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WORLD MARITIME UNIVERSITY

Malmö, Sweden

INTERDICTION OPERATIONS AT SEA

**A critical analysis of irregular migration beyond the
territorial seas**

JUNYA OTANI

Japan

A dissertation submitted to the World Maritime University in partial
fulfilment of the requirements for the reward of the degree of

MASTER OF SCIENCE

in

MARITIME AFFAIRS

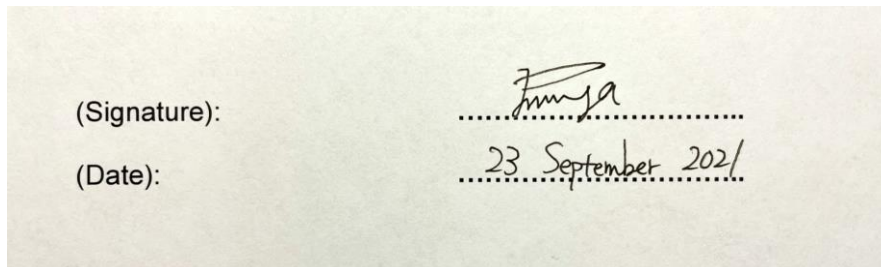
MARITIME LAW AND POLICY

2021

Declaration

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.



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(Date): 23 September 2021

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World Maritime University

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Junya Otani

Abstract

Title of Dissertation: Interdiction operations at sea

Degree: Master of Science

The dissertation is a study of interdiction operations against irregular maritime migrants at sea. Interdiction operations beyond the territorial seas can be contentious since different legal frameworks are applicable depending on the three maritime areas: contiguous zones, exclusive economic zones and high seas. However, existing conventions and national laws do not necessarily cover the whole migrant situation as most of them were established a long time ago.

There are many publications regarding irregular maritime migrants in the past. However, interdiction methods always change depending on migration trends, government policies and case laws. Accordingly, legal analysis needs to be updated all the time.

Both Italy and Australia have a long history of dealing with irregular maritime migrants. Because the two countries are located in different regions, the ways that the states approach are somewhat different. In order to have a holistic view, it is significant to compare how the two states tackle migrant issues with the case laws, the government regimes and the regional frameworks.

With regard to irregular migrants, it is essential to discuss three key points: jurisdiction, non-refoulement and rescue operations. The discussion chapter examines the above three issues, whilst conclusions and further research are written in the final chapter.

KEYWORDS: Interdiction operation, irregular maritime migrants, jurisdiction, non-refoulement, rescue operation

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List of Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
ECHR	European Convention on Human Rights, 1950
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	The International Covenant on Civil and Political Rights, 1966
ICG	Italian Coast Guard
IMO	International Maritime Organization
IOM	International Organization for Migration
LCG	Libyan Coast Guard
MoU	memorandum of understanding
MPA	Maritime Powers Act 2013
MRCC	Maritime Rescue Coordination Center
NGO	non-governmental organization
Refugee Convention	Convention Relating to the Status of Refugees, 1951
SAR	search and rescue
SAR convention	International Convention on Maritime Search and Rescue, 1979
SOLAS convention	International Convention for the Safety of Life at Sea, 1974
UNCLOS	United Nations Conventions on the Law of the Sea, 1982
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UNSMIL	United Nations Support Mission in Libya

Chapter 1 Introduction

1.1 Background

An interdiction operation against irregular maritime migrants is a complex issue in the maritime field as there are different maritime zones and different applicable laws at sea. The Mediterranean Sea, the Gulf of Mexico and the Indo-Pacific region are some of the biggest hotspots for migrants around the world. In this regard, there are already a lot of articles and reports have been established but mostly the ways of approaching are from the humanitarian side. Whilst protecting human rights is essential, there might be other factors needed to consider. For example, a remarkable incident occurred off the coast of Libya, which was in the high seas in November 2017. A dinghy departed the Tripoli area on November 5th that soon capsized after departure. There were almost 150 people onboard and the search and rescue (SAR) coordination was dealt by the Maritime Rescue Coordination Center (MRCC) in Rome as they received the distress call first (*S.S and others v. Italy*, 2019). However, the Italian Coast Guard (ICG) did not rescue the migrants in distress and instead let the Libyan Coast Guard (LCG) rescue migrants at sea. The plaintiff argued from the humanitarian side that this is an unacceptable situation because Italy knew that the migrants were taken back to Libya and it could possibly violate humanitarian laws (*Hirsi Jamaa and others v. Italy*, 2012). From the law enforcement side, in contrast, there was a possibility that migrants might have sent a distress call in order to enter Italy even though the boat was probably still seaworthy at that time. Therefore, it should be well balanced from both the humanitarian and the law enforcement perspectives in light of legal instruments and case laws in each maritime zone.

1.2 Aims and objectives

The aims and objectives of this study are to critically analyze what kinds of methods maritime authorities apply in order to interdict irregular maritime migrants at sea

since it is discussed that authorities might potentially violate international conventions and legislations. Interdiction is generally defined as stopping, inspecting, searching and seizing vessels for the purpose of prohibiting actions (Kenneth et al, 2016). This study will also discuss how interdiction methods have changed over the course of time. Case laws could influence the trend of interdiction methods because authorities occasionally take new methods after the court's decision. Therefore, this research intends to fill the gap between previous interdiction operations and emerging cases outside of the territorial seas. An expected outcome of this research is to create a holistic view of irregular maritime migrant issues and understand maritime authorities' interdiction methods in different major migration areas. As for the research areas at sea, this study will look at the Mediterranean Seas and the Indo-Pacific regions in order to examine the regional issues at first. Thereafter it will narrow down to Italy and Australia to specifically focus on the migration policy in the two states.

Looking at Italy, it is one of the biggest destinations for migrants in Europe together with Spain and Greece according to the United Nations High Commissioner for Refugees (UNHCR) report (UNHCR, 2021). The report also notes that the departure countries for migrants are not focused on one place. Especially in the Mediterranean Seas, although Tunisia is the biggest departure country for migrants in 2020, Algeria and Morocco are major states that migrants depart to go to Europe. For instance, Morocco has been a transit country for sub-Saharan migrants since after 1990 (Lahlou, 2015). In terms of maritime operations, there were many case laws established with regard to interdiction operations by the Italian maritime authorities. Several key judgements were made by the ECtHR and they are worth analyzing with related legislations in Europe. The *Hirsi* case particularly had a major impact not only in Italy but in the entire Europe. A brief summary of this incident is that a group of about two hundred people left Libya for Italy. Applicants of the *Hirsi* case, 11 Somali and 13 Eritrean people, were intercepted by the Italian maritime authority in Italy's exclusive economic zone. After that, the migrants were transferred to the Italian military vessel and eventually sent back to Libya. While migrants were being

sent back, none of them was interviewed properly, and nobody knew where the military ship was heading (*Hirsi Jamaa and others v. Italy*, 2012). The ECtHR later concluded that Italy violated several articles of the European Convention on Human Rights (ECHR). Among other things, a remarkable decision was that jurisdiction is given to Italy in the exclusive economic zone regarding the interdiction operation against migrants. Accordingly, European maritime authorities needed to alter the interdiction methods. This study will analyze further in Chapter 5.

As for Australia, the country is one of the biggest migrant destinations, especially from East Asia and Southeast Asia. A key difference between Italy and Australia is that there might be multiple jurisdictions involved in Italy's cases such as Libya and other nations, whilst Australia normally does not collaborate with other countries in order to interdict migrants. Looking at the decision from the courts, many cases are in favor of plaintiffs in Europe whilst most cases are in favor of defendants in Australia even in comparable ones. Therefore, it is worth considering by comparing similar cases in the two different regions with regard to interdiction operations. Additionally, there are relatively new cases taking place in Australia as opposed to other large maritime migration areas such as the United States. Consequently, Australian national legislations and regional frameworks are regularly updated along with new cases. Those are the reasons why the two nations were selected for this study. A comparative analysis of their experiences will contribute to having a holistic view on the irregular maritime migrant issue.

1.3 Scope and exclusions

The scope of this research does not exceed an analysis of interdiction methods by maritime authorities. It spotlights how authorities exercise law enforcement power in light of relevant conventions, legislations, case laws and other factors. In terms of the maritime areas, this paper will discuss the areas which are beyond the territorial seas such as contiguous zones, exclusive economic zones and high seas.

Since coastal states generally have the right to exercise its law enforcement power in the territorial seas, migrant issues are relatively clear that states are responsible for migrants under related conventions in the territorial seas. That said, one thing should be noted is that the right of “innocent passage” is generally accepted based on the freedom of navigation to ships of all states under the United Nations Conventions on the Law of the Sea (UNCLOS) (Tanaka, 2019). However, this is unlikely to apply to migrant boats for two reasons. First, the purpose of irregular migrant boats is to reach a coastal state to enter the state without proper immigration procedures in general. Second, Article 19 of the UNCLOS says that a passage of a foreign ship against a coastal state’s immigration laws shall be regarded to be prejudicial. For those reasons, once migrant boats enter the territorial seas, it is hard to claim that migrants do not breach any coastal state’s immigration laws and merely pass through as an innocent passage. In essence, entering the territorial seas by breaching a coastal state’s laws could be regarded as a “non-innocent” passage.

Moreover, this paper does not extend its analysis to a state which is under war. Otherwise, the Geneva Convention applies to the case. Furthermore, the correlation between the UNCLOS, the International Convention on Maritime Search and Rescue (SAR Convention) and the Geneva Convention is uncertain and this would require another examination.

1.4 Research questions

The research question in this paper is to examine what major issues are in assessing interdiction operations both in Italy and in Australia and how it changes over the course of time in light of recent case law. In addition, it is significant to spotlight whether emerging cases do not fall within the scope of state’s responsibility. For example, several authors have expressed their views that an indirect approach conducted by Italy could possibly violate relevant conventions such as the case of *S.S and others* (Pijnenburg, 2020; Moreno-Lax, 2020). Having said that, since no case law has been issued for an indirect approach yet, it is uncertain whether or not Italy

is responsible in such case. This point will be later analyzed in Chapter 2 and Chapter 5.

This study will tackle three major questions that are crucial in assessing interdiction operations. First of all, the condition of establishing criminal jurisdiction outside of the territorial sea is a fundamental issue in analyzing irregular maritime migrants. In terms of criminal jurisdiction, although exercising law enforcement power is limited against foreign vessels by Article 27 of the UNCLOS, it is unlikely to apply to migrant boats in the territorial seas. Because the purpose of maritime migrants entering the territorial seas is normally recognized as reaching a coastal state, Article 27 excludes such a case if the consequences of the crime extend to the coastal state. Hence, the article only applies to merchant vessels or government vessels operated for commercial purposes (Markard, 2016). As for migrant boats, they potentially breach a coastal state's immigration laws at the point of entering the territorial seas. Therefore, a coastal state may exercise its jurisdiction to irregular maritime migrant boats in the territorial seas. On the other hand, exercising jurisdiction is not generally accepted outside of the territorial seas. In other words, it is limited to exceptional cases in principle. Additionally, the UNCLOS defines limited purposes in each maritime zone for interdiction beyond the territorial seas. In this regard, the jurisdiction matter is even more complex recently since maritime authorities took new approaches including indirect interdiction without any physical contacts. Therefore, this is a new challenge for the issue of irregular maritime migrants in Europe and Australia. Whether authority is given jurisdiction or not is a fundamental point to see if the authority needs to comply with related conventions and legislations.

