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## State Jurisdiction in Search and Rescue Operations

The extraterritorial reach of the European Convention on Human Rights and *S.S. and Others v. Italy*

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# Summary

Every year thousands of refugees and migrants take on perilous journeys and cross the Mediterranean, hoping to reach safety and a better life in Europe. These so-called “boat people” often travel on overcrowded and unseaworthy dinghies and regrettably, many lives are lost each year.

To protect the lives of those at sea, coastal States have established Rescue Coordination Centres with the purpose of receiving distress calls and coordinating maritime rescue operations. While the safety of those being rescued should arguably be prioritized, the Italian Maritime Rescue and Coordination Centre routinely instructs the Libyan Coastguard – known to act violently towards migrants and refugees and pull them back to Libya – to participate in Search and Rescue (SAR) operations of boat people on the Mediterranean. Thus far, Italy’s coordination and involvement of the Libyan Coastguard in SAR operations has remained unchallenged, but currently a case against Italy regarding SAR coordination – *S.S. and Others v. Italy* – is pending before the European Court of Human Rights.

Whether or not Italy can be held responsible for any alleged violations of the European Convention on Human Rights (ECHR) because of its SAR coordination, depends on whether the Court will find that the applicants were within Italy’s jurisdiction under art. 1 ECHR.

This thesis finds that in previous interception cases, jurisdiction has been triggered through States’ exercise of *physical control* under the personal model of jurisdiction, and that it is not obvious how the Court will rule in the present case, where Italy has not (directly) exercised such physical control. By applying the doctrinal legal research method, this thesis therefore examines scholarly suggestions and other strands of case law to assess whether the Court could adopt a different approach to jurisdiction in *S.S. and Others v. Italy*.

First, this thesis investigates the suggestions of legal scholars Trevisanut and Papastavridis, who propose by reference to the Court's case law on the right to life and emergency situations that the receipt of a distress call could be considered to trigger what they call "long distance *de facto* control" because of the impact that the SAR coordinating State has over the lives of the persons in distress. While such a finding would allow the Court to stick to the control-based understanding of jurisdiction, this thesis finds that the notion of "long distance *de facto* control", not involving physical control, lacks doctrinal support.

Second, this thesis explores the propositions of legal scholars Pijnenburg and Gammeltoft-Hansen and finds that instead of resorting to the control-based notion of jurisdiction, the Court could resort to the so-called extraterritorial effects doctrine. Based on the doctrine, the Court could find that the Italian coordination of the SAR operations conducted from Rome had the effect of violating the applicants' human rights outside Italian territory, thereby triggering art. 1 ECHR. Such a finding would require the Court to rule that there was a direct and immediate causal link between the coordination and the alleged violations, but because of the scarce case law on the matter, it is difficult to foresee whether the present link would suffice. Although the doctrine has not been applied to the same extent as control-based jurisdiction, this thesis concludes that the doctrine could apply to SAR coordination over distance and could prove to be crucial in ensuring that European States maintain humane standards during SAR operations.

# Sammanfattning

Varje år färdas tusentals flyktingar och migranter över Medelhavet i hopp om att nå säkerhet och ett bättre liv i Europa. Färderna genomförs ofta på överfulla och sjöodugliga gummibåtar, vilket förödande nog resulterar i att flera människor drunknar varje år.

För att skydda dem som färdas till havs har flera kustländer inrättat sjöräddningscentraler som ska ta emot nödsamtal och koordinera räddningsoperationer. Även om det kan tyckas att de nödsattas säkerhet borde väga tyngst, instruerar den italienska sjöräddningscentralen ofta den libyska kustbevakningen att delta i räddningsoperationer trots flertalet rapporter om libyska *pull-backs* och kustbevakningens våldsamma agerande gentemot flyktingar och migranter.

Hittills har Italiens koordinering kunnat fortgå obehindrat, men år 2018 väcktes en talan mot Italien vid Europadomstolen. Målet har fått namnet *S.S. and Others v. Italy*, och huruvida Italien kan hållas ansvarigt för den libyska kustbevakningens våldsamma agerande och *pull-backs*, på grund av att ha koordinerat räddningsoperationen i målet, beror på om Italien kan anses ha utövat jurisdiktion över sökandena i fråga enligt art. 1 i Europakonventionen.

Denna uppsats identifierar att jurisdiktion i tidigare mål hos Europadomstolen avseende förhindrande av framfart till havs (*interceptions*) uppstått då Stater utövat *fysisk kontroll* över sökandena i fråga. Det är således inte uppenbart hur domstolen kommer förhålla sig till denna fråga i *S.S. and Others v. Italy*, då Italien inte (direkt) utövat sådan fysisk kontroll som tidigare varit jurisdiktionsgrundande. Uppsatsen utreder därför genom den rättsdogmatiska metoden på vilka sätt, utöver utövandet av fysisk kontroll, jurisdiktion kan uppstå vid koordineringen av räddningsoperationer. Uppsatsen har undersökt både doktrin och rättspraxis för att besvara denna frågeställning.

Uppsatsen undersöker först de förslag som framförts av Trevisanut och Papastavridis. Enligt dem skulle nödsamtal kunna anses ge upphov till vad de kallar "long distance *de facto* control", som följer av den makt som Staten vars räddningscentral mottagit samtalet utövar över de nödsattas liv. Uppsatsen visar att även om förslagen skulle tillåta domstolen att fortsätta förstå jurisdiktion som kontroll, är det osannolikt att domstolen kommer följa Trevisanuts och Papastavridis resonemang, som saknar stöd i både rättspraxis och litteratur.

Uppsatsen behandlar också förslag ifrån Pijnenburg och Gammeltoft-Hansen, enligt vilka domstolen, istället för att undersöka kontroll, skulle kunna använda sig av doktrinen om extraterritoriella effekter. Enligt denna doktrin skulle Italien kunna anses ha utövat jurisdiktion under art. 1 Europakonventionen då koordineringen av räddningsoperationerna de utfört från Rom har haft effekten att sökandenas mänskliga rättigheter kränkts utanför Italiens territorium. Detta förutsätter dock att det enligt domstolen funnits ett tillräckligt nära kausalsamband mellan koordineringen och de påstådda kränkningarna, vilket är svårt att förutspå genom en läsning av domstolens nuvarande rättspraxis. Trots att doktrinen om extraterritoriella effekter inte tillämpats i samma utsträckning som den kontrollbaserade tolkningen av jurisdiktion, finner denna uppsats att doktrinen om extraterritoriella effekter kan vara tillämplig vid koordineringen av räddningsoperationer och därför vara avgörande för att försäkra att Europa upprätthåller en human nivå på framtida räddningsoperationer.

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*Nadja Airaksinen*



# Abbreviations

CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organization for Migration
LCG	Libyan Coastguard
MRCC	Italian Maritime Rescue Co-ordination Centre
NATO	North Atlantic Treaty Organization
RCC	Rescue Co-ordination Centre
SAR	Search and Rescue
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties

“It is not my wish to go on a rubber dinghy. It is not my wish. I just want safety.”<sup>1</sup>

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<sup>1</sup> One of the survivors of the distress situation in *S.S. and Others v. Italy*. See Adams et. al. (2018) *How Europe Outsources Migrant Suffering at Sea* [video] at 14:30, <https://www.nytimes.com/video/opinion/10000005820783/europe-migrant-crisis-mediterranean.html?src=vidm>, visited 3 February 2020.

# 1. Introduction

The night between the 5<sup>th</sup> and the 6<sup>th</sup> of November 2017, a rubber dinghy carrying around 150 “boat people”<sup>2</sup> left Tripoli and steered towards Europe.<sup>3</sup> As the sea became rougher and the dinghy started taking in water,<sup>4</sup> the passengers sent a distress call to the Italian Maritime Rescue Co-ordination Centre (MRCC) positioned in Rome.<sup>5</sup> The MRCC initiated Search and Rescue (SAR) operations and instructed the nearby vessels Ras Jadir – owned and manned by the Libyan Coastguard (LCG) – and Sea Watch 3, an NGO rescue vessel sailing under Dutch flag, to proceed towards the dinghy in distress.<sup>6</sup>

The Ras Jadir was the first vessel to arrive at the distress scene. Instead of providing effective assistance, the LCG impaired the distress situation by steering the vessel in such an aggressive way, that even more people were thrown off the dinghy into the water.<sup>7</sup> Against standard rescue tactics, the crew positioned the Ras Jadir so close to the dinghy that many of the boat people in the water were pulled underneath the vessel.<sup>8</sup> When the Sea Watch 3 reached the distress scene and tried to coordinate the rescue operation with

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<sup>2</sup> The term is used by some scholars to refer to the mixed group of refugees and migrants trying to reach Europe irregularly by sea. See e.g. Den Heijer, Maarten; Rijpma, Jorrit and Spijkerboer, Thomas (2016A) ‘Coercion, Prohibition and Great Expectations: the Continuing Failure of the Common European Asylum System’. *Common Market Law Review*, vol. 53, pp. 607-642. This thesis will use the term for the same purposes.

<sup>3</sup> Adams et. al., *supra* note 1 at 01:05, visited 3 February 2020.

<sup>4</sup> Pijnenburg, Annick (2018) ‘From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?’ *European Journal of Migration and Law*, vol. 20 no. 4, p. 405; Forensic Oceanography – Forensic Architecture (2018) *Mare Clausum: The Sea Watch vs Libyan Coast Guard Case* [video] at 01:35, <https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard>, visited 3 February 2020.

<sup>5</sup> European Court of Human Rights (2019): Requête no 21660/18 S.S. et autres contre l’Italie. Communiquée le 26 juin 2019, para. 3, [https://hudoc.echr.coe.int/eng#{"fulltext":\["21660/18"\],"itemid":\["001-194748"\]}](https://hudoc.echr.coe.int/eng#{), visited 23 January 2020.

<sup>6</sup> Forensic Oceanography – Forensic Architecture (2018), *supra* note 4 at 01:40, visited 3 February 2020.

<sup>7</sup> European Court of Human Rights (2019), *supra* note 5 p. 2, para. 6, visited 23 January 2020; *Ibid.* at 16:05, visited 3 February 2020.

<sup>8</sup> Adams et. al., *supra* note 1 at 03:30, visited 3 February 2020.

the Ras Jadir, the Libyan crew refused to cooperate and kept the vessel's engines on, endangering the lives of the people in the water. The Sea Watch 3 urged the LCG to turn off the vessel's engines, but the LCG refused to comply.<sup>9</sup>

While the Sea Watch 3 started rescuing people from the water, video evidence suggests that the Ras Jadir crew members tried to hinder the rescue operations by threatening the NGO workers and throwing hard objects at them, effectively preventing the Sea Watch 3 from performing the rescue operation to the fullest extent possible.<sup>10</sup> Not only was the LCG violent against the Sea Watch 3, the survivors testify that the LCG also threatened and abused the people it had rescued,<sup>11</sup> which is also supported by the video evidence recorded by the Sea Watch 3.<sup>12</sup> The LCG's behaviour at the distress scene became so violent, that the NGO vessel eventually found itself forced to retreat for its own safety.<sup>13</sup> Out of the approximately 150 passengers that had left Libya on the dinghy, the Sea Watch 3 managed to rescue 59 people, 47 were rescued but pulled back to Libya by the Ras Jadir and more than 20 people drowned.<sup>14</sup>

Seventeen applicants have lodged a complaint against Italy before the European Court of Human Rights (the ECtHR, the Court or the Strasbourg Court), where the case, *S.S. and Others v. Italy*<sup>15</sup> is currently pending. According to the applicants, Italy violated their rights under art. 2, 3, 4, and 13 of the European Convention of Human Rights (the ECHR or the Convention) as well as art. 4 of Protocol No. 4 of the ECHR, by instructing the LCG to participate in the rescue operations.<sup>16</sup>

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<sup>9</sup> Pijenburg (2018), *supra* note 4, p. 405.

<sup>10</sup> Adams et. al. (2018), *supra* note 1 at 07:25, visited 3 February 2020.

<sup>11</sup> European Court of Human Rights (2019), *supra* note 5, p. 2, paras. 6 and 9, visited 23 January 2020.

<sup>12</sup> Forensic Oceanography – Forensic Architecture (2018) *supra* note 4 at 21:25, visited 3 February 2020.

<sup>13</sup> Adams et. al. (2018) *supra* note 1 at 09:10, visited 3 February 2020.

<sup>14</sup> Forensic Oceanography – Forensic Architecture (2018), *supra* note 4 at 26:45, visited 3 February 2020.

<sup>15</sup> App. No. 21660/18.

<sup>16</sup> European Court of Human Rights (2019), *supra* note 5, p. 6–7, visited 23 January 2020.

It has repeatedly been reported that the LCG has acted aggressively in SAR operations and pulled intercepted people back to Libya, where migrants are being arbitrarily detained and exposed to torture and other ill-treatment.<sup>17</sup> Despite the reports, Italy routinely instructs the LCG to participate in SAR operations and allegedly, the individuals pulled back to Libya the 6<sup>th</sup> of November 2017 were subjected to, among other things, detention in inhumane conditions, rape, abuse and starvation.<sup>18</sup>

Whereas Libya is not a party to the ECHR, Italy is,<sup>19</sup> and it is crucial to consider the potential responsibility of Italy,<sup>20</sup> likely being one of the main causes of the violent pull-backs that the applicants were exposed to.<sup>21</sup> As will be discussed more thoroughly in Chapter 2, Italy has entered into an agreement with Libya under which Italy sponsors, trains and equips the LCG in exchange for pull-backs. By being called upon to rule on *S.S. and Others v. Italy*, the ECtHR will for the first time adjudicate on the potential human rights responsibility arising from the coordination of SAR operations,<sup>22</sup> and

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<sup>17</sup> Amnesty International and Human Rights Watch (2019): Written submissions on behalf of the interveners, para. 10, [https://www.hrw.org/sites/default/files/supporting\\_resources/hrw\\_amnesty\\_international\\_submissions\\_echr.pdf](https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf), visited 23 January 2020.

<sup>18</sup> Global Legal Action Network (2018): Legal Action Against Italy over its Coordination of Libyan Coast Guard Pull-Backs Resulting in Migrant Deaths and Abuse, <https://www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse>, visited 3 February 2020.

<sup>19</sup> Council of Europe: Chart of signatures and ratifications of Treaty 005, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>, visited 29 April 2020.

<sup>20</sup> However, Libya's potential responsibility could be investigated for example under the African Charter on Human and Peoples' Rights or the International Covenant on Civil and Political Rights.

<sup>21</sup> Italy and Libya have signed a Memorandum of Understanding, under which Italy sponsors, equips and trains the LCG in exchange for the LCG pulling back intercepted boat people to Libya. See Chapter 2-2.1.

<sup>22</sup> Fink, Melanie and Gombeer, Kristof (2018): 'The Aquarius incident: navigating the turbulent waters of international law, EJIL: Talk!', <https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/?fbclid=IwAR1bUIHKabviH8B8ecJJy9y0P6h6F8tkXCtrY3VKMJVKIp6opyUFjqS3EI>, visited 3 March 2020.

the outcome of the case is predicted to have a great impact on both Italian and European migration policies and maritime border control.<sup>23</sup>

## 1.1 Purpose and research questions

The purpose of this thesis is to investigate in light of *S.S. and Others v. Italy*, whether boat people from third States are protected by the ECHR when they find themselves in a distress situation at sea and a Contracting State of the ECHR coordinates the maritime SAR operation. In pursuit of the purpose, this thesis seeks to answer the following question:

- Does the coordination of (including the giving of instructions in) SAR operations trigger a Contracting State's jurisdiction under art. 1 ECHR?

As will be discussed in Chapter 4.3, the so-called personal model<sup>24</sup> of jurisdiction is generally applied in interceptions. The above question is hence divided into the following parts:

- 1. Does the coordination of (including the giving of instructions in) SAR operations trigger a Contracting State's jurisdiction under art. 1 ECHR:
  - o (a) under the personal model of jurisdiction, as it has been applied thus far in the context of interceptions, or
  - o (b) under other readings of "jurisdiction"?
- 2. By answering the above question, this thesis seeks also to answer whether the Court will be able to adjudicate on the applicants' claims in *S.S. and Others v. Italy*.

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<sup>23</sup> Baumgärtel, Moritz (2018): 'High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan 'Pullback' Policies to the European Court of Human Rights', EJIL: Talk!, <https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys-involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights/>, visited 3 March 2020.

<sup>24</sup> To put it shortly, under the personal model a State exercises jurisdiction when it exercises authority or control over a person. See Chapter 4.2.

