

Hard Cases

Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?

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Abstract

In the aftermath of the migration crisis, the European Union and its member states adopted a series of policies aimed at reducing migratory pressure. A sample of these measures is the Italy-Libya Memorandum of Understanding of 2 February 2017. Under this commitment, Libya agreed to perform interception and return of boat migrants on high seas, an operation known as pull-back or push-back by proxy. Among the episodes falling within this label, the most relevant is the one which occurred on 6 November 2017, which was carried out by the Libyan Coast Guard under the coordination of the Italian authorities. Seventeen of the survivors lodged an application before the European Court of Human Rights, claiming that Italy had violated various provisions of the European Convention of Human Rights. The present paper examines the challenges posed by pull-backs from the standpoint of the Law of the Sea and the International Human Rights Law, as well as the issues specifically concerning the proceeding before the Strasbourg Court.

I. Introduction

Throughout recent years, frontline European Union (EU) member states have faced a high migratory pressure due to the lack of a fair burden-sharing system in force among European countries. The massive flow to Europe proved the weakness of the Common European Asylum System (CEAS) and, more specifically, of the mechanism enshrined under the Dublin III Regulation in order to avoid 'asylum shopping'.¹ This regulation establishes the principle that only one EU member state is responsible for examining an application for

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¹ For an overview of the situation concerning the sea route through the Aegean and Mediterranean seas, see the data provided by the United Nation High Commissioner for Refugees (UNHCR), available at <https://tinyurl.com/y9l4lhrc> (last visited 27 December 2018). The CEAS, also known as the 'Dublin System', aims at managing the migratory flow to Europe. The CEAS involves both primary and secondary EU law. The EU secondary legislative elements of the current CEAS are two regulations and four directives, among which there is also the Dublin III Regulation (European Parliament and Council Regulation (EU) 2013/604 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJL 180/31).

international protection.² The identification of the country responsible for this evaluation is carried out according to several hierarchical criteria set forth in this instrument, among which the most frequently applied is the 'first country of irregular entry'.³ As a result, certain states at the external borders of the EU - namely, Greece and Italy - have experienced unprecedented difficulties.

In the aftermath of the increase of arrivals during 2015,⁴ the EU and its member states adopted a plurality of tools aimed at lowering the entrance of migrants via the Aegean and the Mediterranean seas. Among other policies, these measures encompass the externalization of the management of migratory movements through bilateral agreements between would-be destination states and countries of departure.⁵ These commitments aim at entrusting these latter countries with various containment-flow practices, such as pull-backs (also known as push-backs by proxy). According to these schemes, the authorities of the countries of departure perform interceptions and returns of the boat migrants which are interdicted in their territorial waters or on the high seas.⁶

A sample of this kind of cooperation agreements meant to outsource the border-crossing control is the Italy-Libya Memorandum of Understanding (MoU) of 2 February 2017, which constitutes the legal basis for several pull-backs carried out during the last months.⁷ One of the most relevant of these episodes is the one which occurred on 6 November 2017. The event consisted in a search and rescue (SAR) operation performed by both a Libyan Coast Guard unit and the private vessel Sea-Watch 3, under the coordination of Italian authorities. The interception of the boat migrants in distress ended with the death of twenty persons, the return of forty-seven people to Libya and the disembarkation of other fifty-nine individuals in Italy. The case is quite significant, since seventeen of the survivors lodged an application against Italy before the European Court

² Dublin III Regulation, *ibid* Art 3.

³ Dublin III Regulation, *ibid* Art 13.

⁴ During 2015, more than a million of migrants arrived reached EU by sea. See the data provided by UNHCR, n 1 above.

⁵ D. Ghezelbash et al, 'Securitization of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia' 67(2) *International & Comparative Law Quarterly*, 315, 342-344 (2018); M. Giuffrè, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-Backs to Libya?' 24(4) *International Journal of Refugee Law*, 692, 713-716 (2012); C. Hathaway and T. Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' 53 *Columbia Journal of Transnational Law*, 235, 241-243 (2015); M.L. Basilien-Gainche, 'Leave and Let Die: The EU Banopticon Approach to Migrants at Sea', in V. Moreno-Lax and E. Papastvridis eds, *Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Leida: Brill-Martinus Nijhoff, 2016), 327, 336-338.

⁶ N. Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' 27(3) *European Journal of International Law*, 591, 602, 613 (2016).

⁷ For a detailed overview of the operations carried out in the Mediterranean Sea by the LCG, under the coordination of the Italian RCC, from May 2017 to March 2018, see eg Forensic Oceanography, 'Mare Clausum - Italy and the EU's undeclared operation to stem migration across the Mediterranean' (May 2018), available at <https://tinyurl.com/y72ex226> (last visited 27 December 2018).

of Human Rights (ECtHR), claiming the violation of several provisions of the European Convention on Human Rights (ECHR).⁸

This episode illustrates the tension between state sovereignty and state obligations under international law in the context of the management of migratory flows. On the one hand, countries are entitled to regulate the entry, residency and expulsion of aliens.⁹ On the other hand, obligations stemming from different branches of international law narrow down this power, among which the duty to assist people in distress and the duty to perform SAR operations under the law of the sea (LOS), and the guarantees provided under international human rights law (IHRL), such as the right to life, the principle of *non-refoulement*, the right to leave a country, and the prohibition of collective expulsion.

The conclusion of bilateral agreements aimed at entrusting third countries with – among other policies – pull-back practices intensifies this tension and tips the scale in favour of national interests. Specifically, these cooperation agreements cause an accountability gap with regard to the chances of triggering the responsibility of would-be destination states for the violation of obligations owed toward migrants under international treaty law. Indeed, assigning preventive-departure tasks to third countries, in addition to the legal uncertainty surrounding the extent of states' responsibility for extraterritorial activities, reduces the chances of submitting a victorious claim before treaty-based bodies.

The purpose of the present paper is to analyse this accountability gap in the light of the pull-back of 6 November 2017 - namely, the jurisdictional challenges concerning the possibility of lodging a successful application against Italy before the ECtHR. The analysis begins with a general overview of the policies employed to achieve the lowering of arrivals through the Mediterranean Sea, with a focus on the outsourcing of border-crossing controls and its main features. The Italy-Libya MoU is considered as a sample of these practices, and the push-back by proxy of 6 November 2017 is deemed as a case study to analyse the criticalities characterizing such mechanisms under international law (Section 2). Since the states involved in the performing of this scheme usually defined it as a SAR operation, the paper briefly outlines the different and overlapping legal frameworks regulating these activities. Specific attention is paid to the interplay between the duties enshrined under LOS (Section 3) and IHRL (Section 4), and their application to the episode of 6 November 2017. Lastly, this pull-back is analysed against the background of the ECHR. Due to the preliminary stage of the proceeding against Italy, the paper examines the preliminary issue concerning the extraterritorial exercise of jurisdiction (Section 5). Section 6 concludes.

⁸ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (4 November 1950, entry into force 3 September 1953) ETS 5 (ECHR).

⁹ B. Conforti, *Diritto internazionale* (Napoli: Editoriale Scientifica, 11th ed, 2018), 253.

II. 'Fortress Europe', the Securitization of SAR Operations in the Mediterranean Sea and the Pull-Back of 6 November 2017

Although the implementation of policies intended to reduce the number of arrivals is not a tactic which emerged during the recent migration flow to Europe, the migratory pressure on Greece and Italy has represented an opportunity to render these mechanisms more severe. A brief outline of the evolution of these strategies, as well as of the increasing securitization of the SAR operations in the Mediterranean Sea, may be useful in order to have a better understanding of the specific issues stemming from the pull-back of 6 November 2017, which was performed under the Italy-Libya MoU of 2 February 2017.

1. A Brief Overview of the Evolution of the Tactics of *Non-entrée*

Far from representing a novelty in the field of migratory management, tactics of *non-entrée* have long been a feature of states' strategies intended to prevent migrants from accessing their territories. The ground underlying these schemes is the perception of migrants as a threat to the possible destination states and their society.¹⁰ These measures have evolved over the years in order to improve their effectiveness while simultaneously shielding putative destination countries from responsibility.¹¹

The first generation of *non-entrée* policies was based on a unilateral model of deterrence – ie they were carried out by the receiving states, and consisted of three main tools: (i) the denial of visas for the purpose of seeking international protection, combined with the sanctions issued against carriers who crossed frontiers transporting persons without a valid entry permit; (ii) the establishment of international zones within the states' territories (eg airports), in which the country concerned claimed the inapplicability of some international obligations; (iii) interceptions on the high seas by destination states. However, these measures proved either scantily effective in lowering the onward flux of migrants, or inadequate to screen states from legal responsibility.¹²

States have tried to remedy the weaknesses of these methods by implementing a different *non-entrée* approach based on cooperation with third countries. With a view to significantly reducing the number of arrivals, this set of policies is meant not only to deter, but also to actively restrain migratory movements by

¹⁰ N. Klein, 'A Maritime Security Framework for the Legal Dimension of Irregular Migration by Sea', in V. Moreno-Lax and E. Papastavridis eds, *Boat Refugees' and Migrants at Sea* n 5 above, 35, 39-40.

¹¹ C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 243-248.

¹² *ibid*; V. Moreno-Lax and M. Giuffrè, 'The Raise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows', in S. Juss ed, *Research Handbook on International Refugee Law* (Cheltenham: Edward Elgar, forthcoming), 3-4, available at <https://tinyurl.com/y8zxy2w4> (last visited 27 December 2018).

actions performed by countries of origin or transit. As a means to avoid states' responsibility for breaching migrants' rights, this containment-regime is performed outside the territory of receiving states and under the authority of third countries.¹³ Among other policies, states have enacted cooperation agreements aimed at preventing arrivals of migrants by sea. These forms of collaboration have been adopted in different geographical areas by several countries, among which Australia, the United States of America, Greece, Italy, and Spain.¹⁴ The response to maritime migration has focused on securitization and deterrence by means of – among other tools – interceptions of boat migrants outside states' territorial waters.¹⁵ The implementation of these measures has altered the core of SAR operations, which has shifted from the original humanitarian purpose to ensuring the security of the likely destination states.¹⁶

2. The Securitization of the Mediterranean Sea

The securitization regime has been employed also with reference to the sea routes to Greece and Italy, in order to curtail the migratory flow through the Aegean and Mediterranean seas. With the intention to achieve the securitization of SAR operations carried out therein, three main tools have been deployed: (i) the militarization of on-water responses to maritime flow; (ii) the criminalization of non-governmental organizations (NGOs) performing private rescues; (iii) the externalization of the management of migratory movements. These strict border-crossing control measures have proved so highly effective in lowering the arrivals to Greece and Italy as to lead someone to label all these migratory management policies with the term 'Fortress Europe'.¹⁷

As for the militarization of the Mediterranean Sea, this scheme has risen from the ashes of *Mare Nostrum* Operation, launched by the Italian government on 18 October 2013 as a response to the humanitarian emergency in the Strait of Sicily.¹⁸ This Italian-run military operation had a two-fold aim: the fighting

¹³ V. Moreno-Lax and M. Giuffré, *ibid.* For a general overview of this set of policies, see C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 248-257.

¹⁴ D. Ghezelbash et al, n 5 above, 327-330; C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 244-257.

¹⁵ C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 245. On the issue of securitization, see also A. Di Pascale, 'Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations', in R. Rubio-Marín ed, *Human Rights and Immigration* (Oxford: Oxford University Press, 2014), 278.

¹⁶ D. Ghezelbash et al, n 5 above, 317, 330-331.

¹⁷ Oxfram Briefing Paper, 'Beyond 'Fortress Europe' - Principles for a Humane EU Migration Policy' (2017), available at <https://tinyurl.com/y9wth2eq> (last visited 27 December 2018); M. Welander, 'Migration, Human Rights and Fortress Europe: How Far Will European Leaders Go to Protect the EU's Borders?' (2018), available at <https://tinyurl.com/y89lk2v6> (last visited 27 December 2018).

¹⁸ Ministero della Difesa, *Mare Nostrum* Operation, available at <https://tinyurl.com/ocgchts> (last visited 27 December 2018). As for the militarization of the Aegean Sea through *Operation Poseidon* (2006-2015), *Operation Poseidon Rapid Intervention* (2015-present), and the

against trafficking and smuggling, and the safeguarding of human lives at sea.¹⁹ Deemed as a pull factor for migrants to cross the Mediterranean, it was replaced by *Triton Operation* on the 31 October 2014, coordinated by the EU agency FRONTEX. The mandate of this operation is to conduct border control and surveillance, and not SAR operations.²⁰

Due to the increasing number of boat tragedies, on 20 April 2015 the EU launched a Ten Point Action Plan on Migration, which confirmed the military nature of the EU response to migratory movements through sea routes.²¹ For the purpose of the present paper, two aspects of this strategy deserve attention: (i) the reinforcement of *Operation Triton*, by the increase of financial resources and number of assets, alongside the extension of the operational area – so-called *Operation Triton Plus*; (ii) the intention to launch a mission meant to capture and destroy vessels used by the smugglers.²² The latter feature has been pursued by the establishment of EUNAVFOR Med on 22 June 2015,²³ a

involvement of NATO in controlling this route, see FRONTEX, 'Frontex and Greece agree on operational plan for Poseidon Rapid Intervention' (17 December 2015), available at <https://tinyurl.com/yb8ctpcw> (last visited 27 December 2018); B. Miltner, 'The Mediterranean Migration Crisis: A Clash of the Titans' Obligations' 22 *Brown Journal of World Affairs*, 213, 215, 223-224 (2015); D. Ghezlbash et al, n 5 above, 335-336.

