstances in which asylum seekers may find themselves, the Court has emphasized that they must frequently be given 'the *benefit of the doubt* when it comes to assessing the credibility of their statements and the documents submitted in support thereof'.[353]

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status affirms that the general legal principle is that the burden of proof lies on the person submitting a claim. In refugee law, however, the cases in which an applicant can provide evidence of all his statements are the exception rather than the rule.[354] If it were a requirement for a refugee to 'prove' every part of his case, the majority of refugees would never be recognized. Therefore, after the applicant has made a *genuine effort* to substantiate the claim, there may still be a lack of evidence for some of the statements, impelling to give the applicant the benefit of the doubt.[355] There are some limitations, though: the applicant's statements must

[348] *Imakayeva v. Russia* 2006, para. 112; *Giuliani and Gaggio v. Italy* 2011, para. 181
[349] Ibid.
[350] *Schabas* 2015, p. 194; *Saadi v. Italy* 2008, para. 125
[351] *Hilal v. the United Kingdom* 2001, para. 60
[352] *Inter alia Saadi v. Italy* para. 128 (emphasis added)
[353] *N. and Others v. the United Kingdom* 2014, paras 112, 122–126; see also *Salah Sheekh v. the Netherlands* 2007 and *R.C. v. Sweden* 2010 (emphasis added)
[354] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, p. 43, para. 196
[355] Ibid., p. 44, para. 203 (emphasis added)

be coherent and plausible and must not run counter to generally known facts. The benefit of the doubt should only be given when all available evidence has been obtained.[356] The claims usually concern situations in which the applicant is entering a State, but in cases concerning interception and forced return the benefit of the doubt could be applicable, too.

To conclude, by its omissions the State can be responsible for acts of private individuals that violate Convention rights where there is evidence that the State's authorities connived or acquiesced,[357] extending the obligation beyond their conduct to encompass a duty to ensure that third parties do not infringe the rights of individuals.[358] Despite the margin of appreciation and the Osman test, the ECtHR must not take an overtly cautious approach to positive obligations. Should the Court refrain from imposing preventive obligations on States, it can be imagined that their duties could be evaded by outsourcing public interests far enough to break the chain of formal attribution[359] – an important reminder for the case of *S.S.*

The State's positive obligation to secure human rights is an obligation of due diligence of the state doing all that it could reasonably be expected to do to protect a territory's inhabitants even from third parties.[360] In *Manoilescu and Dobrescu v. Romania and Russia* the Court referred to *Ilaşcu* and stated that '[e]ven in the absence of effective control of a territory outside its borders, the state still has a positive obligation under Article 1 to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.'[361] That is a strong requisite.

[356] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, p. 44, para. 204
[357] *Ilaşcu and Others v. Moldova and Russia* 2004, para. 318
[358] *Schabas* 2015, p. 90
[359] *Keller and Walther* 2020, p. 969
[360] *Milanovic* 2011, p. 141
[361] *Manoilescu and Dobrescu v. Romania and Russia* 2009, para. 101

VI. Conclusions

1. Jurisdiction

In this last Chapter, I aim to assess the admissibility of the Application – whether the jurisdiction of Italy can be found – and then the alleged violations of the material Articles in the light of the various tests and criteria discussed above.

The outcome of the decision in *S.S.* depends, firstly, on the jurisdiction criterium, as discussed in Chapter IV. Here, the Court can be seen as presented with two divergent main approaches. Under the more conservative approach, the condition of jurisdiction is restrictively interpreted as unambiguous effective control, a situation in which there exists a predefined relationship between the State and the individual.[362] This view was very recently rephrased in the dissenting opinion of the UN Human Rights Committee decision.

Another approach is present in some of the judgments and decisions of the ECtHR mentioned above – for example, *Ilaşcu* and *Bljakaj.* The starting point is that human rights obligations serve as a 'code of conduct' for all activity of a state regardless of territorial considerations, in which the condition of jurisdiction is satisfied if an act or omission of a state affects a person. The 'functional jurisdiction' proposed by *Bonello* and *Moreno-Lax* and demonstrated by the UN Human Rights Committee – and perhaps by the 'duty of diligence' recalled by *Kotilainen and Others*, too – appears to be essentially supportive of this more permissive code of conduct approach. The reasoning behind it is appealing from the perspective of *effective* human rights protection: the State must always be guided by the human rights obligations it has entered into, which can only implicate that it may not do towards a person in another country what it may not do to persons in its own territory.[363]

In the *S.S.* case the conservative approach – the strict requirement of Italy's effective control of the Libyan Coast Guard – would be likely to lead the Court to find that there is no sufficient jurisdictional link. That decision would leave the alleged violations unexplored and give Italy, the EU, and other Member States if not an encouragement, at least a permission to continue with bilateral agreements and endorse the pull-back operations by non-ECHR states.

[362] *Den Heijer* 2012, p. 54
[363] Ibid., p. 61

In *Ilaşcu* it was considered that there was 'a continuous and uninterrupted link of responsibility' ensuing from, at least, from 'the decisive influence'.[364] By analogy, this reasoning can be seen as applying to the duties of States in the context of external processing of asylum claimants.[365] A more permissive interpretation of jurisdiction is suggested by the principles of interpretation of the ECHR, discussed briefly above in Chapter III: the Convention should be interpreted in line with its underlying values and in an evolutive and dynamic manner, and it should effectively secure the rights it provides.

In *Hirsi Jamaa*, the Court adjudicated that Italy cannot circumvent its jurisdiction under the Convention by describing the events in issue as rescue operations on the high seas, and dismissed the argument that 'Italy was not responsible for the fate of the applicants on account of the *allegedly minimal control* exercised by the authorities over the parties concerned at the material time'.[366] In the sense of the 'functional jurisdiction' proposed by *Bonello* and recently by *Moreno-Lax*, in *S.S.* the Court could sum up the extraterritorial effects of the control by the Italian MRCC and the overall contactless but effective control of, or at least decisive influence on, the Libyan Coast Guard, by the systematic funding and support. This could be sufficient for the admissability of the Application.