## 1.2 Previous research

To use the words of Lawson, the question of jurisdiction and the extraterritorial application of human rights instruments is “certainly not a new one”<sup>25,26</sup> The matter has widely been discussed by both human rights treaty bodies and scholars, and hence there is a mountain of literature on the matter.<sup>27</sup> To the best of my knowledge, the specific question of extraterritorial jurisdiction in SAR operations has received far less attention and has mainly been discussed by legal scholars Trevisanut<sup>28</sup>, Papastavridis<sup>29</sup> and Pijnenburg<sup>30</sup> as well as partly by Gammeltoft-Hansen<sup>31</sup>.

When Italy’s (potential) responsibility for the deaths on the Mediterranean is being discussed in literature, attention is often given to Italy’s support of the LCG under the Italy-Libya Memorandum of Understanding, (MoU), under which Italy trains, funds and equips the LCG.<sup>32</sup>

Pijnenburg has, however, also discussed what this thesis seeks to investigate: whether or not Italian jurisdiction could be triggered purely by its SAR coordination. In her article, *From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?*<sup>33</sup> Pijnenburg analyses the *S.S. and Others v. Italy* case in particular and identifies two ways in which the Court

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<sup>25</sup> Lawson, Rick (2004) ‘Life After Bankovic: on the Extraterritorial Application of the European Convention on Human Rights’, in: Coomans, Fons and Kamminga, Menno T. (eds.) *Extraterritorial Application of Human Rights Treaties*. Intersentia, p. 83.

<sup>26</sup> Ibid.

<sup>27</sup> For a thorough analysis of the matter, see Milanovic, Marko (2011) *Extraterritorial application of human rights treaties: law, principles and policy*. Oxford University Press.

<sup>28</sup> See Trevisanut, Seline (2014) Is there a right to be rescued at sea? A constructive view’. *QIL (Questions of International Law)* vol. 4, pp. 3-15.

<sup>29</sup> See Papastavridis, Efthymios (2014) ‘Is there a right to be rescued at sea? A sceptical view’. *QIL (Questions of International Law)* vol. 4, pp. 17-32.

<sup>30</sup> See Pijnenburg (2018), *supra* note 4.

<sup>31</sup> See Gammeltoft-Hansen, Thomas (2018) ‘International Cooperation and Migration Control: Towards a Research Agenda for Refugee Law’. *European Journal of Migration and Law*, vol. 20 no. 4, pp. 373-395.

<sup>32</sup> See Chapter 2 and e.g. Giuffré, Mariagiulia and Moreno-Lax, Violeta (2019) ‘The rise of consensual containment: from ‘contactless control’ to ‘contactless responsibility’ for migratory flows’, in: Juss, Satvinder Singh (ed.) *Research Handbook on International Refugee Law*. Edward Elgar Publishing, pp. 82-108.

<sup>33</sup> Pijnenburg (2018), *supra* note 4.

could establish Italian jurisdiction and/or responsibility stemming from the SAR coordination. First, by applying the extraterritorial effects doctrine and second, by resorting to the State responsibility rules regarding direction and control as reflected by art. 17 of the International Law Committee's *Draft Articles on State Responsibility for Internationally Wrongful Acts*. This thesis will rely on Pijnenburg's findings regarding the extraterritorial effects doctrine but disregard the law of State responsibility, which does not concern the matter of art. 1 ECHR. While Trevisanut and Papastavridis discuss the personal model of jurisdiction as a trigger of jurisdiction in SAR operations, Pijnenburg does not motivate her differing approach.

To the best of this author's knowledge, the *S.S. and Others v. Italy* case has not received much scholarly attention thus far, with the exception of Pijnenburg's article and an EJIL Talk! blog post by legal scholar Baumgärtel.<sup>34</sup> The case itself – the events of the 6<sup>th</sup> of November 2017 – has, however, been much discussed by media.<sup>35</sup>

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<sup>34</sup> Baumgärtel (2018), *supra* note 23, visited 3 March 2020.

<sup>35</sup> See e.g. Kirchgaessner, Stephanie and Tondo, Lorenzo (2018): "Italy's deal with Libya to 'pull back' migrants faces legal challenge", The Guardian, <https://www.theguardian.com/world/2018/may/08/italy-deal-with-libya-pull-back-migrants-faces-legal-challenge-human-rights-violations>, visited 3 March 2020; Agerholm, Harriet (2018): 'Italy sued over migrant 'push back' deal with Libya after 20 migrants drown in Mediterranean', The Independent, <https://www.independent.co.uk/news/world/europe/italy-libya-migrant-refugee-push-back-deal-mediterranean-a8342056.html>, visited 3 March 2020; Gostoli, Ylenia (2018): 'Lawyers pin blame for deaths of 20 migrants at sea on Italy', Al Jazeera, <https://www.aljazeera.com/news/2018/05/lawyers-pin-blame-deaths-20-migrants-sea-italy-180508173551688.html>, visited 3 March 2020.



## 1.3 Limitations

This thesis investigates the extraterritorial applicability of the ECHR and thus, other human rights instruments will not be taken into consideration. Similarly, judgments and views by other human rights bodies than the ECtHR will not be investigated by this thesis, despite their potential relevance under art. 53 ECHR. The status of Italy's conduct as a matter of Italian law or under the rules of State responsibility will also not be discussed.

The focus of this thesis being on the ECHR, only *de facto* control will be examined. Analysing *de jure* jurisdiction would require an analysis of Italy's obligations under other regimes, such as the law of the sea regime, which are not covered by this thesis. For the same reason, this thesis will not take into consideration in which maritime zone or SAR area the distress scene took place.<sup>36</sup>

Regarding jurisdiction, this thesis starts by investigating the personal model of jurisdiction and thereafter explores two other bases for jurisdiction: (1) long distance *de facto* control, which develops the personal model and (2) the extraterritorial effects doctrine. Both bases have been suggested to apply in the context of SAR coordination and are thus relevant for this thesis. Other triggers of jurisdiction, such as the spatial model, the public powers doctrine and decisive influence will not be investigated as they have not, as far as this author is aware, been applied to SAR coordination.

The topic of this thesis being State jurisdiction in SAR operations, only the SAR coordination will be discussed in *S.S. and Others v. Italy*. While jurisdiction in *S.S. and Others v. Italy* could, as suggested by Pijnenburg, also be discussed in relation to Italy's support of the LCG under the MoU as well

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<sup>36</sup> Klug and Howe have, however, discussed the matter to some extent. See Klug, Anja and Howe, Tim (2010) 'The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle to Extraterritorial Interception Measures', in: Ryan, Bernard and Mitsilegas, Valsamis (eds.) *Extraterritorial Immigration Control: Legal Challenges*. Martinus Nijhoff Publishers, pp. 65-99.

as the presence of the Italian helicopter at the distress scene,<sup>37</sup> discussing these two “scenarios”<sup>38</sup> falls outside the scope of this thesis. Even though Italy’s (potential) responsibility for the alleged violations must be assessed in a broader context, the question of human rights responsibility for coordinating SAR operations, still remains open.<sup>39</sup> As people continue to embark on perilous journeys by sea, distress situations are likely to continue occurring in the future and hence, it also serves a greater purpose to investigate the relationship between the ECHR and SAR operations.

Although this thesis investigates whether the coordination from distance in any SAR operation could trigger jurisdiction in itself, the focus of this thesis will be on SAR operations that have (allegedly) resulted in pull-backs taken that the literature on the matter mostly discusses extraterritoriality in relation to *refoulement*.

Finally, as this thesis concerns the establishment of *jurisdiction* in SAR operations, it will not engage in an assessment of potential breaches of the ECHR committed by Italy in *S.S. and Others v. Italy*, which would require an analysis of the rights and –freedoms contained in the Convention.

## 1.4 Method and material

This thesis applies the doctrinal legal research method, where research is conducted into legal doctrine in order to understand the rules governing a specific legal field. A problem area is chosen, whereafter the scope of the research is narrowed down to the specific research questions deserving particular attention (see Chapter 1.2). Relevant data from legal doctrine is thereafter collected and analysed from different perspectives in order to

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<sup>37</sup> See Pijnenburg (2018), *supra* note 4.

<sup>38</sup> *Ibid.*, p. 396.

<sup>39</sup> Fink and Gombeer (2018), *supra* note 22, visited 3 March 2020.

answer the research question and finally, the findings are discussed and possible suggestions for reforms put forward.<sup>40</sup>

As this thesis analyses art. 1 ECHR, the relevant doctrine mostly consists of ECtHR rulings (see Chapter 3.1) where art. 1 ECHR has been a matter of dispute as well as scholarly readings thereof. Articles that have been of particular importance for this thesis include Pijnenburg's *From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?*, Trevisanut's *Is there a right to be rescued at sea? A constructive view* as well as Papastavridis's response to Trevisanut in *Is there a right to be rescued at sea? A sceptical view*.

Of much relevance for this thesis has also been the forensic reconstruction of the events of the 6<sup>th</sup> of November 2017 made by Forensic Architecture and Forensic Oceanography.<sup>41</sup> The reconstruction has been used in this thesis to describe how events unfolded and functions as a complement to the Court's Communication on the case when presenting the "facts" in Chapter 1. It shall be noted, however, that all of the "facts" regarding the incident have either been presented by the applicants or by the forensic reconstruction, on which the applicants themselves base their complaints.<sup>42</sup> As far as this author is aware, the Court has not made public any document presenting Italy's view of the events and hence, the findings of this thesis are conditioned by the information made available by the applicants.

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<sup>40</sup> Ishawara Bhat, P. (2019) *Idea and Methods of Legal Research*. Oxford University Press, pp. 145-161.

<sup>41</sup> Forensic Oceanography – Forensic Architecture (2018), *supra* note 4, visited 3 February 2020.

<sup>42</sup> Pijnenburg (2018), *supra* note 4, p. 405.

## 1.5 Disposition

Having introduced *S.S. and Others v. Italy* and explained the framework of this thesis in Chapter 1, the following chapter puts *S.S. and Others v. Italy* in a bigger context by discussing European and Italian migration policies, in light of which the case must be understood and to which reference is made throughout the thesis.

The topic of this thesis and perhaps the main question in *S.S. and Others v. Italy* – the concept of jurisdiction – will be discussed in Chapters 3 and 4. The former chapter starts by setting out how the ECHR is to be interpreted and continues by analysing the content of art. 1 ECHR. The latter chapter discusses the matter of extraterritorial jurisdiction in particular and how it has been asserted in the ECtHR’s case law thus far. It investigates the so-called personal model of jurisdiction and applies it to *S.S. and Others v. Italy*.

The following two chapters investigate two alternative ways of asserting jurisdiction in cases of SAR coordination and *S.S. and Others v. Italy* in particular. Chapter 5 investigates so-called “long distance *de facto* control”<sup>43</sup> as suggested by Trevisanut and Papastavridis, whereas Chapter 6 looks at the extraterritorial effects doctrine and the propositions of Gammeltoft-Hansen and Pijnenburg.

Rather than outsourcing the analysis to a separate chapter, the analysis is woven into the presentation as the thesis unfolds. Chapter 7, however, summarises the main findings of the thesis and discusses them from a broader perspective.

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<sup>43</sup> Trevisanut (2014), *supra* note 28, p. 13.

## 2. Background: Europe and migration

Every year thousands<sup>44</sup> of lives are lost on the Mediterranean when people from economically struggling and war-torn countries take on perilous journeys to flee persecution, war and poverty.<sup>45</sup> Whereas Italy and the European Union (EU) used to have in place effective maritime rescue operations on the Mediterranean, saving the lives of hundreds and thousands of people, the operations have been discontinued and their mandates changed from rescue to border control, as the discourse in Europe has changed.<sup>46</sup> Anti-immigration voices have started gaining more foothold and some politicians have argued that rescue operations “[b]y creating incentives for embarkation, [...] encouraged people to their own deaths”<sup>47, 48</sup> Not only have the sea journeys been considered dangerous for the individuals crossing the Mediterranean on unseaworthy rubber boats, but the arrival of irregular boat people is, more upsettingly, considered to be a threat to Europe that needs to be fought against. The arriving individuals are oftentimes perceived as potential criminals and, more generally, as “jeopardizing the existing lifestyles, economy or cultures of the destination State[s].”<sup>49</sup>

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<sup>44</sup> According to minimum estimates by the International Organization for Migration, during a ten-month period in 2019 at least 1080 people died on the Mediterranean, whereas the corresponding number in 2018 was 1971. Note, that as these numbers are minimum estimates, the real number is likely significantly higher. See International Organization for Migration: Missing Migrants Project, <https://missingmigrants.iom.int/region/mediterranean>, visited 4 February 2020.

<sup>45</sup> Zamatto et. al. (2017) ‘Migrants caught between tides and politics in the Mediterranean: an imperative for search and rescue at sea?’. *BMJ Global Health*, vol. 2 no. 3, p. 1.

<sup>46</sup> Mann, Itamar (2018) ‘Maritime Legal Black Holes: Migration and Rightlessness in International Law’. *European Journal of International Law*, vol. 29 no. 2, p. 354; Frenzen, Niels W. (2017) ‘The legality of Frontex Operation Hera-type migration control practices in light of the *Hirsi* judgment’, in: Gammeltoft-Hansen, Thomas and Vedsted-Hansen, Jens (eds.) *Human rights and the dark side of globalisation. Transnational law enforcement and migration control*. Routledge, p. 303.

<sup>47</sup> Mann (2018) *supra* note 46, p. 353-354.

<sup>48</sup> *Ibid.*

<sup>49</sup> Ghezelbash et al. (2018) ‘Securitization of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia’. *International & Comparative Law Quarterly*, vol. 67 no. 2, p. 330.

Especially in the aftermath of the so-called “refugee crisis”, but starting already after the Cold War, Europe’s migration policies have been characterised by “externalisation, privatisation and securitisation”<sup>50</sup>.<sup>51</sup> In order to prevent mass influx, similar to the one of 2015-2016, Europe has responded to the increased amount of people seeking protection in Europe by resorting to so-called non-entrée measures, that is, various efforts to keep migrants and refugees away from EU territory without, at least on paper, violating any of the EU’s international obligations.<sup>52</sup>

Resorting to non-entrée policies is not a new phenomenon. Whereas early generation non-entrée practices used by European States involved e.g. visa controls, carrier sanctions and the establishment of international zones, there has been a shift to arrangements more actively involving third States.<sup>53</sup> The newer forms of non-entrée rely on cooperative deterrence carried out by (or on the territories of) countries of origin and countries of transit, often poorer and willing to “serve as gatekeepers to the developed world”<sup>54</sup>.<sup>55</sup> Italy, for instance, has trained, equipped and sponsored the LCG in order for Libya to strengthen its border controls and to prevent migrants and refugees from reaching Europe.<sup>56</sup>

Such arrangements stem from States’ belief that they are only obliged to meet their human rights and refugee law obligations within their own territories.<sup>57</sup> It is also expensive to process asylum applications and to provide asylum-

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<sup>50</sup> Spijkerboer, Thomas (2018) ‘The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control’. *European Journal of Migration and Law*, vol. 20 no. 4, p. 453.

<sup>51</sup> Ibid.

<sup>52</sup> Gammeltoft-Hansen, Thomas and Hathaway, James C. (2015) ‘Non-Refoulement in a World of Cooperative Deterrence’. *Columbia Journal of Transnational Law* vol. 53 no. 2, p. 235.

<sup>53</sup> Ibid., p. 235-236.

<sup>54</sup> Ibid., p. 248-249.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid., p. 252.

<sup>57</sup> Gammeltoft-Hansen, Thomas (2016) *Hvordan løser vi flygtningekrisen?*. Informations Forlag, p. 33.

seekers and refugees the rights they are entitled to, and thus, many EU States do whatever they can to keep persons from third States from ever reaching their territories. In the absence of safe and legal routes to what has become to be called “fortress Europe”, thousands of people continue to embark on dangerous journeys on the Mediterranean,<sup>58</sup> knowingly risking their lives in the lack of better alternatives to find safety or better living standards.

Many refugee and migration scholars have chosen to talk about a *European policy crisis* or *solidarity crisis*, rather than a *refugee crisis*.<sup>59</sup> Under the Dublin Regulation<sup>60</sup> – the legal instrument allocating the responsibility for processing asylum claims – as a general rule of thumb, the first EU Member State entered by an asylum-seeker is responsible for examining the asylum claim.<sup>61</sup> In practice, the EU Member States located at the EU’s external borders, particularly Greece and Italy, have experienced a much higher migratory pressure than other EU Member States because of their geographic location and therefore “carried a disproportionate share”<sup>62</sup> of managing the EU’s external borders and processing asylum applications.<sup>63</sup> While art. 80 in the Treaty on the Functioning of the European Union<sup>64</sup> highlights the role of solidarity,<sup>65</sup> the Dublin system distributes responsibility unfairly. Northern Member States have been unwilling to change the responsibility allocation rules,<sup>66</sup> and European “solidarity” has been limited to financial support and

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<sup>58</sup> Zamatto et al. (2017), *supra* note 45, p. 1.

