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Libyan Pull-backs in the Mediterranean Sea: Any Italian Responsibility under the European Convention on Human Rights?

Student: Greta Albertari

Supervisor: Maarten den Heijer

Abstract

This dissertation discusses the possibility of Italy being found responsible for a violation of Article 3 of the European Convention on Human Rights in light of its involvement in the pull-back operations carried out by Libya in the Mediterranean Sea. This dissertation analyzes different pull-back scenarios, categorizing them by way of the different levels of involvements of Italian actors. Then, the question of Italian responsibility is addressed, and an analysis of the substantial violations and the Italian knowledge of their possible occurrence is carried out. Subsequently, particular attention is paid to the question of jurisdiction and an answer is researched within the existent case law of the ECtHR. The legal question which is addressed is whether and to what extent the Italian authorities' coordination activities and involvement are sufficient to establish the jurisdictional link in the meaning of Article 1 ECHR that makes possible to attribute a breach of the principle of refoulement to Italy. The dissertation concludes that there are the elements, in the case law of the ECtHR on extraterritorial jurisdiction, to argue that Italy be exercising jurisdiction in factual scenarios like the ones discussed. These elements only need to be re-arranged in what is proposed as a new model of jurisdiction, emerging from the fusion of two existent models.

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Introduction

On 8th May 2018, an application against Italy was lodged before the European Court of Human Rights. The claim was made, with the support of the Global Legal Action Network (GLAN) and the Italian Association for Juridical Studies on Immigration (ASGI),¹ on behalf of seventeen Nigerian citizens who were intercepted and rescued while crossing the Mediterranean Sea, on November 6th, 2017. The incident saw at least 20 people dying, 59 brought to Italy and 47 to Libya. While the actual pull-back was carried out by the Libyan Coastguard (LCG), the claim is that Italy could be found responsible under the ECHR for the violation of, *inter alia*, its non-refoulement obligation in light of its authorities' involvement in the incident. Were violations to be found in this case, say the promoters of this claim, it would be “establish[ed] the key principle that so-called ‘pull-backs’ are contrary to basic human rights standards”.²

The facts of this and of similar events have been reconstructed and published in a report issued by the University of London, Forensic Oceanography: ‘*Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean*’.³ The case of November 6th was brought before the ECtHR as a paradigmatic example of a broader pattern of behaviors systematically occurring in the Mediterranean. The outcome of this case is likely to impact dramatically on the actual *status quo* and to shed some light on the legitimacy of current Italian and European involvement in these pull-backs and on the future developments of externalization of borders at large.

This dissertation will analyze the facts of this and other incidents described in the *Mare Clausum* report, for a total of ten instances, and attempt to draw some conclusions as to the possible Italian responsibilities under the ECHR for its involvement in them. As the report will constitute the main source of information on the factual scenarios described, the time frame of the report will be the same

¹ Glan, ‘Legal action against Italy over its coordination of Libyan Coast Guard pull-backs resulting in migrant deaths and abuse’ (2018) at: <<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>>; Sea Watch, ‘Legal action against Italy over its coordination of Libyan Coast Guard pull-backs resulting in migrant deaths and abuse’ (2018, press release) at: <<https://sea-watch.org/en/legal-action-against-italy-over-its-coordination-of-libyan-coast-guard/>>; Moritz Baumgärtel, ‘High Risk, High Reward: Taking the Question of Italy’s Involvement in Libyan ‘Pull-back’ Policies to the European Court of Human Rights’ (2018) EJIL:Talk!

² Sea Watch, *ibid* - Itamar Mann, GLAN; Annalisa Camilli, ‘L’Italia rischia un processo per aver coordinato la guardia costiera libica’ *Internazionale* (8 May 2018, Loredana Leo, ASGI) at: <<https://www.internazionale.it/bloc-notes/annalisa-camilli/2018/05/08/italia-migranti-libia-respingimenti>>.

³ Charles Heller and Lorenzo Pezzani, ‘*Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean*’ (2018) Forensic Oceanography, at: <<https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>>; Video reconstruction at: <<https://www.forensic-architecture.org/case/sea-watch/>>. (Hereinafter: *Mare Clausum*)

employed in this dissertation: namely, from September 2017 to March 2018. The situation in the Mediterranean Sea undergoes continuous changes, as different actors are more or less present and their policies routinely modified. Nevertheless, this dissertation will only deal with the reference period described above and with the factual scenarios which originated at the time. Therefore, the conclusions of this dissertation will be without prejudice to the current, and possibly mutated, *status quo*.

The general question that this research attempts to answer is whether Italy is breaching its obligation of non-refoulement as enshrined in Article 3 ECHR⁴ through any of the actions it is undertaking with respect to these pull-backs. In order to answer this question, after a detailed description of the events considered (Chapter 1), three main elements have been identified and analyzed, which correspond to the steps undertaken by the ECtHR itself when assessing a case concerning Article 3. The first two steps will be addressed in Chapter 2: namely, investigating the possibility of substantial violations of Article 3 and the knowledge that Italy had, or ought to have had, of this possibility. Chapter 3 will be dedicated to the last step of this analysis, the one which proves to be the most complicated: the question of Italian jurisdiction over these actions. The main question becomes, then, whether and to what extent is the Italian involvement in the pull-backs sufficient to establish extraterritorial jurisdiction in the meaning of Article 1 ECHR, that would make possible to attribute a breach of the principle of refoulement to Italy. The method employed to address this question will be one which attempts to find possible applicable precedents in the existent case law of the Court on extraterritorial jurisdiction.

The dual involvement of Italian and Libyan authorities in the pull-backs would render the situations suitable for an analysis based on general rules of international responsibility. Italy could therefore only be held responsible if the pull-backs were attributable to it.⁵ Nevertheless, for the purpose of this dissertation, the choice has been made to focus in depth on the requirements of article 1 ECHR and the meaning of the concept of jurisdiction contained therein. This choice is led by the consideration that the ECtHR has distanced itself from issues of state responsibility in general.⁶ “The ECtHR has been adamant that, in order for the ECHR to apply, the first threshold is to establish jurisdiction under

⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Article 3. (ECHR)

⁵ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), ILC Yearbook 2001, vol.II (Part Two) at < http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>, Art 2.

⁶ André Nollkaemper, ‘The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?’ (2012) EJIL:Talk!

Article 1 of the ECHR, not attribution under state responsibility”.⁷ This being the case, the focus will be on the ECtHR's own case law and the way it has dealt with the establishment of jurisdiction as a “threshold criterion for the existence of the positive international obligation of a state party to the treaty to ‘secure’ the human rights of persons ‘within its jurisdiction’. These cases of the European Court do not revolve around the general law on state responsibility, but deal with a concept of state jurisdiction which is specific to human rights treaties”.⁸ Although the Court does not reject *tout court* the notion of attribution, its use of the concept is far from being consistent.⁹ ARSIWA rules of attribution and allocation of responsibility only come to the fore as an auxiliary method to the analysis of jurisdiction. Therefore, the assumption for the choice to focus on jurisdiction is that the Court would be more likely to accept an approach based on its own jurisprudence rather than on concepts that are external to it.

What this dissertation will conclude is that there is a risk of torture, or inhuman and degrading treatment to which all migrants returned to Libya are subjected. Moreover, the knowledge of this situation is so widespread and documented that it would not be possible to sustain the contrary. For what concerns the finding of jurisdiction, the dissertation will argue that a compounded test, which merges two models of jurisdiction established by the Court, could be employed. The selected models are the one of “measures with extraterritorial effects”¹⁰ and the one of “authority and control of State’s agents over individuals”.¹¹ What will emerge from this analysis of selected case law and its application to the cases discussed, is an argument which establishes that the extraterritorial effect of the Italian instructions and involvement is to put the migrants under the authority and control of Italian authorities and, therefore, within Italian jurisdiction.

The conclusion that this dissertation reaches, with the proposal of this compounded test for the finding of extraterritorial jurisdiction, renders the difference between *lex lata* and *lex ferenda* somewhat fuzzy. Whereas the attempt is that of remaining within the scope of the existent Court’s jurisprudence

⁷ Kim Seunghwan, ‘Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context’ (2017) 30(1) LJIL 49; Reference: Miller S, ‘Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention’, (2009) p 1235; “Michael O’Boyle plausibly argues that, [t]he [state responsibility] approach . . . only makes sense as regards a treaty which has no limiting “jurisdiction” clause”: O’Boyle, M., ‘The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on “Life after Bankovic”’, in Coomans F. and Kamminga MT (eds.), *Extraterritorial Application of Human Rights Treaties* (2004) 125, p 131.

⁸ Marko Milanovic, ‘State Responsibility for Genocide’ (2006) 17(3) EJIL 553, p 586; see also *Al-Skeini and Others v United Kingdom* (2011) ECHR 55721/07, §130 for the idea of threshold criterion.

⁹ Nollkaemper, supra n 6; Seunghwan, supra n 7.

¹⁰ *Banković and Others v. Belgium and 16 Other Contracting States* (2001) ECHR Admissibility 52207/99, §67; *Ilaşcu and Others v. Moldova and Russia* (2004) ECHR 48787/99, §312-4.

¹¹ *Issa and others v. Turkey* (2004) ECHR 31821/96, §71.

(*lex lata*) without proposing entirely new conceptualizations, the extensive argumentation presented and the de facto creation of a new jurisdictional model, leads inexorably towards the scope of *lex ferenda*. Rather than creating new conceptions, however, what is proposed in this dissertation is a concrete suggestion for a different employment of the existing ones. The proposed model therefore emerges from a critical stance on the use the Court makes of its own case law. Therefore, albeit anchored to existent case law, this dissertation ends up elaborating on it to the extent that something new is created. In this sense the boundaries between *lex lata* and *lex ferenda* become blurry.