Second, applicability of non-refoulement in Article 33 of the Convention Relating to the Status of Refugees (Refugee Convention) is another major issue. For instance, the Refugee Convention does not stipulate any areal limitation to which area the convention applies. For this reason, there are conflicting views between a broad interpretation and a narrow interpretation of this convention. A broad interpretation

does not limit its applicable area, whilst a narrow interpretation restricts the area in the territorial seas. As for Italy and Australia, both nations have tackled this issue in the past. For example, Italy once questioned the applicability of non-refoulement in the high seas given its areal uncertainty (*Hirsi Jamaa and others v. Italy*, 2012). Australia also claimed that it has a limited scope in the contiguous zones (*CPCF v. Minister for Immigration and Border Protection*, (2015)). Italy also argued in the *Hirsi* case that there should be several exceptions for the applicability such as memorandum of understanding (MoU) or bilateral agreements. The reason that states are reluctant to accept non-refoulement is that once the principle of non-refoulement applies, maritime authorities are restricted to take certain actions such as sending back migrants to a country with a possibility of torture or other inhuman treatments. Therefore, the applicability of non-refoulement is one of the most significant protections for irregular maritime migrants.

Third, an interpretation of rescue operations is another crucial issue in assessing interdiction. As maritime operations at sea are mostly invisible for other people, authorities could say that they simply conduct a rescue operation by following the duty of rescue instead of interdiction. The correlation between interdiction and “duty to render assistance” which is stipulated in Article 98 of the UNCLOS is often brought up as an arguable point since both actions seem identical by picking up migrants on board. Moreover, a “place of safety” which is described under the SAR Convention is another point because states sometimes take migrants to a place that is not the closest point from the rescue area. For example, the migrants argued in the *CPCF* case that the authority tried to take migrants to India even though the rescue point was originally just sixteen nautical miles from the Australian territory (*CPCF v. Minister for Immigration and Border Protection*, 2015). Furthermore, it is sometimes claimed that bilateral agreements or regional cooperation should be taken into consideration. All in all, differentiating between rescue operations and interdiction is a key to assessing maritime activities.

1.5 Outline of the dissertation

In the first chapter, the three key research questions were raised with the set scope based on the objectives of the study.

In the second chapter, this research will discuss interdiction operation methods in Italy with the government's policy and how it changes over the course of time. The interdiction methods also vary depending on regional cooperation and agreements with foreign countries. Case laws are mainly about Italy and Libya as these incidents critically influenced on Italy's migration policy. In addition, Australia's methods should be spotlighted as well since Italy and Australia take different measures on similar matters. The result will be summarized at the end of the chapter.

In the third chapter, it is essential to analyze the backgrounds of maritime migration in Italy and Australia. It is because the trend of interdiction methods has been historically changing by case laws and regional frameworks. After that, fundamental legal instruments in three maritime zones will be examined. Each maritime zone has its own character and legally contentious issues. Finding those points will benefit in assessing further topics in the following chapter.

In the fourth chapter, this study will tackle three key topics: jurisdiction, non-refoulement and rescue operations. These topics will be analyzed based on the outcome of the second and the third chapters. In order to have a holistic view, further case laws will be brought up here to corroborate this research.

Finally, conclusions and further research will be given in the five chapter. This will highlight how the outcome would be instructive with current case laws and what future cases could offer to develop the discussion of interdiction operations.

Chapter 2 Literature review

In the second chapter, literature reviews on specific topics are conducted contributing to the following discussions. Since the purpose of this chapter is merely for literature review, no examination will be made out of the content. The analysis will be described in the following chapters. Item 2.1 and 2.2 explain the general meaning of interdiction operations and SAR operations. After that, while Item 2.3 will describe Italy's new interdiction methods after the *Hirsi* decision, Item 2.4 will explain Australia's political influence and the court's decision at the center of the *CPCF* case. The outcome of the above analysis will be shown in Item 2.5.

2.1 Interdiction operation

Guilfoyle (2009) introduces the origin of the word “interdiction” from the Oxford English Dictionary, explaining an “authoritative prohibition”. It possibly came from an old French legal word *entredit*. This word firstly appeared on the law enforcement scene by the United States military in the 1940s or 1950s. Guilfoyle (2009) describes that “interdiction” can be dissected into a two-step process. First, boarding, inspecting and searching of a ship can be conducted for a potential illegal action at sea. Second, exercising further law enforcement such as arresting ships, persons or seizing cargo where such suspicions are justified by the first procedure. The first step should be called “boarding” or “searching”, whilst the second step may be called “seizure”. Since the second process requires much more law enforcement power than the first one, “seizure” should be separated from the rest of the processes. In addition, Guilfoyle (2009) claims that there are mainly three actors conducting interdiction at sea. Interdiction may be enforced by either coastal states, flag states or third states, depending on the maritime zone and legal instruments. Coastal states might be able to interdict ships in several maritime zones close to its coast. Flag states could also conduct interdiction especially in the high seas which is specified in Article 94 of the UNCLOS. Moreover, third states might be an actor under limited

conditions of international laws or with permission by flag states or coastal states. One example that third states may exercise its law enforcement power is Article 110 of the UNCLOS. States are allowed to interdict a vessel if the vessel is engaged in piracy, the slave trade and so on (Guilfoyle, 2009).

Tsaltas (2010) spotlights the complexity of the matter of interdiction on the high seas as freedom of navigation and a state's sovereignty are given to vessels. In this regard, the author claims that there are three rights in interdicting vessels at sea based on the UNCLOS and customary laws in the high seas. Firstly, the "right of approach" should be brought up because a maritime authority sometimes verifies a vessel's flag, registry and other symbols or identifications. Secondly, there is the right of enquiry including boarding and inspecting a vessel and legal documents. This right could be used by authorities if the suspicion remains after the first phase. Lastly, an authority might enforce the right of seizure if they find an evidence of illegal activities conducted in the high seas (Tsaltas et al, 2010). These rights are somewhat exemplified in actual training scenes. For example, the United Nations Office on Drugs and Crime (UNODC) coordinates a training called the Visit, Board, Search and Seizure (VBSS) training in Asia and African countries for the purpose of capacity buildings of maritime officers (Tsaltas, 2010).

Coppens (2012) takes a different approach from the above two authors. The author claims that there is no internationally recognized difference between interception and interdiction. According to the Executive Committee of the UNHCR, both interception and interdiction are used as synonyms and the Committee uses those words interchangeably (UNHCR, 2003). In addition, although Tsaltas (2010) introduced the three rights of interdiction, Coppens (2012) asserts that the right of approach might be excluded from the principle of interdiction. The reason being that, maritime authorities often check a ship's registry or flag as a routine operation in the high seas. As the action does not restrict any activities of commercial ships, the right of approach should not be bound by legal instruments. Furthermore, the author also asserts that the right of approach could fall under the category of interception

because the principle of interception is wider than interdiction. In this regard, the European Union (EU) Council stipulates the definition of maritime interception including “observing a ship’s identity and nationality” (European Council, 2010). Therefore, even if the right of approach is not included in interdiction, it could fall under the category of interception (Coppens, 2012).

2.2 SAR operation

Ratcovich (2019) mentions that the SAR Convention is the prime legal instrument of the international maritime rescue legislation as well as the UNCLOS and the International Convention for the Safety of Life at Sea (SOLAS Convention). The SAR convention entered into force in 1985 and both Italy and Australia are the state parties of the SAR convention. Based on the convention, “rescue” means an operation to retrieve rescuees in distress, supply initial medical needs, and carry rescuees to a place of safety. “Distress” means a situation that a vessel or a person is under imminent danger and requests immediate support. All ships are required to give support to a vessel in distress. In terms of the role of vessels, the UNCLOS divides it into two categories: all ships and maritime authorities. Whilst the item 1 of Article 98 requires all ships to merely render assistance to ships in distress at sea, the item 2 further requires maritime authorities to establish a SAR operation and coordinate the operation with neighboring country. (Ratcovich, 2019).

Mallia (2009) points out several potential issues under the current rescue conventions. First, the author found an incompatibility between the SAR convention and the situation of irregular maritime migrants. Although the convention emphasizes the importance of the duty of rescue, the possible scenarios that the lawmakers had were shipwrecks and small number of sailors when the convention was drafted. In response to mass migrants found in the Mediterranean Sea and Australia, rescue conventions are silent and the same international norms are still applied as before. Another issue is that the duty of disembarkation is not written enough compared to the duty of rescue in the SAR convention. “A place of safety” that Ratcovich mentioned above has no particular criteria to which country a vessel

should carry rescuees. Again, this might have worked traditionally as the master of ship simply consulted with rescuees to which destination the rescuees would like to disembark. However, in the wake of mass migrants, some states have changed its border guard policy. For example, a Spanish vessel called *Francesco Catalina* rescued migrants in Libya's SAR zone in 2006. The vessel proceeded to Malta to disembark the migrants but the Maltese authority refused to accept the migrants by reasoning that there was a lack of imminent danger. Technically, Malta is not obliged to accept the migrants under the current rescue conventions. Conversely, from the humanitarian view, the Maltese authority should have rescued. To do so, the definition of "a place of safety" and "the duty of rescue" shall be modified to tailor to modern scenarios for protecting migrants. Finally, there is a possibility that maritime migrants send a false distress call or "self-induced" distress at sea. Under the current rescue conventions, a ship is bound to rescue if they receive a distress signal from another vessel. This could be taken advantage of by migrants aiming to reach their destination. Even though the master of ship may determine the most favorable disembarkation point after rescuing migrants, the master often meets some resistance or violent attitude by rescuees to alter the destination once they embark a vessel (Mallia, 2009).

Ghezelbash (2018) points out the ambiguous line between interdiction and SAR operations. For instance, the Australian maritime authority often conducts SAR operations under their border control missions. One possible reason is that while the state is bound to follow some duties including human rights laws with interdiction operations, Australia could potentially avoid those obligations by declaring as SAR operations. This method was also taken by the Italian authority in the *Hirsi* case. Though this claim was denied by the ECtHR in 2012, the Australian authority continues this approach by keeping all information secret. Hence, it is hard to assess whether the authority is conducting interdiction or SAR operation with little information. The author mentions that the line between the two operations might be intentionally distorted by the Australian authorities, especially after Operation Sovereign Borders was launched in 2013, and this conflation method goes even

further. The purpose of the operation is to prevent irregular maritime migrants from entering the Australian territorial seas while the authorities remain silent about any details of activities. Furthermore, it is important to note that the authority could potentially change from an interdiction operation to a SAR operation during a mission and vice versa. Hence, the ambiguity of the two operations could be exploited by maritime authorities (Ghezelbash et al, 2018).

2.3 Interdiction and the state's maritime policy in Italy

Pijnenburg (2020) spotlights the MoU updated between Italy and Libya in 2017. This agreement was initially aimed to strengthen the Treaty of Friendship, Partnership and Cooperation (TFPC) between the two nations in 2008. After the *Hirsi* case, *de jure* and *de facto* control of interdiction operations were denied by the European Court of Human Rights (ECtHR) which became a trigger for Italy to change the interdiction methods. Based on the updated MoU agreement, Italy guarantees financial, technical and asset support to Libya in order to curb the flow of illegal migrations. Instead of conducting a direct approach to migrants, Italy chose an indirect approach by supporting the LCG. In fact, the MoU in 2017 called “aid of assistance agreement” has a huge influence on the migrant issue in the Mediterranean Sea. Consequently, the number of migrants reaching Italy decreased and a lot of them were sent back to Libya. When it comes to this indirect approach, the author points out that criminal jurisdiction over migrants should not be excluded from the indirect interdiction method by the reason of lacking physical presence. Her work also mentions the possibility that this support might be a trigger that jurisdiction is given to Italy. Indeed, it is argued that if state A directs or suggests state B to push back migrants, it could suffice to establish jurisdiction to the both states with certain conditions. For example, if there is an obvious link of financial assistance, technical support or a breach of international obligation between two countries, both states might be to blame. Even if an interdiction operation is conducted in the high seas and the Italian authority is not there, the ECtHR once mentioned that “states might be found to have jurisdiction where they exercise public powers abroad” (Al-Skeini and others v. The

United Kingdom, 2011). In addition, the case of *Women on Waves* corroborates the theory that physical contact and interception are not necessary to establish jurisdiction (*Women on waves and others v. Portugal*, 2009). Therefore, even if Italy is not present and merely providing financial and technical support to Libya, there is a possibility that Italy is responsible for the Libya's interdiction operation because of "extraterritorial" jurisdiction (Pijnenburg, 2020).