Moreover, if the goal of the MoU is to intercept migrants before they reach the territorial scope of the ECHR – and bring them back to a country in which they are subjected to extreme forms of violence and exploitation – and thus ultimately to sever the jurisdictional link with Italy, it would be incompatible with the *purpose and object* of the ECHR if Italy was absolved of its responsibility.[367] Neither should Italy be able to avoid responsibility by transferring functions to the FRONTEX or some other EU organ, because the transfer would also clearly go against the purpose and object of the Convention by limiting or excluding its guarantees at will and 'thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards'.[368] The default subsidiarity rule under EU law is that 'Member States shall retain primary responsibility for the management of their sections of the external borders'.[369]

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[364] *Ilaşcu and Others v. Moldova and Russia* 2004, paras 392–394
[365] *Den Heijer* 2012, p. 48
[366] *Hirsi Jamaa and Others v. Italy* 2012, para. 79 (emphasis added)
[367] *Peers* et al. 2015, p. 659–660; see *inter alia T.I. v. UK 2000*, para. 15; *K.R.S. v. UK 2008*, para. 15 (emphais added)
[368] *Bosphorus v. Ireland* 2005, para. 154
[369] *Moreno-Lax* 2017 p. 327; EBCG Article 5(1)

If the Court comes to the conclusion that there existed a normative relationship between the migrants as the right-holders and the Italian authorities as the duty-bearers, it can rule that the case is admissible as Italy exercised jurisdiction. Thence the Court could move on to examine on the merits whether Italy breached its obligations by exposing the applicants to the risk of losing their lives and the risk of ill-treatment in Libya. In addition, the Court could examine whether Italy was responsible for violence that amounted to inhuman and degrading treatment when the passengers were on board the Libyan ship, and further, for a breach of the prohibition of slavery and forced labour. It could examine, as it did in *Hirsi Jamaa*, whether there was a violation of the right to an effective remedy and a risk of chain refoulement from Libya to the applicants' countries of origin.[370]

Within the scope of the thesis, I concentrate on the alleged breaches of Articles 2 and 3, and make only a brief note on the two other Articles. Before that I sum up the central evidence.

2. The MoU and the Video Reconstruction as Proof or Evidence

In *Hirsi Jamaa,* the Court observed that Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols.[371] Italy was thus responsible under Article 1 'for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence […] of the necessity to comply with international legal obligations'.[372]

In *S.S.,* rather than absolving Italy of responsibility, it seems that the MoU is the central piece of proof that the Court can refer to when establishing the jurisdiction and when examining the alleged omissions of positive obligations. The fact that the *Hirsi Jamaa* decision partly led to the suspension of the 2008 Treaty of Friendship, Partnership and Cooperation further corroborates the significance of the bilateral agreements.

The MoU is not a real treaty in the sense of the Vienna Convention on the Law of Treaties (VCLT).[373] If the general rule of interpretation of the VCLT is nonetheless applied to the

[370] *Pijnenburg* 2018, p. 413
[371] *Hirsi Jamaa and Others v. Italy* 2012, para. 129
[372] *Al-Saadoon and Mufdhi v. the United Kingdom* 2010, para. 128
[373] United Nations, Treaty Series, 1969, vol. 1155, p. 331

agreement, the agreement 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[374] The context for the purpose of the interpretation of a treaty comprises the text, including its preamble and annexes.[375] The preamble of the MoU reaffirms 'the resolute determination of cooperating to individuate urgent solutions to the irregular migrants matter which cross Libya to go to Europe by sea, through the provision of temporary hosting camps in Libya […] in anticipation of repatriation or voluntary return to the countries of origin'. The preamble aims 'to ensure the reduction of illegal migratory fluxes', to which end 'the Italian party commits to provide technical and technologic support to the Libyan institutions' according to Article 1(C). Article 2(5) promises 'support to the present international organizations and that operate in Libya in the migration sector in order to continue the efforts also aiming to the *migrants' return to their countries of origin*, including the voluntary return'.[376]

Interpreted by the VCLT rules, it seems quite clear that the object and purpose of the MoU is the interception of migrants at sea by the Libyan authorities as well as their voluntary and forcible return (refoulement) to their countries of origin. That should prove the intention of Italy to support the kinds of actions that took place when Ras Jadir intercepted the migrants on 6.11.2017, their subsequent handling in Libya, and their forced return.

Article 5 contains obligations pertaining to human rights. It requires the Parties to interpret and apply the MoU 'in respect of the international obligations and the human rights agreements of which the two Countries are part of'. The formulation is vague, and 'respect' does not amount to a binding obligation. Especially problematic is the condition that both States should be under the same 'agreements', thus expressly leaving out the ECHR. Nonetheless, I hold that even based on this wording, Italy invokes responsibility to guarantee the fundamental human rights when cooperating with Libya – *including* those guaranteed by the ECHR, because the 'treaty commitments' of the MoU cannot override the prior entry of force of the Convention, as ruled in *Hirsi Jamaa.*

Other sources of proof are the reconstruction and the statements of the applicants. The footage compiled of the wide-angle cameras mounted on the mast and the deck of the Sea Watch 3 vessel and from two cameras mounted on the RHIBs gives a reliable picture of the

[374] VCLT, Article 31(1)
[375] Ibid., Article 31(2)
[376] MoU, see Appendix 2 (emphasis added)

events that unfolded. As far as the video corroborates the applicants' statements, they should be interpreted as tenable, too. The Application contains also the victims' claims that concern incidents that took place after they had embarked Ras Jadir and been taken back to Libya. To these accounts, the standard of proof beyond reasonable doubt should be applied. The burden of proof is within the applicants, who might to some degree have the advantage of the benefit of the doubt.

3. The Alleged Violation of Article 2

In my view, the assessment of the alleged violation of Article 2 is more difficult than that of the other Articles. In *Hirsi Jamaa*, which otherwise is a helpful reference, the right to life does not come into question, as refoulement cases are regularly brought under Article 3. Therefore, it can be assumed that the risk to life in the countries of origin, Nigeria and Ghana, would also in *S.S.* fall under Article 3.

The case of *Ilaşcu* involves an alleged violation of Article 2, but in relation to death penalty; the Court additionally considered that 'the facts complained of by Mr Ilaşcu do not call for a separate examination under Article 2 of the Convention, but would be more appropriately examined under Article 3 instead'.[377] As in *Hirsi Jamaa*, there were no actual deaths in *Ilaşcu*. Neither in *Osman* did the Court find a violation of Article 2;[378] in the *Kotilainen* case it did. However, as mentioned, both of those cases are quite different from *S.S.*

The MoU does not contain instructions or suggestions to depriving migrants of their lives, neither can it be interpreted as having that as its object or purpose. The video shows that the Libyan vessel has arrived to the scene and started the rescue operations. It is clear that the measures of the Ras Jadir crew are characterized by ineffectiveness and carelessness, if not outright brutality. Still, it can be hardly argued that the crew members had the intention to let the migrants drown, thus intentionally violating the right to life, although at least some of the deaths were likely caused by their negligence.

The events could probably be framed as an accident. Alas, the Court's case law of accidental deaths seems only to contain cases where there have been omissions of safety regulations for public transportation or industrial constructions, none of which are extraterritorial.

[377] *Ilaşcu and Others v. Moldova and Russia* 2004, para. 418
[378] *Osman v. the United Kingdom* 1998, para. 122

However, the whole assessment of the degree of culpability might be superfluous, as the question concerns the omissions of Italy's positive obligations. By applying the *Osman* test to *S.S.,* the first condition for responsibility is that Italy knew or should have known that the LYCG was likely to use careless measures – including the manoeuvring the vessel so that the forceful water movements threw people into the water, and neglecting to launch the RHIBs or to provide life jackets. The other condition is, rephrasing *Osman* and *Kotilainen*, the crucial question of whether there were measures which Italy might reasonably have been expected to take to avoid the risk to life arising.