Chapter 1 – Mediterranean Sea as a *Mare Clausum*

The Mediterranean Sea is increasingly becoming a difficult sea to cross, a closed sea or *Mare Clausum*¹² where boats of migrants are intercepted and returned to the countries of departure. The actors engaging in these activities are multifold and their level of involvement varies greatly: many European Member States, as well as the EU itself, are involved at different extents. The involvement of these actors raises interesting questions of responsibility, complicity, dual or combined responsibility and responsibility of international organizations. However, the two main actors which will constitute the core of this dissertation are Italy and Libya. This choice is preponderantly led by the fact that a case against Italy has already been brought before the ECtHR. Therefore, the Court will soon be asked to analyze the implications of the Italian involvement in these pull-backs under Article 3 ECHR.

1.1. Hirsi Jamaa as an end to Italian push-backs and its developments

The year 2012 marks for Italy the moment in which it had to review its practice of returning migrants to Libya. In that year the ECtHR issued its *Hirsi Jamaa* judgment¹³ whereby it extended the reach of the principle of non-refoulement to interceptions of migrants occurring at the high seas and it found Italy in violation of, *inter alia*, Article 3 ECHR¹⁴ for returning rescued migrants to Libya. The Court construed Italian jurisdiction for the purpose of Article 1 of its Convention on the basis of the embarkation of refugees on Italian vessels, therefore subject to the exclusive Italian jurisdiction¹⁵ and, hence, responsibility. Consequently, it is against the background of this judgment, and other relevant developments in the ECtHR conception of jurisdiction, that the current Italian course of action must be evaluated.

The *Hirsi Jamaa* judgment was welcomed as the end of Italian push-backs to Libya. However, other ‘smarter’ forms of externalization of borders emerged in its aftermath. Whether they arose as a

¹² *Mare Clausum*, supra n 3; See, Naor Ben-Yehoyada, “‘Follow Me, and I Will Make You Fishers of Men’: The Moral and Political Scales of Migration in the Central Mediterranean” (2016) 22 *Journal of the Royal Anthropological Institute* 183, p 189.

¹³ *Hirsi Jamaa and Others v. Italy* (2012) ECHR 27765/09.

¹⁴ ECHR, supra n 4, art 3, art 4 Protocol 4; For an analysis, see Maarten Den Heijer, ‘Reflections on Refoulement and Collective Expulsion in the Hirsi Case’ (2013) 25(2) *IJRL* 265; Marie-Bénédicte Dembour, ‘Interception-at-sea: Illegal as currently practiced – Hirsi and Others v. Italy’ (2012) *Strasbourg Observers* at: <<https://strasbourgobservers.com/2012/03/01/interception-at-sea-illegal-as-currently-practiced-hirsi-and-others-v-italy/>>.

¹⁵ *Hirsi Jamaa*, supra n 13, §81.

response to the judgment or not, it remains in the field of suppositions. In fact, it soon became clear that other externalization practices could be implemented at the edges of international responsibility and outside of the reach of the clear-cut precedent of the *Hirsi Jamaa* case.¹⁶ Since 2012 we have been witnessing a wide range of developments in the externalized management of migration flows in the Mediterranean and Northern African area, which raise interesting questions of responsibility for the European States involved in their implementation.¹⁷ These developments present, *inter alia*, increasing integration of countries of origin and transit into the EU border control system¹⁸; military and logistical support to Sub-Saharan countries for the control of their borders¹⁹; criminalization of NGOs involved in the rescuing of migrants at sea²⁰; the discussion at the EU level of regional disembarkation platforms²¹; closure of ports²²; “pull-backs”²³ (as opposed to push-backs) operated by Libya.

¹⁶ Paolo Biondi, ‘The Case for Italy’s Complicity in Libya Push-Backs: Italy has avoided contact with migrants returned to Libya. But Paolo Biondi, a human rights lawyer, argues that its support for the Libyan coast guard violates the principle of non-refoulement’ (2017) *Refugees Deeply*

at: <<https://www.newsdeeply.com/refugees/community/2017/11/24/the-case-for-italys-complicity-in-libya-push-backs>>.

¹⁷ For a report of some of these practices: Catherine Woollard, ‘Lost in Externalization Fantasyland’ ECRE Editorial (2018) at: <https://www.ecre.org/editorial-lost-in-externalization-fantasyland/?utm_source=ECRE+Newsletters&utm_campaign=806567270c-EMAIL_CAMPAIGN_2018_07_13_12_04&utm_medium=email&utm_term=0_3ec9497afd-806567270c-420538757>; For a discussion on how EU third country agreements may circumvent non-refoulement obligations, see: Nula Frei and Constantin Hruschka, ‘Circumventing Non-Refoulement or Fighting ‘Irregular Migration’?’ (2018) *EU Immigration and Asylum Law and Policy*, at: <<http://eumigrationlawblog.eu/circumventing-non-refoulement-or-fighting-illegal-migration/>>; Mariagiulia Giuffrè, ‘State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya?’ (2012) 24(4) *IJRL* 692.

¹⁸ Nora Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’ (2016) 27(3) *EJIL* 591, p 610.

¹⁹ Antonello Mangano, ‘La mappa degli accordi contro i migranti’ (terrelibere.org 7 Feb 2017) at: <<https://www.terrelibere.org/la-mappa-degli-accordi-migranti/>>.

²⁰ On the Proactiva Open Arms seizure: Tribunale di Catania, ‘Decreto di convalida e di sequestro preventivo’ (27 Mar 2018) at: <<http://www.statewatch.org/news/2018/apr/it-open-arms-sequestration-judicial-order-tribunale-catania.pdf>>; Tribunale di Ragusa, ‘Decreto di rigetto di richiesta di sequestro preventivo’ (16 Apr 2018) at: <http://www.questionegiustizia.it/doc/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_gip.pdf>.

²¹ European Council, Conclusions 28-29 June 2018 (Press release, 29 June 2018) at: <<https://www.consilium.europa.eu/en/meetings/european-council/2018/06/28-29/>>; UNHCR and IOM, ‘Proposal for a regional cooperative arrangement ensuring predictable disembarkation and subsequent processing of persons rescued-at-sea’ (June 2018)

at: <http://www.unhcr.org/5b35e60f4?utm_source=ECRE+Newsletters&utm_campaign=5af1c577dd-EMAIL_CAMPAIGN_2018_10_18_11_38&utm_medium=email&utm_term=0_3ec9497afd-5af1c577dd-422324585>; For a critical opinion: Francesco Maiani, ‘Regional Disembarkation Platforms’ and “Controlled Centres”: Lifting The Drawbridge, Reaching out Across The Mediterranean, or Going Nowhere?’ (2018) *EU Immigration and Asylum Law and Policy*, at: <<http://eumigrationlawblog.eu/regional-disembarkation-platforms-and-controlled-centres-lifting-the-drawbridge-reaching-out-across-the-mediterranean-or-going-nowhere/#more-2188>>.

²² Lorenzo Bagnoli, ‘Migranti, porti chiusi alle ONG: ecco perché Salvini può farlo’ (Osservatorio Diritti, 15 Jun 2018) at: <<https://www.osservatoriodiritti.it/2018/06/15/migranti-sbarchi-in-italia-salvini-porti-chiusi-ong/>>.

²³ Violeta Moreno-Lax and Mariagiulia Giuffrè, ‘The Rise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Forced Migration Flows’ (2017) in S. Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar, Forthcoming).

The phenomenon of pull-backs is the one which will be at the core of this research. What characterizes this practice is that, not only the interceptions take place in the high seas, but individuals now fail to come into “exclusive *de jure* and *de facto* control of the Italian authorities”²⁴ and consequently never enter the Italian jurisdiction where the Convention would start applying. The rescues are carried out by the LCG with the institutional and financial support of Italy deriving from the contested bilateral Memorandum of Understanding (MoU)²⁵ signed in February 2017 by the governments of the two States. The general question that this research attempts to answer is whether Italy, by implementing this policy, could still be considered by the ECtHR as breaching its obligation of non-refoulement as enshrined in Article 3 of the ECHR. In order to answer this question, it is important to present the details and circumstances under which this practice has come into existence and its main components. This chapter therefore aims at presenting the factual scenarios under which the pull-backs take place and the features that characterize them.

1.2. Pull-backs in practice

For what concerns the practice of pull-backs *per se*, the *Mare Clausum* report²⁶ attempted to shed light on the exact dynamics in which these interceptions take place. In order to do so, the report relied on findings generated mostly through interviews with migrants and NGOs²⁷, but also with state officials, through official reports, statistical analysis and cartographic and spatial reconstruction methods. These information were then elaborated through forensic techniques and cartography to reconstruct the conditions that lead to deaths at sea.²⁸ The report, in analyzing a number of incidents occurred in the high seas, out of the territorial waters of any coastal State, delineates the boundaries

²⁴ *Hirsi Jamaa*, supra n 13, §81.