Kim (2017) took a different approach on this matter because the author claims that jurisdiction should be established by a factual control at least over a person or a territory. In other words, extraterritorial jurisdiction may be limited to only exceptional cases. If this theory applies to the indirect approach that Pijnenburg (2020) mentioned, Italy might not be responsible for Libya's interdiction due to a lack of factual control. Operations are clearly conducted by the LCG itself. Moreover, the author mentions that even though the *Hirsi* case has a strong influence on Italy's interdiction method, there is still room for discussion with different legislations. For instance, it might be possible to find a solution by looking at a public international law such as the Responsibility of States for Internationally Wrongful Acts in 2001 (ARSIWA). The author found three possible situations where this legislation might be applied to the aid of the Italian authorities. First, Article 16 of the ARSIWA says that if state A knows the circumstances of the internationally wrongful act by state B with the support of A, state A is responsible for the act such as a violation of non-refoulement. Although this may be true, it could be difficult to apply to the Italian case because it is not a settled part of the law. It means that even the definition of "aid or assistance" is still unclear. Second, applying Article 47 of ARSIWA is another possibility. It stipulates that if several states are both responsible for the same internationally wrongful act, both are to blame. In this case, a key point is to find a correlation between the two countries on the same action, which is sending migrants back to Libya. However, it needs to be remembered that European countries, especially Italy, do not have authorities to conduct interdict operations out of their territories in general. Since Italy simply provides assistance to Libya, it is hard to find a violation in Italy. Furthermore, even if Article 47 can be applied, it

requires an aggression with a particular intention by a supporting country. From this aspect, it could say that Italy has a specific motivation to provide assets and finance. However, it might be difficult to prove it since such an intention is hard to be proven. Finally, it might also be possible to rely on “positive due diligence obligations” because it is recognized by several fields of international laws. With this principle, it is emphasized that the “positive due diligence” obligation is usually found within a country’s territory. However, once jurisdiction is established outside of the territorial seas like *Hirsi* case, it might give rise to an obligation and it could claim the state’s responsibility as a result. In other words, establishing jurisdiction by Italy’s assistance is a key point. Hence, the author tackles this indirect approach with the jurisdiction matter. In addition, the ARSIWA is brought up as another possibility to apply as an international law (Kim, 2017).

Moreno-Lax’s work (2020) goes further the topic of aid of assistance. Her work refers to the recent case called *S.S and others* in the Mediterranean Sea as explained in Chapter 1.2 (*S.S and others v. Italy*, 2019). In this case, it should be highlighted that the MRCC instructed both the LCG and the non-governmental organization (NGO) vessel to rescue a migrant boat although the Italian Navy helicopter and vessel were nearby as a part of the operation. Another fact is that the Libyan vessel was donated by the Italian government a few months before this incident. Additionally, several LCG crews were trained in Europe in order to strengthen border control capability. Allegedly, 47 people were pulled back to Libya and later they were detained under inhuman circumstances. Her work goes deeper compared to the previous two authors since Italy did not simply provide assets in the case of *S.S and others*. The Italy-funded LCG vessel conducted inhuman treatment and the Italian authority was merely an onlooker in the distress area. With these factors, the author claims that jurisdiction should be given to Italy under the ECHR Article 1 in line with the *Hirsi* case. The main difference between *S.S and others* and *Hirsi* is whether or not a physical contact exists. For this matter, even though the Italian authority did not enforce any physical power to migrants in the event of *S.S and others*, it could fall within the same policy as the *Hirsi* case by the “principle of

proxy”. In other words, the Italian authority remotely exercised its power with the Italy-funded vessel instead of physically being there. Hence, the author goes onto the claim that it might reach an adequate amount of “effective control” over migrants on the boat. Looking at the case laws, most cases including *Medvedev* required “*de fact*” control with a “full and exclusive” manner in order to establish a state’s jurisdiction (Medvedyev and others v. France, 2010). The author further expects that this case might be a turning point contributing to a human rights breach because there might be no severance between the authority’s indirect approach and *de facto* control with a full and extensive manner. This case is still ongoing as of August 2021 since it was lodged in 2019. However, the case *S.S and others* is expected to determine whether or not a state, especially Italy, continues to have indirect interdiction operations in the future (Moreno-Lax, 2020).

Papastavridis’s work (2020) basically follows the previous author’s work but it also considers the factor of SAR operations as a possible exception from establishment of jurisdiction. Firstly, Papastavridis (2020) recognizes that a fundamental question would be whether or not jurisdiction is given to a state with contactless control of migrants at sea. It is also emphasized that the ECHR Article 1 basically covers states’ territorial seas but it could be extended under limited conditions. It refers to the *Al-Skeini* case which the ECtHR showed the validity of a personal case over a spatial case (*Al-Skeini and others v. The United Kingdom*, 2011). A key point of this case was whether the court prioritizes control over the persons or the location of the incident. In the same principle, the author mentions that the above personal case might apply to an indirect approach at sea. The reasoning behind it is that the court clarified in the *Al-Skeini* case that when the state exercises its power to control individuals, the state is obliged to follow the ECHR Article 1, even if it is in an extraterritorial area. Secondly, looking at SAR operations, an important question is whether or not a rescue operation is recognized as an exception of jurisdiction under related conventions. More clearly, it is questionable in the *S.S and other* case if Italy claims that they are simply involved in rescue operations and it has nothing to do with interdiction. The author says that the coastal state needs to take action with due

diligence as well as establishing search and rescue missions. In this regard, there could be two conditions brought up in order to fulfill the requirement of jurisdiction during SAR operations. First, a clear recognition of a rescue operation is required even over technology such as unmanned vehicles, radar and satellite systems. Second, the existence of a coordinator is also essential like coast guard vessels or even a rescue coordination center. To apply this hypothesis, jurisdiction might be given to Italy in the *S.S and others* case since the coordinator was the Italian MRCC having *de facto* control over individual migrants as an on-scene coordinator. In addition, the MRCC was fully aware of the case as they were the first receiver of the distress call. Hence, the author claims that the two conditions are satisfied and there is a possibility that jurisdiction is given to Italy. (Papastavridis, 2020).

2.4 Interdiction and the state's maritime policy in Australia

In his work, Marmo (2017) highlights the *CPCF* case in 2014 with the executive and the judicial decisions by comparing it to the *Hirsi* case. The purpose of Marmo's work is to analyze how judicial globalization goes based on the two case laws with different political backgrounds. The reason is that both incidents occurred beyond the territorial seas and non-refoulement is one of the key points. At first, the author writes about how the Australian policy against migrants flowed in the past by referring to the *Tampa* case in 2001 (*VCCL v. Minister for Immigration & Multicultural Affairs*, 2001). This case was a turning point in Australian history since the state tightened their migration policy right after *Tampa* by amending the Migrant Act 1958. Additionally, Australia started Operation Relax to strengthen the border security in the wake of this case. Several years later, Australia also experienced a surge of migrant influx between 2006 and 2013, which led to a stricter security policy. This is how Australia strengthened their border security over the course of time. With regards to the *Hirsi* and the *CPCF* cases, Marmo (2017) indicates that both have several similarities since the authorities took place interdiction during the routine operations and the military officers took onboard to detain without any identification procedures. A key difference is the courts' decisions about non-

refoulement. Whilst the High Court of Australia decided that the whole interdiction procedure at sea was lawful in the *CPCF* case, the ECtHR found a violation in the *Hirsi* case. In this regard, what is particularly found through the *CPCF* case is a strong and swift political movement. As a matter of fact, the author points out that while the judges were contemplating the *CPCF* case, the government immediately passed several updates to the Migration Act 1958 and the Maritime Powers Act 2013 (MPA) in order to remove migrants in the high seas without violating any national laws. Consequently, the MPA had a huge influence on the case because the legislation was passed in December 2014, which was just one month before the court took a final judgement of the *CPCF* case. These political swift movements clearly characterize Australian policy. Moreover, the judicial and the executive are closely linked in re-organizing the legislations and irregular migrant policies. In the end, the author concludes that the judiciary will have a key role to deal with irregular migration matters, in contrast to the executive's effort trying to decrease the significance of the courts (Marmo et al, 2017).

Lamichhane (2017) tackles the matter of non-refoulement from a different direction by citing another case law. In the *Sale* case, the Supreme Court of the United States of America once mentioned that the USA is not under the obligation of non-refoulement regarding interception operations beyond the territorial seas (*Sale v. Haitian Centers Council*, 1993). The court also indicated that the right of non-refoulement should be limited only in the state's territory. The purpose is to avoid a concern with regard to inappropriately broad reading of Article 33 of the Refugee convention. It is also claimed that the drafters' initial thought of the non-refoulement provision did not go beyond the territorial seas. Therefore, the convention applies so long as the state is engaged in its operation in the territorial seas. Looking at Australia, the Full Federal Court of Australia once stated in the *V872/00A* case that there is no duty to decrease the state's sovereign rights and the regulations of border security simply because of the purpose of non-refoulement (*V872/00A v. Minister for Immigration and Multicultural Affairs*, 2002). Hence, it is obvious that Australia's policy has been historically strict on irregular migrants trying to enter the

country. Even in the *CPCF* case, the High Court judged that the state did not violate non-refoulement.

On the other hand, the UNHCR argued about the *CPCF* case that the obligation of non-refoulement applies to the state parties of the Refugee Convention wherever it exercises jurisdiction (UNHCR, 2015). They also mentioned that Australia is bound to follow its obligations in good faith and Australian internal laws do not change its international obligations. Lamichhane (2017) also introduced the perspective from the Human Rights Committee that a state may be held accountable for human rights violations even if it happens beyond the territorial seas if there is a causal connection between an interdiction operation and a violation. To supplement this theory, the Inter-American Commission on Human Rights once stated that the court disagreed with the *Sale* case and they found a violation of non-refoulement regarding the interdiction operation in the high seas. The court reasoned that if there is a significant risk of violation of the Refugee Convention, the state may be in violation of the covenant (The Haitian Center for Human Rights et al. V. United States, 1997). Finally, the author concluded that while the Refugee Convention remains silent on several cases, the ECtHR and the Treaty Bodies reaffirmed the effectiveness of the convention beyond the territorial seas (Lamichhane, 2017).

In her work, Moreno-Lax (2019) views the *CPCF* case from both non-refoulement and SAR operation perspectives. The author indicates that the *CPCF* case is a typical example of an argument with two points: a rescue operation and a place of safety. As for the rescue operation, although Australian authority detained the migrants onboard the vessel “*SIEV885*” located 16 nautical miles from Christmas Island, they took the migrants to India as per the order from the National Security Committee of Cabinet in Australia. This entire process took a month and the migrants were kept onboard during the whole time. The migrants later argued that the operation going to India was unreasonable as there is no agreement of disembarkation of migrants between Australia and India. The author cited the judge’s comment saying that “removal must be to a reasonable place and within a reasonable time”. The other judge also states

“only limitation on the power was that it be exercised reasonably in good faith”. For those reasons, the author claims that the choice of destination and the period of detaining onboard are arguable. Additionally, since no evidence suggests that there is no fear for migrants after they enter India, the Australia’s operation and lengthy detention do not fulfill the obligation under the principle of non-refoulement. In particular, given the fact that India has not ratified the Refugee Convention, it is difficult to predict that India is a place to offer such a protection.