¹⁹ Ministero della Difesa, '*Mare Nostrum* Operation', *ibid*; J.P. Gaucci and P. Malilla, 'The migrant Smuggling Protocol and the Need for a Multi-faceted Approach: Inter-sectionality and Multi-actor Cooperation', in V. Moreno-Lax and E. Papastvridis eds, '*Boat Refugees' and Migrants at Sea* n 5 above, 119, 140. The operation, which lasted one year and covered an area of around twenty-seven thousand square miles, saved around one hundred and sixty thousand lives at sea. In Italy around nine million euro a month.

²⁰ European Commission, 'Frontex Joint Operation 'Triton' - Concerted Efforts for managing migrator flows in the Central Mediterranean' (Memo, 31 October 2014), available at <https://tinyurl.com/ybbgwcb4> (last visited 27 December 2018). The EU regulation establishing FRONTEX in 2004 was amended in 2016, and the current agency name is European Border and Coast Guard (EBCG): European Parliament and Council Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard and amending European Parliament and Council Regulation (EU) 2016/399 of 9 March 2016 and repealing European Parliament and Council Regulation (EC) 2007/863, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251/1. The original *Operation Triton* patrolled waters thirty miles off Italian coast, with a budget of two point nine million euro a month.

²¹ European Commission, 'Joint Foreign and Home Affairs Council: Ten Point Action Plan on Migration' (Press Release, 20 April 2015), available at <https://tinyurl.com/y7r5aqou> (last visited 27 December 2018).

²² *ibid*.

²³ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 122/31; Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 157/51; Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) [2016] OJ L 162/18; Council Decision (CFSP) 2017/1385 of 25 July 2017 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) [2017] OJ L 194/61; Council Decision (CFSP) 2018/717 of 14 May 2018 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR

‘military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean’,

whose mandate was later extended to train the Libyan Coast Guard and the Navy.²⁴

To the end of fighting smuggling and trafficking activities, on 7 October 2015 the EU instituted *Operation Sophia*, whose specific mandate to enforce action on the high seas was strengthened by the UN Security Council Resolution 2240 (2015), adopted under Chapter VII of the UN Charter.²⁵ This instrument authorised, for one year after its adoption, UN member states ‘to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking’ from that country, as well as to seize those vessels that are confirmed as being used for this illicit purpose, and ‘to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers’.²⁶ Since this set of activities may be performed also by UN member states acting through regional organizations,²⁷ its scope also covers conducts carried out by the EU via *Operation Sophia*.

The wording of the EU Council Decisions launching EUNAVFOR, as well the resorting to a UN Security Council resolution under Chapter VII of the UN Charter, confirms the military nature of the EU response to the maritime migratory flow through the Mediterranean Sea. The securitization purpose of these policies is also confirmed by other elements. Firstly, the references both to the duties to assist people in distress and to conduct actions in accordance with human rights obligations are solely in the preamble of the EU Council Decision on EUNAVFOR Med, whilst none of the operative provisions of this legal instrument provides for such a commitment.²⁸ Secondly, it is worth underlining that the 2014 Maritime Surveillance Regulation, whose Art 4 sets forth the prohibition to disembark rescued persons in a country where there is a real risk of being subjected to serious violations of human rights, applies exclusively to FRONTEX coordinated-operations – ie to *Operation Triton* and *Operation Triton Plus*, not to the most

MED operation SOPHIA) [2018] OJ L 120/10. See also D. Guilfoyle, ‘Transnational Crime and the Rule of Law at Sea: Responses to Maritime Migration and Piracy Compared’, in V. Moreno-Lax and E. Papastavridis eds, *Boat Refugees’ and Migrants at Sea* n 5 above, 169, 183-187. On 22 January 2019, Germany decided to suspend its participation in Operation Sophia: see eg *Deutschland setzt Beteiligung an Sophia-Mission im Mittelmeer aus* (Germany suspends participation in Operation Sophia in the Mediterranean sea), available at <https://tinyurl.com/y94gyt8u> (last visited 23 January 2019).

²⁴ Council Decision (CFSP) 2015/778, *ibid*, Art 1; Council Decision (CFSP) 2016/993, *ibid*, Art 1.

²⁵ UN Security Council, Resolution 2240 (2015), 9 October 2015, UN Doc S/Res/2240.

²⁶ *ibid*, paras 7, 8 and 10.

²⁷ *ibid*.

²⁸ Council Decision (CFSP) 2015/778, n 23 above, whereas 6.

recent *Operation Sophia*.²⁹ Thirdly, smuggling and trafficking are addressed merely as a crime, taking into consideration neither the urgency to provide protection to victims, nor the demand of safe passages to reach Europe.³⁰ Hence, it is quite evident that the reason underpinning the militarization of maritime operation in the Mediterranean Sea is the need to satisfy the security concerns of would-be destination states.

The criminalization of civil society organizations involved in private rescues – ie the second tool meant to implement the securitization of SAR operations – pursues the same aim. Since 2015, several NGOs (non-governmental organizations) have tried to fill the gap affecting rescue missions, which was a direct consequence of the increasing militarization of maritime activities in both the Mediterranean and the Aegean seas.³¹ These NGOs' activities have been deemed as a pull factor which migrants, smugglers and traffickers could rely upon,³² in the same way as on the previous *Mare Nostrum* Operation. The response of national authorities to SAR operations performed by these organizations has been two-fold. On the one hand, domestic judicial authorities have accused NGOs' staff of criminal practices, such as facilitation of illegal migration.³³ On the other hand, national governments, in order to hinder NGOs performing such activities, either enacted legislative measures sanctioning the non-adherence to a series of requirements with the (possible) refusal to authorize the access to national ports to NGOs vessels;³⁴ or revoked the flag to boats

²⁹ European Parliament and Council Regulation (EU) 2014/656 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014], OJ L 189/93, Arts 1 and 4. See D. Ghezelbash et al, n 5 above, 336-338.

³⁰ J.P. Gaucci and P. Malilla, n 19 above, 143.

³¹ D. Ghezelbash et al, n 5 above, 347.

³² European Council - EEAS, 'EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 January - 31 October 2016', Council Doc 14978/16 (30 November 2016), 3, 7 and 8, available at <https://tinyurl.com/y8ekdbdz> (last visited 27 December 2018); D. Ghezelbash et al, *ibid*.

³³ E. Nicosia, 'Massive immigration flows management in Italy between the fight against illegal immigration and human rights protection' 5 *Questions of International Law*, 24, 35-38 (2014). As samples: on the 24 April 2018, the Italian Court of Cassation uphold the decision to seize the vessel *Iuventa*, belonging to the German NGO Jugend Rettet, on which see ECRE, 'Italy's Supreme Court rejects appeal against the seizure of NGO rescue vessel the *Iuventa*' (27 April 2018), available at <https://tinyurl.com/yarp33kr> (last visited 27 December 2018); the judicial decision to release the vessel belonging to the Spanish NGO Proactiva Open Arms on 16 April 2018, pending the investigation against the crew, on which see ECRE, 'Proactiva rescue ship released, crew members remain under investigation' (20 April 2018), available at <https://tinyurl.com/yaa5ck35> (last visited 27 December 2018); the criminal trial against Sea-Watch, which recently ended with the decision to uphold the motion to dismiss on 28 May 2018, decision available at <https://tinyurl.com/y7l2djkf> (last visited 27 December 2018).

³⁴ Ministero dell'Interno, Codice di condotta per le ONG impegnate nel salvataggio dei migranti in mare (7 August 2017), available at <https://tinyurl.com/yb4sslne> (last visited 27 December 2018). The unofficial translation is available at <https://tinyurl.com/ybrprwsb> (last visited 27 December 2018). For a critical point of view, see eg ASGI, 'Position Paper on the

belonging to such organizations.³⁵ These policies of deterrence proved highly effective in reducing the number of NGO ships operating in the Mediterranean Sea.³⁶

The last mechanism implemented to achieve the securitization of SAR operations is the outsourcing of the management of migratory movements to countries of departure. This tool is based on various bilateral agreements, which, on one side, share common features and, on the other, differ for several aspects. As for the mutual elements, firstly these cooperation commitments pursue the same aim, which is to prevent migrants from accessing would-be receiving states territories.³⁷ Secondly, they are based on a costs-benefits evaluation. From the perspective of countries of departure, they agree to enact measures of border-crossing controls (and to assume the burden of thousands of migrants in their territories) in exchange for inducements - such as technical, logistical, or financial support. From the standpoint of putative destination states, they provide such benefits in order to achieve two advantages: on the one hand, to avoid migratory pressure; on the other hand, to relieve themselves of international obligations concerning the protection of migrants' rights by allocating the task of performing flow-containment to neighbouring countries.³⁸ However, the strategies of pre-

Proposed 'Code of Conduct for NGOs Involved in Migrants' Rescue at Sea', available at <https://tinyurl.com/y7u54wro> (last visited 27 December 2018). On the denial of access domestic ports, see the refusal to allow Aquarius (a vessel belonging to the NGO Doctors Without Borders and SOS Mediterranee) to disembark more than six hundred persons in Italy: E. Papastavridis, 'The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?' (27 June 2018), available at <https://tinyurl.com/y9ohmx8h> (last visited 27 December 2018).

The criminalization of NGOs activities has been pursued also by Hungary via the amending of the crime of facilitation of illegal migration, with the purpose of broadening its scope of application: Hungary, Bill no T/333 'amending certain laws relating to measures to combat illegal immigration', 20 June 2018, whose unofficial translation is available at <https://tinyurl.com/y7hgca5u> (last visited 27 December 2018). The bill is also known as the 'Stop Soros Bill' and has been severely criticised: Council of Europe, Venice Commission Opinion no 919/2018, 'Hungary - Joint Opinion on the Provisions of the so-called 'Stop Soros' draft Legislative Package which directly affect NGOs (in particular Draft Art 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018) CDL-AD(2018)013, available at <https://tinyurl.com/ybqwp7tv> (last visited 27 December 2018); Amnesty International, 'Hungary - New Laws That Violate Human Rights, Threaten Civil Society And Undermine The Rule Of Law Should Be Shelved' (2018), available at <https://tinyurl.com/y744r9c2> (last visited 27 December 2018).

³⁵ This is the case of Aquarius, the vessel belonging to the NGOs Doctors Without Borders and SOS Mediterranee. See Doctors Without Borders, 'Mediterranean: MSF protests decision to revoke registration for rescue ship Aquarius' (23 September 2018), available at <https://tinyurl.com/ydfkd7tw> (last visited 27 December 2018).

³⁶ At the time of writing, there was only one boat performing SAR operations in the Mediterranean Sea. It is the *Mare Ionio* vessel, flying an Italian flag and belonging to the NGO Mediterraneana.

³⁷ C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 241.

³⁸ *ibid* 241-243; D. Ghezlbash et al, n 5 above, 342-344; M.L. Basilien-Gainche, n 5

emptive containment performed by countries of departure and the incentives granted by possible destination states vary from case to case. For the purpose of the present paper, the Italy-Libya MoU is taken into account as an example of this kind of cooperation agreement.³⁹

3. The Italy-Libya Memorandum of Understanding of 2 February 2017

First and foremost, it is worth noting that the Italy-Libya partnership is inscribed in a wider framework involving EU actions meant to reinforce relationships with third countries.⁴⁰ In particular, under the Malta Declaration, the EU priority is training, equipping and supporting the Libyan Coast Guard⁴¹ and, as mentioned above, the mandate of EUNAVFOR Med was extended so as to include this activity. Besides the EU involvement, the 2017 MoU is the latest in a long line of bilateral deals between Italy and Libya, whose partnership on migration issues began in 2000.⁴² According to the preamble of this treaty, the parties are

‘determined to work in order to face all the challenges that have negative repercussions on peace, security and stability within the two countries. More specifically, the two states aim to achieve a solution to illegal border-crossings of the Mediterranean Sea and to human trafficking by implementing policies which are in compliance with the international law obligations respectively binding the two countries’.⁴³

above, 336-338; M. Giuffré, ‘State Responsibility’ n 5 above, 713-716.