²⁵ Odysseus Network, ‘Memorandum of understanding on co-operation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic’ (MoU) (2 February 2017) official translation. *Accordo di cooperazione in materia di difesa tra il governo della Repubblica italiana ed il governo della Repubblica del Niger* (adopted 29 June 2017) at: <https://cild.eu/wp-content/uploads/2019/02/Italia-Niger_Accordo-in-materia-di-Difesa.pdf>; ASGI, ‘Mancata ratifica parlamentare del memorandum Italia-Libia : al via il ricorso alla Corte Costituzionale’ (28 Feb 2018) at: <<https://www.asgi.it/asilo-e-protezione-internazionale/mancata-ratifica-parlamento-memorandum-italia-libia-ricorso-corte-costituzionale/>>; Annalisa Camilli, ‘Perché l’accordo tra l’Italia e la Libia sui migranti potrebbe essere illegale’ *Internazionale* (20 February 2017) at: <<https://www.internazionale.it/notizie/annalisa-camilli/2017/02/20/italia-libia-migranti-accordo-illegale>>; Fulvio V. Paleologo, ‘Elementi per un esposto nei confronti del governo italiano a seguito dell’applicazione del Memorandum d’intesa sottoscritto con il governo di Tripoli il 2 febbraio 2017’ (ADIF, 2017) at: <<https://www.a-dif.org/2017/06/14/elementi-per-un-esposto-nei-confronti-del-governo-italiano-a-seguito-dellapplicazione-del-memorandum-dintesa-sottoscritto-con-il-governo-di-tripoli-il-2-febbraio-2017/>>; For an accurate overview of all the measures taken by Italy in support of Libya, see: Maarten Kos, ‘Italy’s Responsibility Under International Law for Human Rights Violations of Migrants Intercepted at Sea and Returned to Libya by the Libyan Coast Guard with the Support of Italy’ (2019) 16 VU Migration Law Series, pp 20-31.

²⁶ *Mare Clausum*, supra n 3.

²⁷ *ibid* p 101.

²⁸ *ibid* p 181.

of a systematized and recurrent pattern of practices of different Italian agents which it denounces as being illegitimate and which it defines “*refoulement by proxy*”.²⁹

For the purpose of this dissertation, the relevant facts of ten of these incidents are reported and categorized by way of the different extent and modalities of involvement of different Italian actors. The main actors identified to have a prominent role in these incidents are the Maritime Rescue Coordination Center (MRCC) located in Rome and the Italian Navy, with its assets differently located in territorial, international or Libyan waters. The reported incidents provide a fundamental insight into the practical level of coordination and command exercised by Italian actors over the LCG and, in almost all situations, NGO vessels.³⁰

1.2.1. Events characterized by the MRCC of Rome’s instructions

Most of the reported instances see the involvement of the Italian MRCC which, receiving a distress call from the migrants’ boat or from other assets in the area, is in charge of the coordination of the rescue operation. These events are the ones of 31st October³¹, 6th³², 23rd and 24th November³³, 8th December³⁴ 2017, 27th January³⁵ and 31st March³⁶ 2018.

Similar patterns emerge from the analysis of these instances, whose common features can be summarized as follows. The MRCC alerts the NGOs of the position of a boat in distress and asks them to direct there and intervene for its rescue. Once the NGO boat is on the scene or in its vicinity, it is re-contacted by the MRCC which communicates it that the coordination of rescue has been assigned to the LCG, either already present or approaching, and that they should now follow their commands. In some cases it emerges from the report that the LCG has also received the distress call from the Rome MRCC.³⁷ Alternatively, the NGO vessels are approached by the LCG itself which arrives on the scene and orders them to move away. In some cases, the instructions given to the NGOs by the MRCC continue even after the LCG takes formal control of the operation and the NGOs are

²⁹ *ibid* p 58.

³⁰ *ibid*, in particular pp 65, 73, 83, 99. It argues that we only have a view of the tip of the iceberg of what happens at sea: “While the documentation available for these cases is exceptional as it hinges on the chance of an NGO asset overhearing radio communication, it records practices that probably took place in several other subsequent cases discussed below without being recorded”; See also, Amnesty International, ‘Italy: Refugees and Migrants in the Central Mediterranean, Cutting the Lifelines’ (2017).

³¹ *Mare Clausum*, *supra* n 3, p 73.

³² *ibid*, p 87. Case brought to ECtHR.

³³ *ibid*, p 74, 75.

³⁴ *ibid*, p 75.

³⁵ *ibid*, p 78.

³⁶ *ibid*, p 82.

³⁷ *ibid*, p 87, 6th November 2017.

requested to stand-by while remaining at visual distance from the boat in distress and to update MRCC Rome on the situation.³⁸

1.2.2. Events characterized by the Italian Navy's instructions

In only one of the reported cases, that of 27th September 2017³⁹, there is no evidence of MRCC involvement, but only of an Italian Navy ship which, being present on the spot, sends a distress notification to the LCG asking for and coordinating its intervention. As noted in *Mare Clausum*, “while the provision of such instructions by the Italian Navy was not recorded in the other cases, as recording depends on the chance of a nearby NGO vessel overhearing radio communication, it probably took place in some of the other cases too without being recorded”.⁴⁰ Another interesting aspect of this case is that there is no involvement of an NGO either: the only actors involved are the Italian Navy ship and the LCG.

1.2.3. Events characterized by a conjunction of MRCC and Italian Navy's instructions

The role of the Italian Navy in giving instructions, however, is not limited to incident presented above. Two of the reported cases show the contemporary involvement of the MRCC and Italian Navy, both instructing other actors on the steps to undertake. They are the cases of 11th October⁴¹ and 15th December⁴² 2017.

In both instances we can discern contradictory orders given by the MRCC and the Italian Navy. The MRCC sends a distress signalization to Vos Hestia of Save the Children in the first case and Aquarius of SOS Méditerranée in the second, instructing them to direct towards the migrants' boats position. In the meantime, in both situations some conversations occurring between the Italian Navy and the LCG are overheard by the involved NGOs. In the first case, the Andrea Doria Navy ship, in the vicinity of the incident, is heard demanding the LCG to approach with maximum speed. This request is reiterated asking specifically: “We are waiting for you to perform interception”.⁴³ In the second instance, the Italian Navy ship Rizzo is the “On Scene Coordinator” of the rescue and, as demanded by MRCC, provides the NGO with exact coordinates of boat. At the same time, however, the

³⁸ *ibid*, p 74, 23 November 2017.

³⁹ *ibid*, pp 68-9.

⁴⁰ Kos, *supra* n 25, p 26.

⁴¹ *Mare Clausum*, *supra* n 3, pp 70-80.

⁴² *ibid*, pp 76-8.

⁴³ *ibid*, p 71.

Aquarius overhears a conversation between the same Italian warship and the LCG in which the latter is requested to intercept the vessel and confirm the result of the operation.

Communication between Charlie (Italy) and Bravo (Libya).⁴⁴

- Charlie: Bravo this is Charlie. You have to go in this position [coordinates]
- Charlie: Bravo this is Charlie. Please, please confirm me that you are going on the last position I gave you.
- Bravo: Charlie this is Bravo.
- Charlie: Bravo, please, confirm me when you find the rubber boat in the last position I gave you.
- Bravo: Ok. I will give you information about the rubber boat when I have found.

In these incidents, Italian Navy ships take active role in detecting migrants in distress and passing on the information to the LCG, coordinating and instructing it.

1.2.4. Events characterized by the presence of Italian assets on the scene

In some of the instances described above there is another element worthy of consideration, namely the presence on the area of the interceptions of Italian Navy assets which act in different manners. In particular, the case of 27th September 2017, discussed above as the only one in which there is no involvement of MRCC, is also important because of the prominent role that the Andrea Doria warship played. As mentioned before, the ship was the first and only asset present on the scene, but it refrained from rescuing the migrants as it prioritized the interception by the LCG. However, at the same time it provided migrants with life vests while waiting for the arrival of the LCG – life-vests which were handed back to the Italian Navy by the LCG after the interception.⁴⁵ Also on October 11th 2017 the Andrea Doria was present on the scene and coordinated the LCG to intervene while remaining at a distance. Only once people fell into the water did it intervene to rescue them by using its rigid-hulled inflatable boat (RHIB).⁴⁶

In other cases, the presence of Italian assets is only mentioned without further details. For example in the case of 31st October where it is reported the presence of the Andrea Doria ship and of an Italian

⁴⁴ *ibid*, p 77.

⁴⁵ *ibid*, pp 68-9; Ministero Della Difesa, 'Difesa - Marina Militare: unità della Guardia Costiera libica effettua prima operazione di salvataggio dopo le verifiche di efficienza' (2017) at: <https://www.difesa.it/SMD/Comunicati/Pagine/guardia_costiera_libica_prime_operazioni_salvataggio.aspx>.

⁴⁶ *Mare Clausum*, supra n 3, pp 70-80.

military helicopter.⁴⁷ Or the case of the 6th November 2017, object of the ECtHR application, where it is reported the presence of other international and EU assets, among whom an Italian Navy helicopter.⁴⁸

1.3. Sub-conclusion

In almost all of these cases, what emerges is that Italian authorities, providing instructions as part of their SAR duties, *de facto* privilege interceptions by the LCG over the rescues by NGO vessels by either referring to the LCG the location of the vessels in distress or by coordinating the other actors and ordering them to stand-by as the LCG gets in charge of the operation. The distinctive role of Italian actors in coordinating and directing the interceptions is prominent and often accompanied by a disengagement from the rescue operations themselves. In some instances, this inaction is accompanied by the provision of life-vests to migrants while waiting for the arrival of the LCG.