As India is unlikely to be considered as a place of safety, her work further examines to seek where could be the “place of safety” under the SAR convention and the SOLAS convention. In light of the International Maritime Organization (IMO) Guidelines issued in 2004, a ship cannot be a place of safety because a ship is only a temporary place of safety and it does not satisfy the meaning of the original term. In the *CPCF* case, the author argues that Christmas Island seems a suitable place as a destination due to the distance from the rescuing point. A contentious point is that both the SAR convention and the SOLAS convention do not mandate a disembarking point as the closest land. Even so, the author mentions that Christmas Island is the most possible option because both the SAR convention and the SOLAS convention require to disembark rescuees as soon as reasonably practicable (Moreno-Lax et al, 2019).

Klein (2014) claims that a key legislation to assessing the *CPCF* case is the MPA. Article 18 of the MPA allows maritime officers to exercise law enforcement power such as detaining, boarding and searching against foreign ships or ships without a nationality in the contiguous zone. In terms of a place of safety, Article 72 states that maritime officers are allowed to take a vessel to a port or another place that is regarded as an appropriate place. Even if the place is outside of Australia, it is still acceptable. Maritime officers can also change the destination of migrants in the middle of transferring at any time if necessary. Therefore, in the *CPCF* case, authorities are widely granted the power of law enforcement at sea and the interdiction operation was conducted in accordance with the MPA. When it comes to

the detention period against irregular migrants at sea, Article 74 stipulates that maritime officers are not allowed to keep a person onboard unless the officer is satisfied. It also says that an officer needs to recognize that the situation is safe for people onboard before the authority releases migrants. In other words, it is possible to keep migrants onboard until the authority is “satisfied” on reasonable grounds. In response to this, Klein (2014) argues that migrants are protected by the principle of non-refoulement written in the MPA. Looking at Article 95, it requires to ensure human rights protections by saying;

A person arrested, detained or otherwise held under this Act must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.

Even so, the Court disagreed with the claim that the maritime officers violated the principle of non-refoulement in the *CPCF* case. The officers’ act was recognized within the scope of the MPA. Even so, it is indicated that there might be other international human rights conventions applicable with the principle of non-refoulement. For example, non-refoulement is written in the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT) to which Australia is a state party. Therefore, it could be possible that the refugees claim human rights obligation with the above conventions (Klein, 2014).

2.5 Result of literature review

This section summarizes several key points that were brought up in this chapter.

In Chapter 2.1, Guilfoyle (2009) describes that interdiction could be divided into a two-step process. Arresting as the second step requires more law enforcement power and legal basis than the first step: boarding, inspecting and searching. The author also mentions the three actors that conduct interdiction at sea. Coastal states, flag states and third states could be all actors but there are different law instruments

applied to each state (Guilfoyle, 2009). Tsaltas (2010) interprets interdiction in a more extensive way by mentioning the three rights. The rights of approach, enquiry and seizure are generally accepted for authorities but the author also claims the complexity of applicability of these rights in the high seas. Freedom of navigation is widely recognized as the right of all ships in the above area (Tsaltas, 2010). Coppens (2012) tackles the matter of interdiction differently since the right of approach could be excluded from the principle of interdiction. The author also argues the vagueness of the definitions between interdiction and interception. Although there is no official recognition of the difference, it is widely regarded that the word “interception” has a broader meaning than “interdiction” (Coppens, 2012).

In Chapter 2.2, Ratcovich (2019) introduces the general term of a SAR operation. The duty of rescue written in Article 98 of the UNCLOS is divided into two parts: all vessels and maritime authorities. The latter is required to establish a SAR operation, if necessary, with other states (Ratcovich, 2019). Mallia (2009) brings up some potential issues under the current legal instrument of the rescue conventions. Since the SAR convention was established a long time ago, it does not match emerging cases such as mass migrants at sea. For example, the term of disembarkation is unclear because it could be several places under the SAR convention. While some nations have updated its border guard policy, the SAR convention has still been silent on the issue of mass migrants. Similarly, a false distress call could be problematic as some migrants might take advantage of the duty of rescue from commercial ships. It is said that some crew members are threatened by migrants to change the destination at their will (Mallia, 2009). Ghezelbash (2018) further extends the topic to the ambiguity between interdiction and SAR operations. As an example, his work points out the possibility that Australian authority claims a SAR operation in order to avoid responsibilities caused by interdiction. This trend was even strengthened by launching Operation Sovereign Borders in 2013. As the authority keeps operational information secret, it is hard to examine if the authority conducts interdiction or a SAR operation. In this case, the authority could switch from

interdiction to a SAR operation so long as they remain silent about their maritime activities (Ghezelbash, 2018).

In Chapter 2.3, after several new cases occurred recently in Italy, there is room for a discussion whether or not an indirect approach falls within the past case laws in the ECtHR. Pijnenburg (2020) explains how Italy's interdiction methods have changed since the MoU between Italy and Libya in 2017. The author spotlights the "aid of assistance" method, also called indirect approach, to irregular migrants through the LCG. Italy started adopting this method after their claim was denied in the *Hirsi* case. There is an obvious link between financial assistance as well as technical support and the breach of the international obligation. Hence, jurisdiction should be given to Italy by referring to the *Al-Skeini* case and the *Women on waves* case. On the other hand, Kim (2017) recognizes a limited scope of jurisdiction and took a different approach to this issue. The author finds a possible violation of the ARSIWA. According to Article 16 and 47, even if one state merely supports the other country, both might be to blame if two states are involved in the same wrongful act. Moreover, a violation could be found under the "positive due diligence" obligation of international laws on the condition that jurisdiction is given beyond the territorial seas.

Moreno-Lax (2020) extends the previous two authors' theory further by mentioning the *S.S and others* case in the Mediterranean Sea. Her work highlights two facts. Firstly, the LCG vessel was donated by Italy. Secondly, the Italian authorities were merely in the distress area without taking any action. The author introduces a new theory called a "proxy" system provided that Italy had an adequate amount of "effective control" over migrants on the boat through the LCG. Lastly, Papastavridis (2020) finds the conditions of establishing jurisdiction by citing the *Al-Skeini* case. Given the fact that there are a personal case and a spatial case, the former one might apply to the *S.S and others* case. The author also considers the possibility of a SAR operation that could be used as an exception. However, jurisdiction might be still

given to Italy because there was a clear recognition and an existence of coordinator by Italian authorities.

In Chapter 2.4, several authors tackle potential problems of Australian interdiction operations at the center of the *CPCF* case. Marmo (2017) and Lamichhane (2017) view the case through the principle of non-refoulement, whilst Moreno-Lax (2020) and Klein (2014) consider the case from the aspect of SAR operations along with human rights concerns.

Marmo (2017) compares the *CPCF* case with the *Hirsi* case in order to examine a judicial globalization between the two regions with different political backgrounds. The cases have similarities as both happened outside of the territorial seas. In addition, the principle of non-refoulement is at the center of the arguments. The author particularly points out that Australian political movement with the immediate update of the Migrant Act and the MPA, which happened during the court's procedure of the *CPCF* case. It is also found that the judiciary and the executive are closely connected in modifying the legislations and migrant policies.

On the one hand, Lamichhane (2017) has a different approach to the *CPCF* case by referring to the *Sale* case in the USA. Since the Court denied the involvement of non-refoulement outside of the territorial seas, the author emphasizes that applicability of non-refoulement in the high seas is not a uniform decision throughout the world. In this regard, his work has a opposite view because there is still a possibility that a state is responsible for human rights violations outside of the territorial seas. The case of *The Haitian Center for Human Rights* is one example that the court found a violation of non-refoulement in the contiguous zones.

Moreno-Lax (2019) particularly focuses on the rescue operation of the *CPCF* case regarding the destination and the detention period onboard. After reviewing the SAR convention, the SOLAS convention and the IMO guidelines, the author claims that Christmas Island is the most plausible option as a place of safety given the distance from the rescuing point and the requirement of prompt disembarkment by the related

conventions. hence, the author argues that the authority's action might be against the principle of non-refoulement because the authority tried to take the migrants to India and the entire procedure took a month.

Klein (2014) highlights the MPA and its influence on rescue operations in Australia. Despite the fact that Australia is a state party of the Refugee Convention, the author recognizes that the MPA grants a wide range of enforcement power to maritime officers including taking refugees outside of the territory, detaining migrants until officers are satisfied with reasonable grounds. However, it might be against the ICCPR and the CAT conventions because those legislations contain the clause of human rights obligations. Hence, the refugees could claim a violation of the ICCPR and the CAT as Australia is a state party of both conventions.

Chapter 3 Analysis

In Chapter 3, this paper will examine the states' background including key legislations and policies in Italy and Australia in order to evaluate how the trend changed over the course of time and understand characteristic methods in each country. In addition, legal instruments in the contiguous zones, the exclusive economic zones and the high seas will be highlighted since the UNCLOS and other key conventions are the bases of analyzing irregular migrants entering a foreign country.

3.1 Background of migrant issues in Italy and the Mediterranean

This section will examine migrant issues in Italy and other Mediterranean countries. Even though Italy's issue is the focal point of this research, neighboring countries, including northern and southern Mediterranean countries, should be also mentioned as maritime migrants depart and arrive in multiple states through the Mediterranean Sea route.

In Europe, maritime migrants from African and the Middle Eastern countries is one of the biggest concerns. Based on the UNHCR report, over one hundred thousand people arrived in northern Mediterranean countries in 2019 (UNHCR, 2021). From the migrants' view, the Mediterranean route is a major route going to Europe since it is geographically close to the southern part of the Europe. However, going across the ocean with unreliable boats takes a lot of risks; therefore, allegedly over a thousand people died in the Mediterranean Sea in 2019 and almost 30 percent of victims were children (UNHCR, 2021). Looking at Africa, people generally choose close countries from Europe as a departure point and one of the examples is Libya. Knowing that the current regime in the state is not stable and functioning well, Libya became an ideal nation for irregular maritime migrants to go to Italy, Malta and Greece (Cusumano et al, 2020). Morocco is another principal state for people seeking a chance to reach Europe. People tend to choose Libya and Morocco especially after the EU – Turkey statement in 2016, which basically blocked off the

“Eastern route”. Therefore, both the central and the western routes appear to be the major ones that a lot of migrants take (Ippolito et al, 2020). As for the EU – Turkey deal, the main purpose is to send migrants back to Turkey without any formal asylum application process in order to decrease the influx of migrants. In return, the EU offers financial and technical supports to Turkey (BBC, 2016). This influenced on the migrants’ flow as the present statistics say that the amount of people coming to Europe through the Mediterranean route has been decreasing (UNHCR, 2021). The report also indicates that the hot spot of maritime migrants in the Southern Mediterranean area slightly shifted now to the western side, which includes Morocco and Algeria.

Another thing that should be taken into consideration is the COVID situation. Due to the coronavirus restrictions, several states refuse to give a safe port to humanitarian NGO ships engaged in SAR operations in the Mediterranean Sea (Office of the United Nations High Commissioner for Human Rights, 2021). From the humanitarian perspective, it might deteriorate migrants’ health conditions and alternative measure should be considered.

As for the European policy, the issue of irregular migrants is not a brand-new topic. Looking at the past event, the Barcelona Declaration in 1996 already tackled migrant issues between the European and Arab states in order to strengthen their cooperation and reduce the pressure of migrant matters amongst the member states (Ippolito et al, 2015). Following the Declaration, the European Mediterranean Partnership was established to improve the circumstances of economy, society and the fundamental human rights of immigrants in the EU (European Commission, 2020).

