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The Interception of Refugees and Migrants on the High Seas

- The Scope of Applicability of the Principle of
Non-Refoulement and Extraterritorial Jurisdiction

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Summary

According to the European Convention on Human Rights, jurisdiction is a prerequisite for holding a contracting state responsible when an allegation of infringement of the ECHR arises, such as the principle of *non-refoulement*. States implement extraterritorial migration management measures trying to avoid triggering the principle of *non-refoulement* arguing that it cannot be applied extraterritorially. The cooperation between Italy and Libya is an example of extraterritorial migration management, that highlights the difficulties in determining the extent of the applicability of non-refoulement. Migrants as well as refugees are intercepted on the high seas and returned to Libya with the support of Italy in accordance with the 2017 *Memorandum of Understanding*. Whilst in Libya migrants and refugees face the risk of torture and other ill-treatment.

The aim of this thesis is to examine to what extent the principle of *non-refoulement* in ECHR protects refugees and migrants intercepted on the high seas. This study shows that extent of the protection of non-refoulement in the ECHR extends to the high seas, however this is dependent on the extent of extraterritorial jurisdiction within the ECHR. According to the case-law of the European Court of Human Rights extraterritorial jurisdiction is applicable in interception operations if there is *de jure* and or *de facto* control. However new developments raise the question if contactless control can constitute for *de facto* jurisdiction; this could potentially expand the extent of the protection of non-refoulement in the ECHR of refugees and migrants intercepted on the high seas.

Sammanfattning

Enligt den Europeiska konventionen om skydd för de mänskliga rättigheterna och grundläggande friheterna (EKMR) krävs jurisdiktion för att en avtalsslutande part ska kunna hållas ansvarig, när ett påstående om intrång av *non-refoulement* enligt EKMR uppstår. Stater genomför extraterritoriella gränskontroller för att kontrollera migranter och internationella flyktingar utanför statens egna territorium. Stater försöker undvika att utlösa principen om *non-refoulement* genom att hävda att *non-refoulement* principen inte kan tillämpas extraterritoriellt. Samarbetet mellan Italien och Libyen är ett exempel på ett extraterritoriell migrationshantering, som belyser svårigheterna med att fastställa utsträckningen av tillämpligheten av *non-refoulement*. Enligt överenskommelsen *Memorandum of Understanding* från 2017 blir migranter och flyktingar tillbakavisade av libyska statliga aktörer på öppet hav, och återförs tillbaka till Libyen. Detta sker med stöd av den Italienska regeringen. I Libyen står migranter och flyktingar inför inhumana bemötanden och risk för tortyr.

Syftet med denna avhandling är att undersöka i vilken utsträckning principen om *non-refoulement* i EKMR skyddar flyktingar och migranter som fångas upp på öppet hav. Denna studie visar att omfattningen av skyddet för *non-refoulement* i Europakonventionen sträcker sig till öppet hav, men detta beror på omfattningen av extraterritoriell jurisdiktion inom Europakonventionen. Enligt Europadomstolens rättspraxis är extraterritoriell jurisdiktion tillämplig på öppet hav om det finns *de jure* och eller *de facto* kontroll. Men en ny utveckling väcker frågan om kontaktlös kontroll kan utgöra *de facto* jurisdiktion; detta kan eventuellt öka utsträckningen av skyddet för *non-refoulement* i EKMR för flyktingar och migranter som fångats upp på öppet hav.

Abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRW	Human Rights Watch
ICJ	International Court of Justice
MoU	Memorandum of Understanding
MRCC	Maritime Coordination and Rescue
UNCLOS	United Nations Convention on the Law of the Seas
UNHCR	United Nations High Commissioner for Refugees
Refugee Convention	Convention Regarding to the Status of Refugees

1. Introduction

1.1 Background

Many refugees and migrants resort to travelling irregularly by sea when trying to reach Europe's borders. The year 2015 was the deadliest year on record for those crossing the Mediterranean,¹ as individuals travel in unseaworthy vessels risking injury or death at sea, and exploitation by smugglers and human traffickers. Hence Irregular migration by sea is a deep-rooted and continuing **global challenge**.²

On the 6th of November 2017, 150 people left Libya in a rubber dinghy. That night the dinghy sent out a distress message contacting Italian Rome Maritime Coordination and Rescue and calling on nearby ships to rescue the sinking vessel. ³ Non-governmental organization Sea-Watch instigated the rescue operation however, this was interrupted by the Libyan Coast Guard. According to 17 survivors, the crew of the Libyan ship threatened and hit people in the water with ropes, and an unknown number of people died.⁴ There were 47 people intercepted by the Coast Guard and pulled back to Libya where they were detained. ⁵

The interception measures on the high seas are part of the cooperation between Italy and Libya bound by the *Memorandum of Understanding* signed on the 2nd of February 2017 to combat irregular migration.⁶

¹ International Organization for Migration (IOM), *Over 3,770 Migrants Have Died Trying to Cross the Mediterranean to Europe in 2015*, <<www.iom.int/news/over-3770-migrants-have-died-trying-cross-mediterranean-europe-2015>>, (accessed: 2021-05-26).

² Klein, (2017), p. 35-36.

³ *SS and Others v. Italy*, no. 21660/18, decision pending, para 3 <<<https://hudoc.echr.coe.int/eng>>> (accessed: 2021-04-28)

⁴ Ibid para 6, 8.

⁵ Human Rights Watch and Amnesty International, joined third party intervention on the case *S.S. and Others v. Italy*, 11 November 2019, <<https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf>>, (accessed: 2021-08-01).

⁶ Amnesty International, *Libya: Renewal of migration deal confirms Italy's complicity in torture of migrants and refugees*, <<<https://www.amnesty.org/en/latest/news>>>, (accessed:2021-05-16).