It seems that at the general level of the MoU some anticipation of Libya's roughness could not be excluded, but whether it could reasonably have been expected to amount to deaths is harder to fathom. The Rome Maritime Coordination and Rescue Center could possibly have coordinated the rescue operation differently; on the other hand, the Italian helicopter did try to persuade Ras Jadir to stop. In the beginning of the operation, the LYCG did not respond or did not transmit further instructions. A strict reading of the MoU in the light of Libya's reported overall dire human rights situation might lead to the conclusion that if Italy had been able to take another course of action, there would have been 'a real prospect of altering the outcome or mitigating the harm', reflecting *Bljakaj*.

Italy will certainly argue that the criterium of proximity is not fulfilled. A direct causality is mostly excluded, but the systematic and determinate funding, equipping and training, together with the provisions of the MoU, could still establish the required nexus.

Something that was not present in *Hirsi Jamaa* or *Ilaşcu* and that might weigh heavily is the priority of the rights of the child. Two of the applicants act on behalf of their minor children, who died during the interception and rescue operation. Functioning as one of the third-party interveners, Defence for Children the Netherlands requests the Court to take into account the involvement of children in the case and put this aspect at the centre of its considerations on the question as to the positive obligations and jurisdiction,[379] referring to the UN Convention on the Rights of the Child (CRC),[380] to a comment of the Committee on the Rights of the

[379] Defence for Children the Netherlands 11.11.2019, para. 37

[380] Article 22(1) CRC: 'States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.'

Child[381] and to the decisions of the Court in *Popov v. France*[382] and *Tarakhel v. Switzerland.*[383] Defence for Children the Netherlands reminds that the Committee on the Rights of the Child has demonstrated its concern about all international, regional or bilateral cooperation agreements focused on restricting migration that negatively impact children's rights.[384] Thus, the Court might find the crew's disregard especially aggravating if it is shown that it led to the deaths of the children.

My estimation is that the Court could be careful with Article 2 and consider that the deaths were accidental, and that Italy could not have foreseen them to take place. Therefore, it is possible that the Court would not find a violation of Article 2 in *S.S.*

4. The Alleged Violation of Article 3

Article 3 has mainly been applied where the risk to the individual of a violation emanates from intentional acts inflicted by State agents or public authorities, but it also has a positive dimension to the right requiring the State to take action to prevent torture and inhuman or degrading treatment being inflicted by persons not acting on behalf of the State.[385] As with Article 2, the Court has developed a 'procedural obligation' contained within Article 3 and assisted by Article 1, by which the State is required to investigate and prosecute cases of torture and inhuman or degrading treatment or punishment even when the acts themselves cannot be imputed to the State.[386]

As suggested before, there are substantive grounds for finding violations of Article 3 in *S.S.* Reflecting again on *Hirsi Jamaa*, the Court would likely observe that 'two different aspects of Article 3 of the Convention are in issue and must be examined separately', namely the

[381] 'In all international, regional or bilateral cooperation agreements on border management and migration governance, the impacts of […] initiatives on children's rights should be duly considered and adaptations made as necessary to uphold the rights of the child'. – UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3–CRC/C/GC/22, available at https;//www.refworld.org/docid/5al293a24.html

[382] 'The Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents.' – Popov v. France 2012, para. 91

[383] 'With more specific reference to minors, the Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant.' – *Tarakhel v. Switzerland* 2014, para. 99

[384] Defence for Children the Netherlands 11.11.2019, para 27

[385] *Schabas* 2015, p. 191; *inter alia Abdu v. Bulgaria* 2014, para. 40

[386] Ibid.; *M.C. v. Bulgaria* 2003, para. 151; Ay v. Turkey 2005, para. 59; *Gülbahar and Others v. Turkey* 2008, para. 72

risk that the applicants would suffer inhuman and degrading treatment by the LYCG and in Libya, and secondly the danger of being returned to their respective countries of origin.[387]

Starting with the non-refoulement aspect, in *Hirsi Jamaa* the Court took into consideration the fact that Italy returned the migrants to Libya, a country that it knew – thanks to the extensive amount of reports from international organizations – would expose them to degrading treatment, and potentially return them to countries such as Eritrea and Somalia, where human rights violations are also widespread.[388] The Court noted that the situation in Libya 'was well known and easy to verify on the basis of multiple sources', and considered that 'when the applicants were removed, the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country'.[389]

The consequences for migrants who returned to Libya have been documented and condemned by UNHCR, UNSMIL, OHCHR, and the UN Secretary General (see Chapter II). Additionally, the third-party interveners to the *S.S.* case reiterate the dire conditions in the detention camps in Libya and the risk of forced return to the countries of origin.

In its intervention as a third party, UNHCR reminds that it has clarified in a 2015 update that Libya could not be considered a 'place of safety' for disembarking people rescued at sea, and that this has remained UNHCR's public position, including throughout 2017, and has been repeated in several updates.[390] Another intervener, the Council of Europe Commissioner for Human Rights, stresses that member states' migration management practices in the Central Mediterranean have led to the increased return of migrants, asylum seekers and refugees to Libya, resulting in them being exposed to torture or inhuman or degrading treatment or punishment, and that the member states knew, or should have known, about the risk of such serious human rights violations occurring.[391] Additionally, what is said above of the special vulnerable status of children, holds true for Article 3, as well.

Generally, then, it seems obvious that Italy was aware of the existence of a real and immediate risk to the life of the immigrants and of a risk of ill-treatment. More specifically, the knowledge of Italy must have been confirmed by an incident that took place just briefly before the events of the *S.S.* case. On 27.9.2017, an Italian warship notified the LYCG of

[387] *Hirsi Jamaa and Others v. Italy* 2012, para. 84
[388] *Vari* 2020, p. 128
[389] *Hirsi Jamaa and Others v. Italy*, para. 131
[390] UNHCR 14.11.2019, para 2.2
[391] The Council of Europe Commissioner for Human Rights 15.11.2019, para. 35

two migrant boats in distress 20 nautical miles off the Libyan coast. It is not clear if the warship prevented the migrant boats from continuing their journey, but instead of rescuing the migrants itself, or contacting the merchant vessels or NGO boats nearby, it allowed the LYCG intercept the migrants.[392] By these omissions, Italy did not comply with its positive obligations resulting to the migrants' forcible return to Libya.[393]

In the light of the several reports and the recent similar incident, it can be argued that the Italian MRCC, acting *de facto* as coordinator of the SAR operation, knew or should have known that the involvement of Ras Jadir was bound to lead to the disembarkation of the survivors in Libya. Reflecting again on *Hirsi Jamaa*, Italy cannot be 'exempt from complying with its obligations under Article 3 of the Convention because the applicants *failed to ask* for asylum or to describe the risks faced as a result of the lack of an asylum system in Libya', but 'the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees'.[394]

In *S.S.*, the Court will therefore likely consider that the Italian authorities knew or at least should have known that the applicants faced the risk of ill-treatment. It is also likely that the reasonable means condition is met, because Italy could have refrained from entering into the MoU agreement that effectively leads to the pull-backs and refoulement. And as for the proximity criterium, the requirement should be met more easily than for Article 2, too.