³⁹ ‘Memorandum d’intesa sulla cooperazione nel campo dello sviluppo, del contrasto all’immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana’, 2 February 2017, available at <https://tinyurl.com/ycr3d5gl> (last visited 27 December 2018). The unofficial English translation is available at <https://tinyurl.com/ya8c56ea> (last visited 27 December 2018). On the issue of whether the adoption of international agreement concerning migration policy under the so-called simplified procedure is in compliance with the Italian Constitution, see eg F.M. Palombino, ‘Sui pretesi limiti costituzionali al potere del Governo di stipulare accordi in forma semplificata’, in *Rivista di Diritto Internazionale*, 870 (2018).

⁴⁰ European Commission, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration, COM (2016) 385 final, 7 June 2017; European Council, European Council Conclusions, EUCO 26/16, 28 June 2016.

⁴¹ European Council, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017, para 6 (c), available at <https://tinyurl.com/y96jfuzw> (last visited 27 December 2018).

⁴² For an overview of the several bilateral agreements governing the Italy-Libya partnership on migration issues from 2000 to 2009, see M. Giuffré, ‘State Responsibility’ n 5 above, 700-703. As for judgment of the ECtHR concerning the implementation of the 2009 Treaty, see below Section IV.

⁴³ ‘Memorandum d’intesa’ n 39 above, Preamble.

As for the inducements to Libya, the operative provisions of the agreement establish that Italy provides several incentives. Firstly, it grants ‘support and financing’ to development programs in the Libyan regions affected by migration flows.⁴⁴ Secondly, Italy offers ‘technical and technologic support’ to the Libyan authorities in charge of fighting against border-crossing. These authorities are ‘the border guard and the coast guard’ under the Ministry of Defence,⁴⁵ and this support has included the handing over of four military patrol boats, training, expert advice and capacity building.⁴⁶ Thirdly, Italy provides ‘training of the Libyan personnel’ working in the reception centres within Libyan territory and under the exclusive control of Libyan authorities.⁴⁷

With regard to the means to reduce the migrant movements to Italy, the MoU set forth two tools: reception centres within Libyan territory to the end of obstructing departure, and the improvement of the Libyan capacity to control its land and sea borders in order to impede both arrivals to and departures from its frontiers.⁴⁸ The measures aimed at restraining the number of people leaving the country include also SAR operations performed by the Libyan Coast Guard in Libyan territorial waters or on high seas,⁴⁹ operations that fall within the notion of pull-back, also known as push-back by proxy.

As a general remark, pull-backs aim at preventing migrants from accessing would-be receiving states territories through pre-arrival returns carried out either in the territorial waters of the departure countries or on the high seas. The difference between this scheme and the push-backs in international waters, which was one of the first-generation measures of *non-entrée*, lies on the actor carrying out the interdictions and the returns: in previous years, these activities were implemented directly by the organs of the would-be receiving states, which led to the attribution of such conducts to the latter and, hence, to the possibility of triggering its international responsibility for the violation of migrants’ rights; the current cooperation arrangements provide for the interceptions and returns being performed by the authorities of the country of departure, in the interest of the putative destination states. Therefore, these activities are directly attributable to the country of departure.⁵⁰ This circumstance, alongside the legal uncertainty surrounding the extent of states’ accountability for extraterritorial actions,

⁴⁴ *ibid* Art 1(b).

⁴⁵ *ibid* Art 1(c).

⁴⁶ Senato della Repubblica, ‘Relazione Analitica sulle Missioni Internazionali in Corso e sullo Stato degli Interventi di Cooperazione allo Sviluppo a Sostegno dei Processi di Pace e di Stabilizzazione’, deliberata dal Consiglio dei Ministri il 28 dicembre 2017, 101, 367, 368, available at <https://tinyurl.com/yaw2lsw4> (last visited 27 December 2018).

⁴⁷ ‘Memorandum d’intesa’ n 39 above, Arts 2 (2) and (3).

⁴⁸ *ibid* Preamble, Arts 1 (c), 2 (2) and (3).

⁴⁹ Senato della Repubblica, ‘Relazione Analitica sulle Missioni Internazionali in Corso’ n 46 above, 101.

⁵⁰ N. Markard, n 6 above, 602, 613; V. Moreno-Lax and M. Giuffrè, n 12 above, 2-4; C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 244-249.

challenges the possibility of triggering the responsibility of possible destination states for the violation of international obligations owed toward migrants under conventional human rights law.

The Italy-Libya MoU of 2 February 2017 has proved highly effective in reducing the number of arrivals to Italy.⁵¹ The several interdictions and returns performed by the Libyan Coast Guard under this cooperation agreement have significantly contributed to this goal,⁵² and the Italian government has actively contributed to the improvement of this agency's operational capability by means of funding, equipping, and training. The reinforcement of the Libyan Coast Guard operational capacity of preventing departure was meant to outsource responsibilities for internationally wrongful acts from Italy to Libya.⁵³ Pull-back practices, and the purpose underlying these tools, confirm also the aforementioned shift from the core humanitarian object of SAR operations to their securitization, with the view of ensuring 'peace, security and stability' of Italy against migrant flow, which are perceived as a threat.⁵⁴

4. The Pull-Back of 6 November 2017

One of the most relevant pull-backs performed under the Italy-Libya MoU is the one which occurred on 6 November 2017. First and foremost, at the time of the episode the migrant boat in distress was located in a maritime zone that was not within an officially designated SAR region. As explained in detail below, this led to legal uncertainty regarding which (if any) state was responsible for complying with the duties enshrined in LOS provisions.⁵⁵ Moving to the narrative of facts, according to the evidence gathered, in the late evening of 5 November 2017 a migrant boat left the port of Tripoli, with around one hundred and thirty people onboard. In the early morning of the following day, the NGO vessel Sea-Watch 3, which was navigating outside the Libyan contiguous zone, received a distress signal from the Italian Rescue Coordination Centre. The communication was addressed to all ships in the area and to the Libyan Coast Guard, which sent the message to its unit patrolling off the coast of Tripoli (specifically, one of the navy ships donated by Italy during the previous months). A few minutes later, the Italian Rescue Coordination Centre indicated the specific coordinates of the

⁵¹ For an overview of the data concerning arrivals by sea to Italy, see UNHCR, Situation: Mediterranean - Italy, available at <https://tinyurl.com/y92lfes2> (last visited 27 December 2018). As a consequence of the *non-entrée* policies under the Italy-Libya MoU, the number of arrivals to Spain has increased significantly: see UNHCR, Situation: Mediterranean - Spain, available at <https://tinyurl.com/yatdix2o> (last visited 27 December 2018).

⁵² For a detailed overview of the operations carried out in the Mediterranean Sea by the LCG, under the coordination of the Italian RCC, from May 2017 to March 2018, see eg Forensic Oceanography, n 7 above.

⁵³ M. Giuffré, 'State Responsibility' n 5 above, 729.

⁵⁴ 'Memorandum d'intesa' n 39 above, Preamble; D. Ghezlbash et al, n 5 above, 330-331.

⁵⁵ See Section III below.

boat in distress to Sea-Watch 3, warning the crew about the presence of the Libyan Coast Guard and inviting it to proceed to the rescue with caution. This communication was followed by the Italian Rescue Coordination Centre delivering a request of assistance to all the ships near the position of the one in distress. Meanwhile, the Libyan Coast Guard called Sea-Watch 3 and ordered the NGO vessel not to come near the scene of the incident. Sea-Watch 3 informed the Libyan Coast Guard that it would proceed towards the migrant boat, as requested by the Italian Rescue Coordination Centre. Close to the position of the ship in distress there was also a French military warship taking part in the EUNAVFOR Med operation and a Portuguese patrol aircraft, later joined by an Italian Navy helicopter and by a FRONTEX surveillance aircraft. Sea-Watch 3 informed the Italian Rescue Coordination Centre about the presence of these vessels, alongside the unit of the Libyan Coast Guard. Despite this circumstance, the Italian authority renewed its instruction to the NGO vessel to proceed towards the boat in distress. Having seen the position, both Sea-Watch 3 and the Libyan Coast Guard ship tried to arrive there first. It is unclear which vessel was the on-scene commander responsible to perform the rescue. On the one hand, Sea-Watch 3 started fulfilling some of the tasks associated with this role – eg communication with other ships, coordination of the rescue operation. On the other hand, the Libyan Coast Guard unit was appointed as on-scene commander by the Libyan authorities, a designation that was notified to the Italian Rescue Coordination Centre, which accepted this assignment but did not communicate it to Sea-Watch 3. Meanwhile, the latter was also instructed to assist the boat in distress by the Italian helicopter on the scene. Due to this chaotic situation, the NGO vessel and the Libyan Coast Guard unit were left to discuss which of them was responsible for performing the SAR operation. According to the information collected, the Libyan Coast Guard unit used dangerous manoeuvres, mistreated the retrieved migrants, threatened the NGO crew, and voluntarily and actively obstructed their rescue activities. Aside from the fifty-nine persons saved by Sea-Watch 3, more than twenty migrants died before and during the operation, and forty-seven people were returned to Libya – at least two of whom were later transferred to their countries of origin.⁵⁶ Among the survivors, seventeen lodged an application before the ECtHR, claiming that Italy violated the right to life (Art 2 ECHR), the principle of *non-refoulement* (Art 3 ECHR), and the prohibition of collective expulsion (Art 4, Protocol 4 ECHR).⁵⁷

⁵⁶ For a detailed description of the event, see Forensic Oceanography, n 7 above, 87-97. See also HRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya, including on the effectiveness of technical assistance and capacity-building measures received by the Government of Libya', 21 February 2018, A/HRC/37/46, para 46.

⁵⁷ See eg ECRE, 'Case against Italy before the European Court of Human Rights will raise issue of cooperation with Libyan Coast Guard' (2018), available at <https://tinyurl.com/y7sd2bme> (last visited 27 December 2018); L. Riemer, 'From push-backs to pull-backs: The EU's new

As illustrated by this episode, entrusting third countries with containment-flow policies, such as pull-backs, raises the issue of the protection of migrants' rights at EU external borders,⁵⁸ as well as EU member states responsibility for a direct or indirect breach of international obligations enshrined in a plurality of overlapping legal regimes safeguarding persons in distress at sea, provisions that states are bound to interpret and perform in good faith.⁵⁹ Law of the sea, human rights law, refugee law, anti-smuggling and anti-trafficking provisions are all relevant. These frameworks, of customary or treaty nature, as well as of universal or regional character, may also apply simultaneously.⁶⁰

With specific regard to the externalization of migration management through means of pull-backs by third countries, the most significant branches of international law enshrining duties of states and rights of individuals are the Law of the Sea (LOS) and International Human Rights Law (IHRL). The different objectives and scopes of these fields notwithstanding, these two areas are far from being self-contained regimes: with reference to SAR operations, they are closely related to each other, as shown by the case-law of the adjudicating bodies in charge of settling disputes concerning their interpretation and application.⁶¹ The main treaty and customary obligations stemming from these legal regimes related to pull-back practices are outlined in the following sections, alongside the investigation on the challenges concerning the effective and practical application of these rules to the events of 6 November 2017.

deterrence strategy faces legal challenge' (2018), available at <https://tinyurl.com/yas56394> (last visited 27 December 2018). Since at the time of writing the case was not yet communicated to the Italian government, the argumentation beneath the claims were a matter of speculation.

⁵⁸ M. Fernandez, 'The EU External Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts', in V. Moreno-Lax and E. Papastvridis eds, *'Boat Refugees' and Migrants at Sea* n 5 above, 381-382.

⁵⁹ Vienna Convention on the Law of the Treaties (VCLT), 23 May 1969, entry into force 27 January 1980, 1155 UNTS 331, Art 26 (*Pacta sunt servanda*) - Every treaty in force is binding upon the parties to it and must be performed by them *in good faith*.); Art 31(1) (General Rule of Interpretation) - A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose) (emphasis added). See also N. Markard, n 6 above, 597; D. Ghezelbash et al, n 5 above, 346.

⁶⁰ I. Papanicolopulu, 'Human Rights and the Law of the Sea', in D. Attard et al eds, *The IMLI Manual on International Maritime Law - Volume I: The Law of the Sea* (Oxford: Oxford University Press, 2014), 509; V. Moreno-Lax and E. Papastvridis, 'Introduction: Tracing the Bases of an Integrated Paradigm for Maritime Security and Human Rights at Sea', in Id, *'Boat Refugees' and Migrants at Sea* n 5 above, 1 and 5; T. Gammeltoft-Hansen, 'The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration', in V. Moreno-Lax and E. Papastvridis eds, *'Boat Refugees' and Migrants at Sea* n 5 above, 60, 62-63.

⁶¹ T. Treves, 'Human Rights and the Law of the Sea' 28(1) *Berkeley Journal of International Law*, 1, 5 and 6; International Tribunal of the Law of the Sea (ITLOS), *M/V Saiga (no 2) (St. Vincent v Guinea)*, ITLOS Reports 1999, 10, 120 I.L.R. 143, para 155; ITLOS, *Juno Trader*, ITLOS Reports 2004, 17, 128 I.L.R. 267, para 77; Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy*, Judgments of 23 February 2012, paras 24-25 and 75-78, available at <http://www.hudoc.echr.coe.it>.