The Italian authorities' approach towards NGO vessels seems unclear, or even contradictory. The reasons behind the reported practice of ordering them to stand-by while inviting them to remain in the vicinity remain obscure. It seems inconsistent with the open attempt to delegitimize, criminalize and sideline NGOs from the Mediterranean, a pattern which is extensively described in *Mare Clausum* report.⁴⁹ Not being the focus of this dissertation, this factor will not be deeply investigated and possible explanations, at this stage, would be too speculative and conjectural.

⁴⁷ *ibid*, p 73.

⁴⁸ The other assets were a French military warship taking part in the EUNAVFOR MED operation, Premier maître L'Her (hull number F 792) which would always remain at a distance but contribute one of its RHIBs to the rescue; a Portuguese patrol aircraft, the MPA P3C Wolf, also part of the same operation.

⁴⁹ *Mare Clausum*, supra n 3, pp 57, 61.

Chapter 2 – Human Rights Violations in Libya

These instances represent the factual background upon which this dissertation will attempt to answer its central question, namely, whether it could be possible to find a breach by Italy of its obligation of non-refoulement as enshrined in Article 3 ECHR for any of the actions it is undertaking with respect to these pull-backs. The answer to this question will be researched by elaborating on the existent jurisprudence of the ECtHR, trying to outdistance it as little as possible. The Court has very different jurisprudence depending on the different provisions whose violation is claimed. When it comes to Article 3 case-law, three elements are recurring in the jurisprudence of the ECtHR in non-refoulement cases⁵⁰: substantial violations, knowledge of the returning country of the possibility of such violations and jurisdiction of the returning country over the returned individuals. Although the order of these elements is inverted in actual cases before the Court, jurisdiction will be analyzed last in this dissertation (Chapter 3), first ascertaining the requirements of substantive violations and knowledge. This choice is led by the fact that “even though there may be a breach of the *non-refoulement* under Article 3 of the ECHR, without the establishment of jurisdiction under Article 1, the ECtHR will declare a case inadmissible”.⁵¹ By analyzing the substantive violations first, it will emerge, at the end of this chapter, how these incidents would fall in a regular paradigm of refoulement cases if they were carried out by Italian authorities themselves.⁵² However, because the factual matrices are different – pull-backs take place at the hands of LCG in international waters – the standard conceptualization of non-refoulement intended as expulsion from territory does not seem to apply. Nonetheless, were jurisdiction to be found, an Italian breach of Article 3 could be framed as a failure to prevent a known risk of harm from happening to individuals placed under Italian jurisdiction. The prohibition of refoulement enshrined in Article 3 ECHR would then be reconciled with the ECtHR’s “doctrine on positive obligations, and in particular the duty to protect, requiring states to take measures designed to ensure that individuals within their jurisdiction are not subjected to treatment contrary to Article 3”.⁵³ In these terms, if the situation is found to be within Italian jurisdiction and if a risk of ill-treatment is found, Italian actions could be conceptualized as a breach of Article 3. A peculiar breach of the principle of non-refoulement intended as “an obligation to shield a person from harm. This

⁵⁰ For an analysis of the recurring steps of the Court’s case law in non-refoulement cases, see: Aisling Reidy, *A guide to the implementation of Article 3 of the European Convention on Human Rights* (2002) Human rights handbooks No. 6, Council of Europe; Pieter Boeles, Maarten Den Heijer et. al., *European Migration Law* (2nd edn Intersentia 2014).

⁵¹ Seunghwan, *supra* n 7.

⁵² Cfr *Hirsi Jamaa*, *supra* n 13.

⁵³ Maarten den Heijer, ‘Europe and Extraterritorial Asylum’ (PhD Thesis, Leiden University, 2011), p 148; See also, Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights*, Human Rights Handbooks No. 7 (2007), Council of Europe, at: <rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4d>.

protective duty is well apt to apply regardless of territorial considerations, provided that a person is within the jurisdiction of a Contracting State”⁵⁴ and that the State, having knowledge about the incumbent risks on that person, would have the ability to do something about it.⁵⁵ In a nutshell, we would be speaking of ‘refoulement from jurisdiction’, rather than from territory.

2.1. Violations of human rights in and by Libya

In order to build a case for the Italian responsibility in the commission of refoulement, an act of refoulement must have occurred. It is therefore necessary to determine, as a preliminary step, that the return of migrant to Libya constitutes an act of refoulement, or, in other words, that they would run a risk to be subjected to torture, or inhuman or degrading treatment or punishment.

Because the rescued migrants are returned to Libya by Libyan officials, it is Libyan acts that must be considered. However, Libya is not a State Party to the ECHR and therefore the Court has no jurisdiction over its actions. For this reason, the aim of this dissertation is not that of determining Libyan international responsibility. Nevertheless, in order to proceed with the analysis of Italian responsibilities, an assessment of the conditions of the receiving country against the standard of Article 3 is inevitable. The only conclusions that can be drawn refer to the responsibility of the Contracting State “by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment”.⁵⁶

Thus, it will be necessary to determine what could amount to torture or inhuman or degrading treatment in Libya. Of course, such assessment highly depends on the precise circumstances of the specific situation, nevertheless, some general conclusions can be drawn from an analysis of patterns of behavior by Libya with respect to migrants and would-be-refugees in its territory. International reports show that, as of September 2017, over 416,556 migrants were present in Libya⁵⁷ of which about 20,000 were imprisoned in detention centers for irregular immigrants. Among them, also the migrants rescued at sea and taken back to Libya.⁵⁸ The conditions in these centers have been widely documented⁵⁹ and all evidence converges in concluding that the human rights of the detainees are

⁵⁴ Den Heijer, supra n 53, p 149.

⁵⁵ Thomas Spijkerboer, ‘The Human Costs of Border Control’ (2007) 9 ELML 127, p 138.

⁵⁶ *Soering v. The United Kingdom* (1989) ECtHR 14038/88, §91.

⁵⁷ IOM, ‘Libya Update, 24 October-5 November 2017’ (2017)

at:<<https://reliefweb.int/sites/reliefweb.int/files/resources/IOM%20Libya%20Newsletter%2024%20October%20-%2006%20November.pdf>>.

⁵⁸ Amnesty International, ‘Libya’s dark web of collusion: abuses against Europe-bound refugees and migrants’ (2017) at:<<https://www.amnesty.org/en/documents/mde19/7561/2017/en/>>, p 30.

⁵⁹ OHCHR, ‘UN human rights chief: Suffering of migrants in Libya outrage to conscience of humanity’ (2017) at:<www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393&LangID=E>; OHCHR, “‘Detained and dehumanised: Report on human rights abuses against migrants in Libya’ (2016)

routinely violated by all the actors involved in the management of these centers: Libyan officials and security forces, armed groups and criminal gangs, who are often working in close co-operation and to mutual financial advantage. The increasing number of migrants detained in these centers have caused a situation of “chronic severe overcrowding”⁶⁰ with the effect of further worsening already deplorable conditions⁶¹, defined as “inhumane”⁶². Reports suggest that, “in some facilities, the conditions of detention in themselves may amount to torture or other ill-treatment”.⁶³ Instances of sexual violence⁶⁴, severe beatings, killings for demonstrative aims at the hands of Libyan officials, militias and smugglers⁶⁵, forced or bounded labour⁶⁶ and other forms of exploitation are documented.⁶⁷ Indicative of this extreme situation is the 2011 opening of an investigation by the ICC in Libya⁶⁸ in the framework of which, in May 2017, the Prosecutor of the ICC stated the intention of opening investigations into crimes against migrants transiting through Libya.⁶⁹

at:<www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf>; Agnes Callamard, UN Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions, report to the UNGA ‘Unlawful Death of Refugees and Migrants’ (2017) at:<<http://www.statewatch.org/news/2017/sep/un-report-unlawful-refugees-and-migrants.pdf>>; Amnesty International, ‘Libya: Refugees and migrants fleeing sexual violence, abuse and exploitation in Libya’ (2016) at:<www.amnesty.org/en/latest/news/2016/07/refugees-and-migrants-fleeing-sexual-violence-abuse-and-exploitation-in-libya/>; Amnesty International, ‘EU risks fuelling horrific abuse of refugees and migrants in Libya’ (2016) at:<www.amnesty.org/en/latest/news/2016/06/eu-risks-fuelling-horrific-abuse-of-refugees-and-migrants-in-libya/>; Amnesty International, ‘Libya is full of cruelty’: Stories of abduction, sexual violence and abuse from refugees and migrants’ (2015) at:<<https://www.amnesty.org/en/documents/mde19/1578/2015/en/>>; Amnesty International, ‘Scapegoats of fear: Rights of refugees, asylum-seekers and migrants abused in Libya’ (2013) at:<<https://www.amnesty.org/en/documents/mde19/007/2013/en/>>; Amnesty International, ‘We are foreigners, we have no rights’: The plight of refugees, asylum-seekers and migrants in Libya (2012) at:<<https://www.amnesty.org/en/documents/MDE19/020/2012/en/>>; Médecins Sans Frontières, ‘Trapped in Transit: Refugees, Migrants, and Asylum Seekers Stranded and Suffering in Libya’ (2016) at:<<https://www.doctorswithoutborders.org/what-we-do/news-stories/news/trapped-transit-refugees-migrants-and-asylum-seekers-stranded-and>>; Amnesty International, ‘A perfect storm: The failure of European policies in the central Mediterranean’ (2017) at:<<https://www.amnesty.org/en/documents/eur03/6655/2017/en/>>.

⁶⁰ UN, ‘Report of the Secretary-General pursuant to Security Council Resolution 2312(2016)’ (2017) at:<www.un.org/ga/search/view_doc.asp?symbol=S/2017/761>.