The events taken place on the Mediterranean, of 6th of November 2017, are the center of the pending European Court of Human Rights (ECtHR) case *S.S and Others v. Italy*. The applicants claim that there was a breach of the principle of *non-refoulement*.⁷ In international human rights law, the principle of *non-refoulement* guarantees protection from being removed or returned to a country where they risk facing torture, cruel, inhuman or degrading treatment.⁸

The general principle of the European Convention on Human Rights (ECHR), is that jurisdiction is required for holding a contracting state responsible when an allegation of infringement of the ECHR arise, such as the principle of *non-refoulement*.⁹

However, there seems to be a discrepancy between how the principle is legislated and how it is applied, exposing refugees and migrants to the risk of refoulement at sea. Guy S. Goodwin-Gill explains that the situation on the high seas is an area that offers opportunities for flexible maritime borders that seem to allow states to carry out national interests in a common space under the pretense of non-territorial notion. States implement extraterritorial migration management measures trying to avoid triggering the principle of *non-refoulement* arguing that it cannot be applied extraterritorially.¹⁰

There is therefore a need to examine the scope of the application of the principle of *non-refoulement* and whether refugees and migrants are sufficiently protected by the principle in ECHR. Can states implement extraterritorial interception methods without triggering their responsibilities under the ECHR?

⁷ *SS and Others v. Italy*, no. 21660/18, decision pending, para 11-12, <<<https://hudoc.echr.coe.int/eng>}>> (accessed: 2021-04-28)

⁸ The European Convention for the protection of Human rights and Fundamental Freedoms (ECHR), as amended by Protocols no. 11 and 14, 4 November 1950, Rome.

⁹ ECtHR Guide on Article 1 of the Convention, para 1, <<https://www.echr.coe.int/documents/guide_art_1_eng.pdf>>, (accessed: 2021-05-16).

¹⁰ Goodwin-Gill, (2017), p.23.

1.2 Purpose and Research Questions

The purpose of this thesis is to examine to what extent the principle of *non-refoulement* in ECHR protects refugees and migrants intercepted on the high seas. In order to achieve the aim of this study the following questions will be answered:

1. How does the principle of *non-refoulement* in ECHR apply to refugees and migrants?
2. To what extent is the principle of *non-refoulement* applicable on the high seas?
3. Can extraterritorial jurisdiction be applied during interception on the high seas in search and rescue missions in light of the ECHR case *Hirsi* and pending the application of *S.S.*?

1.3 Delimitations

This thesis focuses mainly on the ECHR which is an international human rights treaty between 47 states that are members of the Council of Europe. I will be focusing on the member state Italy.¹¹ The ECHR enforces human rights and freedoms regionally in Europe, however, this should not be confused with the European Union (EU).¹²

This paper will mainly describe the cooperation throughout bilateral agreements between Italy and Libya as independent states, not the cooperation between the EU and Libya.

¹¹ The Council of Europe, *Map & Members*, <<<https://www.coe.int/en/web/tbilisi/the-coe/objectives-and-missions>>>, (accessed: 2021-05-20)

¹² Henriksen, (2019), p. 175.

The principle of *non-refoulement*, discusses the effects on the right to seek asylum, which is often associated with the right to asylum, that determines who has the right to international protection as a refugee. This thesis will mainly focus on the principle of *non-refoulement*, it will only briefly discuss the right to asylum in order to define the legal status of refugees and migrants in the context of *refoulement*.

The concept of jurisdiction in human rights law is sui generis which is unrelated to different forms of jurisdiction found in other general international law.¹³ I will therefore only be covering jurisdiction in human rights law in this thesis.

1.4 Method and Material

Throughout this study, the legal dogmatic method will be used where relevant legal sources such as legislation, preparatory work, case law and doctrine, are used for the purpose of establishing the applicable law on a specific legal issue.¹⁴

In addition to the traditional legal dogmatic method, I will use an international perspective. I will base my analysis on clearly defined questions and apply generally accepted sources of international law to find the answers to them.¹⁵ As described in art.38(1) ICJ ST, international legal sources are categorized in a hierarchy, which I follow in my thesis. I use primary sources of international law such as; international treaties, general principles and rules of general customary law¹⁶, and secondary means such case-law and legal doctrine to strengthen my analysis.¹⁷

¹³ Ibid. p. 180.

¹⁴ Kleineman, (2018), p. 21-23.

¹⁵ Ibid.

¹⁶ Statue of the International Court of Justice (1945), UNTS N/A, art. 38(1)(a)-(c).

¹⁷ Art. 38(1)(d) ICJ St.

As primary sources, I use treaty provisions 1951 Convention Relating to the Status of Refugees (Refugee Convention)¹⁸, the ECHR¹⁹, as well as rules of international customary law.

Based on the objective and purpose of the ECHR and the ECtHR role in developing legal doctrine on human rights²⁰ case-law of the ECtHR will be used to contribute to the application of relevant laws and principles as a secondary source. As for doctrine, I use the works of distinguished scholars within the field of international human right law, in order to contribute with different perspectives on the topic.

The case *S.S and Others v. Italy* is currently pending before the Court and the ECtHR has yet to deliver a judgement. The information in the application of *SS and Others V. Italy* no.21660/18 as well as the reconstructed facts from the Search and Rescue Observatory for the Mediterranean²¹, will be used to understand the legal issues of the case.

Whilst the legal dogmatic method seeks answers to questions concerning the meaning of applicable law, a critical perspective will permeate the analysis of the study, by focusing on the unsatisfactory legal position through a discussion using the legal sources.²²

¹⁸ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) Geneva, UNTS.

¹⁹ European Convention for the protection of Human rights and Fundamental Freedoms (ECHR), as amended by Protocols no. 11 and 14, 4 November 1950, Rome.

²⁰ See *Soering v. The United Kingdom*, no. 14038/88, 7 July 1989, para 87.

²¹ SAROBMED, *Sea Watch: Confrontation in high seas*, <<<https://sarobmed.org/incident/sea-watch-confrontation-in-high-seas/>>>, (accessed: 2021-04-30)

²² Kleineman, (2018), p. 105-146.