<sup>59</sup> See e.g. Den Heijer, Rijpma and Spijkerboer (2016A), *supra* note 2, p. 607.

<sup>60</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or Stateless person.

<sup>61</sup> Ibid. Art. 3(2). See also e.g. Karageorgiou, Eleni (2019) ‘The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity’. *Nordic Journal of International Law*, vol. 88, p. 339.

<sup>62</sup> Den Heijer, Rijpma and Spijkerboer (2016A), *supra* note 2, p. 615.

<sup>63</sup> Ibid.

<sup>64</sup> Consolidated Version of the Treaty on the Functioning of the European Union 2012 Official Journal C326/55.

<sup>65</sup> Karageorgiou (2019), *supra* note 61, p. 327.

<sup>66</sup> Den Heijer, Maarten; Rijpma, Jorrit and Spijkerboer, Thomas (2016B): ‘The systemic failure of the Common European Asylum System, as exemplified by the EU-Turkey deal’, Thomas Spijkerboer, <http://thomasspijkerboer.eu/thomas-blogs/the-systemic-failure-of-the-common-european-asylum-system-as-exemplified-by-the-eu-turkey-deal/>, visited 25 March 2020.

operational support under the coordination of the European Border and Coastguard Agency Frontex.<sup>67</sup> With such lack of solidarity between EU Member States, the entering of deals on migration control between border States and third States, such as Italy and Libya, have not been unforeseeable. The Italy-Libya MoU is an example of such a bilateral agreement and will be explored more in detail in the sub-chapter below.

## **2.1 Italy-Libya MoU, *Hirsi and S.S. and Others v. Italy***

Since the beginning of the 21<sup>st</sup> century, Italy and Libya have cooperated on migration control in the shape of both formal and informal frameworks (including official agreements as well as unofficial agreements “removed from parliamentary scrutiny”<sup>68</sup>). In the beginning, boat people intercepted in surveillance or SAR operations were taken to Italy for processing. In 2007, however, the arrangements were changed and Libyan authorities agreed to immediately repatriate intercepted boat people to Libya, and thereby the boat people were effectively denied the possibility of applying for asylum in Italy.<sup>69</sup> The new arrangements were never officially declared, but were revealed in the *Hirsi Jamaa and Others v. Italy* (Hirsi)<sup>70</sup> case,<sup>71</sup> where the ECtHR, five years after the conclusion of the agreements, ruled that such deterrence arrangements were in violation of the prohibition of refoulement as well as collective expulsion.<sup>72</sup>

The *Hirsi* case, in various ways similar to *S.S. and Others v. Italy*, concerned the interception of Somali and Eritrean nationals who had left Libya by boat

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<sup>67</sup> Den Heijer, Rijpma and Spijkerboer (2016A), *supra* note 2, p. 615.

<sup>68</sup> Mussi, Francesca and Tan, Nikolas Feith (2017) ‘Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia’. *UCD Working Papers in Law, Criminology & Socio-Legal Studies*. Research Paper No. 09/2017, p. 6.

<sup>69</sup> Frenzen (2017), *supra* note 46, p. 302.

<sup>70</sup> *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.

<sup>71</sup> Mussi and Tan (2017), *supra* note 68, p. 8.

<sup>72</sup> *Hirsi*, *supra* note 70, paras. 136–138 and 185–186.



with the aim of reaching Italy. Instead of being intercepted by the LCG, the applicants were intercepted by the Italian Coastguard and thereafter taken on-board Italian military vessels and returned to Libya, where they were handed over to Libyan authorities.<sup>73</sup> The applicants invoked that Italy had violated their rights under the ECHR by not trying their asylum applications and by sending them back to Libya in violation of the prohibitions of *refoulement* and *chain-refoulement* as enshrined in art. 3 ECHR.<sup>74</sup>

The Court ruled in favour of the applicants and found that Italy could not evade its ECHR responsibility by entering into bilateral migration agreements with Libya.<sup>75</sup> The Court noted that “the Italian authorities knew or should have known that, as irregular migrants, [the applicants] would be exposed in Libya to treatment in breach of the Convention”<sup>76</sup> and that Italy thereby, “in full knowledge of the facts”<sup>77</sup>, exposed the applicants to treatment prohibited by the Convention, by pushing the boat people back to Libya, without examining their asylum claims in violation of art. 3 ECHR and art. 4 of Protocol No. 4 ECHR.<sup>78</sup> Importantly for our purposes, the Court confirmed that the ECHR *does apply* during SAR operations when it ruled that:

Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion.<sup>79</sup>

While the ECtHR condemned the Italian push-backs, what the Court examined in *Hirsi* was essentially an outdated model of cooperative deterrence, that Italy no longer pursued.<sup>80</sup> Indeed, the cooperation between Italy and Libya had already shifted, like the title of Pijnenburg’s article, “From Italian pushbacks to Libyan pullbacks”<sup>81</sup>. According to Mann:

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<sup>73</sup> Ibid., paras. 9–12.

<sup>74</sup> Ibid., paras. 3, 85, 139 and 159.

<sup>75</sup> Ibid., para. 129.

<sup>76</sup> Ibid., para. 131.

<sup>77</sup> Ibid., para. 137.

<sup>78</sup> Ibid., paras. 136–138 and 185–186.

<sup>79</sup> Ibid., para. 81.

<sup>80</sup> Mann, Itamar (2013) ‘Dialectic of Transnationalism: Unauthorized Migration and Human Rights 1993-2013’. *Harvard International Law Journal*, vol. 52 no. 2, p. 367.

<sup>81</sup> Pijnenburg (2018), *supra* note 4.

Though *Hirsi* reviewed an obsolete Italian model of disaggregation [...] it contributed to understandings of how to evade judicial review in future cases. By saying that a State must not turn back asylum seekers with boats under their *de jure* or *de facto* control, the court is also *inviting* such policies, as long as they can be conducted with no such control.<sup>82</sup>

Instead of Italy intercepting and *pushing back* irregular migrants and refugees to Libya before reaching Italian waters, the LCG intercepts and *pulls back* the boat people unwanted by Italy to Libya, from where they have departed. This new version of deterrence was formally written down in 2017 when Italy and the UN supported Libya's Government of National Accord concluded a MoU, under which Italy would provide support to the LCG, which, in return, would intercept and pull back boat people to Libya.<sup>83</sup> According to Amnesty International and Human Rights Watch:

Italy pursued these activities to enable Libya to conduct sea operations leading to the interception and return to Libya of migrants found at sea, and so to create the conditions for at least the appearance of Libya's ownership of operations at sea with the effect, and arguably the intent, to achieve the same outcome of the pushback practices and policies that [the ECtHR] fell afoul of Convention standards in *Hirsi*, while trying to circumvent Italy's relevant obligations.<sup>84</sup>

The applicants and their legal representatives hope that the Court will take the opportunity in *S.S. and Others v. Italy* to establish “the key principle that so-called ‘pull-backs’ are contrary to basic human rights standards”<sup>85</sup> and that the LCG cannot be allowed to be “Italy’s vehicle for migrant abuses”<sup>86</sup>.<sup>87</sup> The case has the potential of having a big impact on Italian and European migration policies and accordingly, the hopes on the outcome are high. According to Baumgärtel, an ECtHR condemnation of the arrangements would be a “serious blow to border control practices in the Mediterranean”<sup>88</sup>

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<sup>82</sup> *Ibid.*, p. 369.

<sup>83</sup> *Ibid.*, p. 397.

<sup>84</sup> Amnesty International and Human Rights Watch (2019), *supra* note 17, para. 7, visited 23 January 2020.

<sup>85</sup> Global Legal Action Network (2018), *supra* note 18, visited 3 February 2020.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> Baumgärtel (2018), *supra* note 23, visited 3 March 2020.

but he also notes, that caution should also be paid to *Hirsi* like restrained judgments, “which only seemingly improve the situation”.<sup>89</sup> Baumgärtel puts forward that:

In the worst case scenario, the ECtHR could provide pullback policies with legitimation [...] More likely, the ECtHR will recuse itself in some way, leaving human rights defenders behind with the costs in money and effort, and with shattered hopes. But the impact of a successful action – by no means an impossibility – could be tremendous. Not only would it be a rare victory at a difficult time, but it would eclipse the *Hirsi* decision in both legal and practical significance. The pullback policies in question *are* common practice in Europe these days.<sup>90</sup>

In order to be able to rule upon the lawfulness of Italy’s acts in *S.S and Others v. Italy*, where the Italian coordination could be argued to have encouraged the LCG to conduct pull-backs in line with the MoU, the Court will first have to rule that the applicants were entitled to any rights under the ECHR. Thus, we need to start by asking a very fundamental question: who is protected by the ECHR? Only if the applicants, nationals of Nigeria and Ghana,<sup>91</sup> can establish that the protections of the ECHR apply to them can their case succeed. Although the question is so fundamental, the answer is not straight forward.

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<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> European Court of Human Rights (2019), *supra* note 5, p. 9.

### 3. The main issue: jurisdiction

The scope of the individuals protected by the Convention is regulated in art. 1 ECHR, which stipulates that:

The High Contracting Parties shall secure to *everyone within their jurisdiction* [emphasis added] the rights and freedoms defined in Section I of this Convention.

In other words, a person needs to be within a Council of Europe (CoE) State's jurisdiction in order to be entitled to any rights under the Convention. What we are interested in is the *geographical scope* of the Convention – that is whether individuals outside a CoE State's territory can be protected by the Convention. Note, that it is important not to confuse the meaning of “jurisdiction” in art. 1 ECHR, often referred to as State jurisdiction, with the other meanings that the word has, such as the one used in general international law concerning a State's right to regulate conduct or consequences of events;<sup>92</sup> legislative, adjudicative and enforcement jurisdiction,<sup>93</sup> or the right of tribunals to adjudicate upon cases,<sup>94</sup> such as the one enshrined in art. 32 ECHR.

What State jurisdiction amounts to is neither defined by the Convention, nor any other human rights instrument using the term. The starting point is, however, that jurisdiction is territorial (the so-called territoriality principle)<sup>95</sup> and that Convention rights are owed to the individuals within the State's territory. Even though there is no mention of the word “territory” in art. 1 ECHR, the Court has in various of its judgments acknowledged that a “State's

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<sup>92</sup> Oppenheim, Lassa Francis Lawrence (1996) *Oppenheim's International Law Vol. 1, Part 2–4, Peace*. 9th edition. Edited by Jennings, Robert and Watts, Arthur. Longman, p. 456.

<sup>93</sup> Staker, Crisopher (2018) 'Jurisdiction', in: Evans, Malcolm D. (ed.) *International law*. Oxford University Press, p. 292.

<sup>94</sup> *Ibid.*, p. 290.

<sup>95</sup> European Court of Human Rights: Guide on Article 1 of the European Convention on Human Rights. Obligation to respect human rights – Concepts of “jurisdiction” and imputability, updated 31 December 2019, para. IA, p. 7-8,

[https://www.echr.coe.int/Documents/Guide\\_Art\\_1\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf), visited 13 May 2020.

jurisdictional competence under Article 1 is primarily territorial”<sup>96</sup>. Even in the *travaux préparatoires* of the Convention it was suggested that instead of using the term “jurisdiction”, art. 1 would refer to individuals residing in the territory of the Contracting State in question.<sup>97</sup> This baseline position is shared by various other human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), explicitly referring to territory in its jurisdictional clause.<sup>98</sup>

The relevant question in *S.S. and Others v. Italy* is whether the ECHR protects the rights of individuals who are outside a Contracting State’s territory – in other words, whether the ECHR applies extraterritorially. In *S.S. and Others v. Italy*, the applicants were clearly outside Italian territory and appear to have been outside Italian territorial waters, and thus, for the Convention to apply, one would need to step outside the baseline position of the territorial application of the Convention. To discover whether the term “jurisdiction” could also cover individuals outside a State’s territory, the following parts of this thesis will interpret art. 1 ECHR. Chapter 3.1 will briefly look into the general tools of treaty and ECHR interpretation, whereas the remaining Chapters of this thesis will apply the tools to art. 1 ECHR and *S.S. and Others v. Italy*.

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<sup>96</sup> See e.g. *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012, para. 104.

<sup>97</sup> European Court of Human Rights, *supra* note 95, para. 2, p. 5.

<sup>98</sup> Art. 2(1) ICCPR.

### 3.1 How to interpret the ECHR

Being an international treaty,<sup>99</sup> the general “frame of reference”<sup>100</sup> for interpreting the ECHR is set by art. 31-33 of the Vienna Convention on the Law of Treaties (VCLT).<sup>101</sup> The general rules of interpretation are set out by art. 31 VCLT whereas the latter two articles stipulate the supplementary means of interpretation and the rules for interpreting multilingual treaties. Relevant for us in this context are mostly:

#### Article 31(1) VCLT

A treaty shall be interpreted in good faith and in accordance with the *ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose* [emphasis added].

#### Article 32 VCLT

Recourse may be had to *supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion* [emphasis added], in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Although the VCLT, as Scheinin notes, does not mention judicial decisions as a source for interpretation, the ECtHR’s rulings are nonetheless of crucial importance when interpreting the ECHR. According to art. 19 ECHR, the Court has as its task to ensure the observance of the Convention and according to art. 32 ECHR it falls within the jurisdiction of the Court to interpret the Convention. It was exactly for this purpose, to interpret the Convention, that the Court was established.<sup>102</sup> The Court’s rulings, which are binding according to art. 46(1) ECHR, have made a “major and influential

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<sup>99</sup> Letsas, George (2007) *A Theory of Interpretation of the European Convention on Human Rights*. Oxford University Press, p. 58.

<sup>100</sup> Scheinin, Martin (2017) ‘The art and science of interpretation in human rights law’, in: Andreassen, Bård A.; Sano, Hans-Otto and McInerney-Lankford Siobhán (eds.) *Research Methods in Human Rights. A Handbook*. Edwar Elgar Publishing, p. 25.

<sup>101</sup> Ibid., p. 25

<sup>102</sup> Ibid., p. 27.

contribution”<sup>103</sup> to the development of the ECHR,<sup>104</sup> and accordingly, the Court’s case law will be the focus of the following chapters.<sup>105</sup>

Even though the ECtHR does not make much reference to the VCLT in its rulings, the Court has adopted a method of interpretation which, according to Letsas, is in line with the VCLT. By finding that the ECHR is a “living instrument to be interpreted in the light of present-day conditions”<sup>106</sup>, Letsas argues that the Court meets both art. 31(1) VCLT requiring purposive interpretation and art. 32 VCLT giving the preparatory works only a supplementary role in its interpretations. By “relatively consistent[ly]”<sup>107</sup> requiring such an interpretation, the Court has often taken the stance that the Convention shall not be limited to the original meaning intended by the drafters of the Convention.<sup>108</sup> Note, however, that some scholars have criticised the Court when ignoring the intentions of the drafters, finding that departing from the intention risks judicial illegitimacy.<sup>109</sup>

The following chapters will, in line with what was presented above, analyse the Court’s jurisprudence, but not the *travaux préparatoires* of the Convention, to conclude how the Court could rule on jurisdiction in the present case and other cases regarding SAR coordination from distance.

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<sup>103</sup> Bantekas, Ilias and Oette, Lutz (2016) *International Human Rights Law and Practice*. Second Edition. Cambridge University Press, p. 243.

<sup>104</sup> *Ibid.*, p. 243.

<sup>105</sup> While the doctrinal basis for the interpretive authority of the ECtHR is not quite settled, Scheinin has identified and discussed four different constructions offering an explanation for the basis for the Court’s authority. See Scheinin (2017), *supra* note 100, p. 28 – 30.

<sup>106</sup> See e.g. *Banković and Others v. Belgium and Others (dec.)* [GC], no. 52207/99, ECHR 2001-XII, para. 64.

<sup>107</sup> Letsas (2007), *supra* note 99, p. 11.

<sup>108</sup> *Ibid.*, p. 59.

<sup>109</sup> *Ibid.*, p. 3.