The victims reported that they had been beaten and possibly also restricted by ropes by the crew of Ras Jadir, and the video reconstruction corroborates the reports of the victims to some degree. In order to amount to a violation of Article 3, the interference with the integrity of the migrants must esteemed to have attained 'a minimum level of severity and disrespect a person's humanity'.[395] The assessment of the threshold depends on all the circumstances of the case such as the duration of the treatment, its physical or mental effects, and in some cases the sex, age, or state of health of the victim – here particularly the children's. The acts of the crew can be considered as 'degrading treatment', if it is shown that the acts humiliated or debased the migrants, diminished their human dignity, or aroused in them 'feelings of fear, anguish or inferiority capable of breaking [their] moral and physical resistance'.[396]

[392] Suggested by *Biondi, P.:* Italy Strikes Back Again: A Push-back's Firsthand Account, Border Criminologies, 15 December 2017, https://www.law.ox.ac.uk/
[393] *Pijnenburg* 2018, p. 408–410
[394] *Hirsi Jamaa and Others v. Italy*, para. 157 (emphasis added)
[395] *Grabenwarter* 2014, p. 32
[396] Ibid.; see, *inter alia*, *M.S.S. v. Belgium and Greece* 2010, para. 220

Khlaifia and Others was decided four years after Hirsi Jamaa. The case concerns Tunisian migrants fleeing the events of the Arab Spring. They were intercepted by the Italian coast guard interdicted in September 2011, brought to a reception and aid center (Centro di Soccorso e Prima Accoglienza, CSPA), commonly known as a migration 'hotspot', on the island of Lampedusa, and later deported to Tunisia. In the judgment, the Court notes that the 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3' and reminded that 'the assessment of that level is relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim'.[397]

The Court went on to list other factors that can be taken into consideration. These are 'the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it', 'the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions' and the possibly vulnerable situation of the victim, concluding that 'there is an inevitable element of suffering and humiliation involved in custodial measures and this as such, in itself, will not entail a violation of Article 3'.[398] The Court did not find the violation, departing remarkably from its prior jurisprudence by pointing to the role of context when interpreting the meaning of Article 3 rights and eroding the absolute character of the prohibitions within the provision.[399] The said context was the post-Arab Spring influx of migrants to Europe and the difficult circumstances that Italy faced – something that could apply to the *S.S.* case, too.

It seems that there is very a narrow margin of discretion for the Court. In the end, the rather unfortunate *Khlaifia* decision notwithstanding, I would assume that the violation of Article 3 is found, mainly due to the centrality of the non-refoulement doctrine.

5. The Alleged Violations of Article 4, Article 13 and Article 4 of Protocol 4

As mentioned, I give only a brief outline regarding the other alleged Article violations. Here I reflect essentially on *Hirsi Jamaa*, and conjecture, *mutatis mutandis*, what the Court could decide. Starting with Article 13, the 'automatism' of the transfer to Libya may breach the notion of an effective remedy. In the case of *Hirsi Jamaa*, the special nature of the maritime

[397] *Khlaifia and Others v. Italy* 2016, para. 159
[398] Ibid., para. 160
[399] *Goldenziel* 2018, p. 279

environment could not exclude Italy's jurisdiction,[400] and the Court found a violation of Article 13 in conjunction with Article 3 of the Convention and Article 4 of Protocol 4 due to the lack of any suspensive remedies by which to applicants could have lodged their complaints with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.[401]

The Court has indicated that expulsion orders have to be served in writing, after an individual examination of the case, following a legal procedure previously established by law, stating the reasons and indicating the means and conditions to appeal, before deportation. The video reconstruction of the scene cannot prove the alleged violation of the procedural Article 13, and not much can be derived from the MoU. It seems indisputable, though, as the applicants were not allowed any form of independent and rigorous scrutiny nor a prompt and impartial investigation.

Neither are the alleged violations of Article 4 regarding slavery and forced labour and Article 4 of Protocol No. 4 regarding collective expulsion something that can be evidenced by the video footage or by the MoU. As for Article 4 of Protocol No. 4, given the circumstances of the incident and the fact that the migrants were returned to Libya, it appears indisputable that the applicants were submitted to collective expulsion. In *Hirsi Jamaa*, the Court held unanimously that there has been a violation of this provision: the applicants had not undergone any identity checks and the authorities had merely put the migrants, who had been intercepted on the high seas, onto military vessels to take them back to Libya.

In *Khlaifia and Others* the Court refers to *Hirsi Jamaa*, noting that 'it is necessary to consider the circumstances of the case and […] the specific situation of the individuals concerned' when determining whether there has been a 'sufficiently individualised' examination.[402] Regard must also be had to the particular circumstances of the expulsion and to the general context at the material time. In *Khlaifia* the Court found a violation of Article 13 of the Convention taken together with Article 3,[403] but did not find a violation of Article 13 taken together with Article 4 of Protocol No. 4[404] nor of Article 4 of Protocol No. 4 itself.[405]

[400] *Grabenwarter* 2014, p. 422
[401] Ibid.; *Hirsi Jamaa and Others v. Italy* 2012, para. 283
[402] *Khlaifia and Others v. Italy* 2016, para. 238
[403] Ibid., para. 271
[404] Ibid., para. 281
[405] Ibid., para. 254

I think that insofar the Court finds that there is jurisdiction, in *S.S.* it, similarly to *Hirsi Jamaa,* finds the violation of the prohibition of collective expulsion, as the only difference seems to that the expulsion was done by proxy.

As for Article 4, the applicants could additionally have been exposed to forced labour either in Libya or in their countries of origin, if returned there – or in both. However, without the support of *Hirsi Jamaa*, or *Khlaifia*, neither of which included this Article, I refrain from further conjecture about Article 4.

6. Final Remarks

By writing this thesis I have substantially increased my understanding of the Court's procedure, jurisprudence and interpretation of the Convention. Even so, it is not at all easy to foresee its argumentation, not to speak of its decision, in a complicated and novel case like *S.S.* The dynamic and evolutive – may I say fluctuating – interpretation of the Convention leaves a lot of room for the Court to operate, and its decisions will also be affected by the particular composition of judges. The Court is not completely free from the current political situation, either. I will wrap up the thesis with some notes on this issue.

In its effort to create a zone of free movement within, the EU and the Member States have used measures that not only sit uncomfortably with the very principles of proportionality and non-discrimination of the Union itself, but can outright violate the articles of human rights conventions and charters. As far as it can be established that the measures are within the jurisdiction of the Member States, the victims can, at least, apply to the European Court of Human Rights, in hope for effective protection and remedies.