1.5 Previous Research

The principle of *non-refoulement* found is internationally recognized as the central principle of international refugee law²³ as well as an absolute right of international human rights according to the ECHR.²⁴

Legal obligations due to the principle of *non-refoulement* is contentiously undermined, which can be exemplified by states extraterritorial migration management. However, the interpretation of the scope of the principle of *non-refoulement* and the extraterritorial application of the principle is debated by scholars. As the extent of the principle of *non-refoulement* is still vague there is a need for further research.

1.6 Disposition

- Chapter two starts by examining the issues of irregular migration and mixed migratory flows. The legal status of refugees and migrants and right to international protection will be examined.
- Chapter three describes the principle of *non-refoulement*. This chapter will investigate the scope of non-refoulement and the applicability of the principle on the high seas.
- Chapter four inspects the issue of extraterritorial jurisdiction in human rights law and how this extends to the state's obligations under the ECHR. The case *Hirsi* as well as the current developments of the pending case of *S.S.* will be examined as well.
- Chapter five constitutes an analysis in order to answer the research question.

²³ Art 33 in Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) Geneva, UNTS.

²⁴ Art. 3 in European Convention for the protection of Human rights and Fundamental Freedoms (ECHR), as amended by Protocols no. 11 and 14, 4 November 1950, Rome.

-Chapter 6 will present my final conclusions.

2. Mixed Migration Flow on the High Seas

Travelling by sea is a means of irregular migration that is becoming increasingly challenging for most states, as large-scale arrivals of migration flows by sea from Africa are reaching Mediterranean Europe.²⁵

A universal term to define **irregular migration** does not exist, however, the term is commonly used to identify people moving outside regular migration routes which can consist of migrants, refugees and asylum seekers. It is the movements of people that take place outside the regulations, international agreements or laws governing the exit from the state of origin or entry into the state of destination.²⁶

The Parliamentary Assembly of the Council of Europe expressed their deep concern in resolution 1821 over the measures taken to deal with arrival by sea of the mixed migration flows. The Assembly emphasises the fact that because of the mixed nature of these migratory arrivals, there is a need for specialised and tailored responses to the status of the individuals being rescued.²⁷ Migrants who travel on economic grounds are not granted special protection, except for the guaranteed protection under general human rights law such as the principle of *non-refoulement*.²⁸

2.1 Immigration Status and the Right to International Protection

The definition of the term *refugee* according to article 1A(2) of the Refugee Convention²⁹, is a person who has fled either their own country of

²⁵ Parliamentary Assembly, Res. 1821, para 1-2.

²⁶ IOM, Key Migration Terms, << <https://www.iom.int/key-migration-terms> >>, (accessed: 2021-06-31)

²⁷ Parliamentary Assembly, Res. 1821, para 3.

²⁸ Komp, (2017), p. 225-226.

²⁹ Art. 1A(2) in The 1951 Convention relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, 189 UNTS.

nationality or in cases of the lack of a nationality being outside of their country of habitual residence, because of a

“[...]well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is unable or because of such fear is unwilling to subject themselves to the protection of that country [...]”³⁰

Refugees are protected from expulsion or arbitrary return to situations of persecution according to the principle on *non-refoulement* in article 33 of the Refugee Convention.³¹

No universally accepted definition of migrant exists, instead the International Organization for Migration (IOM) has developed their own definition. A *migrant* is commonly understood as an individual who moves away from their place of usual residence, either within a country or across an international border, temporarily or permanently for various reasons. These often include economical grounds, work related reasons or for higher studies.³²

Migrants do not inherently have the right to international protection, however migrants are guaranteed respect for their human rights, as declared by the Universal Declaration of Human Rights in New York.³³ In article 3 of the ECHR there is a prohibition of torture or inhumane and ill treatment, this applies irrespectively of an applicant’s conduct or legal status.

³⁰ Ibid.

³¹ Art. 33 in The 1951 Convention relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, 189 UNTS.

³² IOM- key Migration Terms, << <https://www.iom.int/key-migration-terms>>>, (accessed: 2021-06-28).

³³ UN General Assembly, New York Declaration for Refugees and Migrants: resolution/adopted by the general assembly, 3 October 2016,A/71/1. <<<https://www.refworld.org/docid/57ceb74a4.html>>>, (2021-06-27).

3. The Principle of *Non-Refoulement*

Every state possesses territorial sovereign authority over its borders, which means that they have the right to control the entry, residence and expulsion of aliens from their territory. However, this authority is limited by human rights and international refugee law imposing legal obligations such as the principle of *non-refoulement*.³⁴

The principle of *non-refoulement* is a fundamental necessity to ensure that people in need of international protection can exercise their right to seek and enjoy asylum from persecution in other states.³⁵

The principle of *non-refoulement* found in article 33 Refugee Convention, is internationally recognized as the central principle of international refugee law.³⁶ Additionally to the Refugee Convention, the principle is also guaranteed regionally in article 3 of the ECHR.³⁷

3.1 The Refugee Convention

Every individual who can be considered a refugee according to the definition in Article 1A (2)³⁸, is protected by the principle of non-refoulement found in article 33 of the Refugee Convention.³⁹

Article 33(1) prohibits the expulsion or return. Contracting states are not to expel or return a refugee in any kind of matter to the territories where “[...]”

³⁴ Gammeltoft-Hansen,(2017), p. 61- 63.

³⁵ UNHCR, Interception of Asylum-Seekers and refugees: the International framework and recommendations for a Comprehensive Approach, UN Doc EC/50/SC/CRP.17, para. 21-25.

³⁶ Art. 33.in Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), Geneva, UNTS.

³⁷ Art. 3 in European Convention for the protection of Human rights and Fundamental Freedoms, as amended by Protocols no. 11 and 14, 4 November 1950, Rome.

³⁸ Art. 1A(2) in Convention relating to the Status of refugees (adopted 28 July 1951, entered into force 22 April 1954) UNTS.