⁶¹ OHCHR, “Detained and dehumanised”, supra n 59. Detention in inhuman conditions, including in warehouses and other facilities “unfit to hold people”, was documented; Médecins Sans Frontières, ‘MSF warns of inhumane detention conditions in Libya as EU discusses migration’ (2017) at:<www.doctorswithoutborders.org/article/msf-warns-inhumane-detention-conditions-libya-eu-discusses-migration>; UN, *ibid*.

⁶² Médecins Sans Frontières, ‘MSF warns of inhumane detention conditions in Libya as EU discusses migration’ (2017) at:<www.doctorswithoutborders.org/article/msf-warns-inhumane-detention-conditions-libya-eu-discusses-migration>; UN, ‘Report of the Secretary-General, supra n 60; UN, ‘Libya’s detention of migrants ‘is an outrage to humanity,’ says UN human rights chief Zeid’ (2017, UN News) at:<<https://news.un.org/en/story/2017/11/636022-libyas-detention-migrants-outrage-humanity-says-un-human-rights-chief-zeid#.WhWx7LSdWUk>>.

⁶³ Amnesty International, supra n 58, p 30; UN, ‘Report of the Secretary-General, supra n 60.

⁶⁴ Amnesty International, *ibid*, p 7.

⁶⁵ *ibid*, p 6.

⁶⁶ Annalisa Camilli, supra n 25.

⁶⁷ IOM, ‘IOM Learns of ‘Slave Market’ Conditions Endangering Migrants in North Africa’ (2017) Press Release at:<<https://www.iom.int/news/iom-learns-slave-market-conditions-endangering-migrants-north-africa>>.

⁶⁸ International Criminal Court, ‘Libya, Situation in Libya ICC-01/11’ (2011) at:<<https://www.icc-cpi.int/libya>>. UN Security Council referral under Resolution 1971 as Libya is not a party to the ICC.

⁶⁹ International Criminal Court, ‘Statement of ICC Prosecutor to the UNSC on the Situation in Libya’ (2017) at:<www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>; Itamar Mann, Violeta Moreno-Lax and Omer Shatz, ‘Time to Investigate European Agents for Crimes against Migrants in Libya’ (2018) EJIL:Talk!

Detention of migrants in Libya has become the primary migration management system in the country and it is carried out in execution of Law no. 6 of 1987 Organizing the Exit, Entry and Residence of Foreign Nationals in Libya⁷⁰, which criminalizes the “illegal” entry, stay or exit of foreign nationals and subjects them to indefinite detention, “hard labor” and the payment of a fine until deportation is carried out.⁷¹

When it comes to the specific incidents described in this dissertation, the *Mare Clausum* report contains information which supports the findings described above. In all the reported instances (at least part of) the migrants were returned to Libya, and for five of them there is evidence that the migrants have been returned to the Tajoura detention center in Tripoli.⁷² For the incident of November 6th 2017, on which the application to the ECtHR has been lodged, there is more information as to the fate of the 47 migrants returned to Libya. Upon arrival, they were “held captive in Tajoura detention center for one month in cells with hundreds of people and given scarce food or water. They describe being beaten three to four times a week by Libyan guards armed with ropes and pipes. While some of the survivors were released and deported to their countries of origin, others were sold to a captor. He tortured them to extract ransom from their families, who were unable to pay”.⁷³

The picture that emerges is one in which any migrant could be indefinitely detained, in conditions amounting to inhuman and degrading treatment and subjected to torture and inhuman degrading treatment or deportation with no procedural safeguards.

2.2. Italian knowledge of these facts

Moreover, the requirement of knowledge, presented as the second prerequisite for the finding of a violation of the prohibition of refoulement, appears also to be fulfilled. Italy, as arguably any other member of the international community, could not argue to not have full knowledge of the situation in Libya. First, because of the univocal evidence of international, independent and reliable reports consistently denouncing the abuses taking place there. Second, and more related to the Italian specific situation, because of the prohibition imposed on its authorities to return migrants to Libya in the aftermath of *Hirsi Jamaa*. And third, but of not minor importance, because of the Italian own judiciary

⁷⁰ Law n6 1987, Organizing the Exit, Entry and Residence of Foreign Nationals in Libya. Detention: art 18; deportation: art 17; Altai Consulting, UNHCR and Impact, ‘Mixed migration trends in Libya: Changing dynamics and protection challenges’ (2017) at: <www.altaiconsulting.com/wp-content/uploads/2017/07/LIB-HCR-MAS-Final-Report.pdf>.

⁷¹ Amnesty International, supra n 58, p 20.

⁷² *Mare Clausum*, supra n 3, pp 69, 72, 73, 75, 98. 27th September 2017, 11th and 31st October 2017, 6th November 2017, 8th December 2017.

⁷³ *ibid*, p 98.

acknowledgment, in October 2017, of the situation of widespread tortures and abuses in the Libyan detention centers to which all migrants (underlined in the text) are subjected”.⁷⁴

2.3. Sub-conclusion

In conclusion, the first two elements for the possible finding of a violation are fulfilled: migrants returned to Libya are subject to a risk of ill-treatment and Italy cannot be unaware of such possibility. Consequently, in order to make any meaningful analysis under the ECHR, the main question, which will be addressed in the following chapter, is the one of jurisdiction.

⁷⁴ Corte di Assise di Milano, *Udienza del giorno 10 ottobre 2017*, at: <https://www.asgi.it/wp-content/uploads/2017/12/2017_10_10_sentenza_libia_milano.pdf>. The Corte di Assise of Milan acknowledged tortures in detention centres and sentenced to life imprisonment a Somalian citizen who operated in these camps for violent acts committed in 2016.

Chapter 3 – ECHR and a compounded approach to jurisdiction

The third element identified as a necessary step for an answer to the general research question of this dissertation is that of jurisdiction. What this chapter aims to do, consequently, is to analyze the possibility, considering the case law of the ECtHR as it stands today, to have the room for interpreting the presented factual situations as falling within the protective scope of the Convention as defined in Article 1 thereof.

3.1. *The question of extraterritorial jurisdiction*

The question of jurisdiction for human rights treaties and its exceptional extraterritoriality is a core one and it has been for long at the center of heated debates.⁷⁵ On the one hand, basic rights, such as the right to be free from torture or inhuman and degrading treatment, are universal and absolute. On the other hand, the corresponding obligations of States are specific and limited. Not every State has to actively secure the rights of individuals everywhere. The criterion of jurisdiction serves to delimitate the responsibility of States. This delimitation is in general not a problem for the safeguarding of rights, since there is always one State responsible. It can become a problem, however, in complex and multi-stakeholder contexts, as the one of migration at sea.⁷⁶

In the context of the ECHR, an application will be declared inadmissible *ratione loci* if it relates to an alleged violation of the Convention which occurred outside the Contracting State's jurisdiction.⁷⁷ The exercise of jurisdiction is therefore a necessary pre-condition for a State to be able to be held accountable. The development of the ECtHR's position on jurisdictional issues underwent an oscillatory development. After a period in which the former European Commission of Human Rights

⁷⁵ See for example, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties - Law, Principles, and Policy* (Oxford University Press, 2013); Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 HRLR 411; UN Human Rights Committee, 'General comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, §10-2.

⁷⁶ Dana Schmalz, 'Will the ECtHR shake up the European asylum system?' (2019) Rights in Exile; See also, Vassilis P Tzevelekos and Elena Katselli, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)' (2017) 86 Nord.J.Int'l L 427; Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 LJIL 857, p 867.

⁷⁷ Bernadette Rainey, Elizabeth Wicks, Clare Ovey, *The European Convention on Human Rights* (7th edn, Oxford University Press, 2017) p 34; ECtHR, 'Guide on Article 1 of the European Convention on Human Rights' (2018); ECtHR, 'Extra-territorial jurisdiction of ECHR States' Factsheet (2011).

adopted a very open-ended test for jurisdiction which did not really contain any threshold⁷⁸, the (in)famous Court's decision of *Banković* bluntly reversed such approach. In *Banković*, the Court established the notion according to which it is not enough to affect a person's enjoyment of human rights in order to bring her within the jurisdiction of a State, but an additional criterion is needed for a jurisdictional link to be established, namely the concept of 'effective control'.⁷⁹ In subsequent judgments and decisions, the Court gradually reviewed and re-enlarged its conception of jurisdiction and established extraterritorial jurisdiction in an increasing number of situations.⁸⁰ As of today, although the Court repeats that jurisdiction is primarily territorial, and that recognition of extraterritorial jurisdiction must remain exceptional⁸¹, there have been various instances in which it has moved beyond this conception. It has indeed made clear that it would not allow a signatory State to act in a way that contravenes the ECHR outside its own territory, if that act would be a violation of the convention if perpetrated on its territory.⁸² The Court reaches this conclusion by applying to the interpretation of Article 1 ECHR its jurisprudential principle that rights of the Convention should be interpreted as to be "practical and effective, rather theoretical and illusory".⁸³ Nevertheless, the Court's case law on the matter is far from coherent, to the extent that it has been criticized because it fails to speak with one voice in its application of extra-territorial jurisdiction and because Article 1 case law has "enshrined everything and the opposite of everything".⁸⁴

It is important to note that the text of Article 1 ECHR imposes an obligation on State Parties to secure to everyone in their jurisdiction the rights and freedoms defined in section 1 of the Convention.⁸⁵ However, the Court refined its interpretation of the provision and readjusted it to the exceptional cases of extraterritorial jurisdiction: "the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'".⁸⁶ It is in light of this doctrine of divided and tailored rights that the analysis of jurisdiction in the Court's case law is often hard to isolate from the merits; on the same line, it is for this reason that this

⁷⁸ Den Heijer, supra n 53, p 46. The Commission employed an approach under which 'anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention'.