## 3.2 Extraterritorial jurisdiction

No matter the baseline position that jurisdiction is primarily territorial, jurisdiction is not synonymous to territory. Both the European Commission on Human Rights (the ECmHR) and the ECtHR have in a plurality of cases been faced with the question of the extraterritorial scope of the Convention, and a somewhat conflicting jurisprudence on the matter has evolved. Both bodies have nonetheless multiple times confirmed that (under certain circumstances) the Convention does apply extraterritorially. In the *Loizidou v. Turkey* (Loizidou) case, for instance, the Court Stated that:

[A]lthough Article 1 [...] sets limits on the reach of the Convention, the concept of “jurisdiction” under this provision is *not restricted to the national territory* [emphasis added] of the High Contracting Parties.<sup>110</sup>

In the much discussed and criticised 2001 *Banković and Others v. Belgium and Others* (Banković) ruling however, the Court challenged this view and took a more restrictive approach to extraterritoriality. The case concerned the NATO<sup>111</sup> bombing of a Serbian radio station killing 16 civilians and instead of finding that the Convention applied, the Court found that jurisdiction under the ECHR is triggered extraterritorially only in *exceptional* circumstances:

In keeping with the essentially territorial notion of jurisdiction, *the Court has accepted only in exceptional cases that acts* [emphasis added] of Contracting States performed, or producing effects, *outside their territories can constitute an exercise of jurisdiction* [emphasis added] by them in the meaning of Article 1 of the Convention.<sup>112</sup>

In its assessment, the Court relied on the VCLT and found that based on the VCLT references to “ordinary meaning”<sup>113</sup>, “any relevant rules of international law”<sup>114</sup> and “preparatory work”<sup>115</sup>, art. 1 ECHR “must be considered to reflect [the] ordinary and essentially territorial notion of

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<sup>110</sup> *Loizidou v Turkey* (preliminary objections), 23 March 1995, Series A no. 310, para. 62.

<sup>111</sup> North Atlantic Treaty Organization.

<sup>112</sup> *Banković*, *supra* note 106, para. 67.

<sup>113</sup> Art. 31(1) VCLT.

<sup>114</sup> Art. 31(3)(C) VCLT.

<sup>115</sup> Art. 32 VCLT.



jurisdiction”<sup>116</sup> as set out by public international law.<sup>117</sup> In public international law, jurisdiction is closely tied with sovereignty, and as den Heijer notes:

Since sovereignty is in the present world organised along territorial demarcations, the starting point for assessing ‘jurisdiction’ is also territorial.<sup>118</sup>

In its ruling, the Court referred to (some of) its earlier jurisprudence on jurisdiction and made an effort to explain why those cases had been exceptional and art. 1 ECHR triggered,<sup>119</sup> in practice limiting the extraterritorial applicability of the Convention and declared the case inadmissible.<sup>120</sup> The judgment caused confusion among legal scholars, as the *Banković* interpretation of jurisdiction was much stricter than the Court’s previous findings, as well as that of other human rights bodies.<sup>121</sup> Milanovic, for instance, criticised the Court for conflating State jurisdiction with general international law jurisdiction.<sup>122</sup>

However, later the ECtHR appeared to change its view,<sup>123</sup> as “the stringency of *Banković* started to look less and less appealing”<sup>124</sup>.<sup>125</sup> In *Pad and Others v. Turkey* (Pad)<sup>126</sup> concerning the shootings of Iranian nationals by a Turkish helicopter, for example, the Court found opposite to the *Banković* Court, that the Convention applied extraterritorially.<sup>127</sup> The outcome appears to have been in contradiction of *Banković* and in its important *Al-Skeini* ruling, the

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<sup>116</sup> *Banković*, *supra* note 106, para. 61.

<sup>117</sup> *Ibid.*, paras. 56–61.

<sup>118</sup> Den Heijer, Maarten (2012) *Europe and Extraterritorial Asylum*. Studies in International Law. Hart Publishing, p. 19.

<sup>119</sup> *Banković*, *supra* note 106, paras. 67–72.

<sup>120</sup> *Ibid.*, para. 85.

<sup>121</sup> Gammeltoft-Hansen and Hathaway (2015), *supra* note 52, p. 260.

<sup>122</sup> Milanovic, Marko (2012) ‘*Al-Skeini* and *Al-Jedda* in Strasbourg’. *The European Journal of International Law*, vol. 23 no. 1, p. 123.

<sup>123</sup> Bantekas and Oette (2016), *supra* note 103, p. 306–307. See also Milanovic (2012), *supra* note 122, p. 124.

<sup>124</sup> Milanovic (2012), *supra* note 122, p. 124.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Pad and Others v Turkey* (dec.) no. 60167/00, 28 June 2007.

<sup>127</sup> Milanovic (2012), *supra* note 122, p. 124.

Court tried to bring clarity into its existing case law,<sup>128</sup> although one can question how successful the Court was in fulfilling its aim. *Al-Skeini* concerned the shooting of six Iraqi civilians by British troops and the investigations conducted by the UK into their deaths. While the merits of the case concerned art. 2 ECHR, the importance of the ruling lies in the ECtHR's assessment of jurisdiction as the Court "effectively abandoned the [...] reservation that the ECHR does not apply extraterritorially"<sup>129</sup>. The Court explained why it in its previous jurisprudence had established jurisdiction and found e.g. regarding the personal model (see Chapter 4.2) that:

[T]he Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual [...] into the State's Article 1 jurisdiction.<sup>130</sup>

By recalling previous situations of extraterritorial applicability, the ECtHR according to Shany, "underscored the limited relevance of borders in determining the Convention's applicability"<sup>131</sup>.<sup>132</sup> Milanovic, however, was not convinced by the Court's clarification and argued that the ECtHR "basically pretended that all of its prior jurisprudence somehow fitted neatly into a bigger picture even though it manifestly did not"<sup>133</sup>.<sup>134</sup>

To borrow the words of Gammeltoft-Hansen, we can conclude that the Strasbourg Court's approach to jurisdiction "has not been distinguished by either the clarity of its reasoning, or its consistency"<sup>135</sup>. Even though it is not easy to foresee how the ECtHR will rule, it suffices for the purposes of this chapter to conclude here that while jurisdiction is predominantly territorial,

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<sup>128</sup> Shany, Yuval (2013) 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in Human Rights Law'. *Law & Ethics of Human Rights*, vol. 7 no. 1, p. 58.

<sup>129</sup> Bantekas and Oette (2016), *supra* note 103, p. 306–307.

<sup>130</sup> *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 ECHR 2011, para. 136.

<sup>131</sup> Shany (2013), *supra* note 127, p. 58.

<sup>132</sup> *Ibid.*, p. 158; Banković, *supra* note 106, paras. 133–140.

<sup>133</sup> Milanovic (2012), *supra* note 122, p. 127.

<sup>134</sup> *Ibid.*

<sup>135</sup> Borelli, Silvia and Stanford, Ben (2014) 'Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights'. *Review of International Law & Politics*, vol. 10 no. 1, p. 41.

the ECHR does at least under some circumstances apply extraterritorially. The following chapter will investigate under what circumstances art. 1 ECHR could be triggered in such extraterritorial situations.

## 4. The extraterritorial exercise of control

Two primary models of extraterritorial jurisdiction have been established by the Court (as well as other human rights bodies) in its case law: the spatial model (control over areas) and its personal counterpart (control over persons).<sup>136</sup> The main subject of this chapter will be the personal model, but in order to understand it properly, let us first look at the connection between both models.

### 4.1 The spatial model

Under the spatial model, the exercise of effective control by a State over an area outside its territory might amount to an exercise of jurisdiction.<sup>137</sup> The model is perhaps the least controversial one of all models on extraterritorial jurisdiction as it is the one with the most textual support,<sup>138</sup> and stems from the logic that if a State owes human rights obligations to individuals within its territorial boundaries, it should likewise have identical obligations within areas or territory it controls outside its national territory.<sup>139</sup> The spatial model was set in *Loizidou*,<sup>140</sup> where the Court found that:

[T]he responsibility of a Contracting Party may [...] arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control [...]<sup>141</sup>

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<sup>136</sup> Al-Skeini, *supra* note 129, paras. 133–140.

<sup>137</sup> Milanovic (2011), *supra* note, p. 127.

<sup>138</sup> *Ibid.*

<sup>139</sup> See *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004, para. 71.

<sup>140</sup> Milanovic (2011), *supra* note 27, p. 128.

<sup>141</sup> *Loizidou*, *supra* note 110, para. 62.

The model has hitherto only been applied in the context of armed conflict,<sup>142</sup> although as will be seen in Chapter 4.3.1 it has also partly been discussed in relation to vessels.<sup>143</sup>

By controlling an area, a State essentially also controls the individuals within that area and in practice, the spatial model is therefore similar to the personal model which will be discussed in the below sub-chapter. Therefore Besson argues that jurisdiction is always triggered by personal control, but “sometimes presumed by reference to territorial control and hence [...] indirect or general control over the person in that territory”.<sup>144</sup> A similar approach is adopted by Milanovic, who discusses whether the spatial model could be applied to vessels and finds that:

In most cases, it would be impossible to distinguish as a matter of fact between the control over a ship and the control over individuals on it. To the extent that a personal notion of jurisdiction would govern, the spatial notion would be redundant.<sup>145</sup>

Let us therefore move on to investigate the personal model and how it has been applied in cases concerning interceptions.

## 4.2 The personal model

Under the personal model, jurisdiction may be triggered where a State exercises control or power over an individual outside its territory regardless of whether the State exercises control over the area in which the individual is located.<sup>146</sup> The model was set by the ECmHR in *Cyprus v. Turkey* (1975), where it found that persons under a State’s *actual authority and responsibility* – whether the authority is exercised inside or outside a State’s territory – come

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<sup>142</sup> European Court of Human Rights, *supra* note 95, para. 43, p. 16.

<sup>143</sup> See *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010, para. 67.

<sup>144</sup> Besson, Samantha (2012) ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’. *Leiden Journal of International Law*, vol. 25, p. 875.

<sup>145</sup> Milanovic (2011), *supra* note 27, p. 169.

<sup>146</sup> European Court of Human Rights, *supra* note 95, para. 30(a-b), p. 12.

within that State's jurisdiction.<sup>147</sup> The word "responsibility" was however later avoided, likely in order to avoid confusion between the assessment of jurisdiction and the assessment of alleged violations of the rights and freedoms set out in the Convention.<sup>148</sup> Hence, in later cases such as *Issa v. Turkey* (Issa), the Court ruled instead that what triggers jurisdiction over persons is *authority and control* exercised over the individuals in question.<sup>149</sup> Sometimes reference is made to *physical power or control*,<sup>150</sup> or to the exercise of *effective control*,<sup>151</sup> the term used by the Court in *Loizidou* in connection to the spatial model.<sup>152</sup>

The jurisdiction exercised over a person can be *de jure* and/or *de facto* – the Court often refers to control exercised whether "lawfully or unlawfully".<sup>153</sup> *De jure* jurisdiction has been recognized for instance in "cases involving the activities of [a State's] diplomatic or consular agents abroad"<sup>154</sup> as well over individuals on vessels flying its flag (flag State jurisdiction), in line with the rules of the law of the sea.<sup>155</sup> *De jure* jurisdiction often correlates with *de facto* control and, as Klug and Howe note, "*de jure* jurisdiction provides strong evidence for a corresponding *de facto* control".<sup>156</sup> In *Hirsi*, for instance, Italy was found to exercise both *de jure* and *de facto* control (see Chapter 4.3.1).<sup>157</sup> Other examples of *de facto* control include *Öcalan* where an individual was physically handed over to a State's authorities and therefore came under that State's control.<sup>158</sup>

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<sup>147</sup> Cyprus v. Turkey, nos. 6780/74 and 6950/75, Commission decision of 26 May 1975, Decisions and Reports 2, para. 8.

<sup>148</sup> Da Costa, Karen (2013) *The Extraterritorial Application of Selected Human Rights Treaties*. Nijhoff, p. 109.

<sup>149</sup> Ibid.

<sup>150</sup> Raible, Lea (2016) 'The extraterritoriality of the ECHR: why Jaloud and Pisari should be read as game changers'. *European Human Rights Law Review*, vol. 2 no. 2, p. 11.

<sup>151</sup> Loizidou, *supra* note 110 para. 62; Tzevelekos, Vasillis P. (2014) 'Reconstructing the Effective Control Criterion in Extraterrestrial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility'. *Michigan Journal of International Law* vol. 36 no. 1, p. 136.

<sup>152</sup> Ibid.

<sup>153</sup> See e.g. Issa, *supra* note 138, para. 71.

<sup>154</sup> Banković, *supra* note 106, para. 73.

<sup>155</sup> Klug and Howe (2010), *supra* note 36, p. 85; art. 92 UNCLOS.

<sup>156</sup> Klug and Howe (2010), *supra* note 36, p. 93.

<sup>157</sup> Hirsi, *supra* note 70, para. 81.

<sup>158</sup> Öcalan v. Turkey [GC], no. 46221/99, ECHR 2005-IV, para. 91.

Whether jurisdiction is triggered naturally depends on the circumstances of the case but what is important is the power or control *actually* exercised over the person in question.<sup>159</sup> Of relevance is in other words the result of the act.<sup>160</sup> While the exact amount of control required is unclear and contested,<sup>161</sup> the ECtHR has repeatedly highlighted the importance of *de facto* control as opposed to the *de jure* counterpart.<sup>162</sup>

As has already been mentioned, the ECtHR is for the first time called to adjudicate upon the lawfulness of a SAR operation, and it is not obvious what arguments the Court will put forward when assessing art. 1 ECHR. While there is no obvious ruling that could be applied as a blueprint to the present case, we must nonetheless rely on the Court's case law when interpreting art. 1 ECHR in line with what has set out in Chapter 3.1. Let us therefore immerse into the personal model and the ECtHR jurisprudence resembling *S.S. and Others v. Italy* the most: the cases concerning interceptions at sea.

### 4.3 The personal model and interceptions

The ECtHR case law on interceptions can be divided into two categories regarding jurisdiction: cases where the Court has engaged in a discussion on art. 1 ECHR and cases where the Court has assumed jurisdiction without elaborating on its reasoning. Whereas the former category more clearly gives us an insight into the Court's approach and how it might rule in the present case, the latter will also be investigated and used as a comparison. Let us start

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<sup>159</sup> European Court of Human Rights, *supra* note 95, para. 30(a), p. 12.

<sup>160</sup> Oudjeans, Nanda; Rijken, Conny and Pijnenburg, Annick (2018) 'Protecting the EU External Borders and the Prohibition of Refoulement'. *Melbourne Journal of International Law*, vol. 19, p. 626.

<sup>161</sup> Kessing, Peter Vedel (2017) 'Transnational operations carried out from a State's own territory: armed drones and the extraterritorial effect of international human rights conventions' in: Gammeltoft-Hansen, Thomas and Vedsted-Hansen, Jens (eds.) *Human rights and the dark side of globalisation. Transnational law enforcement and migration control*. Routledge, p. 84.

<sup>162</sup> Papastavridis (2014), *supra* note 29, p. 28.

with the former category and the cases of *Medvedyev and Others v. France* (Medvedyev) and *Hirsi*.

### 4.3.1 *Medvedyev and Hirsi*

*Medvedyev* concerned the interception of a Cambodian cargo ship. French authorities suspected the ship for smuggling drugs to Europe through the Canary Islands and therefore intercepted the vessel on the high seas. The French authorities boarded the vessel, used weapons to open locked doors, confined the vessel's crew members to their quarters and re-routed the vessel towards France. The Cambodian vessel was escorted to Brest by a French warship, where the Cambodian vessel's crew members were handed over to the police.<sup>163</sup> The procedure before the ECtHR mainly concerned the alleged arbitrary deprivation of the applicants' liberty, but for our purposes it is of course the Court's assessment of France's jurisdiction that is the most relevant.

What can first be noted regarding the judgment is that the Court made no clear distinction between the spatial and personal models when it found that France had owed obligations *vis-à-vis* the applicants because of the control exercised by France over *both the vessel and its crew*.<sup>164</sup> The Court reasoned based on the facts that:

[A]s 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 [...]<sup>165</sup>

While the assessment was ambiguous, the Court later commented its findings in *Al-Skeini*, where it clarified that jurisdiction in *Medvedyev* had *not* arisen solely from the control exercised over the vessel as what had been decisive

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<sup>163</sup> *Medvedyev*, *supra* note 142, paras. 9, 13, 15 and 18.

<sup>164</sup> *Ibid.*, para. 67.