In recent history, a remarkable event that influenced on the European policy was a migrant surge, which is generally referred as a “refugee crisis” in 2015 and 2016. This phenomenon led to a number of changes in the European policies intended to enhance the control of migrant flows. First, in response to the migrant surge, the “European Integrated Border Management” was legally defined for the first time by the regulation in 2016 (European Union, 2016). The purpose of this regulation is to

enhance the boarder management and SAR operations by enacting 13 legislative acts in total. Subsequently, the function of the FRONTEX was strengthened in order to improve the limitation of personnel and necessary assets. At the same time, the “European Border and Coast Guard” was established as a new FRONTEX.

With regard to maritime operations, “Operation Sophia” of the European Union Naval Force Operation in the Southern Central Mediterranean (EUNAVFOR Med) was launched in 2015. It aimed for supporting the LCG missions and law enforcement activities in the wake of the migrant shipwrecks that originally came from Libya. According to the United Nations Support Mission in Libya (UNSMIL), the number of migrants from Libya exponentially surged in 2014 and 2015 (UNSMIL, 2015). Therefore, the EU states tried to decrease the flow by giving assistance such as capacity building programs to Libyan officers with the aim of shifting the responsibility to Libya and controlling the situation of migrants. Another significant event is the Malta Declaration in 2017, having new cooperation measures between Europe and Libya to strengthen the relationship even further by funding and donating equipment (European Council, 2017). As such, the European countries have been spotlighting on the Libyan situation since the migrant surge in 2015. Furthermore, Operation Sophia officially ended and was replaced by Operation Irini, which also focused off the coast of Libya by monitoring violations until 2023.

Based on the background of maritime migrants in the Mediterranean Sea, this study will focus on Italy from this point. Italy has been a major destination for maritime migrants mainly from North Africa over the past couple of decades due to its geographical position from Africa (Vari, 2020). As a matter of fact, between the year of 2015 and 2016, over 335,000 irregular migrants arrived in Italy through the Mediterranean route (Scotto, 2017). On the departure side, Libya is one of the biggest leaving points for migrants going to Italy. Based on the UNHCR report, over 90% of migrants who reached the Italian coast came from Libya in 2017 and 2018 (UNHCR, 2018). However, this number significantly dropped after the year of 2018 due to the strengthened cooperation between Italy and Libya. Moreover, the fact that

a lot of migrants come from Libya does not mean that the migrants' nationality is mostly Libyan. The same UNHCR report mentions that dominant nationalities among migrants are Tunisia, Bangladesh, Ivory Coast, Algeria, Pakistan and so on.

Aside from the Libyan case, another major departure point to go to Italy is Tunisia. After the number of migrants from Libya significantly dropped in 2018, migrants started choosing Tunisia as an alternative port. Although maritime migrants from Tunisia took up only less than 5 percent in the entire migrants in Italy in 2017, the number increased to 43 percent in 2020 (UNHCR, 2020). To sum it up, whilst Libya has been one of the major departure points for a long time, Tunisia recently emerged as an alternative country for maritime migrants due to the tightened migration policy between Italy and Libya.

With regard to the flow of the migration policy in Italy, it could be roughly divided into two categories: before and after the *Hirsi* case. It is because the *Hirsi* case gave a huge influence on the European states' migrant policy. Before the *Hirsi* case, Italy and Libya had a lot of agreements including the protocol in 2007, the treaty in 2008 and the executive protocol in 2009 in order to control migrant issues (Vari, 2020). However, since Italy's maritime operation against migrants was condemned due to the violation of the non-refoulement and the prohibition of collective expulsions in the *Hirsi* case in 2012, Italy temporarily stopped the migrant "push-back" operation. That said, this case was not the end of discussion. In 2017, Italy and Libya reached a new MoU to reinforce the border security and develop further cooperation (Palm, 2017). The major difference of Italy's policy between before and after the *Hirsi* case is that while Italy took a direct approach to migrants in the past, the state began to have more indirect approaches by providing financial, training and asset support to Libya. This MoU was even renewed in 2020 with continuing support from Italy to Libya (Abdallah, 2021).

3.2 Background of migrant issues in Australia

Australia is a democratic nation which historically accepted a lot of irregular maritime migrants from the Middle East, Central Asia and South Asia (Missbach, 2015). Since the nation is geographically isolated from neighboring countries, migrants usually use a boat trying to reach the Australian coast. Every time Australia encountered the huge influx of migrants, the nation created a number of protocols and regulations in order to tighten its border security (Hassan et al, 2020).

Accordingly, the number of migrants decreased. Looking at the past events, the state has experienced two migrant surges since 2000, based on the report of the Parliament of Australia (Parliament of Australia, 2017). The report says that the first migrant surge occurred in 2001, at which time 54 boats were found off the coast of Australia. The number decreased to 19 boats in 2002 mainly because of Australia's revised protocol and the new maritime operation. The second surge happened in 2012 with 403 boats. However, the number decreased again to 104 boats in 2013 and only 1 boat in 2014 due to the new legislation called the MPA. The main difference between Italy and Australia is that while Italy's migrant policy heavily relies on the EU policy and operations, there is relatively less pressure on Australia in changing its policy because Australia is not a part of a regional framework such as EU. Instead, Australia has established the MoU with several Pacific countries and Southeast Asian countries. For instance, Papua New Guinea and Nauru are important states for Australia because there are offshore processing centers in those countries. The centers were built in order to accept migrants from Australia. As a result, over 3,000 people have been sent from Australia to the above two nations since 2013 (Refugee Council of Australia, 2021). Malaysia and Cambodia are also the nations that decided to accept migrants from Australia after having MoU with Australia (Hassan et al, 2020).

In terms of Australian policy, a fundamental legislation regarding migrants is the Migration Act 1958, which prohibits the arrival of irregular migrants through the ocean without visa (Klein, 2014). This legislation was later amended, triggered by

the first surge of migrants including the case *VCLL*, so called “*Tampa* incident” in 2001 (*VCCL v. Minister for Immigration & Multicultural Affairs*, 2001). This sudden increase caused a major change in Australian policy. Soon after the *Tampa* incident, the Howard regime announced that the state introduced the “Pacific Solution”, which includes an amendment of the Migration Act to introduce a new border guard regime (Roam, 2017). Furthermore, the government launched Operation Relex to strengthen the border control by intercepting ships in the contiguous zones and pushing them back to outside of the Australian territorial seas (Klein, 2014). Interestingly, however, these events do not mean that Australia has been maintaining strict measures against maritime migrants since 2001. This is also true that Australia temporarily stopped strict border control for several years after the *Tampa* incident. In 2008, when Rudd became the Prime Minister, he decided to suspend the Pacific Solution as a part of his new policy (Grewcock, 2008). Consequently, the number of irregular migrant boats increased again from 23 to 117 between 2008 and 2009. In response to this, the following Prime Minister Gillard resumed the Pacific Solution in 2012 after being sworn in.

The second surge of irregular maritime migrants happened in 2012. Following the event, the circumstances in Australia drastically changed since the government enacted the MPA in 2013. The legislation includes several strict measures against migrants. Article 72 of the MPA states that Australian officers are authorized to require a boat to stop, detain migrants at sea and possibly take them to another place if there are reasonable grounds (Australian Government, 2013). These maritime authorizations are arguable because some claim that this is against the principle of non-refoulement and the Refugee Conventions (Hassan et al, 2020). In addition to the MPA, a new operation called “Sovereign Borders” was introduced in 2013 by Prime Minister Abbott (McDonald, 2015). The purpose of the operation is to secure the border guard and monitor unauthorized boats. According to the government, this new operation is explained with strong words that;

Anyone who attempts an unauthorized boat voyage to Australia will be turned back to their point of departure, returned to their home country or transferred to another country. No-one who travels illegally to Australia by boat will be allowed to remain in Australia (Australian Government, 2021).

This authorized “push-back” operation successfully reduced the number of migrant boats at sea. Moreover, it is important to realize that the government keeps operational information secret under Operation Sovereign Borders. In 2013, the Prime Minister Morrison officially announced that the government will not reveal information when asylum seekers boats were turned back by the authority (ABC news, 2013).

After the new operation, there were some controversial cases regarding interdiction of maritime migrants conducted by the maritime authority in addition to the *CPCF* case, which this paper introduced in Chapter 2. For example, the “Suspected Irregular Entry Vessel 885 (SIEV-885)” with 153 Sri Lankan Tamil refugees was intercepted in the contiguous zone in 2014 (*Jark v. Minister for Immigration and Border Protection*, 2014). Allegedly, the vessel was in distress as it almost ran out of fuel due to the oil leak. After that, people were taken by Australian authority and disembarked in Papua New Guinea (IMO, 2018). Although there is no sufficient information revealed publicly, there is a possibility that Australian interdiction is against the rescue obligations since the authority had no right to interdict a vessel until the rescue operation ends.

To summarize, the migration matter is one of the most important topics in Australia and the policy changes from regime to regime. As for major events, Australia historically enacted its own legislations including the Migration Act in 1958 and the MPA in 2013 with corresponding maritime operations in order to strengthen the border guard. Especially, the Pacific Solution and the MPA authorize maritime officers to interdict migrant boats in a strict way by towing to outside of the Australian maritime area. As for the judicial decisions, the High Court of Australia is

historically in favor of the authority side in relation to the *Tampa*, the *CPPF* and the *SIEV-885* cases.

3.3 Legal instrument in the contiguous zones

From this section, this study will examine legal instruments in the contiguous zones, the exclusive economic zones and the high seas. According to the UNCLOS Article 33, contiguous zones are the area that a coastal state exercises the necessary control to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial seas. To put it another way, a coastal state is not obliged to exercise its jurisdiction in the contiguous zones and a state is merely allowed to do so (Ratcovich, 2019). Looking at the UNCLOS Article 33, the Item A can only apply to incoming vessels as preventive measures cannot be taken to outgoing vessels. On the other hand, the Item B can only apply to outgoing vessels since an incoming ship may breach a coastal law within the territorial seas only after it passes the limit of the territorial seas (Tanaka, 2019). In applying this article to incoming vessels, a nexus to the territorial seas of the coastal state is a key point. If a vessel simply passes through the contiguous zones, it does not satisfy the requirements by Article 33.

In terms of jurisdiction, Ratcovich claims that Article 33 implies that it only contains enforcement jurisdiction, but not prescriptive jurisdiction (Ratcovich, 2019).

However, the International Organization for Migration (IOM) mentions that this is contentious because two interpretations could be found: a narrow interpretation and a broad interpretation. While a narrow interpretation follows Ratcovich's view, a broad one asserts that a coastal state is allowed to regulate a violation of domestic law in the contiguous zones only for limited circumstances (IOM, 2018). In addition, Tanaka (2019) supports the narrow definition because an infringement of internal laws of a coastal state in the contiguous zones is out of the scope of Article 33 (Tanaka, 2019).

One of the controversial points in the contiguous zones is the definition of “necessary control” under Article 33. The UNCLOS does not define the clear meaning of what actions a coastal state can take in the area. For example, in the *CPCF* case, the Australian authority not only interdicted the migrants but took them to Papua New Guinea, which is outside of Australian jurisdiction. However, it is questionable to what extent an authority is allowed to enforce its law enforcement power in the contiguous zones. One claims that there is a broad view that a coastal state may take necessary and proportionate power to conduct law enforcement operations in the contiguous zones (Klein, 2017). The other author states that Article 111 of the UNCLOS may be a manifestation of the methods. The reason is that the provision allows authorities to have concrete methods including the right to stop, arrest and escort a ship to the port in the contiguous zones (Tanaka, 2019). In response to this theory, there is a further claim that the hot pursuit against outbound ships and exercising law enforcement against inbound ships have a crucial difference because no offence has yet to be committed by the latter case (Shearer, 1998). Hence, it is questionable if Article 33 allows a coastal state to exercise as much law enforcement power as Article 111 does. In this case, establishing a legislation of a coastal state might supplement the provision of Article 33 for further clearance.