³⁹ Art. 33.in Convention relating to the Status of refugees (adopted 28 July 1951, entered into force 22 April 1954) Geneva,UNTS.

his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”⁴⁰.

The scope of the principle includes indirect *refoulement*, which is the removal of a refugee or asylum seeker to a third country where he or she would risk being redistributed to a country where they fear persecution.⁴¹ The prohibition of *refoulement* should however not be confused with the right to admission into a country, which is the right to *asylum*.⁴²

The principle of *non-refoulement* applies categorically to refugees within the meaning of article 1, however the protection in article 33 can also be applicable to asylum seekers.⁴³

3.2 The European Convention of Human Rights (ECHR)

The principle of *non-refoulement* is not explicitly expressed in the European Convention of Human Rights (ECHR), the prohibition of refoulement is incorporated into prohibition of torture in article 3. This is a fundamental human rights norm.⁴⁴ There are additionally those who consider the prohibition of refoulement as a rule of *jus cogens*, such as Judge Pinto De Albuquerque in his concurring opinion in *Hirsi*, due to no derogation being permitted.⁴⁵ Rules of *jus cogens* are the fundamental overriding principles of international law from which no derogation is permitted.⁴⁶

Every contracting state has an obligation to ‘secure’ everyone within their jurisdiction the rights and freedoms defined in Section 1 ECHR, as stated in

⁴⁰ Ibid.

⁴¹ UNHCR, Interception of Asylum-Seekers and refugees: the International framework and recommendations for a Comprehensive Approach, UN Doc EC/50/SC/CRP.17, para: 21-25.

⁴² Goodwin-Gill, McAdam,(2007), p. 215.

⁴³ Art. 33.in Convention relating to the Status of refugees (adopted 28 July 1951, entered into force 22 April 1954) Geneva, UNTS.

⁴⁴ Komp, (2006), p. 227.

⁴⁵ *Hirsi Jamaa and Others v. Italy*, Concurring Opinion, p. 63.

⁴⁶ Henriksen, (2019), p. 48.

Article. 1.⁴⁷ When an individual runs a real risk of torture and inhumane and degrading treatment in case of being returned, article 3 triggers an obligation on the contracting state not to remove and return that individual.⁴⁸

The ECHR does not guarantee the right of non-nationals to enter or remain in the territory of a contracting state.⁴⁹ However, in *Saadi v. Italy* the Court observes the issue between the obligation under Article 3 and the general principle, determining that there is no “provision for exceptions and no derogation”⁵⁰ from Article 3 when an individual proves a genuine risk of ill treatment in the receiving country . Therefore establishing that the principle of *non-refoulement* is an exception to the general principle of sovereign authority over state borders.⁵¹

It is important to note that article 3 provides protection from refoulement applies irrespective of a person’s legal status or conduct, and persons who are explicitly excluded from refugee status.⁵²

3.3 The Application of the Principle of *Non-Refoulement* on the High Seas

The applicability of *non-refoulement* has been recognized as international customary law by the State Parties of the Refugee Convention and the 1967 Protocol, in their Declaration of 2001.⁵³ With the prohibition of *refoulement* being a principle of customary international law, the principle is binding for all states, even those that have not ratified the Refugee Convention.⁵⁴ However, as restrictive external migration control policies became

⁴⁷ The Convention for the Protection of Human Rights and Fundamental Freedoms, Rom 4 november 2000, CETS 177.

⁴⁸ Art. 3, in Convention for the Protection of Human Rights and Fundamental Freedoms, Rom 4 november 2000, CETS 177; De Weck, p. 17.

⁴⁹ *Saadi v. Italy*, no. 37201/06, 28 February 2008, (GC), para. 124.

⁵⁰ *Saadi v. Italy*, no. 37201/06, 28 February 2008, (GC), para. 127.

⁵¹ *Ibid.*

⁵² *Soering v. The United Kingdom*, no. 14038/88, 7 July 1989; *Chahal v. The United Kingdom*, no. 22414/93, 15 November 1996 (GC).

⁵³ Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relation to the Status of Refugees, accessed: 2021-06-25, para. 4.

⁵⁴ *Hirsi Jamaa and Others v. Italy*, Concurring Opinion, , p. 63; *Komp, The Duty to Assist in Distress*, p. 227.

implemented worldwide, states began to consider it a general moral principle that provided certain legal-constraints.⁵⁵

The Parliamentary Assembly expressed their deep concern in resolution 1821 over the measures taken to deal with arrival by sea of the mixed migration flows.⁵⁶ The assembly expressed that these arrivals have created several problems, one of which is contrasting opinions between states on the interpretation of the scope of non-refoulement and state responsibilities. Certain states consider that *non-refoulement* has an extraterritorial scope that applies to the high seas whilst other states strongly disagree.⁵⁷

According to the convention of *Law of the Sea*⁵⁸ the high seas are a maritime zone that no State has jurisdiction or sovereignty over.⁵⁹ Guy S. Goodwin-Gill explains that situation on the high seas as an area that offers opportunities for flexible maritime borders that seem to allow states to carry out national interests in a common space under the pretense of non-territorial notion. States implement extraterritorial migration management measures trying to avoid triggering the principle of non-refoulement arguing that it cannot be applied extraterritorially.⁶⁰

However, in the recent judgements of *Hirsi* the ECtHR have broadened the application of the principle of non-refoulement making it applicable on the high seas.⁶¹

⁵⁵ Kim,(2017), p. 50-51.

⁵⁶ Parliamentary Assembly, Res. 1872, para 3, Assembly debate on 24 April 2012 (12th Sitting) (see Doc. 12895, report of the Committee on Migration, Refugees and Displaced Persons, rapporteur: Ms Strik). Text adopted by the Assembly on 24 April 2012 (12th Sitting).

⁵⁷ Ibid. para 5.1.