<sup>165</sup> *Ibid.*



was “the exercise of physical power and control over the persons in question”<sup>166, 167</sup>

*Hirsi* concerned, as presented in Chapter 2.1, the interception on the high seas of a vessel transporting migrants and refugees that had departed from Libya and were heading towards Italy. As opposed to *Medvedyev*, the Italian authorities did not board the vessel transporting the boat people but instead, the intercepted people were brought onto Italian ships, and immediately returned to Libya,<sup>168</sup> in accordance with the two States’ (at the time unofficial) cooperation on migration (see Chapter 2.1).<sup>169</sup> The applicants claimed, in particular, that their rights under art. 3 of the ECHR and art. 4 of Protocol No. 4 had been violated.<sup>170</sup>

As was mentioned in Chapter 4.2, the ECtHR found that the applicants had been brought within Italy’s jurisdiction both through Italy’s exercise of *de jure* jurisdiction and *de facto* control. Starting with the former, the Court noted that the applicants had been taken on-board Italian vessels and that under the law of the sea, a vessel on the high seas is “subject to the exclusive jurisdiction of the State of the flag it is flying”.<sup>171</sup> The flag State principle, the Court noted,

[H]as led the Court to recognise, in cases concerning acts carried out on-board vessels flying a State’s flag [...] cases of extraterritorial exercise of the jurisdiction of that State [...] Where there is control over another, this is *de jure* control exercised by the State in question over the individuals concerned.<sup>172</sup>

Regarding *de facto* control, the Court noted that “the events took place entirely on-board ships of the Italian armed forces, the crews of which were

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<sup>166</sup> Al-Skeini, *supra* note 129, para. 136.

<sup>167</sup> Ibid.

<sup>168</sup> *Hirsi*, *supra* note 70, paras. 9–12.

<sup>169</sup> Frenzen (2017), *supra* note 46, p. 302.

<sup>170</sup> *Hirsi*, *supra* note 70, para. 3.

<sup>171</sup> Ibid., para. 77. See also art. 92 UNCLOS,

<sup>172</sup> *Hirsi*, *supra* note 70, para. 77.

composed exclusively of Italian personnel”<sup>173</sup> and hence that *de facto* control was also exercised.<sup>174</sup>

So, what do *Medvedyev* and *Hirsi* tell us regarding jurisdiction when applied to the facts as presented by the applicants in *S.S. and Others v. Italy*?

#### **4.3.1.1 *Medvedyev* and *Hirsi* applied to *S.S. and Others v. Italy***

We learn from *Medvedyev* and *Hirsi* that it is relevant to investigate both *de jure* and *de facto* jurisdiction in cases concerning interceptions. As was put forward in Chapter 4.2, it is also important to notice that both types can be exercised simultaneously. It falls outside the scope of this thesis to discuss *de jure* jurisdiction and hence, the following sections will discuss what can be concluded regarding *de facto* jurisdiction.

Starting with *Medvedyev*, France appears to have had control over in practice everything happening on-board the Cambodian vessel. By boarding the applicants’ vessel, confining them to their quarters and rerouting the vessel, taken together with the fact that the French authorities used gun fire and that the vessel was escorted to France by a French warship, it is difficult to imagine how the French authorities could have exercised any more control over the applicants than they did. Therefore, the exercise of control and thereby jurisdiction appears to have been rather obvious. Indeed, the Court itself described the control exercised by France as “full and exclusive”<sup>175, 176</sup>.

In *Hirsi*, as opposed to *Medvedyev*, the applicants were not confined nor was their vessel boarded by a foreign State’s authorities. However, the applicants were intercepted and taken from their vessel onto Italian State vessels and thus, as in *Medvedyev*, the result was that Italian authorities had control over

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<sup>173</sup> Ibid., para. 81.

<sup>174</sup> Ibid.

<sup>175</sup> *Medvedyev*, *supra* note 142, para. 67.

<sup>176</sup> Ibid.

everything that happened on-board the vessels as well as where the applicants were taken (Libya). Even though the Italian authorities did not confine the applicants in the same way as in *Medvedyev*, it could still be argued that bringing the applicants on-board the Italian vessels also amounted to confinement. Although there was no use of gunfire or an escorting warship, the control exercised by Italy also seems to have been of a very high degree.

It appears that it would be difficult for the applicants in *S.S. and Others v. Italy* to argue that they came within Italy's jurisdiction by reference to *Medvedyev* and *Hirsi* as both cases concerned very high degrees of control. In *S.S. and Others v. Italy* Italy was not physically present at the distress scene<sup>177</sup> and logically, there was no forced boarding, confinement nor rerouting of a vessel similar to *Medvedyev* or *Hirsi* (at least not directly) committed by Italy. Accordingly, it would be rather hard for the applicants in *S.S. and Others v. Italy* to successfully claim that Italy exercised a similar level of control over them. One could nonetheless ponder upon how the level of control exercised in the two cases relates to the amount of control required by the personal model: did the control exercised in *Medvedyev* or *Hirsi* exceed the "authority and control" threshold or did it rather exactly meet the threshold? If the former is true, and *Medvedyev* or *Hirsi*-like physical presence and constraint is not required, there is still potential for the applicants' complaints to succeed under the control notion of jurisdiction. If the latter is correct, the ECtHR would have to dismiss their complaints.<sup>178</sup>

As was mentioned in the beginning of this chapter, there is also another category of Strasbourg interception case law that is interesting to investigate for our purposes: the cases where jurisdiction has been assumed, but not discussed. Perhaps the two cases mentioned by Pijnenburg – *Xhavara* and

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<sup>177</sup> Note, that there was however an Italian helicopter was present at the scene. See limitations in Chapter 1.3.

<sup>178</sup> However, by examining the three pullback scenarios identified by Pijnenburg – the coordination, the MoU and the presence of the Italian helicopter (see Chapter 1.3) together, the Court could find that the art. 1 ECHR threshold was met.

*Women on Waves* – can bring us some clarity regarding the control threshold.<sup>179</sup>

### 4.3.2 *Xhavara* and *Women on Waves*

*Xhavara* concerned the fatal ramming by an Italian navy vessel of a vessel transporting Albanian migrants to Italy. The applicants were trying to enter Italy irregularly, when an Italian warship tried to intercept and search the vessel. The two vessels collided following which the applicants' vessel sunk and only some of the passengers survived the events. While the case concerned alleged violations of art. 2 ECHR in an extraterritorial situation the Court did not discuss jurisdiction,<sup>180</sup> but instead assessed the case, which would not have been possible if jurisdiction had not been established.<sup>181</sup> Eventually, the case was declared inadmissible because of the failure to exhaust remedies.<sup>182</sup>

The Court delivered a similar (non-)finding concerning jurisdiction in *Women on Waves*, where Portugal by a ministerial order had banned an NGO vessel from entering Portuguese territorial waters and physically blocked its entry with a warship.<sup>183</sup> The applicants alleged that Portugal had violated their

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<sup>179</sup> Note that there are also other cases where interceptions have been discussed, such as *Rigopoulos v. Spain*. The case concerned the captain of a ship sailing the Panamanian flag, that was stopped by Spanish authorities and the captain detained on a Spanish State vessel. Again, jurisdiction was assumed but not elaborated on. See *Rigopoulos v. Spain* (dec.) no. 37388/97, EHRR 1999-II. Information Note on the Court's Case Law No. 2, [https://hudoc.echr.coe.int/eng#{"itemid":\["002-208"\]}](https://hudoc.echr.coe.int/eng#{), visited 19 March 2020.

<sup>180</sup> Ibid.

<sup>181</sup> Duttwiler, Michael (2012) 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights'. *Netherlands Quarterly of Human Rights*, vol. 30 no. 2, p. 147.

<sup>182</sup> *Xhavara and Others v. Italy and Albania* (dec.) no. 39473/98, 11 January 2001. Information Note on the Court's Case Law No. 26, [https://hudoc.echr.coe.int/eng#{"itemid":\["002-5809"\]}](https://hudoc.echr.coe.int/eng#{), visited 17 March 2020.

<sup>183</sup> *Women on Waves and Others v. Portugal*, no. 31276/05, 3 February 2009. Information Note on the Court's Case Law No. 116, [https://hudoc.echr.coe.int/eng#{"itemid":\["002-1667"\]}](https://hudoc.echr.coe.int/eng#{), visited 17 March 2020.

rights under art. 10 and 11 of the ECHR, and the Court decided the case on its merits without discussing art. 1 of the Convention.<sup>184</sup>

Now, how are *Xhavara* and *Women on Waves* different from *Medvedyev* and *Hirsi*? In *Medvedyev* and *Hirsi*, as concluded above, the State authorities in question had full control over what happened to the applicants and at least in *Medvedyev*, detention powers were used. In *Xhavara* and *Women on Waves*, the State authorities sure had an impact on how the events unfolded – but did not exercise as self-evident control over the applicants. According to Pijnenburg, one could therefore argue that:

[R]amming a boat or preventing it from moving forward through the presence of a military vessel triggers jurisdiction because it amounts to ‘full and exclusive control’. Alternatively, *Xhavara* and *Women on Waves* could be read as applying a lower threshold for jurisdiction.<sup>185</sup>

Pijnenburg thereby answers the question posed in the previous sub-chapter, finding that either the level of control exercised in *Medvedyev* and *Hirsi* exceeds the one required by art. 1 ECHR, as ramming or hindering a vessel from moving suffices as an exercise of control, or then two different thresholds have been applied: a higher one in *Medvedyev and Hirsi* and a lower one in *Xhavara* and *Women on Waves*. Regardless of which suggestion is more correct, if we accept either one of Pijnenburg’s readings, we can conclude that most likely the Court will not require the same level of control exercised in *Medvedyev* or *Hirsi* for jurisdiction to be triggered. Instead, the *Xhavara* and *Women on Waves* control would lie closer to the art. 1 ECHR threshold. Regrettably, we do not know exactly what triggered jurisdiction in the above-mentioned cases and as Stated in Chapter 4.2, the precise amount of control required by art. 1 ECHR remains unsettled.<sup>186</sup>

The common factor in all four interception cases discussed above, is the clear physical contact between the applicants and the States in question. It was

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<sup>184</sup> See also Duttwiler (2012), *supra* note 180, p. 147.

<sup>185</sup> Pijnenburg (2018), *supra* note 4, p. 410.

<sup>186</sup> Kessing (2017), *supra* note 160, p. 84.

based on physical control exercised by the respondent States that the Court established the *de facto* jurisdiction in *Medvedyev* and *Hirsi*, likely also in *Xhavara* and *Women on Waves*. Even though the latter two cases seem to lower the threshold for the level of physical contact or constraint needed, we cannot escape the fact that the very core of all cases is the concrete contact between the State and individuals in question. Thus, there are two options: either *physical control is required* and cases concerning SAR coordination over distance will always fail under art. 1 ECHR or *physical control is not required but acts as a strong indication of personal model jurisdiction*.

Gammeltoft-Hansen has found, not only in the cases concerning interceptions but concerning personal control in general, that the art. 1 threshold has only been met where a State has exercised full physical control over the individual in question.<sup>187</sup> This being the case, various scholars have resorted to other strands of case law on art. 1 to tackle situations lacking physical control. Legal scholars Trevisanut and Papastavridis have discussed human rights jurisdiction in SAR operations by turning into the Court's case law on the right to life and emergency situations, whereas other legal scholars such Gammeltoft-Hansen and Pijnenburg have considered the applicability of the extraterritorial effects doctrine to migration control and SAR operations. The following chapters will investigate both suggestions and apply them to *S.S. and Others v. Italy* to consider whether, by adopting either of them, jurisdiction could be considered to have been triggered or whether SAR coordinating States simply do not owe human rights under the ECHR *vis-à-vis* boat people in distress.

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<sup>187</sup> Gammeltoft-Hansen, Thomas (2011) *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*. Cambridge University Press, p. 132.

## 5. Long distance *de facto* control

Let us start with the former suggestion – “long distance *de facto* control”<sup>188</sup> as suggested by Trevisanut and Papastavridis. The two scholars stand out for two reasons: first, for being some of the few authors who have expressly discussed State jurisdiction and SAR operations and second, for having resorted to rather creative legal reasoning.

In her article *Is there a right to be rescued at sea? A constructive view*<sup>189</sup>, Trevisanut argues, in light of the right to life, that the sending of a distress call by a person (or group of persons) in distress on the seas could trigger the jurisdiction of the State receiving the call. Trevisanut puts forward that a distress call “creates a ‘relationship’”<sup>190</sup> between the people in distress and the recipient State since the lives of the people will depend on the acts of the recipient State. “The argument could go further”,<sup>191</sup> Trevisanut suggests and finds that since the lives of the people depend on the State (she uses the argument twice), one could claim that the State exercises what she calls “exclusive long distance *de facto* control”<sup>192</sup>. Without explaining where the term comes from or what it exactly amounts to, Trevisanut refers to *Furdik v. Slovakia* (Furdík), which she claims could *support* the recognition of such long distance *de facto* control.<sup>193</sup>

*Furdik* concerned the delayed rescue of a mountain climber, who had been severely injured when mountaineering in the Slovakian Tatras and eventually died while waiting for the rescue services to arrive. The complaint was initiated by her father, who alleged that the Slovakian authorities had failed

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<sup>188</sup> Trevisanut (2014), *supra* note 28, p. 13.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*, p. 12.

<sup>191</sup> *Ibid.*, p. 13.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

to meet their obligations under art. 2 ECHR to protect the life of his daughter. While the complaint was eventually declared inadmissible for the failure to exhaust local remedies, the Court ruled that States' obligations under art. 2 ECHR:

[E]xtend to the provision of emergency services where it has been brought to the notice of the authorities that the life or health of an individual is at risk on account of injuries sustained as a result of an accident.<sup>194</sup>

Hence, Trevisanut argues that when a distress call is launched, a jurisdictional link emerges for the purposes of the right to life “meaning that the authorities consequently have an obligation to provide emergency services”<sup>195</sup>.<sup>196</sup> What Trevisanut claims is that although there is no *physical control*, a State may nonetheless exercise personal control under art. 1 ECHR if the lives of the people in distress depend on the State in question. Although *Furdik* does support such a finding in national situations, it is difficult to apply it to transnational situations and indeed, Trevisanut does not try to address the problem. As *Furdik* concerned Slovakian authorities' obligations within Slovakian territory it would be difficult to claim that such domestic obligations also extend to extraterritorial situations.

Thus far, physical constraint has been required for extraterritorial jurisdiction,<sup>197</sup> and the argument presented by Trevisanut would turn the physical characteristic into legal fiction. This seems to be the biggest weakness in her argument – that there simply seems to be no support for her findings.

Trevisanut's reading of art. 1 ECHR would mean that in any situation where a CoE State receives a distress call, no matter from where it is sent, jurisdiction is triggered if the persons' lives depend on that State. Thus, assuming that there is no prior control between the State and the individuals

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<sup>194</sup> *Furdík v. Slovakia* (dec.) no. 42994/05, 2 December 2008, p. 13.

<sup>195</sup> Trevisanut (2014), p. 9.

<sup>196</sup> *Ibid.*

<sup>197</sup> See Oudjeans, Rijken and Pijnenburg (2018), *supra* note 159, p. 626.



in question, the individuals would “create” jurisdiction by calling the State – whereas jurisdiction in the interception cases discussed above has been triggered because of the act of a State, e.g. a forced boarding. Such a result – art. 1 ECHR being triggered by a phone call – would surely not be appreciated by all CoE States, especially having in mind what was presented in Chapter 2. Hence it is rather unlikely, taken together with the lack of doctrinal support, that the ECtHR would rule in line with what Trevisanut has proposed.<sup>198</sup> In addition, control over a person’s life under art. 2 ECHR (whatever it amounts to) is not the same as personal or spatial control under art. 1 ECHR.

It should, however, also be taken into consideration here that States themselves have undertaken to put up Rescue Co-ordination Centres (RCC) under the SAR regime and should logically be expecting to receive distress calls. It should therefore be of no surprise to them that they are expected to act upon distress calls and that their obligations under the ECHR are not put out of place in SAR operations. In light of *Hirsi*, where the Court stated that “[s]peculation as to the nature and purpose of the intervention”<sup>199</sup> did not have an impact on the assessment of jurisdiction,<sup>200</sup> it can be concluded that States are obliged to meet ECHR standards during SAR operations. Arguably, these standards would not have required much from Italy in the present case – only not to involve the LCG in the SAR operations, as the applicants claim. As the Court found that Convention rights can be “divided and tailored”<sup>201</sup>, Italy would not need to “fear” being obliged to meet e.g. any burdensome positive obligations under the Convention when coordinating SAR operations – it allegedly only had the negative obligation not to involve the LCG in the operations (e.g. under art. 2 and art. 3 ECHR). Surely, the obligation did not impose too heavy of a burden on Italy – the Rome MRCC could have chosen to e.g. instruct any other vessel in the vicinity to participate in the rescue operations instead of the LCG. In the end, however, it is for the Court to rule

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<sup>198</sup> Note, that the ECtHR has been criticised for respecting the political will of States too much in its rulings. See e.g. *Bantekas an Oette* (2016), *supra* note 103, p. 247–248.