3.4 Legal instrument in the exclusive economic zones

In Article 56 of the UNCLOS, it describes a general scope and a limitation of law enforcement by coastal states in the exclusive economic zones. Especially, exercising of its power is restricted for the purpose of exploring, exploiting, conserving marine resources. In addition, the exclusive economic zones are not a part of the high seas and the area could be regarded as a *sui generis* zone (Tanaka, 2019). The reasoning is that Article 86 stipulates “the provisions of the Part VII of the UNCLOS apply to all parts of the sea that are not included in the exclusive economic zone”. Therefore, the two maritime zones are clearly differentiated. On the one hand, basic legal consideration in the high seas can apply to the exclusive economic zones as vessels are given the freedom of navigation based on Article 58 of the UNCLOS, unless

otherwise stated (IOM, 2018). Concerning irregular maritime migration, it appears to be clear that a matter of the special jurisdictional rights does not include migration issues in the exclusive economic zones because the immigration concern is not included in the aims of this zone. Looking at the *Hirsi* case, interdiction was conducted by Italian authority thirty-five nautical miles away from the south coast of Italy (Papanicolopulu, 2013). This area is basically considered as the exclusive economic zone but the legal instruments of the high seas were generally applied to the case. Overall, it is reasonable to say that migrant issues in the exclusive economic zones can be fundamentally considered as it happens in the high seas unless irregular migrants are on a fishing vessel conducting the activities under Article 56 of the UNCLOS.

3.5 Legal instrument in the high seas

The high seas are composed of all parts of the ocean except for internal waters, territorial seas, contiguous zones and the exclusive economic zones. Since no state is allowed to claim sovereignty in the high seas, states fundamentally have no legal reasoning to interfere with foreign ships. With respect to the legal framework in the high seas, two factors need to be considered: the principle of freedom and the principle of fairness (Guilfoyle, 2015). The principle of freedom is written in Article 87 of the UNCLOS. For example, all states have an equal right to enjoy the freedom of activities including navigation, overflight and conducting a scientific research subject to Part VI and XIII of the UNCLOS. Apparently, this primary principle applies to irregular maritime migrants on boats. However, although all flag ships are given this right of freedom, it must be remembered that states are bound to other legislations in the high seas. The UNCLOS Article 94 stipulates that a state's duties such as exercising its jurisdiction and controlling over ships flying its flag. In other words, no sovereignty does not mean no legal basis in the high seas. Flag states have exclusive sovereignty and a responsibility over their flag ships, which is written in Article 92 of the UNCLOS.

Furthermore, even though states are given the freedom to enjoy its voyage in the high seas, there are mainly two exceptions. The right of visit and the right of hot pursuit are written in Article 110 and 111 of the UNCLOS respectively. In terms of the right of visit, a warship is required to find a reasonable ground for suspecting that the ship is engaged in piracy, slave trade, unauthorized broadcasting or without any nationality. Since exercising its force in the high seas interferes with the right of freedom, the right of visit is strictly limited (Ratcovich, 2019). Some authors also say that the definition of “reasonable ground” should be stringently viewed and general doubt and assumption cannot be related to a particular ship (Klein, 2011). Because the right of visit is an “exception” from the principle of freedom, the conditions of exercising law enforcement power must be set high. For instance, the ECtHR found a violation of Article 1 of the ECHR by the French authority in the *Medvedev* case as explained in the section 2.3. Since extraterritorial law enforcement power should be limited in general, the action taken by maritime authorities is highly scrutinized in the high seas. Concerning irregular maritime migrants, two factors might have possibly fallen under this article. First, a migrant boat having no nationality or refusing to raise its flag, considered as a stateless vessel, seems to give the right of visit to states by Article 110 (d) of the UNCLOS. Second, a state is also allowed to exercise the right of visit if a ship is possibly engaged in a slave trade with reasonable ground under Article 110 (b). According to Article 13 of the Convention on the High Seas, every state can take “effective measures” to prevent a slave trade in the high seas. However, it is hard to recognize whether or not a slave trade is conducted in the high seas as the definition of slavery and trafficking do not necessarily match the current trends (IOM, 2018). Indeed, the definitions of “slavery” and “slave trade” are stipulated in the 1956 Supplementary Slavery Convention (Papastavridis, 2013). Considering the time that the convention was created, even though human trafficking might be interpreted as a slavery trade in the modern world, the definition should be revised in order to tailor to contemporary migrant issues. Aside from a slave trade, smuggling of maritime migrants is another issue that a state needs to consider. The 2000 Migrant Smuggling Protocol is the

fundamental treaty dealing with migrant smuggling and supplementing the United Nations Convention against Transnational Organized Crime (Tanaka, 2019). Article 8 provides that a state party may take necessary procedures such as boarding and searching vessels with a flag state's consent if a state has reasonable grounds to suspect the vessel. To put it another way, interdiction in the high seas under this protocol requires a flag ship's agreement based on the concept of the exclusive sovereignty of flag states in this particular area.

Another exception is the right of hot pursuit prescribed in Article 111 (2) of the UNCLOS. Unlike the right of visit applying only in the high seas, the right of hot pursuit is relevant to other maritime areas. It is because a state is allowed to commence an enforcement action in the territorial seas, the contiguous zones or possibly the exclusive economic zones with certain conditions (IOM, 2018). With regard to the requirements to conduct hot pursuit, a coastal state needs to commence that operation in the aforementioned three maritime areas with "good reason to believe" that a vessel has infringed the coastal state's laws. Article 110 (1) of the UNCLOS describes that this applies, *mutatis mutandis*, for infringements in the exclusive economic zones (Poulantzas, 2002). In this article, *mutatis mutandis* means "with the necessary changes", meaning that if a coastal state's regulation can apply in the exclusive economic zones, the state has the right of the hot pursuit. In fact, the Tribunal of the *Saiga* case mentioned that "the question is whether, under the convention, there was justification for Guinea to apply its custom laws in the exclusive economic zones" (M/V "SAIGA" (No. 2), 1999). In other words, justification is a key to applying a coastal state's regulation in this zone. In light of possible cases for irregular maritime migrants, this article applies only to outbound vessels because Article 111 (1) states that "pursuit may only be continued outside the territorial seas or the contiguous zones if the pursuit has not been interrupted". Even so, there is still a possibility that this article applies to migrant boats. For example, when a migrant boat encounters an authority in the territorial seas or the contiguous zones and the boat tries to flee from the law enforcement by proceeding towards the high seas, this may apply (Ratcovich, 2019).

Chapter 4 Discussion

4.1 The conditions of establishing jurisdiction in the high seas

As explained in Chapter 3.3, the high seas are the unique maritime area because jurisdiction is generally not given to authorities except for flag states. In principle, unlike the contiguous zones and the exclusive economic zones, no legal reasoning to interfere with foreign vessels is accepted. In this regard, a state's jurisdiction is the most significant matter to analyze interdiction operations because authorities are not allowed to intercept migrant boats without jurisdiction. However, looking at case laws, authorities often intercepted migrant boats in the high seas. Among other things, the *Hirsi* case gave a major impact on the European maritime interdiction policy against migrants. While Australian interdiction operations mostly happen in the contiguous zones, Italy and other European countries often conduct interdiction operations in the exclusive economic zones and the high seas. Especially in the Mediterranean Sea, there are a lot of border lines of the exclusive economic zones regulated intricately as the Mediterranean Sea is surrounded by multiple countries in such a semi-closed area. Consequently, this often causes problems because the issue of migrant boats extends over several countries. Considering the abovementioned factors, this paper will focus on the *Hirsi* in order to analyze necessary conditions to establish a state's jurisdiction. In addition, other case laws as well as emerging cases will be brought up to supplement the discussion.

First of all, the focal point of the *Hirsi* case is whether jurisdiction is given to Italy although the case occurred in the exclusive economic zone, where the legal instrument of the high seas basically applies. For this matter, Italy argued that Italian maritime authority conducted so called 'push-back operation' by following the bilateral agreement between Italy and Libya (Papanicolopulu, 2013). In response to that, the ECtHR mentioned in the *Hirsi* case that;

The Court observes 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 even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these State. (Paragraph 129)

Therefore, this decision set a vital precedent for other European states that were aiming to shift its responsibility to third nations by bilateral agreements.

The second point is that what kind of actions could satisfy the conditions of establishing jurisdiction. In response to this, the ECtHR already stated in the *Medvedyev* case, which happened before the *Hirsi* case that;

In that connection, it is sufficient to observe that in *Medvedyev* and Others, cited above, the events in issue took place on board the *Winner*, a vessel flying the flag of a third State but whose crew had been placed under the control of French military personnel. In the particular circumstances of that case, the Court examined the nature and scope of the actions carried out by the French officials in order to ascertain whether there was at least *de facto* continued and uninterrupted control exercised by France over the *Winner* and its crew. (paragraph 80)

The *Medvedyev* case is the incident that happened in 2002 off West Africa. A French frigate spotted a Cambodian-flagged ship *Winner* in the high seas due to the suspicion of drug trafficking. Since The vessel *Winner* refused to answer to the radio contact and they started throwing away several packages containing cocaine in the ocean, the French members were onboard and confined crews for 13 days until they entered French territory (*Medvedyev and others v. France*, 2010). Later on, the ECtHR stated that;

The Court considers that, as this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they

were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention. (paragraph 67)

In other words, *de facto* control over people and the ship suffices the conditions to establish jurisdiction. In the *Hirsi* case, the Court cited this interpretation and maintained its position. Accordingly, the next question is the definition of "*de facto*" control. From both *Medvedyev* and *Hirsi* cases, exclusive physical contact could be considered one of the factors consisting of *de facto* control of states. Moreover, exercising continuous law enforcement should be considered. As a matter of fact, the ECtHR mentioned in the *Hirsi* case that;

The applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities." Speculation as to the nature and the purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion. (paragraph 81)

Giuffrè (2012) also emphasized that the 10-hour constraint under full control of the Italian authority clearly played a part in establishing a state's jurisdiction (Giuffrè, 2012). Furthermore, one thing that should be added here is that the ECtHR said *de facto* jurisdiction was assessed objectively based on the facts, not the state's purpose (Papanicolopulu, 2013).

The third point is the areal matter of *de facto* control. Since applying this principle in the high seas is regarded as an extraterritorial interpretation, the ECtHR is generally careful applying jurisdiction in the high seas. As for Article 1 of the ECHR, it says that;

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Chapter I of this Convention.

In other words, jurisdiction is not geographically limited as long as the Court finds a violation no matter where it is. In the *Hirsi* case, the ECtHR mentioned that;

The Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction... (paragraph 178)

This is somewhat a brief explanation of the matter of extraterritorial jurisdiction (Giuffré, 2012). However, it does not mean that the Court did not always keep the same position in the past. As for the *Brankovic* case, which happened in 1999 and NATO's air strike in Serbia was brought up as an extraterritorial jurisdiction issue, the ECtHR said;

As to the 'ordinary meaning of the relevant terms in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extraterritoriality, the suggested bases of such jurisdiction are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. (paragraph 59)

Hence, the ECtHR made its point clear that only some exceptional cases could be accepted as a matter of the extraterritorial case, though the ECtHR also mentioned that "a cause-and-effect notion of jurisdiction not contemplated by Article 1 of the ECHR" (*Brankovic and others v. Belgium*, 2001). However, in the *Medvedyev* case, the ECtHR stated that;

The Court considers that, as this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention (contrast to *Brankovic and Others*, cited above). (paragraph 67)

As explained above, the ECtHR had an opposite view of the *Brankovic* case, since the statement clarified that jurisdiction should be granted to a state even in the high seas with the condition of *de facto* control.