⁷⁹ *ibidem*.

⁸⁰ Shift analyzed by, *inter alia*, Seunghwan, supra n 7; See also, Cathryn Costello, 'Access to Protection. Section II', in Cathryn Costello (ed) *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016).

⁸¹ *Banković*, supra n 10, §61,67; *Ilaşcu*, supra n 10, §312,14; *Drozdz and Janousek v. France and Spain* (1992) ECHR 12747/87, §91.

⁸² *Issa*, supra n 11, §71; *Isaak v. Turkey* (2006) ECHR Admissibility 44587/98.

⁸³ *Mamatkulov and Askarov v. Turkey* (2005) ECHR 46827/99 and 46951/99, §121; *Soering*, supra n 56, §87; See also, Miles Jackson, 'Freeing *Soering*: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27(3) EJIL 817.

⁸⁴ *Al-Skeini*, supra n 8, Bonello concurring opinion, §6,7; See also Den Heijer, supra n 53, p 48.

⁸⁵ ECHR, supra n 4. art 1.

⁸⁶ *Al-Skeini*, supra n 8, §137. cfr *Banković*, supra n 10, §75.

dissertation focused particular attention to Article 3 ECHR and to the substantive features of its possible violation. In this sense, what emerges from this reading of the Court's case law is more than the traditional notion that States cannot violate the human rights of those individuals who find themselves within their jurisdiction. It also presupposes that, in some situations, the opposite might be true: namely, that States might exercise jurisdiction precisely because they commit actions which have the effect of violating some of the rights of individuals, even though they would not be formally and *ex ante* within the State's jurisdiction.⁸⁷

3.2. *Applying extraterritorial jurisdiction to the discussed pull-backs*

Establishing human rights jurisdiction is very complicated when State agents are not physically present or practically involved in the alleged violations of rights. For the cases presented in this dissertation, "the simple argument that refugees are sent back [to Libya] by indirect support of a Contracting State of the ECHR without proving physical custody may not be sufficient to establish a jurisdictional linkage".⁸⁸ The question that needs to be addressed is therefore whether and to what extent the Italian authorities coordination activities and involvement are sufficient to establish the jurisdictional link in the meaning of Article 1 ECHR that makes possible to attribute a breach of the principle of refoulement to Italy.

The method here proposed in order to address this question is one which attempts to find an answer which is grounded, as much as possible, in the existent case law of the Court. Some strands of the case law that emerged in the aftermath of *Banković* and that progressively moved away from the strict position adopted in that case will be the basis for the analysis of jurisdiction presented hereinafter. What will be argued is that the existent case law of the Court already contains the elements that could lead to the establishment of Italian jurisdiction for (at least some of the) situations in which migrants are rescued and taken back to Libya. However, these elements will be reformulated and merged in an innovative way which could establish a new ground for Italian jurisdiction. A ground which the Court has never actually formulated in these terms.

Of particular importance for the purpose of this dissertation are two models in which the Court proves willing to acknowledge the existence of extraterritorial jurisdiction. First, the situations in which an exercise of jurisdiction by a Contracting State is found by virtue of acts which are performed, or

⁸⁷ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), p 360.

"The current attempts to avoid the prohibition of refoulement by means of interception and related extraterritorial forms of refoulement are tantamount to exercising jurisdiction".

⁸⁸ Giuffrè, *supra* n 17, p 694; Seunghwan, *supra* n 7.

produce effects, outside its territory.⁸⁹ Second, the situations in which jurisdiction is exercised by way of the authority and control that a State has over persons who are in the territory of another State through its agents operating in the latter State.⁹⁰ The Court, in these cases, has established not only a spatial model of jurisdiction, but also a personal one⁹¹, in which jurisdiction is established through the control and authority that State agents exercise over individuals present outside of the territory of that State.⁹² It is therefore in the actions of these State agents and their effects on individuals that the jurisdictional link must be found. These two approaches will be presented, intersected and applied to the factual matrices of the incidents presented above. Rather than treating them as alternative models of jurisdiction⁹³, this dissertation argues that a combination of them could lead to a stronger case for a finding of Italian jurisdiction which is anchored to the existent case law of the Court.

3.2.1. Measures with extraterritorial effects

The Court has accepted and reiterated that, “in exceptional circumstances, the acts of a Contracting State which are performed or produce effects outside its territory (“extra-territorial acts”) may amount to an exercise of jurisdiction within the meaning of Article 1 of the Convention”.⁹⁴ The cases in which the ECtHR has established this model of jurisdiction have in common the immediate relation between the State’s actions and their effects.⁹⁵ The “sufficiently proximate repercussions”⁹⁶ of these actions on rights guaranteed by the Convention is a fundamental element in the finding of this exceptional model of jurisdiction.

⁸⁹ *Banković*, supra n 10, §67; *Ilaşcu*, supra n 10, §314.

⁹⁰ *Issa*, supra n 11, §71.

⁹¹ Marko Milanovic, ‘*Al-Skeini and Al-Jedda in Strasbourg*’ (2012) 23(1) EJIL 121.

⁹² *Al-Skeini*, supra n 8, §137.

⁹³ This is what is often done: in absence of control it is argued that the Court has opted for a model of jurisdiction based on the effects of State’s actions. See, James C. Hathaway and Thomas Gammeltoft-Hansen, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2014) Paper 16, Law & Economics Working Papers 1, p 40 note n 138 “Indeed, a number of recent cases suggest that human rights jurisdiction may be established even when there is no evidence of ongoing direct or indirect control. Contrary to the view taken in *Bankovic*, recent decisions suggest that human rights jurisdiction may be established on the basis of what amounts to the effects of rights-violative conduct lacking any element of durable control”.

⁹⁴ *Loizidou v. Turkey* (1996) ECHR 15318/89, §52; *Issa*, supra n 11, §68,71; *Georgia Andreou v. Turkey* (2008) ECHR Admissibility 45653/99, p 11.

⁹⁵ Annick Pijnenburg, ‘From Italian Pushbacks to Libyan Pull-backs: is Hirsi 2.0 in the Making in Strasbourg?’ (2018) 20 EJML 396, p 422; Referenced case law: *Georgia Andreou*, supra n 94; *Isaak*, supra n 82; *Solomou v. Turkey* (1999) ECHR Admissibility 36832/97; *Kallis and Androulla Panayi v. Turkey* (2009) ECHR 45388/99; *Haydarie and Others v. Netherlands* (2005) ECHR Admissibility 8876/04; *Minasyan and Semerjyan v. Armenia* (2009) ECHR 27651/05; See also, Den Heijer, supra n 53, p 48; Kos, supra n 25, p 72.

⁹⁶ *Ilaşcu*, supra n 10, §17; See also, Peter Vedel Kessing, ‘Transnational operation carried out from a state’s own territory: armed drones and the extraterritorial effects of international human rights conventions’ in T. Gammeltoft-Hansen and J Vedsted-Hansen (eds) *Human rights and the dark side of globalization: transnational law enforcement and migration control* (Routledge, 2016). He calls it a “direct and immediate causal link”.

When applied to the present cases, the acts which are performed extraterritorially or produce extraterritorial effect are, respectively, the Italian Navy and MRCC's instructions given to the different actors involved in the rescues. The instructions they give have the effects of directing NGO vessels towards or away from the boats in distress, making them stand-by and/or remain within visual distance, making the LCG aware of the position of the boat in distress and inviting it to intervene, coordinating the interventions by informing the LCG about the changing position of the boat and giving it precise logistical information (even after the command of the operation is formally passed to the LCG).⁹⁷ The involvement of Italian Navy in the coordination of LCG operations is as preponderant as to have led an Italian Court, in a proceeding for seizing a NGO boat, to state that that the intervention of the Libyan patrol vessels happened "under the aegis of the Italian navy ships"⁹⁸ and that the coordination of rescue operations by the LCG is "substantially entrusted to the Italian Navy, with its own naval assets and with those provided to the Libyans".⁹⁹

These instructions qualify as acts of the Italian State as all these actors are Italian agents and they all have extraterritorial effects. What differentiates them is that, whereas the acts of the MRCC are performed from within the Italian territory (in Rome) and then have an effect extraterritorially (in high seas), the acts of the Italian Navy are both performed extraterritorially and have effects which are extraterritorial. This distinction, however, does not change the applicability of this model of jurisdiction. The extraterritoriality of the effects of these measures is therefore undoubted: they all lead to the preferred intervention of the LCG and, consequentially, to the return of migrants to Libya. What is harder to demonstrate are the "sufficiently proximate repercussions" that would connect Italian agents' instructions with the effect of individuals being returned to Libya. This is especially true considering that another State is the one which performs the actual rescue. Can we infer from these situations that Italian instructions directed to the LCG have the direct consequence of violating the rights of migrants? Although some elements of the presented situations could be employed to demonstrate such proximity, they do not always make, if taken alone, a strong case for demonstrating that the direct effects of these actions are the violations of the rights of the people involved. The MRCC and Italian Navy instructions are not directly addressed to the individuals whose rights are allegedly violated; they are rather directed towards a third party which then takes the lead of the situation.

⁹⁷ *Mare Clausum*, supra n 3, pp 73-6, 78, 82, 98. 31st October 2017, 6th and 23rd November 2017, 8th and 15th December 2017, 27th January 2017, 31st March 2018.