<sup>199</sup> *Hirsi*, *supra* note 70 para. 81.

<sup>200</sup> *Ibid.* See also Chapter 2.1.

<sup>201</sup> See e.g. *Al-Skeini*, *supra* note 129, para. 137.

exactly where the lines of Italy's negative and positive obligations under art. 2 (and the other articles) were and whether jurisdiction was triggered for such purposes.

In his reply to Trevisanut's article, Papastavridis requires more than the sending of a distress call for art. 1 ECHR to be triggered. In his article *Is there a right to be rescued at sea? A sceptical view*<sup>202</sup>, Papastavridis discusses, similarly to Trevisanut, the relevance of distress calls in relation to human rights jurisdiction in SAR operations. Instead of focusing on the *sending* of a distress call alike Trevisanut, Papastavridis places importance in the information that a State *receives* through the distress call: knowledge of the location and the life-threatening situation of the persons in distress. According to Papastavridis it is through this information that a State exercises long distance *de facto* control over the individuals whose lives depend on the conduct of that State.<sup>203</sup> To use the exact words of Papastavridis:

Indeed, the life of the persons in distress depends on the conduct of the recipient State, which, being aware of the location of the vessel in distress and being aware of their situation, exerts certain control over these persons. Hence, these persons may be considered within the jurisdiction of the coastal State concerned in this regard.<sup>204</sup>

One might consider whether this is what Trevisanut actually intended in her article as at least instinctively, the whole purpose of sending a distress call is to inform an RCC about the distress situation and one's location in order to receive help. It would also be difficult to argue that in a situation where, for some reason, the State authorities are not provided with the information needed for the rescue to be successful (the situation and the location) that the control threshold is met, which speaks for Papastavridis's proposition when compared to Trevisanut's.

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<sup>202</sup>Papastavridis (2014), *supra* note 29.

<sup>203</sup> *Ibid.*, p. 28.

<sup>204</sup> *Ibid.*

On the other hand, if this is not what Trevisanut implied, her argument could be read as implying that also in situations where a distress call is sent but not acknowledged, the State concerned would still exercise control over the applicants. One could imagine scenarios where, for instance, a State for political reasons would choose not to acknowledge a distress call sent from a dinghy and knowingly let people drown. In such situations, should we not agree with Trevisanut, the State could not be held responsible (or even tried) for the deaths in such a scenario as no jurisdiction could be established, even though the State chose to let the distress situation occur without interfering. Surely, we cannot accept a Europe where we allow States to choose whose journey will end on the Mediterranean and whom to rescue.

Even though ideas of Trevisanut and Papastavridis are interesting and quite bold, we can simply not escape the fact that both of them lack evident support for their ideas in extraterritorial situations and that what they propose rather amounts *lex ferenda* than an accurate reading of *lex lata*.

## 5.1 Power to rescue or power to kill

As was noted in Chapter 4.2, the Court has Stated not only that *control* qualifies as an exercise of jurisdiction but also that *power* is likewise covered by art. 1 ECHR.<sup>205</sup> Power, as Raible notes, is a dispositional concept and amounts to a potential or capacity that a State possesses. To compare it with control: power is the potential and control its manifestation.<sup>206</sup>

It is interesting to note that Trevisanut and Papastavridis both seem to argue that the fact that a person *relies* on a coordinating State in SAR operations is what triggers jurisdiction, even though they use the term “long distance *de facto* control”. To put it in other words, that the *power* that a State has over the lives of the people is what triggers jurisdiction. One could pose that in *S.S. and Others v. Italy*, Italy had the power to rescue the applicants or indirectly the power to kill them by choosing firstly, whether or not to coordinate rescue

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<sup>205</sup> See Chapter 4.2.

<sup>206</sup> Raible (2016), *supra* note 149, p. 11–12.

operations (or even to pick up the phone) and secondly, whether or not to include the LCG in the SAR operations. The question is whether such a power meets the personal model threshold.

According to Milanovic, the power to kill someone “is very much an exercise of ‘physical power’”<sup>207</sup> and thus qualifies for art. 1 purposes.<sup>208</sup> His reasoning is logical – surely there can be no power that is more extensive than the power to kill someone and if not the power to kill someone would meet the art. 1 threshold, then no power would. While Milanovic discusses the purposeful killing of someone (with rifles and drones), the power to indirectly kill someone by omitting rescue (or involving violent third parties as in *S.S. and Others v. Italy*) should also be considered to amount to a high degree of power. The two powers are certainly not identical but taking into consideration the role and purpose of an RCC as a receiver of distress calls and provider of emergency services, the power of an RCC to omit rescuing could be more similar to the power to kill than other situations where rescuing is omitted. RCCs are expected to help people in distress and at least generally possess the capacity to do so. It would be very serious of an RCC to omit rescuing as they are relied upon to provide distress relief. If there are no other vessels in the vicinity, there might be no-one else than the RCC that the sinking vessel could turn to.

Note, however, that Milanovic has himself recognized that his reasoning is not necessarily in line with the Court’s and that even if the Court would accept the reasoning in the above section, jurisdiction would not necessarily be established. Based on *Banković* and an *e contrario* reading of *Al-Skeini*, Milanovic found that the power to kill has hitherto only been applied together with the public powers doctrine.<sup>209</sup> Hence, even if the Rome MRCC could be found to have exercised (something similar to) a power to kill, the Court would likely require an Italian exercise of public powers in Libya for art. 1

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<sup>207</sup> Milanovic (2012), *supra* note 122, p. 129.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*, p. 128–130.

ECHR to be triggered.<sup>210</sup> While it is rather unlikely that the Court would adopt a power to kill approach, if it was to do so, it is more plausible that the Court would acknowledge the exercise of public powers than the parallel between the power to kill and the power to rescue and that jurisdiction under the personal model would be disregarded.<sup>211</sup> Thus, it appears that neither when understood as control nor power, does the impact that an RCC has over the lives of persons in distress trigger jurisdiction. Read together with the findings of Chapter 4, it can therefore be concluded that neither under the personal model as it stands today, nor under Trevisanut's and Papastavridis's extended readings of it, does the coordination of SAR operations trigger jurisdiction under the personal model.

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<sup>210</sup> While the public powers doctrine is not covered by this thesis, it shall be noted that the doctrine has been discussed by Pijnenburg in relation to *S.S. and Others v. Italy*. According to Pijnenburg, the Italian coordination of SAR operations could be considered to amount to a public power normally to be exercised by Libya. See Pijnenburg (2018), *supra* note 4, p. 412.

<sup>211</sup> Note, that Gammeltoft-Hansen and Hathaway suggest that the exercise of migration control abroad could amount to an exercise of public powers and that it could, alone, suffice to establish jurisdiction. See Gammeltoft-Hansen and Hathaway (2015), *supra* note 52, p. 269.

## 6. The extraterritorial effects doctrine

Traditionally, Kessing notes, human rights jurisdiction (and as a corollary, human rights responsibility) “presupposes a relation of control between the perpetrator-State and the victim”<sup>212,213</sup> In the above chapters, such relationships were discussed and it was concluded that establishing control in SAR operations will likely prove to be difficult. So far, the personal model has not been applied without the presence of physical control,<sup>214</sup> and the long distance *de facto* control notion suggested by Trevisanut and Papastavridis has yet to find more support in order to qualify as a legitimate solution to target the jurisdictional gap in SAR operations, or be complemented with an exercise of public powers if considered as a power rather than control.

When discussing the use of drones, Kessing suggests a solution to the gap:

[A]n alternative, or rather, additional approach to holding States accountable for transnational behaviour carried out from their own territory – *the extraterritorial effects doctrine* [emphasis added]. According to this doctrine States are responsible if their territory is used to harm other States.<sup>215</sup>

Indeed, the ECtHR has itself acknowledged that there are two different “situations” where art. 1 ECHR can be triggered in extraterritorial situations: (1) where a State exercises control abroad and (2) where acts of a State performed within its territory produce effects outside that territory.<sup>216</sup> Thus, there is no requirement that a State acts extraterritorially in order for extraterritorial jurisdiction to be triggered. Let us therefore investigate whether the extraterritorial effects doctrine could be applicable in SAR

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<sup>212</sup> Kessing (2017), *supra* note 160, p. 82.

<sup>213</sup> *Ibid.*

<sup>214</sup> Gammeltoft-Hansen (2011), *supra* note 186, p. 132.

<sup>215</sup> *Ibid.*

<sup>216</sup> See Banković quoted above and e.g. Hirsi, *supra* note 70, para. 72.

operations and *S.S. and Others v. Italy* particularly, where the MRCC operated from Rome.

## 6.1 The background of the doctrine and the ECtHR's jurisprudence

The extraterritorial effects doctrine has its roots in public international law, and has been acknowledged especially in international environmental law as well as in international financial law.<sup>217</sup> Looking at international environmental law, the doctrine is enshrined in the duty of States not to injure the rights of other States,<sup>218</sup> and has been recognised e.g. by the Mixed Arbitral Tribunal set up by the US and Canada in the *Trail Smelter Arbitration* case.<sup>219</sup> In the case, which concerned transboundary air pollution, the Tribunal famously held that:

[U]nder the principles of international law [...] no State has the right to use [...] its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>220</sup>

In international financial law, Kessing notes, the effects doctrine is stipulated in the WTO regime and prohibits States from adopting subsidies which negatively impact other States.<sup>221</sup> Whereas the principle is well-known in public international law as well as in international private law,<sup>222</sup> “within [international human rights law] the extraterritorial effects doctrine is still in its infancy”<sup>223</sup>.<sup>224</sup> The doctrine has been recognized by the ECtHR in some of

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<sup>217</sup> Kessing (2017), *supra* note 160, p. 88–89.

<sup>218</sup> Shaw, Malcolm (2003) *International Law*. 5<sup>th</sup> Edition. Cambridge University Press, p. 760.

<sup>219</sup> See also Kessing (2017), *supra* note 160, p. 88–89; Shaw (2003), *supra* note 217, p. 761.

<sup>220</sup> Trail Smelter Arbitration, p. 1965, [https://legal.un.org/riaa/cases/vol\\_III/1905-1982.pdf](https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf), visited 8 May 2020.

<sup>221</sup> Kessing (2017), *supra* note 160, p. 89.

<sup>222</sup> *Ibid.*, p. 99.

<sup>223</sup> *Ibid.*, p. 89.

<sup>224</sup> *Ibid.*

its judgments, but has not been discussed it in a “more comprehensive and in-depth way”<sup>225</sup>.<sup>226</sup> In *Drozd and Janousek v. France and Spain* (Drozd and Janousek), however, the Court famously Stated that:

The term “jurisdiction” is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of *acts of their authorities producing effects outside their territory* [emphasis added] [...]<sup>227</sup>

The case concerned the rulings by an Andorran Court, that had been composed of a French and a Spanish judge. Whereas the applicants complained that their rights under the ECHR had been violated by the Andorran Court, the ECtHR found the acts of the Andorran Court not attributable to the respondent States, as the judges had not been sitting in the Court in their capacity as French or Spanish judges but had functioned autonomously.<sup>228</sup> No matter the outcome of the case, the important finding in *Drozd and Janousek* regarding the effects doctrine has been referred to by the Court in various of its later rulings, such as in its *Banković* judgment, which was cited in Chapter 3.2.<sup>229</sup>

Most cases where the effects doctrine has been referred to or applied have concerned legislative measures, where legislation that negatively impacts individuals in another State has been found to trigger art. 1 ECHR jurisdiction.<sup>230</sup> In *Kovačič and Others v Slovenia* (Kovačič), for instance, Slovenian jurisdiction was triggered because of a law passed in Slovenia, which made it impossible for the applicants to withdraw savings that they had deposited in Slovenian banks in Croatia.<sup>231</sup> The ECtHR found that the applicants in Croatia were affected by the legislation introduced by the

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<sup>225</sup> Ibid., p. 90.

<sup>226</sup> Ibid.

<sup>227</sup> *Drozd and Janousek*, 26 June 1992, Series A no. 240, para. 91.

<sup>228</sup> Ibid., para. 96.

<sup>229</sup> See also e.g. *Loizidou*, *supra* note 110, para. 62.

<sup>230</sup> Kessing (2017), *supra* note 160, p. 90.

<sup>231</sup> *Kovačič and Others v Slovenia* (dec.) nos. 44574/98, 45133/98 and 4316/99, 3 October 2008, p. 54-55. See also Gammeltoft-Hansen (2018), *supra* note 31, p. 384–385.



Slovenian National Assembly and that Slovenian jurisdiction was hence triggered.<sup>232</sup>

The doctrine was similarly applied *Nada v. Switzerland* (Nada),<sup>233</sup> although it was not explicitly discussed by the Court. The case concerned an entry-and-transit ban imposed by Switzerland on the applicant,<sup>234</sup> who was suspected for affiliation with al-Qaeda.<sup>235</sup> The ban allegedly prevented the applicant, who lived in Campione d'Italia – a small Italian enclave of about 1,6 km<sup>2</sup> surrounded by the Swiss Canton of Ticino<sup>236</sup> – inter alia from receiving medical care.<sup>237</sup> The Court ruled that the Swiss decision to implement the ban, with the effect that the applicant was unable to leave Campione d'Italia, triggered Swiss jurisdiction.<sup>238</sup>

The extraterritorial effects doctrine is also supported by various ECtHR judgments concerning Turkish shootings of persons standing in or near neutral buffer zones in Cyprus.<sup>239</sup> In *Andreou v Turkey* (Andreou) for instance – a case concerning the shooting of the applicant, who had been standing outside a neutral UN buffer zone on Cyprus when she was shot at from an area controlled by Turkish armed forces – the doctrine was applied, and the ECtHR found that:

In these circumstances, even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as “within [the] jurisdiction” of Turkey [...] <sup>240</sup>

Even though the doctrine is not as supported as the control doctrine discussed in Chapter 4 and has not so far been applied in a migration context by the

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<sup>232</sup> Kovačič, *supra* note 230, p. 55.

<sup>233</sup> Gammeltoft-Hansen (2018), *supra* note 31, p. 383.

<sup>234</sup> *Nada v. Switzerland* [GC], no. 10593/08, ECHR 2012, para. 3.

<sup>235</sup> *Ibid.*, para. 21.

<sup>236</sup> *Ibid.*, para. 11.

<sup>237</sup> *Ibid.*, paras. 27 and 38.

<sup>238</sup> *Ibid.*, para. 122; Gammeltoft-Hansen (2018), *supra* note 31, p. 383.

<sup>239</sup> *Pijnenburg* (2018), *supra* note 4, p. 422.

<sup>240</sup> *Andreou v. Turkey* (dec.) no. 45653/99, 3 June 2008, p. 11.

ECtHR, various scholars appear to see the potential of the effects doctrine. If the scholars are to believe, the ECtHR could potentially find that the SAR coordination in *S.S. and Others v. Italy* triggered Italy's jurisdiction, even though the effective control threshold, as argued above, likely was not met.

Before turning into the scholarly suggestions, let us first consider the art. 1 ECHR threshold of the effects doctrine. As was the case for the control doctrine, any link between the act of a State and the extraterritorial effect thereof does not qualify to trigger jurisdiction under art. 1. What is required, Kessing notes is "direct and immediate caus[ality]"<sup>241</sup> between the act of the State and the human rights effect outside that State's territory.<sup>242</sup> Whereas in the cases discussed above the Court found State jurisdiction to have been triggered following such a qualified link between the acts and the human rights consequences (see e.g. the citation of *Andreou*), the threshold was not met in *Ben El Mahi and Others v. Denmark* (Ben El Mahi) where the link was too remote.<sup>243</sup>

The proceedings in *Ben El Mahi* were initiated by Moroccan applicants claiming to have been discriminated against as Muslims by Denmark, when a Danish newspaper had published cartoons of Prophet Muhammad. In its ruling, the Court concluded as in its *Banković* judgment cited above (see Chapter 3.2), that art. 1 is triggered by acts producing effects abroad only in exceptional circumstances, and that "such exceptions [were] not in issue in [that] case"<sup>244</sup>.<sup>245</sup> Another case where the link was too remote or weak was *Banković* itself, where the Court rejected the applicants' argument that the bombing amounted to the extraterritorial effect of a prior decision taken in the territory of another State to attack the radio station.<sup>246</sup>

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<sup>241</sup> Kessing (2017), *supra* note 160 p. 91. See also *Andreou*, *supra* note 239, p. 11; Gammeltoft-Hansen (2018), *supra* note 31, p. 384.