III. Issues Arising Under the Law of the Sea

The LOS is a broad framework of international law, and its exhaustive and detailed analysis is beyond the purpose of the present paper. Rather, the following lines outline the core duties binding states towards persons in distress at sea as well as investigating the issue arising from their application to the pull-back of 6 November 2017. As a general remark, it is worth recalling that LOS is mainly a state-centred regime, whose specific object is not the protection of human rights.⁶² However, there is a batch of provisions directly or indirectly safeguarding fundamental rights, among which the two obligations that are pivotal in the context of SAR operations: the duty to rescue, and the duty to provide adequate and effective SAR services.⁶³

Besides being codified in several LOS treaty provisions,⁶⁴ the duty to rescue has customary nature.⁶⁵ The purpose of the duty is to assist people in distress at sea,⁶⁶ and it applies to all persons, regardless of their nationality, legal status, activities they are performing or circumstances in which they are found.⁶⁷ As for the territorial scope, it applies to all maritime zones.⁶⁸ The duty to rescue is a duty binding two actors: the flag states and the masters of the ships flying its flag. As a general principle of LOS, every ship shall sail under the flag of a state, which exercises jurisdiction over the ships flying its flag.⁶⁹ As for the duty to

⁶² T. Treves, *ibid* 3.

⁶³ N. Markard, n 6 above, 601-602; T. Scovazzi, 'Human Rights and Immigration at Sea', in R. Rubio-Marín ed, *Human Rights and Immigration* (Oxford: Oxford University Press, 2014) 212, 225-234.

⁶⁴ United Nations Convention on the Law of the Sea (10 December 1982, entered into force 16 November 1994), 1833 UNTS 3 (UNCLOS), Art 98 (1), according to which: 'Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call'. The duty to rescue is further specified in other treaties: the International Convention for the Safety of Life at Sea, as amended (1 November 1974, entered into force 25 May 1980), 1184 UNTS 278 (SOLAS Convention); International Convention on Maritime Search and Rescue, as amended (27 April 1979, entered into force 22 June 1985), 1405 UNTS 118 (SAR Convention); International Convention on Salvage (28 April 1989, entered into force 14 July 1996), 1953 UNTS 165 (Convention on Salvage).

⁶⁵ I. Papanicolopulu, 'The duty to rescue at sea, in peacetime and in war: A general overview' 98(2) *International Review of the Red Cross*, 491, 492, 494 (2016).

⁶⁶ For an in-depth analysis of the meaning of the term 'distress', see L.M. Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?', in V. Moreno-Lax and E. Papastavridis eds, *'Boat Refugees' and Migrants at Sea* n 5 above, 222, 232-247.

⁶⁷ SOLAS Convention, n 64 above, Chapter V, Regulation 33.1; SAR Convention, n 64 above, Chapter 2.1.10.

⁶⁸ UNCLOS, n 64 above, Arts 18(2), 58 and 98; SOLAS Convention, *ibid*, Chapter V, Regulation 1.1.

⁶⁹ UNCLOS, *ibid*, Arts 92 and 94.

rescue, on the one hand, each country has the duty to require the masters of ships under its jurisdiction to rescue persons in distress at the earliest possible convenience.⁷⁰ On the other hand, each master of vessel is bound to assist people in distress at sea with all possible speed.⁷¹

The duty to rescue is not absolute. Treaty provisions establish four exceptions: (i) the necessity to avoid a serious danger to the rescuing ship, its crew and passengers;⁷² (ii) the vessel receiving the distress call is unable to proceed to the rescue; (iii) the shipmaster considers it unreasonable to provide assistance; (iv) the master deems it unnecessary to aid the persons in distress.⁷³ If none of these grounds is met, the master of the vessel receiving the distress call shall proceed with the rescue. Following the rescue, the shipmaster has two obligations to comply with: the first one is to treat embarked persons with humanity, within the capacity and limitations of the vessel;⁷⁴ the second one is to disembark these individuals to a place of safety within a reasonable time,⁷⁵ an obligation that is closely related to the duty to provide SAR services.

According to this latter obligation, coastal states parties to the relevant conventions are compelled to 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service'.⁷⁶ To this end, these countries are required to identify a SAR region under their responsibility by agreements with the other states concerned.⁷⁷ In particular, each coastal

⁷⁰ *ibid* Art 98 (1) (b).

⁷¹ SOLAS Convention, n 64 above, Chapter V, Regulation 33.1; Convention on Salvage, n 64 above, Art 10(1).

⁷² UNCLOS, n 64 above, Art 98 (1).

⁷³ SOLAS Convention, n 64 above, Chapter V, Regulation 33.1, which provides that: 'The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly.' For an overview of the meaning of 'unable', 'unreasonable' and 'unnecessary' under SOLAS Convention, Chapter V, Regulation 33.1, see I. Papanicolopulu, 'The duty to rescue at sea' n 65 above, 497-498.

⁷⁴ SOLAS Convention, *ibid*, Chapter V, Regulation 33.6; Resolution 167(78) of the International Maritime Organization (IMO) Maritime Safety Committee, 'Guidelines on the treatment of persons rescued at sea', IMO Doc. MSC 78/26/Add.2, 20 May 2004 (IMO Rescue Guidelines), para 5.1.2.

⁷⁵ SAR Convention, n 64 above, Chapter I, Regulation 1.3.2 and Chapter III, Regulation 3.1.9; SOLAS Convention, *ibid*, Regulation 4.1.1.

⁷⁶ UNCLOS, n 64 above, Art 98(2), according to which: 'Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose'.

⁷⁷ SAR Convention, n 64 above, Chapter II, Regulation 2.4.

country shall establish a rescue co-ordination centre entrusted with the task to ensure the organization and coordination of the search and rescue services *within* the SAR zone under its responsibility.⁷⁸ Among other undertakings, when more than one vessel is about to engage in the rescue operation, the relevant rescue coordination centre ‘should designate an on-scene commander’ responsible for carrying out the rescue. This choice should be made as early as practicable and, in any case, before arrival within the area of the incident.⁷⁹ If the rescue coordination centre does not select the on-scene commander, the latter is either appointed by the rescuing ships via agreement,⁸⁰ or the first vessel arriving at the scene of the incident automatically assumes this role (so-called first come, first serve principle).⁸¹ It could also happen that rescue coordination centres receive distress calls launched *beyond* their SAR regions: in this circumstance, the rescue coordination centre involved is under the duty to provide immediate assistance, if in the position to aid, and to inform the rescue coordination centre in whose SAR area the incident took place.⁸²

As for the two services to be ensured, searching is aimed at locating persons in distress,⁸³ whilst rescue is an operation meant to retrieve these individuals, provide for their initial needs, and deliver them to a place of safety as soon as possible.⁸⁴ Hence, a SAR operation is considered terminated solely once the rescued people are disembarked in such a location.⁸⁵ However, the meaning of the expression ‘place of safety’ is not clarified in treaty provisions, and neither does LOS regime provide for criteria determining which state is under the duty to allow the entry of rescuing ships in its ports. The lack of this legal obligation illustrates the countries’ unwillingness to restrain their right to control (and limit) the entrance into their ports,⁸⁶ a right stemming from the principle of states sovereignty over their territories.⁸⁷ An attempt to fill this gap was made by the International Maritime Organization (IMO) through the adoption of guidelines. These soft-law instruments outline the meaning of the expression ‘place of safety’ and establishes the criteria determining which is the state responsible for ensuring or providing such a place. As for the former, a ‘place of safety’ is a location ‘where the survivors’ safety or life is no longer threatened and where

⁷⁸ *ibid* Chapter I, Regulation 1.5, Chapter II, Regulation 2.3.1, Chapter VI, Regulation 4.2.1.

⁷⁹ *ibid* Regulation 5.7.1 and Regulation 5.7.2.

⁸⁰ *ibid* Regulation 5.7.2.

⁸¹ *ibid* Regulation 5.7.3.

⁸² *ibid* Chapter IV, Regulation 4.3.

⁸³ *ibid* Chapter I, Regulation 1.3.1.

⁸⁴ *ibid* Regulation 1.3.2 and Chapter III, Regulation 3.1.9; SOLAS Convention, n 64 above, Regulation 4.1.1.

⁸⁵ IMO Rescue Guidelines, n 74 above, Guideline 6.12; I. Papanicolopulu, ‘The duty to rescue at sea’ n 65 above, 499.

⁸⁶ N. Klein, n 10 above, 46-49.

⁸⁷ I. Papanicolopulu, ‘The duty to rescue at sea’ n 65 above, 500; V. Moreno-Lax and M. Giuffrè, n 12 above, 13; L.M. Komp, n 66 above, 231.

their basic human needs (such as food, shelter and medical needs) can be met'.⁸⁸ As for the latter, the state responsible for the SAR zone within which the rescue is performed is the one charged with the task 'to provide a place of safety, or to ensure that a place of safety is provided'.⁸⁹

Moving to the application of these provisions to the pull-back of 6 November 2017, the first remark concerns the above-mentioned location of the migrant boat in distress outside an officially designated SAR region. In this regard, on 10 July 2017, the Libyan Government of National Accord transmitted an official notification to IMO designating its own SAR region, a declaration that was withdrawn on 10 December 2017. This revocation was provisional, since Libya filed a new official communication to IMO on 14 December.⁹⁰ However, the IMO database officially reported the existence of a Libyan SAR zone (and of a Libyan Rescue Coordination Centre) only from 28 June 2018.⁹¹ This turn of events led to legal uncertainty regarding which state was responsible for providing adequate and effective search and rescue services outside Libyan territorial waters until this date.⁹²

With reference to the duty to rescue, it applies to all maritime zones, hence also to those zones which are not encompassed in an officially designated SAR region. In the case at hand, the ships that could provide assistance to the vessel in distress were Sea-Watch 3, the Libyan Coast Guard unit and the French military ship taking part in the EUNAVFOR Med operation. While the NGO boat and the Libyan Coast Guard vessel performed the operation, the French military ship stood still. However, it is rather easy to justify the non-intervention of this third ship according to the exceptions to the duty to rescue. Initially, the French vessel might have deemed it 'unnecessary' to proceed, due to the presence of both Sea-Watch 3 and the Libyan Coast Guard unit. Later, in the course of

⁸⁸ IMO Rescue Guidelines, n 74 above, Guideline 6.12; International Maritime Organization, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea', 22 January 2009, FAL.3/Circ.194, Principle 2.3. According to some authors, this implies that the state responsible for the SAR zone within which the rescue is performed bears a residual obligation to allow the disembarkation in its ports: see S. Trevisanut, 'Is There a Right to be Rescued at Sea? A Constructive View' 4 *Question of International Law*, 3 and 7 (2014) (last visited 27 December 2018).

⁸⁹ IMO Rescue Guidelines, *ibid*, Guideline 2.5.

⁹⁰ Comando Generale del Corpo delle Capitanerie di Porto - Guardia Costiera, Maritime Rescue Coordination Centre Roma, 'Sea Operation in the Mediterranean Sea - 2017 Report', 18 and 20, available at <https://tinyurl.com/ydgvx2u5> (last visited 27 December 2018); M. Monroy, 'A seahorse for the Mediterranean: Border surveillance for Libyan search and rescue zone' (3 January 2018), available at <https://tinyurl.com/y7uw5os3> (last visited 27 December 2018).

⁹¹ A. Cuddy, 'Prompted by EU, Libya quietly claims right to order rescuers to return fleeing migrants' (6 July 2018), available at <https://tinyurl.com/y8lmmecu> (last visited 27 December 2018); A. Cuddy, 'La Libia crea la sua zona SAR e notifica l'IMO (con il sostegno UE)' (9 July 2018), available at <https://tinyurl.com/yadzvswt> (last visited 27 December 2018).

⁹² See eg Tribunale di Ragusa, Ufficio del GIP, Decreto di rigetto di richiesta di sequestro preventivo, nos 1216-1282/18 R.G.N.R., 28 April 2018, 14-15, available at <https://tinyurl.com/y73em5vf> (last visited 27 December 2018).

the operation, the Libyan Coast Guard crew began using dangerous manoeuvres, as well as threatening the NGO crew and actively obstructing their assistance activities. In view of the foregoing, the French authorities might have deemed that its intervention could cause ‘a serious danger’ to their vessel and crew and, hence, might have decided to avoid any involvement.

As for the obligations that the shipmaster must comply with after the rescue, the Libyan Coast Guard crew did not treat the embarked persons with humanity, and did not disembark them to a place of safety. According to the evidence gathered, the Libyan authorities beat migrants with a rope as they boarded, a behaviour that infringes the former duty.⁹³ Subsequently, they returned the retrieved migrants to Libya, a country where, according to several well-known and reliable sources, migrants faced gross human rights violations and abuses which are carried out by both state and non-state actors. This situation highlights that state institutions have been ‘unable or unwilling’ to ensure effective protection of migrants.⁹⁴ Due to these circumstances, Libya did not meet the requirements to be considered as a ‘place of safety’ under IMO Guidelines.