However, if the Member States, or the Union, succeed in outsourcing the border control activities – the 'dirty work' – to the main transit countries, the fundamental rights violations become much harder to prevent and detect. The border control by proxy to guarantee freedom, safety and justice for those within the EU will have a high price for those who are left outside. To allow such outsourcing could also lead to a slippery slope of externalization or privatization of States' fundamental tasks and responsibilities such as the police or armed forces. Morally, therefore, it is easy to come to the conclusion that in *S.S.* the Court *should* find Italy's jurisdiction as well as violations of at least some of the Articles – probably most poignantly of Article 3.

It remains to be seen whether the pull-back practices are in place when the Court rules on the *S.S.* case but, if they still are, the impact of this judgment could be as significant as *Hirsi Jamaa*, which led to the abandonment of the 2008 Treaty of Friendship, Partnership and Cooperation between Italy and Libya. If the Court invalidates the outsourcing practices, Italy will be compelled to revise its migration control policies in the Central Mediterranean and probably reconsider the MoU altogether. In that sense, the judgment can be compared to *M.S.S. v. Belgium and Greece*, too, which led to a suspension of transfers to Greece under the Dublin Regulation.[406] The Court held that asylum conditions in Greece were so deteriorated that not only Greece had violated the the ECHR, but also Belgium for having transferred an asylum seeker back to Greece.

According to Article 46 of the Convention the judgments of the Court are officially binding only to the parties to the case.[407] However, the Court's interpretations are regarded as determining the meaning of the concepts and principles of the ECHR, and the Parties to the Convention have committed themselves to the developing case law under the *res interpretata* effect.[408] Thus, even if the application of the principles in various circumstances and to the concrete facts of different cases remains particularized, the *S.S.* judgment could have a significant impact on other States' border control strategies and policies, too.

Given the ties between human rights and political authority through its jurisdiction, the ECtHR is expected to take political concerns seriously when deciding cases of extraterritorial application of the Convention.[409] Although finding the violations in *Hirsi Jamaa*, the Court already in its judgment of 2012 acknowledged 'the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in southern Europe'.[410] The Court noted that these States experience 'considerable difficulties in coping with the increasing influx of migrants and asylum-seekers', exacerbated by the European economic crisis.[411]

Hirsi Jamaa was decided before the so-called refugee crisis of 2015–2016, which escalated anti-immigration discourses and drove the policy makers to try to stop, or at least reduce, irregular migration flows at all costs. So, even given that the Court has not shied away from

[406] *Pijnenburg* 2018, p. 406
[407] (1) The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
[408] *Gerards* 2019, p. 45
[409] *Besson* 2012, p. 860
[410] *Hirsi Jamaa and Others v. Italy* 2012, para. 122
[411] Ibid.

controversial decisions in the past, it may take into account the highly politicized context of immigration and adopt a cautious approach when deciding on a politically charged case.[412] With a chronic overload of applications,[413] the Court might prefer to avoid a landslide of new cases based on a similar claim of indirect, extraterritorial jurisdiction.

In the past few years, Italy has been more and more vocal regarding its need for a solution to the heavy fluxes of migrants crossing the Mediterranean to reach its borders. For its part – in line with its approach in Turkey – the EU has backed Italy's efforts in Libya, but has let Italy take the lead in the accord.[414] Italy has been praised for its rescue operations, which have saved countless lives at sea. However, Italy stresses that it cannot bear the burden of helping and taking illegal migrants in large numbers and has repeatedly called for the EU to provide a durable solution.[415]

In *Khlaifia and Others* the Court emphasized, firstly, that the States may establish and keep up their own immigration policies according to their sovereignty and the subsidiarity principle. Secondly, it recognized the difficult situation of Italy 'as a result of the economic crisis […] and the fact that migratory flows are increasingly arriving by sea'.[416] Italy was influenced by the reality of the post-Arab Spring influx of migrants to Europe and the difficult circumstances as a result. The judgment can be seen as giving the States more leeway to manage mass influxes of migrants.[417] *Khlaifia and Others* was decided four years after *Hirsi Jamaa* and right amidst the 'crisis' in 2016, but it concerned the earlier events of 2011. The numbers of people crossing the Mediterranean rose significantly after that. On the other hand, the Court reminded – referring again to *Hirsi Jamaa* – that 'problems with managing migratory flows or with the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto'.[418]

The New Pact planned by the EU Commission underlines the need for solidarity. All Member States of the union should receive refugees, but many of them certainly do not do that and do not want to do that in the future, either. When the EU faced a growing number of asylum applications in 2015, it decided to set up refugee quotas. These were opposed most

[412] *Pijnenburg* 2018, p. 407
[413] The Court had 59,800 pending applications 31.12.2019; ECtHR Guide 2020: Admissibility Criteria, p. 7
[414] *Baczynska, Gabriela:* EU sticks to Libya strategy on migrants, despite human rights concerns, Reuters, Sept. 14, 2017, 9:11 AM, https://www.reuters.com/article/useurope-migrants-libya-italy/eu-sticks-to-libya-strategy-on-migrants-despite-human-rights-concerns-idUSKCN1BP2CQ
[415] *Vari* 2020, p. 114
[416] *Khlaifia and Others v. Italy* 2016, para. 241
[417] *Goldenziel* 2018, p. 279
[418] *Khlaifia and Others v. Italy* 2016, para. 241

fiercely by the so-called Visegrad Group consisting of the Czech Republic, Hungary, Poland and Slovakia. Despite the fact that Hungary is the only one of them that has direct experience of the migration flow, these States have continued to resist any relocation efforts.

The Visegrad quartet is not alone, however. In most Member States, the asylum politics remains high on the lists not only of the populist right-wing parties. Denmark expressed recently its goal of 'zero asylum seekers', as the Danish Prime Minister reinforced the government's restrictive stance on immigration – although already in 2020 Denmark saw the lowest number of asylum seekers since 1998, with only 1,547 people applying.[419] Most striking is the plan to make contracts with non-EU, most likely African, states in order process asylum seekers' claims outside of both the EU and the ECHR and, if seekers are granted asylum, to keep them in that third country.[420] This is rather unexpected if not alarming for a Scandinavian country known for its liberal and tolerant society – and governed by a left-wing coalition.

Justice is certainly not done if Italy, and the other EU Member States facing a disproportionally heavy burden of migration, are offered no solidarity. Likewise, punishing Italy for the border control measures without punishing the Union that endorses them, feels insufficient and unsatisfactory. The numbers of asylum seekers overall have decreased, but that is likely to be temporary – caused to a large extent by the Covid-19 pandemic – and the big issue of migration has definitely not disappeared. The pandemic has restricted movement within the AFSJ, too, and taken a grave toll on the European economy, which is prone to make many Member States even more reluctant to immigration.