<sup>242</sup> Kessing (2017), *supra* note 160, p. 91.

<sup>243</sup> See *Ibid.*, p. 93.

<sup>244</sup> *Ben El Mahi and Others v. Denmark* (dec.) no. 5853/96 11, ECHR 2006-XV, p. 8.

<sup>245</sup> *Ibid.*

<sup>246</sup> Kessing (2017), *supra* note 160, p. 93; *Banković*, *supra* note 106, paras. 53 and 77.

While the above cases give us a hint of how the “direct and immediate causality” link has been applied by the ECtHR in previous cases, it is difficult to apply any of the cases as a blueprint to *S.S. and Others v. Italy*.

It should nonetheless be safe to argue that the link between the MRCC’s coordination and the (alleged) effect on the applicants’ human rights is more direct and immediate than the link in *Ben El Mahi*. As Italy knew about the LCG’s violent behaviour and had entered into a pull-back agreement with them, it should be rather clear that instructing the LCG to participate in the rescue operations would have the effect that Italy and Libya had agreed upon: that the specific boat people in question would be pulled back to Libya and that the LCG would act violently towards them (which Italy has tacitly accepted by continuing to cooperate with the LCG). In *Ben El Mahi* there was no similar closed group of persons who were targeted. It appears that the Court found that the publishing of the cartoons could not be considered to have a human rights effect on any or every Muslim.

The question is whether the link in *S.S. and Others v. Italy* could be considered as direct and immediate as the link in e.g. *Andreou*. Whereas it is rather obvious that the shooting of a person has direct and immediate effect on the thereby injured person’s rights, instructing the LCG to conduct rescue operations does not *necessarily* have to result in a human rights violation of the boat people in question (although it could be argued that the likelihood was very high). After all, what Italy did the 6<sup>th</sup> of November 2017 was to instruct the LCG to proceed towards the dinghy in distress.

When discussing refoulement and art. 3 ECHR, a case oftentimes referred to is *Soering v. The United Kingdom* (Soering), concerning the UK decision to extradite Mr Soering from the UK to the US. Mr Soering was accused of murder in the State of Virginia and if convicted, would likely be sentenced to death penalty. The ECtHR ruled that extraditing him to the US would violate art. 3 ECHR because he would likely be exposed to the death row phenomena,

which the Court found to be against Convention standards.<sup>247</sup> The Court ruled, using words similar to the ones of the effects doctrine, that the taking of action by the UK would have “as a direct consequence the exposure of an individual to proscribed ill-treatment”<sup>248</sup> – in other words, the effects doctrine appears to have been applied. It would be tempting to argue by analogy that instructing the LCG to rescue boat people – tacitly to pull the individuals back to Libya – would similarly violate the prohibition of refoulement in art. 3 ECHR as the boat people in *S.S. and Others v. Italy* (allegedly) risked ill-treatment in Tripoli. However, as the Court noted itself in *Banković* and as Kessing points out,<sup>249</sup> the *Soering* case did not concern extraterritorial jurisdiction as Mr Soering never left UK territory:

[T]he Court notes that liability is incurred [...] by an action of the respondent State concerning a person while he [...] is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State’s competence or jurisdiction abroad.<sup>250</sup>

Thus, *Soering* – the “first and classic example”<sup>251</sup> of where reference was made to the extraterritorial effects doctrine by the ECtHR is not of much use after all when investigating the extraterritorial effects doctrine.<sup>252</sup> Indeed, it is difficult to conclude, not only based on *Soering* but on the Court’s scarce case law, whether and how the effects doctrine will be applied to *S.S. and Others v. Italy* or other cases concerning migration control. Let us therefore turn to the propositions of Gammeltoft-Hansen and Pijnenburg, who have discussed the effects doctrine and its applicability to migration control and SAR operations.

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<sup>247</sup> *Soering v. The United Kingdom*, no. 14038/88, 7 July 1989, Series A no. 161, para. 111.

<sup>248</sup> *Ibid.*, para. 91.

<sup>249</sup> Kessing (2017), *supra* note 160, p. 90–91.

<sup>250</sup> *Banković*, *supra* note 106, para. 68.

<sup>251</sup> Kessing (2017), *supra* note 160, p. 90–91.

<sup>252</sup> *Ibid.*

## 6.2 Migration control and SAR operations

Gammeltoft-Hansen suggests that jurisdiction could be triggered in (at least) some instances of deterrence and proposes that “ordering or encouraging another State’s authorities to block or pull back migrants”<sup>253</sup> could trigger effects jurisdiction under art. 1 ECHR.<sup>254</sup> According to Gammeltoft-Hansen, the *Nada* case discussed in the above sub-chapter, as well as the Human Rights Committee’s condemnation of the issuance of a fatwa authorising the killing of a person, could be argued to support such a finding.<sup>255</sup> Regrettably, Gammeltoft-Hansen does not motivate why or elaborate on his arguments as he only puts forward that:

Following the Human Rights Committee’s argument in the Iran report or the European Court’s argumentation in *Nada v. Switzerland*, a State ordering or encouraging another State’s authorities to block or pull back migrants may be brought within the extraterritorial effects doctrine.<sup>256</sup>

If his findings are nonetheless applied to *S.S. and Others v. Italy*, the Court would first have to find that by instructing the LCG to participate in the rescue operations, Italy tacitly ordered or encouraged the LCG to pull back the boat people. Taking into consideration the Italy-Libya cooperation and the MoU it could be put forward that it should not be difficult for the Court to come to such a conclusion.

Regarding Gammeltoft-Hansen’s parallels, one can question whether an entry ban is comparable to ordering or encouraging pull-backs. In *Nada*, the entry ban imposed on the applicant prohibited him from *leaving* the Italian enclave where he lived, whereas in pull-back operations individuals are prevented from *entering* the territory of a specific State (Italy). In such pull-back

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<sup>253</sup> Gammeltoft-Hansen (2018), *supra* note 31, p. 384.

<sup>254</sup> Note, that relevant for the applicants in *S.S. and Others v. Italy* is also Gammeltoft-Hansen’s proposition that the doctrine could also be applied to “[f]inancing or providing training and equipment for migration control carried out by third States [...] provided there is a sufficiently direct link between funding and breach of obligation. See *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

situations the individuals could at least in theory go to another State after having been pulled back. It cannot be ignored, however, that both the *Nada* entry ban and the ordering of pull-backs *impair* the possibility of an individual (or a group of individuals) to *leave* the territory of a specific State. In practice, while aiming to protect Italy's borders, Italy's ordering or encouragement of pull-back operations through the involvement of the LCG, has the extraterritorial effect of negatively affecting the right of the applicants to *leave* Libya. While it is impossible to know the reasoning of Gammeltoft-Hansen, perhaps this is why he found the two situations comparable.

It shall be pointed out here, however, that neither *Nada* nor *S.S. and Others v. Italy* concerns the *right to leave* itself, but instead, other rights that have been affected through the inability of the applicants to leave the territory of a specific State (in the case of *S.S. and Others v. Italy* by sending the applicants back to the State they departed from). In *Nada* the Court found jurisdiction to have been triggered because the applicant's rights under art. 8 ECHR had been violated as the entry ban prohibited him from accessing health care and judicial services.<sup>257</sup> In *S.S. and Others v. Italy*, the Court could similarly assess whether any of the applicants' rights have been violated through the Italian coordination, which caused some of the applicants to be pulled back to Libya. Allegedly, Italy violated the applicants' rights under art. 2, 3, 13 ECHR as well as art. 4 of Protocol No. 4 ECHR. Regarding art. 3 ECHR in specific, many scholars appear to suggest that refoulement could trigger extraterritorial effects jurisdiction.<sup>258</sup>

While Gammeltoft-Hansen only discusses pull-backs, Pijnenburg, who has applied the effects doctrine to *S.S. and Others v. Italy* also discusses the treatment of the applicants on-board *Ras Jadir* and considers whether it could trigger extraterritorial effects jurisdiction. According to Pijnenburg, the Court could examine not only whether the MRCC's instructions "led to the migrants

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<sup>257</sup> *Nada*, *supra* note 233, paras. 198–199, 225 and 230.

<sup>258</sup> Gammeltoft-Hansen (2018), *supra* note 31, p. 384.

being returned to Libya instead of being brought to Italy”<sup>259</sup> but also “whether the cordoning, beating, and departing while a person was hanging on the ladder outside the ship reaches the threshold of Article 3”<sup>260, 261</sup>

In addition to finding that there has been a violation of the applicants’ rights under the ECHR, the Court would have to rule that there was direct and immediate causality between the giving of instructions and any of the violations for art. 1 to be met, as discussed in the above sub-chapter. While examining any alleged violations of the Convention falls outside the scope of this thesis, it shall be noted that Italy will most likely argue against the existence of a direct and immediate causal link regarding any alleged violation. Even though the Court could find that the treatment of the applicants was against ECHR standards, Pijnenburg points out, in line with what was suggested in Chapter 6.1, that Italy would likely insist that it only instructed the Ras Jadir to rescue the boat people, not to conduct any of possible violations of the ECHR.<sup>262</sup> Hence, Pijnenburg continues:

The Court would therefore probably have to decide whether the fact that Italy knew or should have known that asking the LCG to carry out rescue would expose the applicants to a risk of ill-treatment is a sufficiently close link.<sup>263</sup>

Similarly, the Court could examine any other alleged violations of the Convention – for instance, whether the fact Italy knew or should have known that involving the LCG would expose them to a violation of their right to life suffices. When doing the assessment, Pijnenburg suggests (regarding art. 3) that the Court could take into account all of the alarming reports about the LCG’s violent behaviour as well as the *Hirsi* ruling, where it ruled already in 2012 that the Italian push-backs amounted to prohibited refoulement under art. 3 ECHR.<sup>264</sup> The reports should similarly be taken into consideration

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<sup>259</sup> Pijnenburg (2018), *supra* note 4, p. 423.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

regarding the assessment of the existence of a causal link and any other alleged violation.

What the Court will have to rule upon, in the end, is whether the Italian instructions had the effect of the applicants' rights being violated. As was concluded in Chapter 6.1, it is difficult to estimate what suffices as direct and immediate causal link and regrettably, Pijnenburg makes no effort to analyse the Court's effects jurisprudence nor does she refer to any particular judgment to support her findings. Instead, Pijnenburg bases her propositions on "a few cases seem[ing] to support the view that the extraterritorial effects of State conduct can trigger jurisdiction"<sup>265</sup>.<sup>266</sup> Perhaps, when it comes to extraterritorial effects jurisdiction, the doctrine has not been applied nor discussed to such an extent, that better parallels or deeper analyses could be made. Indeed, as Gammeltoft-Hansen puts it, the effects doctrine "deserves further scholarly attention and practical application"<sup>267</sup>.<sup>268</sup>

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<sup>265</sup> Pijnenburg (2018), *supra* note 4, p. 422.

<sup>266</sup> *Ibid.*

<sup>267</sup> Gammeltoft-Hansen (2018), *supra* note 31, p. 385.

<sup>268</sup> *Ibid.*



## 7. Conclusions

The outcome of *S.S. and Others v. Italy* is likely to have a big impact on both Italian and European migration policies. In the absence of safe and legal paths to Europe, distress situations ought to continue occurring and for the first time, the Court is asked to adjudicate on the responsibility arising from the coordination of a SAR operation. Many hope that *S.S. and Others v. Italy* will set a precedent, and establish how Europe is expected to act in and respond to distress situations.

For the Court to be able to rule upon a SAR coordinating State's responsibility for alleged violations of the ECHR, the Court will first have to establish that the respondent State exercised jurisdiction under art. 1 ECHR. Hence, the purpose of this thesis has been to answer the below research questions:

- 1. Does the coordination of (including the giving of instructions in) SAR operations trigger a Contracting State's jurisdiction under art. 1 ECHR:
  - o (a) under the personal model of jurisdiction, as it has been applied thus far in the context of interceptions, or
  - o (b) under other readings of "jurisdiction"?
- 2. By answering the above question, this thesis seeks also to answer whether the Court will be able to adjudicate upon the applicants' claims in *S.S. and Others v. Italy*

After first having ensured that the ECHR (under some circumstances) applies extraterritorially, this thesis proceeded to seek an answer to research question 1(a).

## 7.1 Research question 1(a)

Finding that in all interception cases where jurisdiction has been established (either explicitly or tacitly) thus far, the respondent States have always exercised a certain degree of *physical* control, it was concluded that *either* physical control must be exercised for jurisdiction to be triggered *or* such control functions as a strong indicator of personal jurisdiction. While the ECtHR's reasoning on the matter has been ambiguous and sometimes completely lacking, this thesis found that if the Court's findings in the four jurisdiction cases investigated are to be applied as a blueprint to *S.S. and Others v. Italy* or other cases of SAR coordination over distance, the art. 1 threshold will not be met. In other words, the coordination of SAR operations over distance does, based on the findings of this thesis, *not* trigger a Contracting State's jurisdiction under the personal model as it has been applied thus far in the context of interceptions. It makes no difference whether the control exercised in either *Medvedyev and Hirsi* or *Xhavara and Women on Waves* more accurately represents the level of control required, since coordination over distance does not itself include the exercise of any *physical* control by the coordinating State.

## 7.2 Research question 1(b)

In order to consider whether other readings of art. 1 ECHR could allow the Court to hold coordinating States responsible for alleged human rights violations, this thesis proceeded to investigate two alternative triggers of jurisdiction put forward by legal scholars: long distance *de facto* control and the extraterritorial effects doctrine.

### 7.2.1 Long distance *de facto* control

The creative suggestion of long distance *de facto* control, which Trevisanut and Papastavridis argue is triggered by the impact that an RCC has over the

life of a person in distress, was commended for building on the personal model. As was established under research question 1(a), the personal model has thus far been the jurisdictional model applied by the ECtHR in cases concerning interceptions, and finding that control can be exercised over distance would allow the Court to stick to a control-based understanding of jurisdiction.

While accepting a notion like long distance *de facto* control could be argued to amount to a reasonable or at least a humane living instrument interpretation of art. 1 ECHR, the notion of long distance *de facto* control lacks doctrinal support and, as this thesis concludes, can hence not be considered a legitimate reading of art. 1 ECHR. While States have *domestic* obligations to provide emergency services under art. 2 ECHR, it can hardly be found that ECHR jurisprudence concerning such national obligations can be extended to cover extraterritorial situations under art. 1 ECHR, although this is what Trevisanut suggests. If the personal model threshold, as discussed under research question 1(a), indeed is physical control, long distance *de facto* control would render the physical characteristic into legal fiction.

Finding that jurisdiction could be triggered through the sending of a distress call (whether through the call itself or through the information that the RCC receives through the call) would likely also meet resistance among various CoE States, which would further discourage the Court from moving beyond its previous jurisprudence. Understanding long distance *de facto* control as a power (to rescue or to kill) would similarly not allow the Court to establish jurisdiction, taken that jurisdiction in cases concerning a State's power to kill has thus far been triggered by an exercise of public powers by that State, not by the exercise of power over the applicants' lives.

## 7.2.2 The extraterritorial effects doctrine

The second suggested reading of art. 1 ECHR, put forward by Pijnenburg and Gammeltoft-Hansen, would allow the Court to establish jurisdiction in cases concerning SAR coordination, without the coordinating State having exercised physical control over the applicants in question. By applying the extraterritorial effects doctrine – under which jurisdiction is established where the acts of a State produce human rights effects outside the State’s territory – the jurisdiction and protection gap left open by the personal model could thus be filled.

For the effects doctrine to be applicable, the Court must assert that the causal link between the act of a State (the SAR coordination) and the effect thereof (the alleged violations of the ECHR) is direct and immediate.

It is not evident how the Court will assess the link in *S.S. and Others v. Italy* or other cases concerning SAR operations, since the effects doctrine has thus far not been applied in cases concerning interceptions or migration control. By comparing *S.S. and Others v. Italy* to the Court’s jurisprudence where the doctrine has been applied, however, it can be concluded that the causal link appears to have been stronger than in *Ben El Mahi*, where the link appears to have been too self-experienced, but weaker than in *Andreou*, where the effect of the State’s act was obvious. While the likelihood of the applicants’ rights being violated through the involvement of the LCG in the SAR operation arguably was very high, instructing the LCG to conduct rescue does not *necessarily* have to result in a human rights violation.