Turning to the duty to provide adequate and effective SAR services, Libya has attempted to establish its own SAR region since July 2017, and achieved this goal in July 2018. Therefore, the pull-back of 6 November 2017 occurred within an ambiguous framework concerning which state was the one responsible for providing adequate and effective search and rescue services within the maritime zone in which the migrant boat in peril was located. Against this background, according to LOS provisions, the Italian Rescue Coordination Centre, which received the distress call, had the duty to provide immediate assistance, even if the vessel was *beyond* the SAR region under its responsibility. The uncertainty concerns the scope of the duty to design an on-scene commander, an obligation bound the rescue coordination centre responsible for the organization and coordination of search and rescue operation *within* the SAR region of the relevant coastal state. If the duty to appoint an on-scene commander applies also to rescue coordination centre involved in activities beyond the SAR region under their responsibility, then Italy violated this obligation during the pull-back of 6 November 2017. Indeed, the Italian authorities had informed all the ships close to the one in distress about the need to proceed to a SAR operation, but then they simply accepted the designation of the Libyan Coast Guard unit as on-scene commander, a decision taken by the Libyan authorities which, at the time of the episode, could not be classified as an officially recognised rescue coordination centre – since this qualification depends on the establishment of a SAR region under the responsibility of the coastal state. On the contrary, if the

⁹³ Forensic Oceanographic, n 7 above, 96; HRC, ‘Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya’ n 56 above, para 46.

⁹⁴ HRC, ‘Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya’, *ibid*, paras 41-45.

duty to design an on-scene commander does not apply to the rescue coordination centre organizing and coordinating SAR operations beyond the SAR region of the relevant coastal state, then Italy did not violate this obligation.

Lastly, the circumstance that the pull-back of 6 November 2017 occurred outside an officially recognised SAR zone affects also the assessment concerning which state was the one responsible for either providing or ensuring that this place is provided. Indeed, according to the IMO Guideline, this obligation should be carried out by the country responsible for the SAR zone within which the rescue is performed. However, the investigation aimed at identifying the state in charge of this assessment is quite theoretical, since this task is set forth in a soft-law instrument.

This final remark is tied to a more general issue concerning the management of migratory flow and the outsourcing of border-crossing control at sea. Indeed, due to the non-binding nature of these provisions, the conclusive phase of SAR operations – ie the disembarkation in a place of safety – is still problematic. As illustrated by practice, countries are often unwilling to allow the entrance of rescuing ships in their ports, in line with their power to control and regulate admission in their territory as a corollary of state sovereignty.⁹⁵ Yet, a situation of distress at sea, and the consequent search and rescue activities, triggers the states' obligations under IHRL, which applies also to the maritime environment, regardless of the nature and purpose of the intervention.⁹⁶ Hence, on the one hand, the principle of sovereignty implies the freedom of countries to regulate the entry, residency and expulsion of aliens, a power that is not limited by binding provisions of LOS. On the other hand, a fragmentary approach to states' obligations under international law should be rejected in favour of a systemic interpretation of their duties.⁹⁷ Therefore, the interaction among LOS and other branches of international law – for the purpose of the present paper, IHRL – may provide a more comprehensive understanding of states' rights and their limits with regard to situations at sea, and more specifically *vis-à-vis* interception of boat

⁹⁵ I. Papanicolopulu, 'The duty to rescue at sea' n 65 above, 499-500. On this point, see also M. Fink and K. Gombeer, 'The Aquarius incident: Navigating the turbulent waters of international law' (14 June 2004), available at <https://tinyurl.com/y73aqhbn> (last visited 27 December 2018).

⁹⁶ I. Papanicolopulu, 'Human Rights and the Law of the Sea' n 60 above; V. Moreno-Lax and M. Giuffré, n 12 above, 10; N. Markard, n 6 above, 593-594; T. Treves, n 61 above. See also Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above, paras 77-81, and 178. Specifically, the Court stated that: 'Italy cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas' (para 78), and that 'the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction' (para 178).

⁹⁷ M. Giuffré, 'State Responsibility' n 5 above, 708; B. Conforti, n 9 above, 194-195, 477; T. Treves, *ibid.*, 1.

migrants.⁹⁸

The relationship between LOS and IHRL is based on rules of treaty interpretation set forth by both general international law and LOS itself.⁹⁹ Art 31 (1) (c) VCLT establishes that, in interpreting a treaty, ‘there shall be taken into account (...) any relevant rules of international law applicable in the relations between the parties.’ This general rule is confirmed by LOS treaty provisions which provide for the application of other international law provisions to the party of a dispute,¹⁰⁰ and that establish a non-prejudice clause concerning rights and obligations stemming from other agreements,¹⁰¹ or specifically related to the protection of human rights at sea.¹⁰² The interaction between the international obligations stemming from LOS and IHRL has also been taken into account by the courts and tribunals in charge of settling the disputes according to the relevant treaties.¹⁰³ From the viewpoint of SAR operations, the consequence of this intertwining is a limitation of states’ sovereignty due to its human rights obligations towards persons in distress at sea.

This circumstance has a significant impact on the remedies available to the victims. From their standpoint, it is worth noting that individuals lack standing before the dispute settled mechanisms set forth under the LOS regime. Therefore, any violation of LOS provisions by the states involved – such as the duty to disembark retrieved persons to a place of safety, the duty to provide adequate and effective search and rescue services, the duty to design an on-scene

⁹⁸ J. Coppens, ‘Interception of Migrant Boats at Sea’, in V. Moreno-Lax and E. Papastavridis eds, *Boat Refugees’ and Migrants at Sea* n 5 above, 197, 218-221.

⁹⁹ For treaty provisions which directly address human rights, see Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), as amended (10 March 1988, entry into force 28 July 2010), 1678 UNTS 22, and in particular – among other articles – Art 8 bis (10)(a)(i) on the safety of life at sea, Art 8 bis (10)(a)(ii) on the protection of human dignity, Art 10(2) on the fair treatment to ensure to persons under custody. The SUA Convention is remarkable for the particular attention paid to human rights guarantees to ensure at sea, alongside its non-prejudice clause concerning human rights in general. On this point, see I. Papanicolopulu, ‘Human Rights and the Law of the Sea’ n 60 above, 519.

¹⁰⁰ UNCLOS, n 64 above, Art 293 (1), according to which: ‘A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.’ See also T. Treves, n 61 above, 2 and 6.

¹⁰¹ UNCLOS, *ibid*, Art 311 (2), which states that: ‘This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.’ On the relation between LOS and the purposes set forth in the UN Charter, see I. Papanicolopulu, ‘Human Rights and the Law of the Sea’ n 60 above, 531-532.

¹⁰² SUA Convention, n 99 above, Art 2 bis (1), according to which: ‘Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international human rights, refugee and humanitarian law.’

¹⁰³ T. Treves, n 61 above, 5 and 6; ITLOS, *M/V Saiga (no 2) (St. Vincent v Guinea)*, n 61 above, para 155; ITLOS, *Juno Trader*, n 61 above, para 77; Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above, paras 24-25 and 75-78.

commander, the duty to provide immediate assistance beyond the state's SAR zone – cannot be directly claimed by the alleged victims.¹⁰⁴ This notwithstanding, if the breach of these duties results in an infringement of human rights obligations, then alleged victims may claim such a violation before the relevant international treaty bodies or courts. This assumption applies also to the afore-examined pull-back practices,¹⁰⁵ regardless of their formal qualification,¹⁰⁶ as shown by the case-law of the ECtHR, which is examined in detail below.¹⁰⁷

IV. Issues Arising Under International Human Rights Law

As a preliminary remark, IHRL sets forth both negative and positive obligations towards individuals. As for the former, states are obliged to respect human rights, ie to abstain from illicitly interfering in the exercise of the relevant right.¹⁰⁸ As for the latter, countries are under the duty to protect and fulfil human rights, ie to prevent the breach of these rights as a consequence of the actions performed by other actors – eg third states, non-state actors, or individuals; if a breach occurs, countries should perform a proper official, independent and public investigation and prosecute the wrongdoer.¹⁰⁹ Positive obligations under human rights treaties are not absolute: states are required to exercise due diligence, according to which countries must take all measures *reasonably within their power* to prevent, investigate, punish and redress the harm caused by other actors' activities.¹¹⁰

Therefore, the responsibility of states may arise from both commissive and omissive conducts. A country is responsible for committing the wrongdoing, hence for acts of its organs or agents whose actions breach a negative human rights obligation¹¹¹ – eg state agents returning a person to a territory where there is a

¹⁰⁴ I. Papanicolopulu, 'The duty to rescue at sea' n 65 above, 502.

¹⁰⁵ Section II.

¹⁰⁶ Eur. Court H.R. (GC), *Hirsi-Jamaa and others v Italy* n 61 above, paras 78-81, 178.

¹⁰⁷ Section IV and Section V.

¹⁰⁸ States can interfere with the enjoyment of human rights in accordance with the specific requirements set forth in limitation clauses attached to the article enshrining the right or freedom involved – eg according to International Covenant on Civil and Political Rights (16 December 1966, entry into force 23 March 1976) 999 UNTS 171 (ICCPR), Art 12 (3) the right to leave a country may be subjected solely to restrictions provided by law, necessary to protect one of the aim listed in the provision, and consistent with the other rights recognized in the Covenant. States can also limit the enjoyment of human rights in accordance with the conditions established under general emergency clauses contained in human rights treaty (see eg ICCPR, Art 4, or ECHR, n 8 above, Art 15).

¹⁰⁹ B. Conforti, n 9 above, 217-218; A. Cassese, *I diritti umani oggi* (Bari: Editori Laterza, 2005), 126-130.

¹¹⁰ On the duty of due diligence, see eg J. Kulesza, *Due Diligence in International Law* (Leida: Brill, 2016).

¹¹¹ M. Milanovic, *Extraterritorial Application of Human Rights - Law, Principles and Policy* (Oxford: Oxford University Press, 2011), 46-47, and the case-law analysed therein.

serious risk of being subjected to cruel, inhuman or degrading treatment. Moreover, a country may also be responsible where it does not commit the act that violates human rights: its international responsibility may arise because of the lack of due diligence in preventing or responding to the illicit behaviour of other actors¹¹² – eg state agents do not prevent a shipwreck which causes a number of deaths, even knowing that the event was going to take place.

As for the territorial scope of obligations under conventional human rights law,¹¹³ states are bound to respect, protect and fulfil rights and freedoms enshrined in treaty provisions to individuals *within their jurisdiction*.¹¹⁴ Jurisdiction is the precondition to determine whether the country is obliged to comply with conventional duties and, therefore, to qualify its conducts as a violation of such norms – ie an internationally wrongful act.¹¹⁵ Although the jurisdiction of states is primarily territorial, it may sometimes be exercised outside their borders.¹¹⁶ Hence, according to the jurisdictional clause contained in human rights' treaties, countries are under the duty to secure human rights within their territory, as well as extraterritorially where they exercise jurisdiction outside their national frontiers.¹¹⁷

Concerning the requirements to be met in order to affirm that a country exercises extraterritorial jurisdiction, courts have developed two main models: the spatial model and the personal model.¹¹⁸ The first model requires the exercise of effective control, ultimate authority and control, or ultimate control over an area outside the national territory;¹¹⁹ the second model entails the exercise

¹¹² *ibid* 209-210, and the case-law examined therein.

¹¹³ On the issue of the (purportedly) different territorial scope of human rights obligations enshrined under conventional law and customary international law, see eg N. Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008) 138-139; N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010), 232-235; M. Milanovic, *Extraterritorial Application* n 111 above, 3.

¹¹⁴ For a general overview of the jurisdictional clause, and of the treaties containing such a provision, see M. Milanovic, *ibid*, 11-18.

¹¹⁵ *ibid* 46.

¹¹⁶ See eg HRC, *Delia Saldias de Lopez v Uruguay*, 29 July 1981, CCPR/C/13/D/52/1979, paras 12.1-12.3; Eur. Court H.R. (GC), *Loizidou v Turkey (Preliminary Objections)*, Judgment of 23 March 1995, paras 59-64, available at www.hudoc.echr.coe.it; Inter-American Commission HR, *Coard et al v United States*, Report no 109/99 of 29 September 1999, paras 36-37; International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, 2004 I.C.J. 131, para 109; ICJ, *Armed Activities of the Territory of the Congo (Dem. Rep. Congo v Uganda)*, Judgment of 19 December 2005, 2005 I.C.J. 168, para 216. See also A. Cassese, n 109 above, 45-46.

¹¹⁷ See eg UNHRC, 'General comment 31 - The nature of the general legal obligation imposed on States Parties to the Covenant' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2004) CCPR/C/21/Rev.1/Add.13 (General Comment 31), para 10; Eur. Court H.R. (GC), *Al-Skeini and others v the United Kingdom*, Judgment of 7 July 2011, paras 131-132, available at www.hudoc.echr.coe.it.