Following the *Medvedyev* case, the ECtHR gave further explanation to this issue with the *Al-Skeini* case happened in 2003. In the statement, it confirmed that there are two conflicting views in the case laws: territorial jurisdiction and extraterritorial jurisdiction (*Al-Skeini* and others, 2011). Additionally, the ECtHR claimed that what matters is an exercise of law enforcement over the person, not over the place. Therefore, the judge followed *Medvedev's* view, which accepts the notion of extraterritorial jurisdiction to a state. Remarkably, in the *Al-Skeini* case, there is no direct territorial connection between the state's territory (United Kingdom) and the place that the incident happened (Iraq). To sum it up, the ECtHR generally acknowledged extraterritorial jurisdiction if there is *de facto* control, which is a continuous activity by an authority no matter where it happened. The geographical link between a state and an incident place seems to be required less than before in the wake of the *Al-Skeini* case.

However, the *Hirsi* and other case laws are not comprehensive in tackling emerging cases lately. One example is the case *S.S and others v. Italy*, which took place in 2017 off the coast of Libya and both Italian and Libyan maritime authorities were involved (*S.S and others v. Italy*, 2019). This is still an ongoing case as of the time of writing. According to the NGO report, when a migrant boat sent a distress call, both the LCG vessel and the NGO vessel approached the boat. However, the LCG obstructed the NGO vessel's operation and picked up 47 migrants from the boat. Eventually, the LCG took the migrants back to Libya. The point is that before the LCG picked up the migrants, the Libyan officers were in contact with the MRCC in Rome, Italy. This means that there is a possibility that the Italian authority ordered or asked LCG to send back the migrants to Libya. In addition, the LCG vessel was donated by Italy based on the MoU in 2017 (Amnesty International, 2021). Moreover, the Italian navy's helicopter was in close proximity as a part of the

maritime operation *Mare Sicuro*. Consequently, the plaintiff claims that jurisdiction should be given to Italy.

This incident is closely linked to the discussion in Chapter 2.3, where several authors approached a matter of jurisdiction from different perspectives. Among other things, the “proxy system” should be spotlighted since it is an advanced opinion of both Pijnenburg (2020) and Papastavridis (2020). Based on this new theory, it is claimed that jurisdiction should be granted to Italy in the *S.S and others* case because of two factors: “contactless control” and the “proxy system” (Moreno-Lax, 2020). In other words, as long as there is a sufficient link between the two states, in addition to *de facto* control by the LCG, a jurisdictional link could exist between the states. To support this theory, Airaksinen (2020) introduces a similar theory. The author claims the fact that the migrants relying on the Italian MRCC’s coordination triggered jurisdiction (Airaksinen, 2020). To put it differently, what is a key to establishing jurisdiction is a law enforcement power that a nation has over people’s lives with a “long distance *de facto* control”.

On the other hand, the case laws may not support the aforementioned claim because physical contact was always found in the cases including *Medvedev*, *Al-Skeini* and *Hirsi*. Those case laws required “exercising physical power” for jurisdiction triggered by a state. Furthermore, Heinänen (2021) claims in a different way that that jurisdiction cannot be shared between the two states simply because Libya is not a state party of the ECHR (Heinänen, 2021).

Considering the both views, this paper claims that it seems unlikely that the proxy system applies to this case. First of all, the ECtHR mentioned that extraterritorial jurisdiction should be exceptional (*Hirsi Jamaa and others v. Italy*, 2012). Second, in order to apply the proxy system to this case, it is necessary to prove that Italy’s MRCC ordered the LCG to send back migrants to Libya. Otherwise, it might be merely Libya’s responsibility since Libya is a sovereign nation, and not under Italy’s authority. However, it is difficult to imagine that Italy acknowledges this theory in a straight way whether or not the MRCC actually did it. Third, looking at the current

trend of migrant issues in Europe, the case *N.D and N.T v. Spain* should be highlighted as a reference (N.D and N.T v. Spain, 2020). A brief summary of this case is that two migrants were pushed back by the Spanish Border Police to Morocco after the migrants illegally entered Spanish territory (European Database of Asylum Law, 2020). The Court initially concluded in 2017 that Spain is to blame because pushing migrants back is a violation of the ECHR. However, the case was overturned in 2020. The ECtHR finally reached a different conclusion that there is no breach if the deportees have caused the collective expulsion by their own “culpable conduct” (N.D and N.T v. Spain, 2020). Though this is a case on land and does not directly apply to maritime issues, one thing should be reminded that the ECtHR’s decisions had been mostly in favor of the plaintiff side before this case. As can be seen in the *Brankovic* case and the following incidents, the case *N.D and N.T* could be a trigger that the ECtHR alters its own view.

To conclude, the case laws have set a couple of standards in terms of establishing jurisdiction in the high seas. However, the decisions were not always uniform because the ECtHR once stated that jurisdictional competence of a state is primarily territorial in the *Brankovic* case. After that, the ECtHR acknowledged that extraterritorial jurisdiction is accepted with a *de facto* control in a continuous, uninterrupted manner in the *Medvedyev* case. The Court maintained this claim in the *Al-Skeini* and the *Hirsi* cases. In the *Al-Skeini* case, the ECtHR recognized that exercising law enforcement is over the person, rather than over the state’s jurisdictional area. That said, the case of *S.S and others* brought a new discussion since it does not fall within the definitions of extraterritorial jurisdiction that the case laws have previously established. As for this new case, the ECtHR might not find a jurisdictional nexus between Italy and Libya due to the fact that there is no physical presence by Italy at the scene. Furthermore, without further information to corroborate a link between Italy and Libya, aside from the MoU and financial and technical support, it might be overstretching the interpretation of jurisdiction. In principle, establishing jurisdiction beyond a state’s territory is exceptional and the meaning should not be stretched in an extensive manner.

4.2 Applicability of non-refoulement

Applicability of non-refoulement to interdiction operations beyond the territorial seas is another key point of the irregular maritime migrant issue because if it applies, states are not allowed to send back people to insecure countries or states that people fear threats (Tanaka, 2019). However, international conventions including the Refugee Convention do not have any areal statement. Pertaining to the Refugee Convention, for example, the principle of non-refoulement is written in Article 33 and it simply mentions;

No Contracting State shall expel or return 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.

Although any aerial limitation is not written in this article, it does at least not exclude the extraterritorial applicability of non-refoulement (Ratcovich, 2019). Moreover, case laws are not always uniform whether non-refoulement applies beyond the territorial seas. Therefore, this paper will examine to what extent, and with what conditions this principle could be applied beyond a state's territory.

In terms of Italy and Australia, the two nations are both state parties of the Refugee Convention and the 1967 protocol. These two instruments are the core principle of non-refoulement which claims that refugees should not be sent back to a country with the risk of danger (UNHCR, 2019). However, what if irregular maritime migrants are not refugees? The Refugee Convention only aims to protect the fundamental human rights of refugees. In this case, even if people who do not fall within the category of a 'refugee' in the Refugee Convention, they may be also protected by other international law instruments (IMO et al, 2015). For instance, the ICCPR, the CAT and the ECHR include the principle of non-refoulement. In short, this principle applies to all human beings, no matter what status people have.

Another major point is to seek if there is a precondition to apply the principle of non-refoulement. On this matter, the UNHCR made it clear by simply saying;

It (the principle of non-refoulement) applies wherever the State in question exercises jurisdiction. (UNHCR, 2007)

In other words, the UNHCR claims that once jurisdiction is given to a state, the nation is under the obligation of non-refoulement regardless of the areal matter. To supplement this theory, many case laws applied non-refoulement on the basis of existence of jurisdiction such as the *Hirsi* case. As jurisdiction is crucial to exercise a state's authority, it might create or end legal relationships and obligations (Lamichhane, 2017).

Considering case laws in Italy and Australia, the two nations have quite opposite judgements regarding non-refoulement. In Italy, the *Hirsi* case has expanded the non-refoulement applicability to the high Seas. After the ECtHR mentioned that the principle is found in the ECHR Article 3, the ECtHR stated that;

The Court considers that when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin. (paragraph 156)

Remarkably, the Court pointed out Italy's potential acknowledgement of ill-treatment in Libya by saying "authorities knew or should have known".

Consequently, the extraterritorial application was adopted and Italy was liable for violating the principle of non-refoulement. The ECtHR also found the breach of Article 3 in another incident. In the case of *Al-Saadoon and Mufdhi v. the United Kingdom*, which the applicants were in the custody of the UK troops in Iraq, the Court mentioned;

For the Court, compliance with their obligations under Article 3 of the Convention requires the Government to seek to put an end to the applicants'

suffering as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty. (paragraph 171)

As is the case of *Hirsi*, the Court indicated that a lack of the state's intention of protecting people under jurisdiction breached Article 3 (*Al-Saadoon and Mufdhi v. the United Kingdom*, 2010). In the wake of the above cases, the wider protection of Article 3 became clearer in Europe.

On the other hand, the Australian view is opposed to the European one. As for the *CPCF* case, the High Court of Australia expressed its view by mentioning that;

Australian courts are bound to apply Australian statute laws even if that law should violate a rule of international law. International law does not form part of Australian law until it has been enacted in legislation. (paragraph 462)

Hence, the extraterritorial application of non-refoulement is not valid unless that provision is incorporated into Australian internal laws. A major contentious point of the *CPCF* case is the MPA, which was enacted as a national legislation in 2013. While the applicant claimed that detaining and taking people to outside of Australia is a clear violation of non-refoulement, the MPA states in Article 72 that;

A maritime officer may return the person to the vessel or aircraft. (Item 2)

A maritime officer may detain the person and take the person, or cause the person to be taken, to a place. (Item 4)

The destination may be: (a) in the migration zone; or (b) outside the migration zone (including outside Australia). (Item 4A)

All in all, the MPA allows maritime officers to detain and take people outside of the Australian territory. One thing that should be emphasized here is that a political movement has a huge influence on maritime migrant issues in Australia. As *Marmo* (2017) indicated in Chapter 2.4, whilst the judges were processing this case, the

administration passed several updates regarding the Migration Act and the MPA in order to legalize interdiction operations in the high seas without violating any national laws (Marmo et al, 2017). In response to this view, the UNHCR published its statement in 2014 that;

The power in Chapter 72(4) of the MPA is constrained by Australia's non-refoulement obligations. (paragraph 8 (b))

The UNHCR claims again that so long as a state exercises *de facto* jurisdiction, the nation should be under the obligation of non-refoulement (UNHCR, 2014). On the other hand, the Australia's decision is quite opposite that non-refoulement does not apply to maritime interception operations in the state. Beside the *CPCF* case, the High Court of Australia denied its applicability in the *VCCL* case in 2001 and the *CPCF* case in 2014, which both cases had a potential of violation of non-refoulement by the push-back operations.

One more thing that the courts have yet to tackle is an extraterritorial applicability of non-refoulement to an indirect approach, which this study discussed in Chapter 4.1. In Italy, a primary method that the maritime authority takes is an indirect approach after the *Hirsi* case in 2012. Accordingly, applying non-refoulement is possible because related international laws do not necessarily require a direct, physical contact. This view is consistent with the UNHCR's opinion as discussed above (UNHCR, 2007). Moreover, Italy ratified the Refugee Convention, the ICCPR and the CAT. That said, these international laws did not expect such an indirect approach when they were established. Hence, further discussions are necessary to apply non-refoulement against indirect interdiction.