[419] Info Migrants 25.1.2021, https://www.infomigrants.net/en/post/29842/denmark-aims-for-zero-asylum-seekers
[420] Politico 10.3.2021, https://www.politico.eu/article/denmark-has-gone-far-right-on-refugees/

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Appendix 1

Application No. 21660/18 to ECtHR
S.S. and others against Italy, brought 26.6.2019 (3.5.2018)

STATEMENT OF FACTS

1. The applicants, whose initials appear in the annexed list, are sixteen Nigerien nationals and one Ghanaian national. Two of them are also acting on behalf of their minor children, who died during the events which are the subject of the application. The applicants are represented before the Court by Ms V. Moreno Lax, law graduate from Queen Mary University in London, Mr Itamar Mann, law graduate from Haifa University and Ms CL Cecchini and L. Leo, lawyers in Rome.

A. The circumstances of the case

2. The facts of the case, as presented by the applicants, may be summarized as follows.

3. The seventeen applicants are part of a group of approximately one hundred and fifty people who, during the night between 5 and 6 November 2017, left Libya in a rubber dinghy. At 6 a.m. on 6 November 2017, the Rome Maritime Coordination and Rescue Center (MRCC) received a distress message from the applicants' boat. He called on all nearby ships to step in to rescue the sinking dinghy.

4. Three ships were in the vicinity of the craft: the Dutch rescue vessel Sea Watch 3 (SW3), the French military vessel Premier Maître l'Her, and the Libyan coast guard Ras Jadir. An Italian military navy helicopter also arrived at the scene.

5. SW3 contacted the Rome MRCC, which authorized him to join and rescue the boat. The French ship offered its aid to SW3 then tried, on several occasions, to contact the Libyan coast guard in order to coordinate operations, without obtaining a response.

6. The Ras Jadir joined the boat first. According to the applicants, the water movement caused by the Libyan vessel caused the death of several people who were on board the boat and who were suddenly thrown into the water. Also according to the applicants, the crew of the Libyan ship did not provide life jackets, hit the people in the water with ropes and threatened them with weapons.

7. It appears from the file that the Italian military authorities made several attempts to contact the Libyan crew, asking them to shut down the vessel's engines and coordinate rescue operations with SW3. The Ras Jadir refused to cooperate with SW3, claiming to have been designated as the vessel responsible for the on-scene rescue (On Scene Commander).

8. SW3 began rescuing those in the water at around eight in the morning, assisted by an Italian Navy helicopter, and took on board several migrants, including nine of the applicants.

9. Eight applicants first boarded the Ras Jadir; then, six of them escaped with others to join SW3. They claim to have suffered several injuries by the Libyan coast guard.

10. The crew of SW3 also recovered the bodies of those who died at sea, including the bodies of two children, sons of the applicants S.S. and R.J. respectively.

11. The applicants R.J. and E.R.O., who remained on board the Ras Jadir, were allegedly tied up by ropes, beaten and threatened by the Libyan crew; they were reportedly taken to a detention camp in Tajura, Libya, where they were reportedly subjected to ill-treatment and violence. On a date that has not been specified, they were repatriated to Nigeria as part of the voluntary humanitarian return assistance program of the International Organization for Migration (O.I.M.).

12. According to the information transmitted to the Court, the fifteen applicants who boarded SW3 were transported to Italy, where they currently reside. The two applicants who remained on board the Ras Jadir, namely R. J. and E.R.O., currently reside in Nigeria. They are all reachable by phone and / or email.

B. Relevant domestic law

Bilateral agreements between Italy and Libya

13. Before the Libyan civil war of 2011, Italy and Libya signed agreements concerning the fight against illegal immigration (for more details, see *Hirsi Jamaa and others v. Italy* [GC], no 27765/09 ECHR 2012). According to a statement by the Italian Defense Minister on February 26, 2011, the application of these agreements was suspended.

14. On April 3, 2012, the Italian Interior Minister visited Libya to re-launch cooperation on immigration matters. According to its response to parliamentary question No. 4-06711, an agreement was signed on this occasion ”providing for cooperation initiatives in the field of public security, in particular for the fight against criminal organizations which manage the smuggling of migrants, the training of the police force, the control of the coasts and the

reinforcement of the surveillance of the Libyan borders, in order to encourage the voluntary repatriation of the migrants". The text of this agreement is not public.

15. On February 2, 2017, the Italian government and the Libyan government of national agreement (formed in 2016 under the aegis of the UN) signed in Rome a Memorandum of Understanding for cooperation in the field of development, strengthening of border security between Libya and Italy, prevention of illegal immigration, trafficking in human beings and smuggling.

Under Article 1 of the said Protocol:

"The Parties undertake to

a) launch cooperation initiatives, in accordance with the programs and activities of the Presidential Council and the Government of Libya of National Accord, concerning assistance to military and security institutions, to reduce the flow of irregular migrants and deal with their consequences, in accordance with the Treaty of Friendship, Partnership and Cooperation and other agreements and conventions signed in this area;

(..)

c) Italy provides technical and technological support to the Libyan authorities responsible for combating illegal immigration, in particular the border police and the coast guards of the Ministry of Defence, as well as other relevant departments close to the Ministry of interior."

Under Article 4 of the Protocol, Italy funds the initiatives provided for in the agreement, as well as those envisaged by a joint Italian-Libyan committee.

C. Relevant elements of international law

1**. The International Convention on Maritime Search and Rescue** ('SAR Convention') (1979, amended in 2004)

16. Both Italy and Libya are parties to the SAR Convention, drawn up by the International Maritime Organization (IMO). Article 2 of the SAR Convention provides:

"2.1.4 Each search and rescue region is established by agreement between the Parties concerned. The Secretary-General is informed of the conclusion of such an agreement.

(...)

2.1.6 Any agreement on the regions or provisions mentioned in paragraphs 2.1.4 and 2.1.5 shall be recorded by the Parties concerned or recorded in writing in the form of plans accepted by the Parties."

Article 4 of the SAR Convention provides:

"4.7.1 The activities of search and rescue units and other assets involved in search and rescue operations are coordinated on the spot so as to achieve the most effective results.

4.7.2 When several assets are preparing to initiate search and rescue operations and when the rescue coordination center or rescue sub-center deems it necessary, the most capable person should be designated as the on-site coordinator as soon as possible and, preferably, before the arrival of the means in the determined area of operations. Specific responsibilities are assigned to the on-site coordinator, taking into account the skills he appears to have and operational needs.

4.7.3 If there is no responsible rescue coordination center, or if for some reason the responsible rescue coordination center is unable to coordinate the search and rescue mission, participating means should jointly designate an on-site coordinator."

2. Communication from the High Representative of the Union for Foreign Affairs and Security Policy (HRU) on "Migration along the Central Mediterranean route Managing migration flows, saving lives"

17. In January 2017, the HRU sent a joint communication to the European Parliament, the European Council and the Council, on the general situation of migratory flows in the Mediterranean and the management projects of these flows financed by the European Union. Referring to the cooperation of the European Union and Italy with Libya, the HRU said (p.7):

"The capacity building of the Libyan Coast Guard aims, in the long term, to achieve a situation in which the Libyan authorities can demarcate a search and rescue zone fully in line with international obligations. With this in mind, the EU is providing financial support to the Italian Coast Guard to help their Libyan counterparts set up a maritime rescue coordination center, a prerequisite for effectively coordinating search and rescue operations in the region. Libyan search and rescue zone, in accordance with international regulations."