⁵⁸ United Nations Convention on the Law of the Sea, 10 December 1982, Montego Bay, UNTS.

⁵⁹ Art. 89 & 92 in UNCLOS, United Nations Convention on the Law of the Sea, 10 December 1982, Montego Bay, UNTS.

⁶⁰ Goodwin-Gill, (2017), p.23.

⁶¹ *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (*Hirsi*), Decision of 23 february 2012 (GC), para 15-17.

4. Extraterritorial Jurisdiction

4.1 The Concept of Jurisdiction in Human Rights Law

International law is based on a system of parallel prescriptive jurisdictions exercised simultaneously on the same territory or over the same questions. Where there is control exercised over another individual by a state this is often referred to as *de jure* or/and *de facto*.⁶² *De jure* means lawfully, an example of this is when states exercise specific jurisdiction abroad without questioning the principal jurisdiction of the territorial state. States acquire *de jure* jurisdiction by ad hoc consent, by treaty or by customary international law.⁶³ Whilst *de facto* means unlawfully, it is de facto control that is exercised irrespective of the legality of the action.⁶⁴

Whilst a general principle in international law is territorial jurisdiction, when it comes to jurisdiction and the applicability of human rights law, there are differences of opinions whether it should have a territorial notion or an extraterritorial scope of applicability.⁶⁵

Anja Klung and Tim Howe argue that human rights law and general international law have different objectives and should therefore be distinguished when it comes to the application of jurisdiction. Klung and Howe suggest that jurisdiction in international human rights law, can be determined by ‘factual control’ so called *de jure* jurisdiction or ‘cause and effect’. This suggests that the notion of jurisdiction is not primarily territorial, but is established by factual circumstances such as control over persons even outside of state territory (extraterritoriality).⁶⁶

⁶² Ibid, p. 74.

⁶³ Ibid, p. 74.

⁶⁴ Ibid, p. 8.

⁶⁵ Kim,(2017), p. 52.

⁶⁶ Klung, Howe (2010), p. 76.

On the other hand, Sarah Miller argues for the need for a territorial notion of jurisdiction in human rights law. Miller argues that circumstances that enable the application of extraterritorial jurisdiction should be understood as limited exceptions to the rule of territorial jurisdiction. In her opinion, extraterritorial jurisdiction requires a significant connection between a contracting state physician territory and an individual, who acts as the human rights holder.⁶⁷

4.2 Case Law of the European Court of Human Rights (ECtHR)

4.2.1 The Governing Jurisdiction of the ECHR

In *Bankovic' and Others* the court rejected a 'cause-and-effect' concept of jurisdiction, establishing the primarily territorial notion of jurisdiction as found in both international law as well as the ECtHR.⁶⁸ Nonetheless, the court acknowledged that in exceptional cases certain acts performed by contracting states outside of their territories can account to an exercise of jurisdiction within the meaning of article 1, if these are performed or cause an effect extraterritorially.⁶⁹

In *Al-Skeini*⁷⁰, the Grand Chamber of ECtHR tried to clarify whether jurisdiction had a territorial notion or extraterritorial one. The Court confirmed that the case law was inconsistent and that article 1 of the ECHR was primarily territorial.⁷¹ However the Court recognized exceptions to this territorial principle: extraterritorial jurisdiction can be established in two circumstances; 1) on the basis of control or power exercised over a person

⁶⁷ Miller, (2009), p. 1224.

⁶⁸ *Bankovic' and Others v. Belgium and Others*, no. 52207/99, Decision of 12 December 2001, para. 75.

⁶⁹ *Bankovic' and Others v. Belgium and Others*, no. 52207/99, Decision of 12 December 2001, para. 68-71.

⁷⁰ *AL-Skeini and Others v. The United Kingdom*, , no. 55721/07, Decision of 7 July 2011, para: 129-130.

⁷¹ *Ibid.* para. 131.

which is called *ratione personae*, 2) on the basis of control actually effective control over foreign territory which is called *ratione loci*.⁷²

Klung and Howe, critically discuss the court's decision in *Bankovic*⁷³ and *AL-Skeini*⁷⁴ explaining that the ECtHR developed standards for its concept of effective control. These standards of de facto control that the courts apply requires a very high control in order to base the extraterritorial applicability of human rights violations. Klung and Howe mean that this approach to jurisdiction is too narrow and leads to human right violations being excluded from investigation. The writers argue that this narrow approach can result in interception measures without any direct physical contact between state agents and the intercepted individual, would be excluded from the scope of the ECHR, irrespective of whether there was a breach of non-refoulement.⁷⁵

4.2.2 Hirsi Jamaa and Others v. Italy

On May 6th, 2009, a group of two hundred individuals' who had left Libya aboard three vessels with the aim of reaching the Italian coast were intercepted on the high seas in the Maltese SAR zone, by three ships from the Italian Revenue Police and the Coastguard. When intercepted the occupants were transferred onto Italian military ships and pushed back to Tripoli, where they were handed over to Libyan authorities.⁷⁶ This was a pushback operation in accordance with Italy-Libya's bilateral agreement; the *Treaty on Friendship, Partnership and Cooperation* in order to combat and decrease the irregular migration between the two countries.⁷⁷

In December of 2007, Italy and Libya signed a bilateral cooperation agreement to combat irregular immigration, that was later amended with an

⁷² Ibid, para. 133-140.

⁷³ *Bankovic' and Others v. Belgium and Others*, no. 52207/99, Decision of 12 December 2001.

⁷⁴ *AL-Skeini and Others v. The United Kingdom*, , no. 55721/07, Decision of 7 July 2011.

⁷⁵ Klung, Howe, (2010), p. 99.

⁷⁶ *Hirsi Jamaa and Others v. Italy*, no. 27765/09, Decision of 23 february 2012 (GC), para 9-12.