¹¹⁸ For an overview of the main features of these models, see M. Milanovic, *Extraterritorial Application* n 111 above, 118-207.

¹¹⁹ As for scholars, see *ibid* 127-172; M. Milanovic, '*Al-Skeini and Al-Jedda in Strasbourg*'

of authority, power or control over an individual.¹²⁰ The issue of whether the grounds required to declare the extraterritorial jurisdiction of the state involved are met is determined on a case-by-case basis, by taking into account the specific circumstances of the episode under inquiry.¹²¹

In relation to interception of migrant boat at sea, the most challenging question does not regard the determination of the treaty-based rights that risk being violated, but whether the state involved exercises its jurisdiction extraterritorially with regard to situations at sea. Both these aspects are analysed in the following paras.

1. The Treaty-Based Rights at Stake

The implementation of *non-entrée* measures jeopardises several human rights enshrined in treaties and conventions: the right to life, in situations involving shipwrecks and drownings;¹²² the principle of *non-refoulement*, where individuals

23 *European Journal of International Law*, 121 (2012); M. Milanovic, 'Jurisdiction, Attribution and Responsibility in *Jaloud*' (2014), available at <https://tinyurl.com/y7v5flc6> (last visited 27 December 2018). As for the case law, see eg Eur. Court H.R., *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Judgment of 2 March 2007, paras 134-135, 140, regarding the criteria of 'ultimate authority and control' and 'effective command'; Eur. Court H.R. (GC), *Al-Skeini and others v the United Kingdom* n 117 above, paras 138-139, concerning the criterion of 'effective control'; Eur. Court H.R. (GC), *Al-Jedda and others v the United Kingdom*, Judgment of 7 July 2011, para 84, on the criteria of 'effective control' and 'ultimate authority and control'; Eur. Court H.R., *Jaloud v the Netherlands*, Judgment of 20 November 2014, paras 143 and 149, regarding the criterion of 'full command'. All these judgments and decisions of the Eur. Court H.R. are available at www.hudoc.echr.coe.it.

¹²⁰ M. Milanovic, *Extraterritorial Application* n 111 above, 173-208. See also Eur. Court H.R., *Banković and others v Belgium and others*, Judgment of 12 2001, para 71, concerning the criteria of the exercise of 'power'; Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above, para 81, on the criterion of 'exclusive control' over a person; Eur. Court H.R. (GC), *Al-Skeini and others v the United Kingdom* n 117 above, para 137, regarding the criterion of 'control and authority over an individual'; Eur. Court H.R., *Jaloud v the Netherlands* n 119 above, para 124, on the criteria of 'exclusive physical power and control and actual or purported legal authority over an individual'. All these judgments and decisions of the Eur. Court H.R. are available at www.hudoc.echr.coe.it.

¹²¹ See eg Eur. Court H.R. (GC), *Al-Skeini and others v the United Kingdom* n 117 above, para 132, available at www.hudoc.echr.coe.it. See also eg P. De Sena, *La nozione di giurisdizione nei trattati sui diritti dell'uomo* (Torino: Giappichelli, 2002), 228-229.

¹²² See eg UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR), Art 3; ICCPR, n 108 above, Art 6; ECHR, n 8 above, Art 2; Organization of African Unity, African Charter on Human and Peoples' Rights, 'Banjul Charter' (27 June 1981, entry into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (AfCHR), Art 4; Organization of American States, American Convention on Human Rights, 'Pact of San Jose', Costa Rica (22 November 1969, entry into force 18 July 1978) (ACHR) Art 4; League of Arab States, Arab Charter on Human Rights (22 May 2004, entered into force 15 March 2008) (Arab Charter) Art 5.

For a detailed analysis concerning the relations between the duty to rescue and the right to life, see I. Papanicolopulu, 'The duty to rescue at sea' n 65 above, 509-513; S. Trevisanut, 'Is There a Right to be Rescued at Sea?' n 88 above; L.M. Komp, n 66 above, 236-242; E.

are disembarked to a country where they risk being subjected to serious human rights violations;¹²³ the right to leave a country, since they are returned to the state from which they were fleeing;¹²⁴ and the prohibition of collective expulsion, since the removal does not follow the individual examination of the particular situation of each of the retrieved persons.¹²⁵ These provisions apply also to pull-backs, such as the one which occurred on 6 November 2017, since they are set forth by human rights instruments to which Italy and Libya are parties.¹²⁶

The right to life requires states to refrain from conduct which results in an arbitrary deprivation of lives, and to take ‘all reasonable precautionary steps’ to protect life and avoid preventable and foreseeable deaths.¹²⁷ This right is not

Papastavridis, ‘Is there a right to be rescued at sea? A skeptical view’ 4 *Question of International Law*, 17 (2014).

¹²³ The principle of *non-refoulement* has been initially affirmed in the field of the protection of refugees, and was later established in the broader context of IHRL. See eg Sir E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’, in E. Felleret al eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 87. As for the IHRL provisions enshrining this principle, see eg UDHR, n 122 above, Art 5; ICCPR, n 108 above, Art 7 as interpreted in UNHRC, ‘General Comment 20’ (2008) HRI/HEN/1/Rev.1, para 9; ECHR, n 8 above, Art 3, as interpreted by ECtHR - eg Eur. Court H.R., *Soering v United Kingdom*, Judgment of 15 November 1996, paras 87-88, available at www.hudoc.echr.coe.it; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984; entered into force 26 June 1987), 1465 UNTS 85, Art 3; AfCHR, n 122 above, Art 5; ACHR, n 122 above, Art 22 (8). On the relationship between *non-entrée measures* and the principle of *non-refoulement*, see eg M. Giuffré, ‘State Responsibility’ n 5 above, 717-720; V. Moreno-Lax and M. Giuffré, n 12 above, 10-12; M. Giuffré, ‘Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations’, in V. Moreno-Lax and E. Papastavridis eds, *Boat Refugees and Migrants at Sea* n 5 above, 248, 252-272; T. Gammeltoft-Hansen, n 60 above, 62; T. Scovazzi, n 63 above, 241-242.

¹²⁴ See eg UDHR, n 122 above, Art 13(2); ICCPR, n 108 above, Art 12(2); ECHR, n 8 above, Art 2 (2), Protocol no 4; AfCHR, n 122 above, Art 12 (2); ACHR, n 122 above, Art 22 (2), Arab Charter, n 122 above, Art 27. For a detailed analysis of the relationship between interception of boat migrants and the right to leave, see eg N. Markard, n 6 above; V. Moreno-Lax and M. Giuffré, n 12 above, 12-14. On the right to leave a country as an ‘asymmetric right’ see eg T. Scovazzi, n 63 above, 212.

¹²⁵ See eg ECHR, n 8 above, Art 4, Protocol no 4; AfCHR, n 122 above, Art 12; ACHR, n 122 above, Art 22 (9); Arab Charter, n 122 above, Art 26 (2). See also Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above, paras 166 and 177, available at www.hudoc.echr.coe.it.

¹²⁶ Interception at sea gives also rise to concerns regarding the prohibition of arbitrary deprivation of liberty, in cases where the crew and other individuals on board the intercepted vessel are held for days on the rescuing ship. This prohibition is set forth in several human right provisions, as UDHR, n 122 above, Art 3; ICCPR, n 108 above, Art 9; ECHR, n 8 above, Art 5; AfCHR, n 122 above, Art 6; ACHR, n 122 above, Art 7, Arab Charter, n 122 above, Art 14. On this regard, see eg T. Treves, n 61 above, 7-10; J. Coppens, n 98 above, 218-220.

¹²⁷ See eg HRC, Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary and arbitrary executions, ‘Unlawful Death of Refugees and Migrants’ 29(4) *International Journal of Refugee Law*, 668, 673; Eur. Court H.R., *Osman v The United Kingdom*, Judgment of 28 October 1998, para 116, available at www.hudoc.echr.coe.it; Eur. Court H.R., *Ilhan v Turkey*, Judgment of 27 June 2000, paras 75-76, available at www.hudoc.echr.coe.it; HRC, *Chongwe v Zambia*, Views of 25 November 2000, para 5.2;

absolute, and the relevant treaties expressly establish the conditions to be met in order to lawfully limit its enjoyment.¹²⁸ In the context of SAR operations, this rule provides for states involved in these activities to take all reasonable measures to assist people in distress.¹²⁹ However, in cases of interceptions of migrant boat at sea, state agents performing push-backs and pull-backs may endanger the life of the persons in distress, either intentionally or negligently.¹³⁰ Any death occurring under this circumstance amounts to an arbitrary deprivation of life, since national authorities involved in these operations did not take all the reasonable measures to protect and avoid the loss of lives of the individuals in distress. With regard to the pull-back of 6 November 2017, according to the evidence gathered, the uncertainty concerning which of the retrieving vessels was the on-scene commander hindered a proper coordination between the rescuing ships, which resulted in the death by drowning of one of the individuals on board the migrant boat in distress.¹³¹ Moreover, the information collected illustrates that the Libyan Coast Guard unit performed dangerous manoeuvres, alongside actively frustrating the attempt of the Sea-Watch 3 crew to carry out the rescue. Due to these conducts, another person in distress died at sea during the operation.¹³² Legitimate doubts could arise on whether Italy could be held responsible for the violation of the right to life because the Italian Rescue Coordination Centre did not communicate to the NGO vessel that the Libyan Coast Guard was the on-scene commander – and, hence, for having contributed to the above-mentioned chaotic situation and to the death of one individual. Contrarily, it is unquestionable that the behaviour of the Libyan authorities constitutes a breach of the prohibition of arbitrary deprivation of life, since they intentionally exposed the migrants in distress to a serious danger of losing their

Inter-American Commission of HR, *Rochela Massacre v Colombia*, Judgment of 11 May 2007, para 127.

¹²⁸ Eg ECHR, n 8 above, Art 2, according to which: '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'. See also ICCPR, n 108 above, Art 6, whose para 1 states that: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'; whilst, paras 2, 4, 5 and 6 establishes specific guarantees referred to countries which have not yet abolished the death penalty, in order to ensure that such sentence is applied only 'for the most serious crimes' and under the strict limits.

¹²⁹ For different opinion on the relationship between the duty to rescue and the right to life, see E. Papastavridis, 'Is there a right to be rescued at sea?' n 122 above, and S. Trevisanut, 'Is There a Right to be Rescued at Sea?' n 88 above.

¹³⁰ HRC, Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary and arbitrary executions, n 127 above, 673, 677; L.M. Komp, n 66 above, 239.

¹³¹ Forensic Oceanographic n 7 above, 96.

¹³² *ibid.*

life, as well as causing the death of one of them.

The principle of *non-refoulement* is a *ius cogens* rule of IHRL that provides the prohibition to remove an individual to a state where he or she risks being subjected to serious human rights violations (direct *refoulement*), or to an intermediate country where there is danger of a subsequent transfer of the person to a state where he or she would be at risk of being victim of such breaches (indirect *refoulement*).¹³³ The assessment of the risk is speculative, and is grounded on a case-by-case basis evaluation according to an objective and a subjective test: in order to determine whether there is a real risk of being subjected to serious human rights violations (or to another transfer) once removed to the country of destination, the sending state must take into account – in a cumulative or alternative way – both the general situation concerning the respect of human rights in the receiving state and the particular situation of the individual concerned.¹³⁴ The principle applies to removal of people already in the territory of the country, as well as to rejection at borders, in transit zones (eg airports) and on the high seas.¹³⁵ With a specific reference to the pull-back of 6 November 2017, at the end of the operation coordinated by the Italian Rescue Coordination Centre, the Libyan Coast Guard returned to Libya fifty-nine of the retrieved migrants, at least two of which were removed to their countries of origin – from which they were fleeing.¹³⁶ If it is determined that Italy exercised jurisdiction, then it would be deemed as responsible for direct *refoulement*, due to the return of individuals to Libya, and indirect *refoulement*, because of the removal of (at least) two of these persons to their countries of origin. Simultaneously, this latter circumstance constitutes also a breach of the prohibition of direct *refoulement* attributable to Libya.

The right to leave a country including one's own is not absolute, and the limits to this entitlement are two. On the one hand, a would-be destination country has the power to regulate the entry, residency and expulsions of aliens as a corollary of state sovereignty over its territory. On the other hand, countries of departure may restrict the enjoyment of this right if this limit is lawful, necessary to achieve one of the legitimate aims listed in the treaty provision, and proportionate.¹³⁷ In the case at stake, none of these requirements is met.

¹³³ See eg Sir E. Lauterpacht and D. Bethlehem, n 123 above, 150-164; UNHRC, 'General Comment 31' n 117 above, para 12; Eur Court H.R., *T.I. v United Kingdom*, Judgment of 7 March 2000; Eur. Court H.R., *Abdolkhani and Karimnia v Turkey*, Judgment of 22 September 2009, para 88; Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above, paras 146-158. All these judgments and decisions of the Eur. Court H.R. are available at www.hudoc.echr.coe.it.