3. Italy's report to the International Maritime Organization (IMO)

18. On December 15, 2017, Italy presented to IMO a report on the results of Italian-Libyan cooperation in the "Libyan Coordination and Rescue Center Project" funded by the European Commission. The conclusions of the report are as follows:

"4. The Italian Coast Guard has a decisive role in strengthening the capacity of the competent Libyan authorities in the search and rescue region. The assistance given to the Libyan authorities for the establishment of a maritime coordination and rescue center, and for the conclusion of agreements with neighbouring countries concerning the search and rescue zone, could, in the medium or long term, strengthen the operational capacity of the competent Libyan authorities for maritime surveillance operations and contrast to irregular migration."

19. Libya declared its SAR zone in June 2018.

D. International documents concerning the situation of migrants in Libya

1. The position of the United Nations High Commissioner for Refugees (UNHCR) on returns to Libya

20. In September 2018, UNHCR released the second update of its position on returns to Libya. In it, UNHCR describes the situation of migrants in Libya as follows:

"17. Asylum seekers, refugees and migrants who pass through or remain in Libya are in a particularly vulnerable situation in the context of the unstable security situation and deteriorating socio-economic conditions. The majority of asylum seekers, refugees and migrants do not have access to residence permits, and they are at high risk of arrest and detention for illegal stay. Due to their irregular status, the absence of official documents and widespread discriminatory practices (particularly, but not only, against people from countries south of the Sahara), they are often excluded from social security mechanisms and are would be denied access to basic services, including emergency care, so that their living conditions are precarious. Many are therefore forced to turn to survival strategies. According to a December 2017 study, there is no difference in terms of access to resources and services between refugees and migrants who have resided for a long time in the country and those who have arrived more recently.

(...)

19. After an interception or rescue at sea, the Libyan Coast Guard (GCL) hand over the collected persons to the authorities of the Directorate for the Fight against Illegal Migration (DCIM), who transfer them directly to government detention centers. where they are held for an indefinite period. Currently, there is no possibility of release, except in the case of repatriation, evacuation or resettlement in a third country. UNHCR currently estimates that more than 8,000 people, including more than 4,500 of one of the nine nationalities UNHCR is able to register in Libya, are being held in detention centers run by the UNHCR. DCIM after having been rescued or intercepted at sea, or after having been arrested on land during house raids or identity checks, particularly near land borders. There are no data available on people held by different armed factions or criminal networks in unofficial detention centers, including warehouses and farms. No matter the location: according to sources, the conditions of detention do not meet international criteria and have been described as 'appalling', 'nightmarish', 'cruel, inhuman and degrading'. Asylum seekers, refugees and migrants, whether men, women or children, are systematically, or are at great risk of being, victims of torture and other forms of ill-treatment, including rape and other forms of sexual violence, forced labor and extortion, both in official and unofficial detention centers. Examples of religious and racial discrimination in detention were also reported. Detainees have no opportunity to challenge the lawfulness of their detention or treatment. Third-country nationals in detention are also suffering from the general security situation in the country, such as violent fighting between rival armed groups in Tripoli at the end of August 2018."

2. The Amnesty International report

21. In its 2017/2018 Report on the Situation of Human Rights in the World, Amnesty describes the situation in Libya as follows:

"Migrants, refugees and asylum seekers were widely and systematically subjected to serious human rights abuses in detention centers and at the hands of Libyan coast guards, smugglers and armed groups. Some have been taken into custody after being intercepted at sea by the Libyan coast guard as they attempted to cross the Mediterranean to Europe. It was estimated that some 20,000 people were held in detention centers run by the Directorate for Combating Illegal Migration (DCIM), a branch of the GUN Interior Ministry. The conditions of detention there were appalling, with extreme overcrowding, a lack of medical care and food, and systematic acts of torture and other ill-treatment, including sexual violence, beatings and acts of violence. extortion. DCIM controlled between 17 and 36 official centers, but several

thousand illicit places of detention throughout the country were in the hands of armed groups and criminal gangs engaged in highly lucrative human trafficking."

3. Statement by the President of the United Nations Security Council (PCS) S / PRST / 2017/24

22. On December 7, 2017, the PCS presented the following statement:

"The Security Council expresses its deep concern at reports indicating that migrants are sold as slaves in Libya."

GRIEVANCES

Relying on Articles 2 and 3 of the Convention, read in conjunction with Article 1 of the Convention, the applicants complained that the Rome MRCC, by allowing Ras Jadir to take part in the rescue operations, had exposed them at risk of ill-treatment and at risk of death. According to the applicants, the Italian authorities had failed in their positive obligations under Articles 2 and 3 to protect their lives and their physical integrity vis-à-vis the actions of the crew of the Ras Jadir. They claim that the Italian authorities could not have been aware that the Libyan refoulement practices are contrary to the standards of the Convention.

The applicants E.K., A.A, I.A., M.O., J.O. and R.J., allege that they were injured and ill-treated by the Libyan Coast Guard during the rescue operations coordinated by the Rome MRCC.

The applicants S.S. and R.J. complain about the death of their respective children, which occurred during the sinking of the boat in which they were traveling.

Relying on Articles 3 and 4 of the Convention, all the applicants allege that they were exposed to the risk of being returned to Libya, a country in which irregular migrants are detained in inhuman and degrading conditions and risk being subjected to slavery. They are also said to have run the risk of being arbitrarily repatriated to their countries of origin.

Relying on Articles 3 of the Convention and 4 of Protocol No. 4, read in conjunction with Article 1, applicants RJ and ERO allege that they were illegally returned to Libya, where they were subjected to the torture and inhuman and degrading conditions of detention. They also complain about the conditions of their repatriation to Nigeria, decided in the absence of sufficient guarantees.

Relying on Article 13 of the Convention, read in conjunction with Articles 2 and 3 of the Convention and 4 of Protocol No. 4, the applicants complained that it was impossible to

challenge before the judicial authorities the ill-treatment inflicted by the crew of the Ras Jadir, the illegal refoulement to Libya, the mistreatment suffered there, and the risk of being repatriated to their country of origin.

QUESTIONS TO THE PARTIES:

1. Do the facts complained of by the applicants in the present case fall within the jurisdiction of Italy?

2. In view of the applicants' allegations and the reports relating to the rescue at sea of the applicants' boat (see application form and attached documents), did the Italian authorities expose the applicants to treatment contrary to Article 3 of the Convention?

3. Was the right to life of the children of the applicants S.S. and R.J. respected?

4. In the light of the information from several international sources concerning the living conditions of illegal migrants in Libya, did the Italian authorities expose the applicants to the risk of being subjected to treatment contrary to Article 3 of the Convention? and to be subjected to slavery within the meaning of Article 4 of the Convention?

5. The return to Libya of the applicants R.J. and E.R.O. Does it amount to a collective expulsion contrary to Article 4 of Protocol No. 4?