⁷⁷ Ibid, para: 9-13.

additional protocol in February 2009.⁷⁸ According to this agreement, Italy and Libya would cooperate in patrolling the search and rescue area and in performing interception operations.⁷⁹

The claimants in the case were 24 individuals. Fourteen of the applicants were granted refugee status by the United Nations High Commissioner for Refugees (UNHCR) office in Tripoli between June to October of 2009.⁸⁰

In the *Hirsi* case the court considered three main issues; 1) whether the alleged violation fell within Italy's jurisdiction according to article 1 of the ECHR, 2) alleged violation of the non-refoulement principle; and 3) the correlation between 'push-back' and collective expulsion of aliens, that is prohibited under article 4 protocol no. 4 of the ECHR.⁸¹

4.2.2.3 Jurisdiction

One of the primary legal questions the Court had to examine was whether the Italian government acted within their jurisdiction according to the definition in art. 1 ECHR.⁸²

The Italian Government argued that the applicants were rescued in accordance with international law such as the *Law of the Sea* and provisions of *Search and Rescue Convention*. The Government disputed responsibility under the European Convention of Human Rights, due to minimal control being exercised at the material time.⁸³ According to the Government, the legal system on the high seas is characterized by the freedom of navigation therefore it was not necessary to identify the intercepted individuals. The

⁷⁸ *Hirsi Jamaa and Others v. Italy*, no. 27765/09, Decision of 23 february 2012 (GC), para 9-12, para 13-14.

⁷⁹ *Ibid.* para. 9-14.

⁸⁰ *Ibid.* para. 15-17.

⁸¹ *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (*Hirsi*), Decision of 23 february 2012 (GC).

⁸² *Ibid.* para. 63-66.

⁸³ *Ibid.* para. 94.

Italian authorities had provided necessary humanitarian assistance as this was a search and rescue mission.⁸⁴

The Court recognized that the exercise of jurisdiction is a necessary condition for triggering state responsibility for acts and omissions of infringements of the rights and freedoms in ECHR convention, such as the principle of *non-refoulement*.⁸⁵ However, the Court found that Italy, despite having ‘minimal control’ of the events of a rescue operation on the high seas, could not circumvent jurisdiction by describing the events as rescue operations on the high seas.⁸⁶

In the discussed case, the court observes the principle of flag states jurisdiction that is applicable on vessels sailing on the high seas under a state’s flag, being *de jure* control, which requires effective control over an individual. According to the Court, this meant that the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the Italian authorities exercised continuous and exclusive *de jure* and *de facto* control over the applicants. The court made the final judgement that the violations fell within Italy’s jurisdiction according to article 1 ECHR.⁸⁷

4.2.2.4 Violations of Article 3 ECHR

The Court had to make a final judgement whether the Italian authorities acted in violation of Article 3 ECHR, on the principle of *non-refoulement*. In their judgement, the court acknowledged that it is well-established by international law that states possess territorial sovereign authority over their borders. However the court argued that the responsibility of a State can be triggered under the ECHR, if there occurs expulsion, extradition or any other kinds of removal contrary to the prohibition of *refoulement* in Article

⁸⁴ Ibid. para. 95.

⁸⁵ Ibid. para. 70.

⁸⁶ Ibid. para. 74-75.

⁸⁷ Ibid. para. 79-82.

3⁸⁸, the obligations under the provisions of article 3, are absolute and a State cannot derogate from securing them.⁸⁹

There were two aspects of *non-refoulement* that the Court had to consider; firstly whether the applicants faced a real risk of being subjected to inhumane, ill-treatment or torture in Libya and secondly whether the applicants were exposed to a real risk of arbitrary repatriation (indirect *refoulement*).⁹⁰

In the instant case applicants were pushed back to Libya. At the time the Italian Government argued that Libya was a ‘safe’ destination state for migrants intercepted on the high seas.⁹¹ According to the government Italy believed that Libya at the time, was in compliance with its international obligations in regard to international refugee protection and asylum which included the principle of *non-refoulement*. Referencing to the *Italian-Libyan Friendship Treaty of 2008* which included compliance with provisions of international human rights.⁹² However, according to numerous reports of international bodies and non-governmental organizations such as Amnesty International, UNHCR and Human Rights Watch, the treatment of irregular migrants in Libya failed to comply with refugee obligations or international human rights. These people were systematically arrested, detained and kept in inhumane conditions, in some cases subjected to torture.⁹³

The refugee status granted by the UNHCR office in Tripoli did not guarantee any legal protection in Libya.⁹⁴ The court took into account that international reports denounced Libya for failure to comply with international obligations. The presence of domestic laws and the ratification

⁸⁸Ibid. para. 113-114.

⁸⁹ Ibid. para. 122.

⁹⁰ Ibid. para. 85.

⁹¹ Ibid. para. 97.

⁹² Ibid. para. 127.

⁹³ Ibid. para. 124-126

⁹⁴ Ibid. para.. 130.

of the Italy-Libya bilateral agreement, were not by themselves sufficient to ensure satisfactory protection against the risk of ill-treatment.⁹⁵

The Court noted that the situation in Libya was easy to verify and widely known.⁹⁶ The Court found that the Italian authorities transferred the applicants to Libya where they were exposed to treatment prohibited by the ECHR, despite having full knowledge of the situation in Libya.⁹⁷

In regard to the question of indirect *refoulement* the court established that according to the established case-law, the contracting state has a responsibility to ensure that an individual being returned would not be subjected to the risk of arbitrary repatriation, the returning state has an obligation to obtain guarantees from the receiving state.⁹⁸ However, in the above mentioned case, Italy failed to obtain such guarantees from the Libyan authorities, exposing the applicants to the risk of arbitrary repatriation, i.e. indirect *refoulement*. Concluding that Italy violated article 3 of the Convention.⁹⁹

4.2.2.5 Italy and Libya Bilateral Agreement

In *Hirsi* the court expressed their opinion on this bilateral agreement condemning Italy and establishing that the contracting state cannot circumvent its own responsibilities by relying on the bilateral agreements with Libya.¹⁰⁰ No matter if the bilateral agreement between the two state's established provisions for the return of irregular migrants to Libya, Italy as the contracting state of ECHR has an obligation to fulfill its responsibilities despite having entered into treaties subsequent to the entry into force of the ECHR and its protocols.¹⁰¹

⁹⁵ Ibid. para. 128-138.