⁹⁸ Tribunale di Catania, supra n 20, p 22.

⁹⁹ *ibid*, p 21.

One way could be for the Court to establish that the fact that Italy knew (or should have known) that asking the LCG to intervene would expose the migrants to a risk of ill-treatment constitutes in itself a direct causal link with this violation. In this sense, responsibility would come to the fore in form of the foreseeable negative consequences of certain actions.¹⁰⁰ As a matter of fact, the ECtHR has in some instances assumed the applicability of the Convention in light of the factual involvement of the Contracting and proceeded in analyzing the merits of the case considering satisfied the condition of jurisdiction.¹⁰¹ Were the Court to do so, it could argue that by inviting the LCG to act, MRCC and Italian Navy's instructions have the effect of deciding on the "fate" of migrants. Italy could therefore be said to have the overall control of the situation and the authority to instruct everyone on how to proceed. Although it remains an option, this theorization would cause the Court to depart considerably from its established case law and, arguably, to render the requirement of causality of the link less central to its analysis. Assuming that the Court is not willing to move in this direction and to set such a precedent, the necessity of a direct causal link between action and violation renders the application of this model of jurisdiction complicated in the present situation. The causality is diluted in a chain of command and the contact between the ordering State and the impacted individual is fragmented and indirect. Jurisdiction as the adoption of measures with extraterritorial effects does not appear to be *prima facie* conclusive if taken alone.

3.2.2. Authority and control over individuals

Although not conclusive because the link seems to be too prospective and the consequences too detached, this conceptualization of jurisdiction is relevant for understanding the Italian involvement in the pull-back of migrants, as Italian instructions are so central to the development of events. It is at this point that the second strand of case law becomes necessary to integrate a reasoning which alone does not stand. The strand of 'authority and control over persons'. The argument that will be presented is the following: the extraterritorial effect of the Italian instructions, is that of triggering Italian jurisdiction by creating a situation in which individuals are put under the "authority and control" of the instructing State, albeit through the actions of the instructed one. Although this authority and control is only rendered real through the actual intervention of Libya, what will be considered relevant is the Italian authorities' legal responsibility in shaping such a situation of control. It is on the basis of its SAR responsibilities that the MRCC coordinates the rescues privileging the

¹⁰⁰ Biondi, *supra* n 16; *Soering*, *supra* n 56, §86 – "These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction".

¹⁰¹ Den Heijer, *supra* n 53, p 51. Referenced sources: *Al-Saadoon and Mufdhi v. The United Kingdom* (2010) ECHR 61498/08; *Medvedyev and Others v. France* (2010) ECHR 3394/03.

intervention of the LCG.

This model of jurisdiction has been established by the Court for those situation in which a State, short of exercising territorial control, is found to be responsible for individuals who are is in the territory of another State but who are found to be “under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State”.¹⁰²

A first qualification must be done in order to apply this precedent to the situations presented in which the MRCC is involved. It could be counterargued that the MRCC cannot be said to be *operating* abroad – be it lawfully or unlawfully. As mentioned above, MRCC is formally acting from within the Italian territory, in its headquarter in Rome, and not in the spot where the incident is taking place. But it is exactly for this reason that the first step of the reasoning is necessary: it is not Italian agents operating abroad that need to be considered, it is rather the measures they take that, although operated *strictu sensu* territorially, have extraterritorial effects. Also for the cases in which there are other Italian military agents involved from abroad, the jurisdictional model presented in the previous section is fundamental. The focus must remain on the effects of extraterritorial acts performed by the State: in particular, it will be argued, on the effect that Italian instructions have in positioning migrants’ boats under *de facto* control and authority of Italian agents. Therefore, the question to be asked is the following: can the Court, based on its previous case law on authority and control, merged with the one of measures with extraterritorial effects, find that the MRCC and Italian Navy instructions have the effect of exercising the amount of authority and control necessary for putting migrants within Italian jurisdiction?

In *Al-Skeini*, where the Court clearly explained this model of jurisdiction, it stated that extraterritorial personal jurisdiction may arise solely from “the exercise of physical power and control over the person in question”.¹⁰³ Cases where this standard is applied often relate to situations of physical custody where the responsible State exercises “total and exclusive” control over the extraterritorial location and hence over the individuals present therein.¹⁰⁴ It is evident how these examples are not directly applicable to the situation here discussed as the level of control reached by the MRCC and Italian Navy does not seem to reach the high threshold of “total and exclusive control” or “physical

¹⁰² *Issa*, supra n 11, §71. “See, *mutatis mutandis*, *W. M. v. Denmark* (1992) ECHR Commission decision 17392/90 Decisions and Reports 73, p193. *Illich Sanchez Ramirez v. France* (1996) ECHR Commission decision 28780/95 DR 86, p155. *Georgia Andreou*, supra n 94, p 10”; The Court sometimes mentions international sources for support: e.g. in *Isaak*, supra n 82, p 20: “*Coard et al. v. the United States* (1999) the Inter-American Commission of Human Rights, Report 109/99, case 10.951, §37, 39, 41. *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay* (1981) Human Rights Committee 52/1979 and 56/1979, §12.3 and 10.3 respectively.”

¹⁰³ *Al-Skeini*, supra n 8, §136.

¹⁰⁴ *Al-Saadoon and Mufdhi*, supra n 101, §88.

power and control” required. However, the rationale behind this kind of jurisdiction will prove relevant.

The question that can be asked is whether it could be possible to read in the case law of the Court another, lower, threshold of control necessary for establishing this model of jurisdiction.¹⁰⁵ Although the Court never developed a structured doctrine on the matter, there are hints in its jurisprudence of such lower threshold of control, and even of conceptions of control different from the physical one. It is worth mentioning, as a demonstration of the inconsistency of the Court’s approach to this standard, that in two instances it introduced a different formulation from the one of “authority and control”: in *Isaak v Turkey* and in *Manitaras and Others v Turkey* the Court states that it is possible for an individual to come under the authority *and/or* effective control, and therefore within the jurisdiction, of a State as a result of the acts of its officials.¹⁰⁶ Although it does not elaborate this change of language and its possible implications, it seems to deconstruct the concept of authority and control and to mean that alternatively authority or effective control could be sufficient for an exercise of jurisdiction. The differences in the scope of “authority” and “effective control” remain nevertheless unclear, leaving wide room for further interpretation and elaboration on the concepts.

Two cases may provide useful insight on the amount of authority and(/or) control that the Court may consider relevant for a finding of jurisdiction. They are the decision of *Xhavara and Others*¹⁰⁷ and the judgment of *Women on Waves*.¹⁰⁸ Worth noting that they have both been issued only in French and that therefore their relevance has been considerably understated.

In *Xhavara*, the Court assumed jurisdiction to exist in a case where an Italian Navy ship seeking to deter migrants on the high seas collided with their vessel, leading to the loss of some lives. Although the question of jurisdiction was not explicitly addressed and the case was declared inadmissible for non-exhaustion of domestic remedies, the reasoning adduced seems to suggest that both Italy and Albania exercised jurisdiction.¹⁰⁹ What can be inferred from this decision is, therefore, that “total and exclusive control”, clearly not exercised in the situation described, is not always needed for an exercise of jurisdiction. Hathaway and Gammeltoft-Hansen read in this decision the implication that a State can be found to exercise jurisdiction when its vessels “block or ‘escort’ a ship carrying refugees”, since the control over those individuals is real while their freedom of movement is

¹⁰⁵ Pijnenburg, *supra* n 95, p 410.

¹⁰⁶ Italics added. *Isaak*, *supra* n 82, p 21; *Manitaras and Others v. Turkey* (2008) ECHR Admissibility 54591/00, §28.

¹⁰⁷ *Xhavara et quinze autres contre l'Italie et l'Albanie* (2001) ECHR Admissibility 39473/98.

¹⁰⁸ *Women On Waves et autres c. Portugal* (2009) ECHR 31276/05. Art 10 violation.

¹⁰⁹ Pijnenburg, *supra* n 95, p 410. Referenced source: *wa*, pp 5-6.

constrained and they are “confine[d] within a narrowly bounded or restricted location” - “indirectly detained”.¹¹⁰ What the Court has done in this decision is indeed to accept that, not only physical custody triggers jurisdiction but also other forms of restriction of movement do.

In the case *Women on Waves*, the Court further elaborated on this case law of contactless control and jurisdiction by concluding that preventing boats from entering territorial waters entails jurisdiction for human rights violations. The NGO boat in question was interdicted from Portuguese territorial waters by way of a ministerial order¹¹¹ and through the positioning of a Portuguese navy ship in its vicinity in order to prevent it from entering territorial waters.¹¹² The Court did not deal with jurisdictional issues in the case, moving directly to the merits, where a violation of Article 10 was found. The Court thus assumed that a government notification and the presence of a Navy ship close to NGO vessel preventing it from entering territorial waters were sufficient to make the ECHR applicable.¹¹³

What follows from these precedents is a proof of the fact that control needs not to be total and exclusive and that forms of indirect control might be sufficient for the exercise of jurisdiction. This reading of control as the power to restrict movement and to decide on the fate of the persons whose movement is restricted, moreover, drifts away from the notion that control necessarily entails physical control. In other terms, control seems to be interpreted, at least in some circumstances, as a concept of result rather than of means.¹¹⁴

Given the factual scenarios of the pull-backs described above, it is undeniable that Italy exercised a certain amount of “influence” over the situations presented, albeit through the intermediation of the Libyan intervention – ordered by Italy.¹¹⁵ What will be necessary to analyze is whether such influence can amount to an exercise of control and(/or) authority over the applicants in the meaning the ECtHR gave to these terms in its jurisprudence. When we apply this model to the factual situations presented in this dissertation, it is necessary to differentiate between two kinds situations: those characterized

¹¹⁰ James C. Hathaway and Thomas Gammeltoft-Hansen, *supra* n 93, p 39. Source referenced : UNHCR, ‘Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) Guideline 1.