To sum it up, Italy and Australia had opposite judgements in terms of applying non-refoulement beyond the territorial seas by the courts. Whilst the ECtHR prioritizes a state's intention and potential acknowledgement of the negative consequences by its own action, the Australian Court is coherent to the opposite view. In Australia, national legislations may override international laws if internal laws do not include

such a clause in it. In addition, these judgements are still not comprehensive since the emerging approach, called indirect interdiction operations, has yet to be tackled by the ECtHR.

4.3 Interpretation of rescue operation

International laws related to SAR operations at sea are an overlapping scheme nowadays. The most significant conventions are the SOLAS convention, the SAR convention and the UNCLOS (Ghezelbash et al, 2018). Though SAR should be separated from interdiction operations, Italy and Australia sometimes argue that approaching migrant boats at sea is merely a rescue operation, not interdiction as discussed in Chapter 2.2. Since the activity that an authority picks up migrants and sends them to another place could seem either interdiction or SAR operation, it is significant to examine related legal requirements and case laws in order to differentiate the two maritime operations. For states, SAR operations are also a political issue as it leads to the matters of migrant acceptance procedures (Ambrosini, 2018).

The UNCLOS Article 98 requires both authorities and private vessels to rescue “any person” in danger at sea. Moreover, it also requires coastal states to promote adequate and effective research. As with the SAR convention and the SOLAS convention, this article was not established in light of the current issue of irregular maritime migrants. In the past, a matter of rescuing people to the closest point was not as complicated as nowadays (IOM, 2018). Currently, this issue is somewhat intricate since some migrants take advantage of this rescue obligation in order to arrive a destination by requesting assistance to ships at sea. In light of this matter, the EU Council established several criteria. According to the guideline, there are several factors that the master of ship may consider in rescuing. For instance, the availability of necessary supplies among migrants, the urgent need of medical assistance from a migrant boat, and the weather conditions are included in the criteria (European Council, 2010).

In assessing maritime interdiction and SAR operations, a state's obligation is a key point to examining whether the state is responsible for the subsequent actions after encountering rescuees. Unlike Australia, there are several SAR regions by coastal states in the Mediterranean seas and this causes the situation further complicated. For example, Italy once claims that when an incident happens in the state's SAR area, which is in the high seas, jurisdiction should not be given to the country due to the fact that the state simply follows the duty to render assistance. In *Hirsi*, Italy mentioned that;

The vessels carrying the applicants had been intercepted in the context of the rescue on the high seas of persons in distress – which is an obligation imposed by international law, namely, the UNCLOS and could in no circumstances be described as a maritime police operation. (paragraph 65)

Italy argued that the obligation to rescue at sea does not create a correlation of jurisdiction between the state and rescuees. In response to this, the ECtHR stated that jurisdiction is given since Italy exercised *de jure* and *de fact* control over persons as mentioned in Chapter 5.1 (*Hirsi Jamaa and others v. Italy*, 2012).

When it comes to SAR zones, there is another case found in the Mediterranean seas. In 2018, Libya officially claimed their new SAR zone which is extended 80 nautical miles, the high seas (The Times, 2018). The newly extended zone is the area where most migrants are rescued. A potential reason of extending the SAR zone is to justify interdiction operations in the high seas by the LCG. Concerning this issue, some human rights organizations assert that the newly built area should be deleted by the IMO because Libya is not a safe state and does not provide any safe ports for migrants (Migreurop, 2020). Even though there is no proof that Italy and Libya pre-negotiated on this matter, there is a suspicion that the LCG intended to take more responsibility for migrants by extending its SAR zone.

Another major point is the definition of a “place of safety” stipulated in rescue related conventions because neither the SOLAS convention nor the SAR convention

defines the meaning of it (Ratcovich, 2019). To supplement this, the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, define a ‘place of safety’ as any places that the rescued people’s lives are no longer in danger (Ippolito et al, 2020). The Guideline highlights that a place of safety should be a location where rescue operations are considered to end. For example, a ship cannot be a place of safety since a rescue operation is still ongoing.

Based on this term, the key difficulty to understanding a place of safety is the absence of regulation. For instance, whether a state needs to bring rescuees to the closest port is uncertain by rescue conventions (Klein, 2014). Looking at the *CPCF* case in Australia, the state did not take rescuees to the closest point, which is Christmas Island. It seems a suitable place due to the distance from the rescue point given the fact that both the SAR convention and the SOLAS convention require to disembark as soon as reasonably practicable (Moreno-Lax, 2019). However, simply judging the case with the distance is questionable since there are only less than 2,000 people living in Christmas Island (Australian Government, 2016). Accordingly, the capability to treat rescuees is somewhat limited. Hence, the remaining factor that states need to consider is non-refoulement. It seems reciprocal between international human rights laws and international rescue laws from the view of the principle of non-refoulement (Ratcovich, 2019). In this theory, even if a disembarked place is further than the nearest point, it is reasonable to take rescuees there as long as the destination is not a place where people do not encounter fear and ill-treatment. Although there are other factors needed to be considered such as the length of time and MoU, non-refoulement could be one pillar in assessing the validity of SAR operations.

To summarize, interdiction operations are sometimes mixed with SAR operations due to the similarity of the activities. In addition, some maritime authorities might aim to take advantage of a SAR region for their own benefits. Italy argued in the *Hirsi* case that the duty to render assistance and the jurisdiction matter should be separated since the operation was merely for the rescue purpose. However, this claim

was denied by the ECtHR whilst Australia have not even tried this theory yet. Libya is another country that is possibly trying to utilize its SAR region. The nation recently extended its SAR zone, halfway to the Italian island of Lampedusa. Allegedly, the possible purpose is to interdict irregular maritime migrants in the high seas by reasoning with rescue operations. A main difference between Italy and Libya is that Libya is not a state party of the ECHR; therefore, Libya is not under the obligation of the legislation.

Furthermore, rescue conventions do not clarify the term of a “place of safety”, although the IMO guideline expressed a supplemental explanation. One of the biggest questions is whether the destination must be the closest port. In this regard, it seems that related conventions do not require such a strict manner. However, non-refoulement should be considered on this matter given the correlation between human right laws and rescue laws.

Chapter 5 Conclusions and further research

In the final chapter, this paper outlines the conclusions of this research and proposes further research regarding interdiction operations against irregular maritime migrants beyond the territorial seas.

5.1 Conclusions

Interdiction methods often change because it depends on the government's policy and states' cooperation including MoU, bilateral agreements and regional frameworks. Both Italy and Australia have experienced a migrant surge several times and there is a long history between the states and irregular maritime migrants. Both countries have changed their interdiction methods after facing a migrant surge in order to tighten its border guard. In Italy, cooperation between Italy and neighboring nations is necessary due to its geographical issue in the Mediterranean Seas. Italy has reached several agreements with African countries so far but the nation especially pays attention to Libya. Even though Italy temporarily stopped its interdiction operations in the high seas after the *Hirsi* case, the state resumed to reinforce the collaboration with Libya in the wake of the MoU in 2017. Additionally, since Italy is a state party of the ECHR, Italy's interdiction operations are reviewed by the ECtHR regarding human right matters. Historically, the judicial decisions including the *Hirsi* case were not in favor of Italy. Accordingly, the state has no choice but to change the policy of interdiction methods every time the Court denied the state's claim.

On the other hand, Australia's situation is quite opposite since the nation is geographically isolated from other countries and it is relatively easy to pursue its own policy. Instead of having regional cooperation, Australia made bilateral agreements with several countries individually such as Papua New Guinea, Nauru, Malaysia and Cambodia in order to send migrants to foreign nations. National legislations also provide a huge law enforcement power to the authority. The Migrant Act 1958, which was later replaced by the MPA 2013, allows maritime officers to exercise its law enforcement power beyond the territorial seas. Moreover, one of the

major points is a judicial decision by the High Court of Australia. Because the country's policy is not influenced by neighboring countries or regional frameworks, the judge is mostly in favor of the authority side.

Furthermore, the matters of jurisdiction, non-refoulement and SAR which this paper tackled in Chapter 4 are closely linked to each other. The *Hirsi* case is an example of the court tackling the above three issues at the same time.

Establishing jurisdiction in the high seas is generally limited to exceptional cases but the scope was recently stretched a bit after the ECtHR found a condition “*de facto* and continued control” in the *Medvedyev* case as described in Chapter 4.1. This was not always a uniform perspective from the ECtHR in the past since the court once mentioned that jurisdiction should be limited to the state's sovereignty in the *Brankovic* case. Even so, through the following case laws including *Medvedyev*, *Al-Skeini*, and *Hirsi*, extraterritorial jurisdiction seems to be generally accepted with continuous, *de facto* control.

Once jurisdiction is given to a state, the applicability of non-refoulement is another important matter as this principle protects migrants' basic human rights from ill-treatments by the state. On this issue, the ECtHR and the High Court of Australia have opposite views. The ECtHR indicates that the principle of non-refoulement applies wherever jurisdiction is given to states. This view was followed by the UNHCR and further corroborated by the *Al-Saadoon* and the *Hirsi* cases. On the one hand, Australian cases are different because the court mentioned that the principle of non-refoulement does not apply unless it has been enacted in legislations (*CPCF v. Minister for Immigration and Border Protection*, 2015). Because the MPA gives wide range of power of law enforcement to maritime officers, non-refoulement was denied in several case laws including *CPCF* and *Jark*.

SAR operations are often treated as a political matter since its method relies on the state's policy. One common thing between Italy and Australia is that both states claim rescue operations should be treated separately from interdiction operations. In

other words, the obligation to rescue at sea does not give rise to a link between the state and the rescuees. This method was later denied by the ECtHR in the *Hirsi* case. In addition, the absence of the clear definition of “place of safety” causes arguments among authors. In this case, non-refoulement should be taken into consideration as one factor in assessing the validity of rescue operations as Ratcovic (2019) claimed. Again, the above three matters are not individual topics. They are closely correlated with each other.

5.2 Further research

The reason that further research is beneficial for the matter of interdiction operations is because existing case laws are not necessarily comprehensive to apply to emerging cases. The methods of interdiction operations have been always changing due to migrant trends, government policies, and regional frameworks in Italy and Australia. In the past, some interdiction operations were denied by the court such as the *Hirsi* case. However, the authorities have no choice but to keep interdicting people at sea in a different way as irregular maritime migrants continue to come to the states.

As for the latest trend, “indirect approach” which the Italian maritime authorities are conducting should be spotlighted the most. Whilst case laws cover a wide range of legal aspects of maritime interdiction operations with physical contact, an indirect approach is a completely new challenge for both migrants and courts. One of the examples is the case *S.S and others v. Italy*. This is an ongoing case and a key point is whether the indirect approach falls within the definition of jurisdiction in the ECtHR. Case laws are unlikely to be applied to this case directly because physical contact was always found in the past cases. A further complicated part is that even if the court acknowledges jurisdiction in Italy, there would be other issues remained: non-refoulement and rescue operations.

On the other hand, Australia does not follow the current trend in Europe. It is because the Australian court is basically in favor of the authority side. Considering the historical interdiction methods, there is no much difference between the past

methods and the current ones. To put it in a different way, Australia has no reason to change its traditional interdiction method due to the favorable judicial decisions to the state. As long as the current “physical contact” is supported by the court, the authorities would continue to take the same method. For further research in Australia, it is important to assess whether interdiction powers exceed beyond the scope of related conventions. Especially, the MPA introduced in 2013 was a turning point that Australia started to take a stricter approach to migrants. Furthermore, judicial decisions are equally as important as the above point. However, given the past trend, it is unlikely that the Australian court turns its back on the authority concerning similar cases.

In summary, considering the current geopolitical and socio-economic characters in Africa and the Middle East, they point to the probability that interdiction operations in the Mediterranean will continue to play an important role for future time to come.

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