6. Did the applicants have access to an effective remedy before a national body guaranteed by Article 13 of the Convention to assert their rights guaranteed by Articles 2, 3 and 4 of Protocol No. 4?

INFORMATION REQUEST:

The parties are also invited to provide the Court with the following information:

- Did the rescue of the applicants' boat take place in an area of S.A.R. (search and rescue) responsibility?

- Was the Rome MRCC responsible for coordinating the search and rescue mission of the applicants' vessel under the "SAR Convention"? Which vessel was designated responsible for organizing the on-site rescue operations (On Scene Commander)?

Appendix 2

Italy-Libya agreement: The Memorandum of Understanding

Memorandum of understanding on cooperation in the development sector, to combat illegal immigration, human trafficking and contraband and on reinforcing the border security between the Libya State and the Italian Republic the National Reconciliation Government of Libya State and the Italian Republic Government, here it follows 'The Parties' mentioned

They are determined to work in order to face all the challenges which have negative repercussions on peace, security and stability within the two countries and in the Mediterranean region in general.

In the awareness of the sensitiveness of the present transition phase in Libya and the necessity to continue on supporting the efforts aiming to the national reconciliation, in view of the stabilization that allows the formation of a civil and democratic Country.

Recognizing the common historical and cultural heritage and the strong bond of friendship between the two people are the basis to face the issues coming from continuous and high fluxes of irregular migrants.

Reaffirming the principles of Libya sovereignty, independence, territorial integrity and national unity, besides the non-interference in internal affairs.

In order to implement the subscribed agreements with regard to the Parties, including the Treaty of Friendship, Partnership and Cooperation signed in Bengasi on August 30th 2008, and in particular the article 19 of the same Treaty, the Tripoli Declaration of January 21st 2012 and other agreements and memorandums signed on the subject.

The Parties have taken cognizance of the Italy commitment in the dialogue and cooperation relaunching with the African countries of priority relevance for the migration routes, which led to the 'Fund for Africa' establishment.

Considering the Italian initiatives implemented pursuant previous agreements and memorandums of bilateral understanding, besides the support ensured to the revolution of February 17th. In order to achieve solutions regarding some matters that negatively affect the Parties, including the irregular immigration phenomenon and its impact, the fight against terrorism, the human trafficking and fuel contraband.

Reaffirming the resolute determination of cooperating to individuate urgent solutions to the irregular migrants matter which cross Libya to go to Europe by sea, through the provision of temporary hosting camps in Libya, under the exclusive control of the Libyan Interior Ministry, in anticipation of repatriation or voluntary return to the countries of origin, working at the same time so that countries of origin accept their own citizens, that is signing agreements with these countries in regard to.

Recognizing that measures and initiatives undertaken to solve the irregular migrants' situation in accordance with this Memorandum don't have to damage in any way the Libyan social fabric or threaten the demographic equilibrium of the Country or the economic situation and the security conditions of Libyan citizens.

Highlighting the importance of Libyan land and sea borders' control and security, in order to ensure the reduction of illegal migratory fluxes, the fight against human trafficking and fuel contraband, besides highlighting the importance of benefiting from the experience of the institutions involved in the fight against the irregular immigration and the borders' control.

Considering the obligations coming from the international common law and the agreements which bind the Parties, including the Italy membership in the European Union, in the framework of the systems in force in the two Countries, the two Parties confirm the cooperation wish to implement the dispositions and purposes of this Memorandum agreeing on what follows:

Article 1

The Parties commit to:

A) start cooperation initiatives in conformity with programs and activities adopted by the Presidential Council and the National Agreement Government of the Libya State, in reference to the security and military institutions' support in order to stem the illegal migrants' fluxes and face the consequences coming from them, in accord with what foresees the Treaty of friendship, partnership and cooperation signed by the two countries and agreements and memorandum of understanding signed by Parties.

B) the Italian party provides support and financing to development programs in the regions affected by the illegal immigration phenomenon within different sectors, such as renewable energy, infrastructure, health, transports, human resource development, teaching, personnel training and scientific research.

C) the Italian party commits to provide technical and technologic support to the Libyan institutions in charge of the fight against illegal immigration, and that are represented by Defense Ministry border guard and the coast guard and Interior Ministry competent organs and departments.

Article 2

In addition, The Parties commit to undertake actions in the following sectors:

1) completion of the land borders' control system of south Libya, according to what foreseen by the above-mentioned article 19 of the Treaty.

2) compliance and financing of the above-mentioned hosting centers already active in respect of the pertinent laws, benefiting from available funds by Italy and funds by European Union. The Italian party contributes through medicines and medical equipment supply for the health hosting centers in order to fulfil the illegal immigrants' medical needs, treatment of transferable and serious chronic diseases.

3) the Libyan personnel training within the above-mentioned hosting centers to face the illegal immigrants' conditions, supporting the Libyan research centers which operate in this field so that they can contribute in the individuation of the most adequate methods to face the irregular immigration phenomenon and human trafficking.

4) the Parties collaborate to propose within three months from the signature of this memorandum, a wider and more complete Euro-African cooperation view, to eliminate the causes of irregular immigration, in order to support the countries of origin of immigration in the implementation of development strategic projects, raise the level of tertiary sectors so that to improve the life standard and the health conditions, and contribute to the poverty and unemployment reduction.

5) support to the present international organizations and that operate in Libya in the migration sector in order to continue the efforts also aiming to the migrants' return to their countries of origin, including the voluntary return.

6) start of development programs through adequate job creation initiatives within the Libyan regions affected by illegal immigration phenomena, human trafficking and contraband, as "income replacement".

Article 3

In order to accomplish the purposes of this Memorandum, the parties commit to establish a mixed committee composed of the same number of members between the parties to individuate the action priority, identify financing, implementation and monitoring instruments of the commitments undertaken.

Article 4

The Italian party provides the financing of the initiatives mentioned in this Memorandum or the ones proposed by the mixed committee indicated in the previous article without additional obligations for the Italian State budget in respect of the allocations already foreseen, besides making use of available funds from European Union, in respect of the laws in force in the two countries.

Article 5

The Parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements of which the two Countries are part of.

Article 6

The disputes between the Parties regarding the present Memorandum's interpretation and application will be friendly negotiated by diplomatic means.

Article 7

The present Memorandum of understanding can be modified on request of one of the two Parties though a notes' exchange during its forcefulness period.

Article 8

The present Memorandum comes into force in effect at the signature. It has triennial validity and it will be renovated by tacit agreement at the deadline for an equivalent period, unless written notification by one of the two contracting Parties, at least three months before the deadline of the period of validity.

Elaborated and signed in Rome on February 2nd 2017 in two original copies, each one in Arabic language and Italian language, all texts equally maintained.

For the National Reconciliation Government of the Libya State Fayez Mustafa Serraj

President of the Presidential Council for the Government of Italian Republic Paolo Gentiloni

President of the Ministers' Council

Translated by Sandra Uselli