¹¹¹ *Women On Waves*, *supra* n 108, §8 - “arrêté ministériel” (my translation).

¹¹² *ibid*, §9 - “un navire de guerre de la marine portugaise prit position près du *Borndiep* pour l’empêcher d’entrer dans les eaux territoriales portugaises” (my translation).

¹¹³ *ibid*; Pijnenburg, *supra* n 95, p 410.

¹¹⁴ Violeta Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23 IJRL 193.

¹¹⁵ Pijnenburg, *supra* n 95, p 411.

by the instructions of the MRCC and of the Italian Navy, on the one hand, and those which also displayed the physical presence of Navy assets on the location of the incidents.

(i) instructions of Italian actors

In the section dedicated to the acts with extraterritorial effects, the cases that are characterized by the presence of Italian authorities' instructions have been discussed and analyzed on the background of that model of jurisdiction. What was missing was the link which connected those extraterritorial acts to the human rights violations of the migrants. When applying the model of "authority and control" to those same situations, it will be possible to demonstrate the existence of the link that connects the instructions (as extraterritorial acts) to the repercussions that they have on individuals.

When the MRCC coordinates the activities from Rome, and it triangulates information between LCG, NGOs, Italian and international assets, it is operating an act of authority in the exercises of its SAR duties. The effect of these actions is that they establish a situation of control over the process of rescuing of migrants. It is the MRCC that decides the unfolding of events from the moment they receive the distress call to the moment they leave command of the operation to Libya – and arguably even afterwards, if we consider their further involvement which seems to show that Italy delegates to Libya the execution of the rescues, but not their coordination.¹¹⁶ At every stage of this process, MRCC has a clear picture of the situation at sea and the chance to make any of the actors in the vicinity intervene. MRCC instructions have the effect of reallocating who has responsibility over the situation. Though this crucial passage, the MRCC is itself exercising authority by deciding who exercises factual control and who has to step aside. Although the control that they exercise over the migrant boats is not *strictu sensu* physical, their instructions have the effect of blocking them and preventing any further movement before the arrival of the LCG: they have full operational control over the situation and, therefore, over the subjects of this situation, migrants. Although to a different extent, given their different institutional role in the rescue operations, the same can be said of the instructions given by Italian Navy ships. As established in the case of *Women on Waves v Portugal*, governmental instructions can constitute authority and control when they prevent a boat from approaching the territorial sea. This conclusion should not be modified by the fact that, in the cases here discussed, the governmental instructions do not reach the migrant boat itself, but are rather addressed to a third actor, the LCG. Under this understanding, control would once again be considered as a concept of result rather than of means.

¹¹⁶ *Mare Clausum*, supra n 3, p 74. 23 November 2017.

(ii) *presence and involvement of Italian Navy assets*

The situations which also display the presence of Italian assets on the spot of the incidents have further elements for the demonstration of the amount of authority and control exercised by Italy over the migrants.

The presence of Italian military assets on the place of the rescue brings the situation extremely close to the one of *Women on Waves*. In that case, the mere presence of a military vessel in the vicinity of the NGO boat was considered to be indicative of an exercise of jurisdiction. Moreover, if the Court has been ready to find a violation of the freedom of expression in a stretched jurisdictional situation as the one of *Women on Waves*, it would be at odds with the importance that the Court gives to the right to be free from inhuman and degrading treatment if it failed to consider almost identical factual circumstances to be enough to establish jurisdiction. However, given the exceptionality of that case, it seems more reasonable to assume that the mere presence of a vessel or helicopter on the scene, without any previous involvement and without giving instructions or intervening in any way, would make it hard for the Court to conclude that it is enough to establish a *prima facie* jurisdictional link and move to the merits as it did in *Women on Waves*.¹¹⁷ As a matter of fact, as described above, the Italian assets present on the scenes did not usually limit themselves to be there, but rather took a more active role in giving instructions themselves – sometimes even contradictory from the ones of the MRCC – e.g. by launching life-vests, helping migrants with RHIBS, patrolling the area and preventing others from approaching: it can therefore be argued that these assets have the effect of creating a situation of indirect control over the migrant boats by deterring their movement and directing the movement of other actors on the scene.¹¹⁸

The conclusion that emerges is that there could be room in the case law of the ECtHR to argue that a State could be said to exercise a necessary amount authority and(/or) control over a vessel stationing outside of its territorial waters¹¹⁹ even through contactless measures - namely governmental orders and instructions and mere presence of military assets on the area. Even more so, this is the case when to these contactless measures are added a physical involvement in the rescue operation.

¹¹⁷ Pijnenburg, *supra* n 95, p 410.

¹¹⁸ *Mare Clausum*, *supra* n 3, pp 68, 70, 73. 27th September 2017, 11th and 31st October 2017.

¹¹⁹ Pijnenburg, *supra* n 95, p 410.

3.3. *Sub-conclusion*

The above-presented analysis demonstrates how the center of these rescue operations can be identified in Italian actors. Be it because the MRCC receives the distress call and acts upon it; be it because the Italian Navy ships instruct the LCG on what to do while refraining from intervening. This demonstrates how, to different extents and through different and sometimes uncoordinated governmental actors, Italy exercises the coordination of operations. The Italian decisions to privilege the sending of the LCG on the spot, even when there were other vessels in the vicinity, is a recurring *modus operandi* which has the consequence of restituting people to Libya. In ECHR terms, through acts which have extraterritorial effects, Italy exercises authority and control over the migrant boats by allocating responsibility of rescues on different actors of its choice.

Jurisdiction can be therefore based on the conceptualization that, although not exclusive and although contactless, a sufficient amount of control is established over the rescued individuals on the basis of the fact that the concrete choices on their fate depend on a decision of Italian authorities. What emerges from this analysis of selected case law and its application to the cases discussed, is an argument which establishes that the extraterritorial effect of the Italian instructions is not directly the violation of rights as it seems to be the direct conclusion of the extraterritorial measures jurisdictional model. The extraterritorial effect of those measures is that to put the migrants under the authority and control of Italian authorities and therefore within Italian jurisdiction. Through the application of this lower and non-traditional standard for control, which finds a place in the Court's jurisprudence, it is therefore possible to establish that Italy exercises authority and(/or) control over the individuals on the boat and, therefore, to conclude that Italy exercises jurisdiction. As mentioned before, this conceptualization blurs the boundary between *lex lata* and *lex ferenda*, moving within the case law of the Court and yet elaborating on it.

Conclusion

In analyzing some reported incidents which occurred in the Mediterranean Sea and which saw migrants being rescued and returned to Libya by the LCG with the involvement of Italian authorities, this dissertation attempted to unveil the possible Italian human rights responsibilities for this involvement. In particular, the question addressed was whether Italy, by way of its various involvement in these pull-backs, could be considered as breaching its obligation of non-refoulement as enshrined in Article 3 ECHR.

The dissertation presented ten incidents which display different modalities and extents of Italian involvement in the reported pull-backs. It then proceeded in addressing the main question by fragmenting it into three sub-questions. The conclusions to the first two were that migrants returned to Libya are under a real risk of torture or inhuman and degrading treatment, and that Italy could not be unaware of this possibility. The third question, related to the Italian jurisdiction over these incidents, was addressed through an analysis of some selected jurisprudence of the ECtHR on extra-territorial jurisdiction. What emerged from the analysis is that, by applying the proposed framework to the different and specific factual matrices of each case, it is possible to assess the amount of coordination exercised by Italy (through different actors) and establish, on a case-by-case approach, the extent to which that coordination may amount to an effective authority and control over the individuals, and therefore that can lead to a finding of jurisdiction for Italy. It is a reasoning that goes closer to the strong view held by judge Giovanni Bonello in his concurring opinion to the case *Al-Skeini* where he proposed a fully ‘functional test’ for the establishment of jurisdiction whereby, “very simply put, a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control”.¹²⁰ Although we cannot say to have yet overcome the era of the “doctrines which somehow seem to accommodate the facts”¹²¹, we see in the “handful of sub-tests”¹²² that the Court has produced, different possibilities of tailoring them to increasing number of extraterritorial situations. If the time is not ripe for the adoption of a single ‘functional test’ of jurisdiction, then at least there seem to be room, in the Court’s existent case law, for other ways to reach similar conclusions.

These results of this dissertation are not meant to be conclusive for the specific incidents analyzed only. Indeed, an accurate case-by-case application of the framework discussed has not been carried

¹²⁰ *Al-Skeini*, supra n 8, Judge Bonello concurring opinion, §11.

¹²¹ *ibid*, §8.

¹²² *ibid*, §17.

out. On the contrary, the idea is to give a theoretical framework to apply to other incidents which, *mutatis mutandis*, display similar patterns of involvement of Italian authorities and could therefore be analyzed in the same way. The attempt is to demonstrate that there is room, in the ECtHR jurisprudence, to expand the condemnation of *Hirsi Jamaa* to a fuller statement that also prohibits pull-backs, or push-backs by proxy. The question that remains is whether the time is ripe for such a ground-breaking ruling.

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