⁹⁶ Ibid. para. 131.

⁹⁷ Ibid. para. 137-138.

⁹⁸ Ibid. para. 146-147.

⁹⁹ Ibid. para. 158

¹⁰⁰ Ibid. para. 129.

¹⁰¹ Ibid. para.. 128

4.2.3 S.S. and Others v. Italy

The facts of S.S. have been reconstructed from the Search and Rescue Observatory for the Mediterranean and described by Violeta Moreno-Lax of which she is the coordinator ¹⁰² as well as taken from the accounts described in the application no 21660/18. ¹⁰³

In this pending application, 17 applicants claim that Italy breached its obligations under the ECHR, by cooperating with Libya to enable Libyan Coast Guard to intercept people on the high sea and take them back to Libya. ¹⁰⁴ In the mentioned case the events took place between the 5th and 6th of November 2017. 150 people left Libya in a rubber dinghy only to be intercepted and pulled-back by the Libyan Coast Guard. The applicants claim that the interception constituted a breach of *non-refoulement*.

That night the dinghy sent out a distress message contacting Rome Maritime Coordination and Rescue (MRCC) and calling on nearby ships to rescue the sinking vessel. ¹⁰⁵ The Libyan Coast Guard Ras Jadir, that was first to join the dinghy. The non-governmental organization Sea-Watch was near the vessel in distress and obtained authorization from Rome MRCC, to join and rescue the boat. However Ras Jadir refused to cooperate with Sea-Watch in the rescue operations. ¹⁰⁶ The applicants that were intercepted by Ras Jadir

¹⁰² SAROBMED, *Sea Watch: Confrontation in high seas*, <<<https://sarobmed.org/incident/sea-watch-confrontation-in-high-seas/>>>, (accessed: 2021-04-30)

¹⁰³ *SS and Others v. Italy* (no.21660/18), Decision pending.<<<https://hudoc.echr.coe.int/eng/>>> (accessed: 2021-04-28).

¹⁰⁴ Reliefweb.int, report-italy, Italy shares responsibility for Libya abuses against migrants: third party intervention filed at European Court of human Rights, <<<https://reliefweb.int/report/italy/italy-shares-responsibility-libya-abuses-against-migrants-third-party-intervention>>>. (accessed: 2021- 04-30)

¹⁰⁵ *SS and Others v. Italy* (no.21660/18), pending decision, para. 3. <<<https://hudoc.echr.coe.int/eng/>>> (accessed: 2021-04-28).

¹⁰⁶ *Ibid*, para. 4-8.

allegedly suffered beatings, were threatened by the Libyan crew and later put in detention centers while in Libya.¹⁰⁷

It is important to point out that there is no commonly agreed account on the sequence of events, due to the fact that the Italian Government had yet to respond to the applicants' allegations despite the Government being notified on 26 June 2019.¹⁰⁸

4.2.3.1 Memorandum of Understanding

After the court's decision on the *Hirsi Jamaa and Others v. Italy* case, the Italian Minister of Defense suspended the application of this bilateral agreement to combat clandestine immigration in February of 2011. However, in 2012 Italy relaunched its cooperation with Libya on immigration in the fight with criminal organizations which smuggle migrants.¹⁰⁹

On February 2nd, 2017 after the Libyan government of national agreement was formed, Libya and Italy signed a Memorandum of Understanding (MoU) for cooperation in the field of development. This memorandum would strengthen boarder security between Libya and Italy, prevent illegal immigration, human trafficking and smuggling. The MoU established that Italy would coordinate search and rescue operations intercepting migrants at sea, however ships flying the Italian flag would not physically participate in the interception mesures.¹¹⁰

¹⁰⁷ SAROBMED, *Sea Watch: Confrontation in high seas*, <<<https://sarobmed.org/incident/sea-watch-confrontation-in-high-seas/>>>, (accessed: 2021-04-30)

¹⁰⁸ European Court of Human Rights: Factsheet- Collective expulsion of Aliens, accessed: 2021-07-25; Moreno-Lax, p. 388.

¹⁰⁹ *SS and Others v. Italy* (no.21660/18), pending decision, para 13-14, <<<https://hudoc.echr.coe.int/eng/>>> (accessed: 2021-04-28).

¹¹⁰ *Ibid.* para 15.

4.2.3.2 Jurisdiction

Similar to the *Hirsi* case, *S.S.* deals with an interception of a vessel with occupants of mixed migratory status, on the high seas and a potential breach of the principle of non-refoulement. However, in contrast to *S.S.* where Italian authorities coordinated the Search and Rescue operation but were absent during the interception, in *Hirsi* the case was built on physical custody of individuals by state agencies which constituted so called ‘extraterritorial’ application of state jurisdiction according to the ECtHR.¹¹¹

The difference between Italy's action in *Hirsi* and *S.S.* is the lack of physical custody over the applicants, which was the case in *Hirsi*. In *S.S.* Italian authorities did not physically participate in the interception of the applicants but the state coordinated the operation, which poses the question if these actions were within Italian jurisdiction according to article 1 of the ECHR and if Italy shares responsibility for the alleged breach of *non-refoulement*.¹¹²

In a joint third-party intervention submitted by Amnesty International and Human Rights Watch on 11th of November 2019, the non-governmental organizations argued that despite the lack of presence during the events, Italy had jurisdiction due to effective control over the implemented policies. These policies were a result of the Memorandum of Understanding between Libya and Italy, Italy supported Libya in coordinating interceptions, offering training to the Libyan Coast Guard and donating vessels and equipment.¹¹³

Dr. Violeta Moreno-Lax is an associate professor of law at Queen Mary University of London, argues that Italy has jurisdiction in the *S.S.* case due

¹¹¹ *Hirsi Jamaa and Others v. Italy*, decision of 23 february 2012, Application no. 27765/09 (Hirsi); Kim, Non-Refoulement and extraterritorial Jurisdiction: Kim, *State Sovereignty and Migration Controls at Sea in the European Context*, p.51.