¹³⁴ For a comprehensive analysis on the assessment of the risk, see F. De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture* (Leiden: Brill, 2016), 232-450.

¹³⁵ See eg E. Lauterpacht and D. Bethlehem, n 123 above, 110-111.

¹³⁶ Forensic Oceanographic, n 7 above, 98.

¹³⁷ Eg ECHR, n 8 above, Arts 12 (2) and (3), according to which: 'Everyone shall be free to

First and foremost, the Italy-Libya MoU does not expressly provide for the Libyan Coast Guard performing pull-backs at sea.¹³⁸ Secondly, it is at least doubtful that these measures are meant to pursue one of the legitimate objectives listed in the relevant rules. Thirdly, the principle of proportionality requires a balancing test between the interests at stake – ie the right to leave and the power of states to restrict such entitlement. This balancing test must be carried out on a case-by-case basis, taking into account the specific situation of the individual targeted by the limitation. All pull-backs, included the one performed on 6 November 2017, imply a blanket restriction of the right to leave which does not satisfy the above-mentioned conditions. Therefore, a competent treaty bodies could declare Libya responsible for this breach.¹³⁹

Lastly, the prohibition of collective expulsion forbids states parties to the relevant conventions from compelling aliens, as a group, to leave their territory, unless this measure is a result of a reasonable and objective assessment of the specific case of each member of the group.¹⁴⁰ Similarly to the principle of *non-refoulement*, this prohibition applies to persons within the territory of the state, as well as to land borders and on high seas – hence, interceptions in this maritime zones that prevent migrants from reaching the frontiers of the state are qualified as collective expulsions.¹⁴¹ With reference to the pull-back of 6 November 2017, the persons on board of the migrant boat were taken back to Libya without an individual assessment of the specific situation of each of them. In this regard, Libya could not be considered responsible for the breach of this provision, since it did not perform an expulsion, but a return - which is the reason underpinning the violation of the right to leave a country. Contrarily, if it is determined that Italy exercised jurisdiction, then it will be held responsible for the infringement of this rule.¹⁴²

Having said that, the application of these guarantees at operations on high

leave any country, including his own. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'; ICCPR, n 108 above, Arts 12 (2) and (3), stating that: 'Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'.

¹³⁸ On the Italy-Libya MoU, see Section II above.

¹³⁹ For a similar opinion, see eg N. Markard, n 6 above; V. Moreno-Lax and M. Giuffré, n 12 above, 12-14.

¹⁴⁰ See eg Eur. Court H.R., *N.D. and N.T. v Spain*, Judgment of 3 October 2017, para 98, available at www.hudoc.echr.coe.it.

¹⁴¹ See eg *ibid* paras 99-108; Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above, para 180. See also Inter-American Commission HR, *The Haitian Centre for Human Rights et al v United States*, Decision of 3 March 1997, paras 156-157, 163 and 188.

¹⁴² Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above, paras 181-186.

seas is questionable due to the uncertainty concerning the exercise of extraterritorial jurisdiction. In this context, a clear distinction between, on one side, control over the vessel and, on the other side, control over the crew or other individuals on board is highly problematic, if not impossible.¹⁴³ Thereby, the traditional difference between the spatial and personal model of jurisdiction appears to be misleading in the determination of whether the state involved is under the duty to respect, protect and fulfil human rights on the boat concerned. This ambiguity is confirmed by the case-law of the European Court of Human Rights (ECtHR) on applications claiming the violation of the rights enshrined in the European Convention of Human Rights (ECHR) in the context of activities performed outside territorial waters.¹⁴⁴

2. The Issue of the Extraterritorial Application of Conventional Human Rights Law: The Case-Law of the ECtHR Concerning Activities on the High Seas

The Strasbourg Court had few opportunities to clarify the territorial scope of the ECHR with reference to operations carried out by states parties beyond their territorial waters. Two situations were brought to the Court's attention. The first one concerns the activities of states' agents on ships flying the flag of that country. In this regard, the ECtHR affirmed that the state of the flag exercised *de jure* control over the individuals located on those vessels and, for this reason, they were within its exclusive jurisdiction.¹⁴⁵ It is worth noting that the Court considered the LOS provisions as relevant in the interpretation of the jurisdictional clause set forth in the Convention.¹⁴⁶ The second situation involves states' agents carrying out actions on vessels flying the flag of a third country – ie on which the respondent country does not have a legitimate entitlement to exercise *de jure* control. In such cases, the Strasbourg Court declared that the applicants

¹⁴³ M. Milanovic, *Extraterritorial Application* n 111 above, 169. On the application of human rights on the high seas, see also T. Scovazzi, n 63 above, 247-251.

¹⁴⁴ See eg Eur. Court H.R., *Rigopoulos v Spain*, Judgment of 1 January 1999; Eur. Court H.R., *Xhavara et Autres v Italie et Albanie*, Judgment of 11 January 2001; Eur. Court H.R., *Medvedyev and others v France*, Judgment of 10 July 2008; Eur. Court. H.R., *Women on Waves and others v Portugal*, Judgment of 3 February 2009; Eur. Court H.R. (GC), *Medvedyev and others v France*, Judgment of 29 March 2010; Eur. Court. H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above. All these judgments and decisions of the Eur. Court H.R. are available at www.hudoc.echr.coe.it.

¹⁴⁵ See eg Eur. Court H.R. (GC), *Medvedyev and others v France* n 144 above, para 65; Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above, paras 77 and 81. In this regard, see also ITLOS, *M/V Saiga (no 2) (Saint Vincent v Guinea)*, n 61 above, para 107, in which the Tribunal stated that 'the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State'.

¹⁴⁶ Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy*, n 61 above, para 77, in which the ECtHR stated that '*by virtue of the relevant provisions of the law of the sea*, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying' (emphasis added).

were within the respondent states' jurisdiction due to the *de facto* control exercised on the boat, the crew and other individuals on board.¹⁴⁷ The most significant judgment on the matter is the *Medvedyev* case. In the context of the fight against drug trafficking, the French authorities suspected that a vessel flying a Cambodian flag was carrying a huge quantity of drugs. For this reason, they requested and obtained the permission from Cambodia to intercept, search and seize the boat, as well as detain the members of the crew. The detention took place on board of the Cambodian ship, under the French military guard, and lasted until the arrival in France, where the members were submitted to criminal proceedings. According to the Grand Chamber, France

‘exercised full and exclusive control over the vessel and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France’.¹⁴⁸

When it comes to the externalization of the management of migratory flow, it is necessary to distinguish push-backs from pull-backs. As previously mentioned, the former measure consists of the interdiction of boat migrants performed by the would-be destination state, whilst the latter entails the interception and return of these vessels by departure countries, in the interest or on behalf of the putative receiving state.¹⁴⁹

The ECtHR had the chance to issue a judgment on push-back practices in the *Hirsi Jamaa* case, in which the Court held Italy responsible for violating the principle of *non-refoulement* (Art 3 ECHR) and the prohibition of collective expulsion (Art 4, Protocol 4 ECHR).¹⁵⁰ The case concerned a group of Eritrean

¹⁴⁷ See eg Eur. Court. H.R., *Medvedyev and others v France* n 144 above, paras 50; Eur. Court H.R. (GC), *Medvedyev and others v. France*, n 144 above, para 67; Eur. Court H.R., *Women on Waves and others v Portugal* n 144 above. The *Women on Waves* case concerned a Portuguese warship intercepting a vessel in order to prevent its entrance in Portuguese territorial water. The warship did not board the other vessel, but it simply performed tactical manoeuvres aimed at stopping the course of the vessel. The Court did not explicitly consider the issue of the extraterritorial jurisdiction, but directly examined the case on the merit. Hence, it seems that the ECtHR deemed the manoeuvring of the warship as a sufficient ground to determine the exercise of jurisdiction by Portugal.

On the case-law of the ECtHR concerning the protection of human rights within the context of LOS, see also M. Milanovic, *Extraterritorial Application* n 111 above, 161-170; J. Coppens, n 98 above, 218-220. On the use of the criterion of ‘*de facto* control’ see also UN Committee Against Torture (CAT), General Comment no 2: Implementation of Art 2 by States Parties, 24 January 2008, CAT/C/GC/2, para 16; CAT, *J.H.A. v Spain*, Decision of 21 November 2008, U.N. Doc. CAT/C/41/D/323/2007, para 8.2.

¹⁴⁸ Eur. Court H.R. (GC), *Medvedyev and others v France* n 144 above, para 67. In this regard, M. Milanovic, *Extraterritorial Application* n 111 above, 164, underlined that ‘it is unclear whether the Court applies a spatial model (control over the ship) or a personal one (control over the crew).’ For an analysis of the *Medvedyev* case, see also T. Treves, n 61 above, 7-9.

¹⁴⁹ Section II above.

¹⁵⁰ Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above. For a more detailed analysis of the judgment, see eg M. Giuffrè, ‘State Responsibility’ n 5 above; F. Lenzerini, ‘Il

and Somali nationals that, during an attempt to reach Italy by sea, was intercepted by vessels of the Italian Revenue Police and Coast Guard. These individuals were transferred onto the Italian boats and returned to Libya. Both the interception and the transfer onto the Italian warship occurred on the high seas, and were performed under the cooperation partnership that was then in force between Italy and Libya.¹⁵¹ As a preliminary issue, the Strasbourg Court examined whether Italy had exercised jurisdiction and, consequently, whether the Court itself had the competence in analysing the merit of the case.

The Grand Chamber declared that, in the case at hand, Italian authorities had exercised a ‘continuous and exclusive *de jure* and *de facto* control’ over the applicants. This control stems from two elements: the first one regards the location of the events, which ‘took entirely place on board ships of the Italian armed force’; the second one attains to the nationality of the members of the crews of these vessels, which ‘were composed exclusively of Italian military personnel’.¹⁵² These two aspects represent the grounds on which the Court declared that Italy had exercised extraterritorial jurisdiction on the applicants. The Strasbourg Court also emphasized that the respondent state could not ‘circumvent its jurisdiction’ under the ECHR by qualifying the activities as SAR operations on the high seas, since it was a mere speculation of the nature and purpose of the intervention which would not have led the Court to any other conclusion.¹⁵³

This latter statement is central in the effort to harmonize LOS and IHRL and, thereby, to avoid states circumventing international obligations alongside their responsibility for the violation of rights towards migrants - a concern raised with regard to pull-backs practices. In this regard, the principle of good faith may prove fundamental. Under this rule, a treaty binding a state must be interpreted and performed in good faith, and its interpretation must be carried out taking into account also the object and purpose of the relevant instrument.¹⁵⁴ According to the International Law Commission (ILC), the interpretation of a treaty according to these criteria is aimed at ensuring that the convention concerned produces appropriate effects (so-called principle of effective interpretation, or rule

principio del non-refoulement dopo la sentenza *Hirsi* della Corte europea dei diritti dell'uomo' *Rivista di Diritto Internazionale*, 721 (2012); C. Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' 12(2) *Human Rights Law Review*, 287 (2012); M. Den Heijer, 'Reflections on Refoulement and Collective Expulsion in the *Hirsi* Case' 25 *International Journal of Refugee Law*, 265 (2013).

¹⁵¹ Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e La Grande Giamariria Araba Libica Popolare Socialista (23 October 2008, entry in force 6 February 2009).

¹⁵² Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above, para 81.

¹⁵³ *ibid* paras 79 and 81.

¹⁵⁴ VCLT, n 59 above, Art 26 (*Pacta sunt servanda*): 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'; Art 31 (1) (General Rule of Interpretation): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

of effectiveness).¹⁵⁵

The wording of the LOS treaty provisions concerning the duty to rescue and the duty to establish and maintain adequate and effective SAR services indicate that these obligations pursue a humanitarian purpose, and are aimed at safeguarding life at sea.¹⁵⁶ Besides, the objective of IHRL instruments is the enjoyment of rights and fundamental freedoms thereby enshrined, whose core is the protection of human dignity.¹⁵⁷ In addition, the rationale underpinning the extraterritorial application of human rights is the idea that it would be 'unconscionable' to allow a state to circumvent its IHRL obligations by performing actions outside its borders that, if they were implemented within its territory, would constitute a violation of human rights.¹⁵⁸

These principles have also been affirmed and applied by the ECtHR, according to which

'the object and purpose of the (European) Convention (on Human Rights) as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective'.¹⁵⁹

As a consequence, states parties to the ECHR cannot 'enter into an agreement with another State which conflicts with its obligations under the Convention'.¹⁶⁰

Therefore, adopting bilateral agreements setting forth *non-entrée* polices in the broader context of the securitization of sea routes raises serious concerns related to possible receiving state *bona fide* compliance with obligations stemming from LOS and IHRL. As outlined above, these measures are aimed at shifting the management of flow and the related responsibility from the would-be destination state to the departure state, as in the case of pull-backs:¹⁶¹ through

¹⁵⁵ ILC, 'Yearbook of the International Law Commission - Vol II, A/CN.4/SERA/1966/Add.I (1966), 219, available at <https://tinyurl.com/ybu458lz> (last visited 27 December 2018).