It is impossible to conclude that the coordination of a SAR operation will always trigger the coordinating State’s jurisdiction under the extraterritorial effects doctrine because of the nature of the doctrine, which requires a human rights violation and a sufficient causal link. In *S.S. and Others v. Italy*, however, it could be argued (e.g.) that the Italian SAR coordination had the effects that the applicants that were rescued by the LCG were ill-treated on board the *Ras Jadir* and that they were pulled back to Libya in violation of

art. 3 ECHR. Whereas the sufficient causality of the link between the coordination and the pull-back is supported by Gammeltoft-Hansen and his reading of *Nada*, the sufficiency of the causal link between the coordination and the ill-treatment by the Ras Jadir crew is supported by Pijnenburg, but no ECtHR ruling. On the other hand, there appears to be no ruling contradicting Pijnenburg's findings.

Hence, it is not implausible that the Court could apply the extraterritorial effects doctrine to SAR operations resulting in pull backs. The doctrine could likely also to SAR coordination resulting in alleged violations during the rescue operation itself.

Thus, whereas art. 1 ECHR is not triggered through the exercise of long distance *de facto* control by a coordinating State, applying the extraterritorial effects doctrine could, at least in SAR operations resulting in pull-backs, trigger the jurisdiction of a coordinating State.

## 7.3 Research question 2

Based on the findings under research question 1(b), this thesis concludes that the Court could be able to adjudicate on the applicants' claims, at least regarding the pull-backs, in *S.S. and Others v. Italy* if it relies on the extraterritorial effects doctrine. Any other finding than that CoE States are expected to meet their ECHR obligations when coordinating SAR operations would be appalling and it would surely go against the object and purpose of the ECHR to find that SAR coordination is not covered by the ECHR.

While there is the possibility that the Court will make an overall assessment under art. 1 ECHR and investigate whether all "scenarios" identified by Pijnenburg regarding *S.S. and Others v. Italy*<sup>269</sup> – the coordination, the MoU and the presence of the Italian helicopter – taken together will amount to an

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<sup>269</sup> See Chapter 1.3.

exercise of jurisdiction, the Court will hopefully also comment on the role of SAR coordination regarding art. 1 ECHR. Without the Court clearly stating that SAR coordination can trigger jurisdiction, it is not unimaginable that European States will consider themselves not obliged to respect the ECHR when coordinating SAR operations. While this appears to be the reality of today, the Court could put an end to such practices by condemning them as unlawful. Whether or not Europe would respect and correct itself after such a ruling is, however, a question of its own.

# Bibliography

## Literature and articles

Bantekas, Ilias and Oette, Lutz (2016) *International Human Rights Law and Practice*. Second Edition. Cambridge University Press.

Besson, Samantha (2012) 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to'. *Leiden Journal of International Law*, vol. 25, pp. 857-884.

Borelli, Silvia and Stanford, Ben (2014) 'Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights'. *Review of International Law & Politics*, vol. 10 no. 1, pp. 29-69.

Da Costa, Karen (2013) *The Extraterritorial Application of Selected Human Rights Treaties*. Nijhoff.

Den Heijer, Maarten (2012) *Europe and Extraterritorial Asylum*. Studies in International Law. Hart Publishing.

Den Heijer, Maarten; Rijpma, Jorrit and Spijkerboer, Thomas (2016A) 'Coercion, Prohibition and Great Expectations: the Continuing Failure of the Common European Asylum System'. *Common Market Law Review*, vol. 53, pp. 607-642.

Duttwiler, Michael (2012) 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights'. *Netherlands Quarterly of Human Rights*, vol. 30 no. 2, pp. 137-162.

Frenzen, Niels W. (2017) 'The legality of Frontex Operation Hera-type migration control practices in light of the *Hirsi* judgment', in: Gammeltoft-Hansen, Thomas and Vedsted-Hansen, Jens (eds.) *Human rights and the dark side of globalisation. Transnational law enforcement and migration control*. Routledge, pp. 294-213.

Gammeltoft-Hansen, Thomas (2011) *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*. Cambridge University Press.

Gammeltoft-Hansen, Thomas and Hathaway, James C. (2015) 'Non-Refoulement in a World of Cooperative Deterrence'. *Columbia Journal of Transnational Law* vol. 53 no. 2 pp. 235-284.

Gammeltoft-Hansen, Thomas (2016) *Hvordan løser vi flygtningekrisen?*. Informations Forlag.

Gammeltoft-Hansen, Thomas (2018) 'International Cooperation and Migration Control: Towards a Research Agenda for Refugee Law'. *European Journal of Migration and Law*, vol. 20 no. 4, pp. 373-395.

Ghezelbash, Daniel; Moreno-Lax Violeta; Klein, Natalie and Opeskin, Brian (2018) 'Securitization of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia'. *International & Comparative Law Quarterly*, vol. 67 no. 2, pp. 315-351.

Giuffr , Mariagiulia and Moreno-Lax, Violeta (2019) 'The rise of consensual containment: from 'contactless control' to 'contactless responsibility' for migratory flows', in: Juss,

- Satvinder Singh (ed.) *Research Handbook on International Refugee Law*. Edward Elgar Publishing, pp. 82-108.
- Ishawara Bhat, P. (2019) *Idea and Methods of Legal Research*. Oxford University Press.
- Karageorgiou, Eleni (2019) 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity'. *Nordic Journal of International Law*, vol. 88, pp. 315-358.
- Kessing, Peter Vedel (2017) 'Transnational operations carried out from a State's own territory: armed drones and the extraterritorial effect of international human rights conventions' in: Gammeltoft-Hansen, Thomas and Vedsted-Hansen, Jens (eds.) *Human rights and the dark side of globalisation. Transnational law enforcement and migration control*. Routledge, pp. 81-98.
- Klug, Anja and Howe, Tim (2010) 'The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle to Extraterritorial Interception Measures', in: Ryan, Bernard and Mitsilegas, Valsamis (eds.) *Extraterritorial Immigration Control: Legal Challenges*. Martinus Nijhoff Publishers, pp. 65-99.
- Lawson, Rick (2004) 'Life After Bankovic: on the Extraterritorial Application of the European Convention on Human Rights', in: Coomans, Fons and Kamminga, Menno T. (eds.) *Extraterritorial Application of Human Rights Treaties*. Intersentia, pp. 83-123.
- Letsas, George (2007) *A Theory of Interpretation of the European Convention on Human Rights*. Oxford University Press.
- Mann, Itamar (2013) 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights 1993-2013'. *Harvard International Law Journal*, vol. 52 no. 2 pp. 315-391.
- Mann, Itamar (2018) 'Maritime Legal Black Holes: Migration and Rightlessness in International Law'. *European Journal of International Law*, vol. 29 no. 2, pp. 347-372.
- Milanovic, Marko (2011) *Extraterritorial application of human rights treaties: law, principles and policy*. Oxford University Press.
- Milanovic, Marko (2012) 'Al-Skeini and Al-Jedda in Strasbourg'. *The European Journal of International Law*, vol. 23 no. 1, pp. 121-139.
- Mussi, Francesca and Tan, Nikolas Feith (2017) 'Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia'. *UCD Working Papers in Law, Criminology & Socio-Legal Studies*. Research Paper No. 09/2017.
- Oudjeans, Nanda; Rijken, Conny and Pijnenburg, Annick (2018) 'Protecting the EU External Borders and the Prohibition of Refoulement'. *Melbourne Journal of International Law*, vol. 19, pp. 614-638.
- Oppenheim, Lassa Francis Lawrence (1996) *Oppenheim's International Law Vol. 1, Part 2-4, Peace*. 9th edition. Edited by Jennings, Robert and Watts, Arthur. Longman.
- Papastavridis, Efthymios (2014) 'Is there a right to be rescued at sea? A sceptical view'. *QIL (Questions of International Law)* vol. 4, pp. 17-32.
- Pijnenburg, Annick (2018) 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' *European Journal of Migration and Law*, vol. 20 no. 4, pp. 396-426.
- Raible, Lea (2016) 'The extraterritoriality of the ECHR: why Jaloud and Pisari should be read as game changers'. *European Human Rights Law Review*, vol. 2 no. 2, pp. 161-168.



Scheinin, Martin (2017) 'The art and science of interpretation in human rights law', in: Andreassen, Bård A.; Sano, Hans-Otto and McInerney-Lankford Siobhán (eds.) *Research Methods in Human Rights. A Handbook*. Edwar Elgar Publishing, pp. 17-37.

Shaw, Malcolm (2003) *International Law*. 5<sup>th</sup> Edition. Cambridge University Press.

Shany, Yuval (2013) 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in Human Rights Law'. *Law & Ethics of Human Rights*, vol. 7 no. 1, pp. 47-71.

Spijkerboer, Thomas (2018) 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control'. *European Journal of Migration and Law*, vol. 20 no. 4, pp. 452-469.

Staker, Crisopher (2018) 'Jurisdiction', in: Evans, Malcolm D. (ed.) *International law*. Oxford University Press, pp. 289-315.

Trevisanut, Seline (2014) 'Is there a right to be rescued at sea? A constructive view'. *QIL (Questions of International Law)* vol. 4, pp. 3-15.

Tzevelekos, Vasillis P. (2014) 'Reconstructing the Effective Control Criterion in Extraterrestrial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility'. *Michigan Journal of International Law* vol. 36 no. 1, pp. 129-178.

Zamatto, Federica; Argenziano, Stefano; Arsenijevic, Jovana; Ponthieu, Aurelie; Bertotto, Marco; Donna, Francesco; Harries Di, Anthony D. and Zachariah, Rony (2017) 'Migrants caught between tides and politics in the Mediterranean: an imperative for search and rescue at sea?'. *BMJ Global Health*, vol. 2 no. 3, pp. 1-4.

## Electronic materials

### European Court of Human Rights

European Court of Human Rights: Guide on Article 1 of the European Convention on Human Rights. Obligation to respect human rights – Concepts of "jurisdiction" and imputability, updated 31 December 2019, [https://www.echr.coe.int/Documents/Guide\\_Art\\_1\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf), visited 13 May 2020.

European Court of Human Rights (2019): Requête no 21660/18 S.S. et autres contre l'Italie. Communiquée le 26 juin 2019, [https://hudoc.echr.coe.int/eng#{"fulltext":\["21660/18"\],"itemid":\["001-194748"\]}](https://hudoc.echr.coe.int/eng#{), visited 23 January 2020.

### News articles, blog posts and statistics

Agerholm, Harriet (2018): 'Italy sued over migrant 'push back' deal with Libya after 20 migrants drown in Mediterranean', The Independent, <https://www.independent.co.uk/news/world/europe/italy-libya-migrant-refugee-push-back-deal-mediterranean-a8342056.html>, visited 3 March 2020.

Baumgärtel, Moritz (2018): 'High Risk, High Reward: Taking the Question of Italy's involvement in Libyan 'Pullback' Policies to the European Court of Human Rights', EJIL: Talk!, <https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys->

[involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights/](#), visited 3 March 2020.

Council of Europe: Chart of signatures and ratifications of Treaty 005, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>, visited 29 April 2020.

Den Heijer, Maarten; Rijpma, Jorrit and Spijkerboer, Thomas (2016B): 'The systemic failure of the Common European Asylum System, as exemplified by the EU-Turkey deal', Thomas Spijkerboer, <http://thomasspijkerboer.eu/thomas-blogs/the-systemic-failure-of-the-common-european-asylum-system-as-exemplified-by-the-eu-turkey-deal/>, visited 25 March 2020.

Fink, Melanie and Gombeer, Kristof (2018): 'The Aquarius incident: navigating the turbulent waters of international law, EJIL: Talk!', <https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/?fbclid=IwAR1bUIHKabviH8B8ecJy9y0P6h6F8tkXCtrY3VKMJVKIp6opyUFjqS3EI>, visited 3 March 2020.

Global Legal Action Network (2018): Legal Action Against Italy over its Coordination of Libyan Coast Guard Pull-Backs Resulting in Migrant Deaths and Abuse, <https://www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse>, visited 3 February 2020.

Gostoli, Ylenia (2018): 'Lawyers pin blame for deaths of 20 migrants at sea on Italy', Al Jazeera, <https://www.aljazeera.com/news/2018/05/lawyers-pin-blame-deaths-20-migrants-sea-italy-180508173551688.html>, visited 3 March 2020.

International Organization for Migration: Missing Migrants Project, <https://missingmigrants.iom.int/region/mediterranean>, visited 4 February 2020.

Kirchgaessner, Stephanie and Tondo, Lorenzo (2018): 'Italy's deal with Libya to 'pull back' migrants faces legal challenge', The Guardian, <https://www.theguardian.com/world/2018/may/08/italy-deal-with-libya-pull-back-migrants-faces-legal-challenge-human-rights-violations>, visited 3 March 2020.

### Submissions on behalf of the interveners in *S.S. and Others v. Italy*

Amnesty International and Human Rights Watch (2019): Written submissions on behalf of the interveners, [https://www.hrw.org/sites/default/files/supporting\\_resources/hrw\\_amnesty\\_international\\_submissions\\_echr.pdf](https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf), visited 23 January 2020.

## Videos

Adams, Taylor; Ellick, Adam B.; Strasser, Max and Varjacques, Leah (2018) *How Europe Outsources Migrant Suffering at Sea* [video] <https://www.nytimes.com/video/opinion/100000005820783/europe-migrant-crisis-mediterranean.html?src=vidm>, visited 3 February 2020.

Forensic Oceanography – Forensic Architecture (2018) *Mare Clausum: The Sea Watch vs Libyan Coast Guard Case* [video] <https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard>, visited 3 February 2020.

## Legal Instruments

Consolidated Version of the Treaty on the Functioning of the European Union 2012 Official Journal C326/55.

Convention Relating to the Status of Refugees.

Draft Articles on State Responsibility for Internationally Wrongful Acts.

European Convention on Human Rights.

International Covenant on Civil and Political Rights.

Protocol No. 4. European Convention on Human Rights.

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or Stateless person.

United Nations Convention on the Law of the Seas.

Vienna Convention on the Law of Treaties.

# Table of Cases

## European Court of Human Rights

Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, 7 ECHR 2011.

Andreou v. Turkey (dec.) no. 45653/99, 3 June 2008.

Banković and Others v. Belgium and Others (dec.) [GC], no. 52207/99, ECHR 2001-XII.

Ben El Mahi and Others v. Denmark (dec.) no. 5853/96 11, ECHR 2006-XV.

Catan and Others v. the Republic of Moldova and Russia [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012.

Cyprus v. Turkey, nos. 6780/74 and 6950/75, Commission decision of 26 May 1975, Decisions and Reports 2.

Drozd and Janousek, 26 June 1992, Series A no. 240.

Furdík v. Slovakia (dec.) no. 42994/05, 2 December 2008.

Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, ECHR 2012.

Issa and Others v. Turkey, no. 31821/96, 16 November 2004.

Kovačič and Others v. Slovenia (dec.) nos. 44574/98, 45133/98 and 4316/99, 3 October 2008.

Loizidou v. Turkey (preliminary objections), 23 March 1995, Series A no. 310.

Medvedyev and Others v. France [GC], no. 3394/03, ECHR 2010.

Nada v. Switzerland [GC], no. 10593/08, ECHR 2012.

Pad and Others v. Turkey (dec.) no. 60167/00, 28 June 2007.

Rigopoulos v. Spain (dec.) no. 37388/97, EHRR 1999-II. Information Note on the Court's Case Law No. 2, [https://hudoc.echr.coe.int/eng#{"itemid":\["002-208"\]}](https://hudoc.echr.coe.int/eng#{), visited 19 March 2020.

Soering v. The United Kingdom, no. 14038/88, 7 July 1989, Series A no. 161.

Women on Waves and Others v. Portugal, no. 31276/05, 3 February 2009. Information Note on the Court's Case Law No. 116, [https://hudoc.echr.coe.int/eng#{"itemid":\["002-1667"\]}](https://hudoc.echr.coe.int/eng#{), visited 17 March 2020.

Xhavara and Others v. Italy and Albania (dec.) no. 39473/98, 11 January 2001. Information Note on the Court's Case Law No. 26, [https://hudoc.echr.coe.int/eng#{"itemid":\["002-5809"\]}](https://hudoc.echr.coe.int/eng#{), visited 17 March 2020.

Öcalan v. Turkey [GC], no. 46221/99, ECHR 2005-IV.

## Mixed Arbitral Tribunal

Trail Smelter Arbitration, [https://legal.un.org/riaa/cases/vol\\_III/1905-1982.pdf](https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf), visited 8 May 2020.