¹¹² *Hirsi Jamaa and Others v. Italy*, decision of 23 february 2012, Application no 27765/09 (Hirsi); Kim, p.51.

¹¹³ Human Rights Watch and Amnesty International, joined third party intervention on the case *S.S. and Others v. Italy*, 11 November 2019, <<https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf>>, accessed: 2021-08-01.

to contactless control. Moneo-lax explains that the meaning of contactless control that can be exercised by a party of the ECHR, through remote management measures or in cooperation with local administration acting as a ‘proxy’ may constitute for effective-control exercised over either persons, territory or specific circumstances abroad, ECHR obligations.¹¹⁴

5 Discussion

The issue with mixed migratory arrival by sea and the legal status of refugees and migrants has been examined in chapter two. I have found that migrants are not inherently vulnerable, they do not inherently have the right to international protection as refugees do. However, migrants are entitled to respect of human rights regardless of their status and are therefore entitled to protection of the principle of *non-refoulement* inherent in article 3 of the ECHR. ECHR applies irrespective of an applicant's legal status and has a broader application than articles 33 of the Refugee Convention.

The results of this study show that the principle of *non-refoulement* is a crucial part of international protection of refugees and migrants. However, the scope of applicability of the principle remains debatable. There is a clear uncertainty whether *non-refoulement* can be applicable on the high seas due to its very nature. As is portrayed by the argument presented by Gill in chapter-3.3.

However recent developments due to *Hirsi* the ECtHR has broadened the application of the principle of *non-refoulement* settling that it can be applicable on the high seas. The extent of the applicability of *non-refoulement* is dependent on whether contracting states are obligated to guarantee such protection, which is determined by jurisdiction. Jurisdiction is a prerequisite for the application of the ECHR as previously mentioned in chapter 3.2.

¹¹⁴ Moreno-Lax,(2020),p. 387.

The high seas is a maritime zone in which no state has jurisdiction or sovereignty over. This makes the high sea extraterritorial, to hold a state responsible for interception measures taken on the high seas in breach of their human rights obligations, there needs to be an examination whether extraterritorial jurisdiction can be applied. In human rights law it is highly debated whether extraterritorial jurisdiction can be applied in cases of human rights violations or whether jurisdiction should have a primarily territorial notion.

The case law in *Bankovic* and *AL-Skeini*, the ECtHR recognized extraterritorial jurisdiction in strictly exceptional cases, which is to be determined according to the level of control or influence a state has indicating that there needs to be a high standard of *de facto* control. This goes in line with Miller's perspective for the need for a territorial notion of jurisdiction in human rights law. The court's decision argues similarly to Miller that circumstances that enable the application of extraterritorial jurisdiction should be understood as limited exceptions to the rule of territorial jurisdiction, and that extraterritorial jurisdiction requires a significant connection between a contracting state physician territory and an individual.

In the *Hirsi* judgement the court considered the principle of flag states jurisdiction as being *de jure* control, which requires effective control over an individual. Establishing that the Italian authorities exercised *de jure* and *de facto* control over the applicants despite having 'minimal control due to it being a rescue operation. It seems that the higher the level of *de jure* control exercised by a contracting state, the lesser the need to prove a higher level of *de facto* control. The ECtHR decision is more in line with the perspective of Klung and Howe. *Hirsi* has lowered the standards of *de facto* control that the courts applied in earlier case law, clarifying that extraterritorial jurisdiction can be applied in search and rescue missions during interception on the high seas.

In spite of the development of the scope and applicability of *non-refoulement* and extraterritorial jurisdiction due to *Hirsi*, new events have occurred that question the extent of extraterritorial jurisdiction. In *S.S.* the court will have to settle whether a contracting state can be held accountable for the breach of *non-refoulement* if there is only 'contactless control'. Third party interveners as well as Moreno-Lax argue that Italy did practice jurisdiction within article 1 of the ECHR due to the effective control the state had over the implemented pull back policies that were a result of the Libya-Italy MoU.

However, it is uncertain how the ECtHR would adjudicate in this case. In *Hirsi* despite there being so called minimal control, the court emphasized on the fact that there was physical custody of the applicants by the Italian authorities. The absence of Italian authorities in *S.S.* during the interception could implicate that there was no contact between Italy and the claimants.

If the court will rely on earlier case law that created a high standard for *de facto* control, this would potentially mean that Italy was not acting within jurisdiction of the ECHR. There is nonetheless a possibility that if the court continues to extend the extraterritorial notion of jurisdiction as it did in *Hirsi*, it could settle in line with Howe and Klungs perspective. Klung and Howe argue that the courts earlier approach to jurisdiction was too narrow and predicted that a case such as *S.S.* would occur. The narrow approach to jurisdiction allows states to circumvent responsibility through bilateral agreements.

6. Conclusion

The purpose of this thesis is to examine to what extent the principle of *non-refoulement* in the ECHR protects refugees and migrants intercepted on the high seas.

It has been affirmed in the results and the analysis of this study that migrants and refugees have a well-established and extensive right to protection from *refoulement* irrespective of migration status. The extent of the protection of *non-refoulement* in the ECHR extends to the high seas, however this is dependent on the extent of extraterritorial jurisdiction within the ECHR. In light of the judgement in *Hirsi* extraterritorial jurisdiction is applicable in interception operations if the state exercises effective control.

The ECtHR has yet to render a decision on the application of S.S. The court has to determine whether contactless control can constitute for *de facto* jurisdiction; this could potentially expand the extent of the protection of *non-refoulement* in the ECHR of refugees and migrants intercepted on the high seas.

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