¹⁵⁶ L.M. Komp, n 66 above, 235.

¹⁵⁷ See eg UDHR, n 122 above, Preamble; ICCPR, n 108 above, Preamble; ECHR, n 8 above, Preamble; AfCHR, n 122 above, Preamble; ACHR, n 122 above, Preamble; Arab Charter, n 122 above, Preamble.

¹⁵⁸ HRC, *Delia Saldias de Lopez v Uruguay* n 116 above, para 12.3. See also M. Milanovic, *Extraterritorial Application* n 111 above, 96-98.

¹⁵⁹ See eg Eur. Court H.R., *Soering v United Kingdom* n 123 above, para 87; Eur. Court H.R., *Al-Saadoon and Mufdhi v The United Kingdom*, Judgment of 2 March 2010, para 126, available at www.hudoc.echr.coe.it.

¹⁶⁰ Eur. Court H.R., *Al-Saadoon and Mufdhi v The United Kingdom* n 159 above, para 138. See also Eur. Court H.R., *Hirsi Jamaa and others v Italy* n 61 above, para 129, according to which 'Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States'.

¹⁶¹ N. Markard, n 6 above, 596-597, 616, who specifically referred to the right to leave a

the implementation of these forms of outsourcing, putative destination states seek to abstain from performing operations at sea that would trigger their legal responsibility – ie they try to avoid being held accountable, as happened in the *Hirsi Jamaa* case.¹⁶² Hence, using the words of the Strasbourg Court, this behaviour may hamper the ‘practical and effective’ application of the LOS and IHRL treaty provisions.

However, the extraterritorial application of IHRL and the principle of effective interpretation may not prove adequate instruments to engage possible destination states’ responsibility for an (asserted) violation of migrants’ rights in the context of pull-backs practices. Notwithstanding its value-based rationale,¹⁶³ the practical and effective application of human rights outside a state’s frontiers is limited by its own scope: if the state does not exercise jurisdiction according to (at least one of) the criteria deemed as adequate ground to this end, then it is not bound to the relevant obligation and, hence, it cannot be held responsible for its violation.¹⁶⁴ As for the principle of effectiveness, it is ‘one of the basic principles governing the creation and performance of legal obligations’, but not in itself a source of obligations.¹⁶⁵ This rule of interpretation contributes in clarifying the scope of states’ duties under international law, but it appears too weak to substantiate all alone a claim lodged by an (alleged) victim of human rights violations before national or international courts: a state action or omission concretely infringing or obstructing the functioning of treaty obligations is needed.¹⁶⁶ Moreover, courts, tribunals and treaty bodies established under LOS and IHRL are not tasked with adjudging and declaring on norm conflicts – ie on whether a bilateral treaty among two states is incompatible with obligations binding one or both these states according to previous agreements concerning, respectively,

country and to the principle of *non-refoulement*.

¹⁶² D. Ghezelbash et al, n 5 above, 346; M. Giuffrè, ‘State Responsibility’ n 5 above, 713-716.

¹⁶³ On the value-based approach underpinning the extraterritorial application of human rights, see: HRC, *Delia Saldias de Lopez v Uruguay* n 116 above, para 12.3, in which the HRC stated that: ‘It would be *unconscionable* to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory’ (emphasis added); HRC, *Lilian Celiberti de Casariego v Uruguay*, 29 July 1981, CCPR/C/13/D/56/1979, individual opinion of C. Tomuschat, according to which ‘excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to *utterly absurd* results’ (emphasis added). On the relation among the value-based rationale underpinning the extraterritorial application of IHRL and the universality of human rights, see also: M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P. Engel, 2005), 3, 43-44; M. Milanovic, *Extraterritorial Application* n 111 above, 175-177.

¹⁶⁴ M. Milanovic, *ibid*, 46, 177.

¹⁶⁵ ICJ, *Nuclear Tests Case (Australia v France)*, Judgment of 20 December 1974, I.C.J. Reports 1974, 253, para 46; ICJ, *Case Concerning Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)*, Judgment of 20 December 1988, I.C.J. Reports 1988, 69, para 94.

¹⁶⁶ Eur. Court H.R. (GC), *Hirsi Jamaa and others v Italy* n 61 above, Concurring Opinion of Judge Pinto de Albuquerque, 68-69.

the law of the sea or the international protection of human rights. Their task is to assess whether specific events constitute a violation of the relevant instrument under which they are established.

The following section puts to the test the first of these feature – ie the effectiveness of extraterritorial application of human rights – in the context of pull-backs, with reference to the application lodged before the ECtHR concerning the episode of 6 November 2017. Moreover, it explores the interplay between, on the one hand, the secondary rules of international law concerning attribution of conducts and, on the other hand, the doctrine of positive obligations as a mean to trigger state responsibility under IHRL.

V. The Issues Specifically Concerning the Proceeding Before the European Court of Human Rights: Jurisdiction, Attribution and the Doctrine of Positive Obligations

Among the human rights treaty-based bodies, the ECtHR proved to be the most effective in ensuring the protection of fundamental rights.¹⁶⁷ However, lodging a successful application claiming the violation of the ECHR outside the relevant state's borders is quite challenging, since the competence of the Strasbourg Court in reviewing these cases depends on whether the respondent state exercised extraterritorial jurisdiction with reference to the specific event under inquiry.

First and foremost, it has to be noted that this episode is completely different from the one examined in the *Hirsi Jamaa* judgment. In the present case, the interception and returning were performed by a Libyan Coast Guard unit that, although donated by Italy, flew the Libyan flag; moreover, the members of the crew were Libyan. Hence, in the word of the ECtHR, it seems that Libya exercised a 'continuous and exclusive *de jure* and *de facto* control' over the retrieved migrants.¹⁶⁸

In order to overcome the difficulty in determining whether the state outsourcing the management exercises extraterritorial jurisdiction, it has been

¹⁶⁷ See eg B. Conforti, n 9 above, 481; A. Cassese, n 109 above, 107.

¹⁶⁸ For a different opinion, see S. Trevisanut, 'Is There a Right to be Rescued at Sea?' n 88 above, 12-13; Id, 'Search and Rescue Operations at Sea', in A. Nollkaemper and I. Plakokefalos eds, *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017), 426, 437-438. According to the Author, the distress call launched by the boat migrant on high seas and the state receiving it 'creates a 'factual' relation' between the persons on the vessel and the recipient state. This 'factual relation' could represent the basis of the existence of an 'exclusive long distance *de facto* control that the state, which received the call, exercises on the lives of those people', since their lives depends on the discretion of that state. Therefore, according to the Author, through the 'long distance *de facto* control', the receiving state exercises its jurisdiction over the migrants in distress. However, this interpretation seems to widen excessively the scope of the criteria of effective control and, consequently, the range of situations in which a state exercises jurisdiction extraterritorially. For an analogous assumption, see also E. Papastavridis, 'Is there a right to be rescued at sea?' n 122 above, 28-29.

proposed to refer to secondary rule of customary international law concerning the attribution of unlawful acts.¹⁶⁹ From this viewpoint, a state can be held accountable if it had supported another country in committing the wrongdoing, although this latter conduct is not attributable to the former state.¹⁷⁰ The rule of complicity has been codified by the ILC in Art 16 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), according to which a state which supports another country committing a wrongdoing directly attributable to the latter can be held responsible for this conduct if three requirements are met: (i) the former state aids or assists the latter country (so-called material element); (ii) the former state acts with the knowledge of the circumstance of the internationally wrongful act (so-called mental element); (iii) the act would be internationally wrongful if committed by that state (so-called opposability element, or communality of obligations).¹⁷¹ The application of this rule would result in the indirect attribution of the illicit act to the respondent state before the ECtHR and, therefore, to its responsibility for conducts committed within a territory or against persons on which it does not exercise jurisdiction. With reference to the episode of 6 November 2017, Italy would be responsible for the conducts of the Libyan Coast Guard.

As for the material element, a plurality of actions can be encompassed in the notion of ‘aid and assistance’, among which financing the activity in question, or providing material support to a state that uses it to commit human rights violations.¹⁷² In the case at hand, Italy has funded, trained and equipped the Libyan agency: with reference to the specific episode of 6 November 2017, it is worth noting that the Libyan Coast Guard unit which performed the interception and return was one of the navy ships donated by Italy; moreover, the Italian Rescue Coordination Centre coordinated the SAR operation.¹⁷³

¹⁶⁹ M. Giuffré, ‘State Responsibility’ n 5 above, 725-732; C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 276-282; V. Moreno-Lax and M. Giuffré, n 12 above, 19-21; N. Markard, n 6 above, 615.

¹⁷⁰ For a comprehensive analysis of the legal doctrine of complicity, see eg H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011); V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (London: Hart Publishing, 2016).

¹⁷¹ ILC, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), November 2001, Supplement no 10 (A/56/10), chp.IV.E.1, Art 16, according to which: ‘A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.’

¹⁷² J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002), 148, 150-151; ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, 422.

¹⁷³ M. Giuffré, ‘State Responsibility’ n 5 above, 725-727; C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 276-279; V. Moreno-Lax and M. Giuffré, n 12 above, 19-20; N. Markard, n

Regarding the mental element, there are (at least) three possible interpretations. The first one is purpose-based and requires that the aid and assistance must pursue the objective to facilitate the commission of the wrongdoing by the another state.¹⁷⁴ The second one sets a lower threshold, and requires that, although the aiding state *knows* facts demonstrating the breaching of international law obligations by a third country, it still provides a support that contributes significantly to the other state's illicit conduct.¹⁷⁵ The third interpretation of the mental element is called 'wilful blindness' and is defined as a state consciously turning a blind aid to credible information showing illicit acts performed by the other state it is aiding or assisting. Whilst under the second interpretation of the mental element the supporting state is aware of the unlawful behaviour of the other country, under the 'wilful blindness' test the assisting state *should have known* such illicit conducts, but it is not aware of it precisely because it chose to avoid such knowledge.¹⁷⁶

In the case at stake, the purpose-based interpretation is hard to satisfy. The MoU aims at lowering the flow, hence there is no evidence that Italy intended to facilitate the death of twenty migrants at sea, or the violation of their fundamental rights once returned to Libya; whilst doubts can be raised on whether Italy planned to ease collective expulsions.¹⁷⁷ Conversely, the application of the second and third thresholds allows the satisfaction of the mental element. Primarily, Italy knew (or should have known) that Libya was characterized by widespread and gross human rights violations against migrants, as several well-known and highly reliable sources have reported.¹⁷⁸ Moreover, with specific reference to the episode of 6 November 2017, the information provided to the Libyan counterpart on the position of the migrant boat in distress, and the acceptance of the designation of the Libyan Coast Guard unit as on-scene commander, alongside the above-mentioned support granted to the Libyan authority under the MoU,

6 above, 615.

¹⁷⁴ J. Crawford, 'The International Law Commission's Articles on State Responsibility' n 172 above, 149.

¹⁷⁵ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* n 172 above, 432; M. Giuffrè, 'State Responsibility' n 5 above, 727-731; V. Moreno-Lax and M. Giuffrè, n 12 above, 21.

¹⁷⁶ Eg M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015), 54, 162; H. Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, Research Paper (2016), 14-17, available at <https://tinyurl.com/y6wr6frg> (last visited 27 December 2018); R. M. Scott, *Torture in Libya and Questions of EU Member State Complicity* (11 January 2018), available at <https://tinyurl.com/ycmbkgjtj> (last visited 27 December 2018); C. Hathaway and T. Gammeltoft-Hansen, n 5 above, 279-281.

¹⁷⁷ For a different opinion, see V. Moreno-Lax and M. Giuffrè, n 12 above, 20.

¹⁷⁸ Eg United Nation Support Mission to Libya (UNMSIL) and Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Detained and dehumanized', 13 December 2016; International Criminal Court, 'Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya', 9 May 2017. See also HRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya', n 56 above.

amount to conducts that ‘contributed significantly’ to the performing of the interception and return to the country of departure.¹⁷⁹

The last condition under Art 16 ARSIWA is the opposability, or commonality of obligations, according to which ‘the conduct in question would have been internationally wrongful if committed by the assisting state’. Yet, the interpretation of this requirement is ambiguous too. The first possible interpretation requires that both countries are bound by obligations laid down in the same norms or sources. The second one demands solely the identity of the content of the relevant obligation, regardless whether or not it is enshrined in the same provision.¹⁸⁰ In the case at hand, Libya is not a party to the ECHR, therefore the adoption of the first interpretation will hamper the possibility to hold Italy responsible for aiding and assisting Libya. Conversely, the second interpretation will lead to the opposite result, since Libya is bound by customary international law and other IHR treaties of a universal nature – such as the International Covenant on Civil and Political Rights, which sets forth the right to life and the principle of *non-refoulement*, which are among the violations claimed before the ECtHR.¹⁸¹ As a consequence, Italy could be held responsible (at least) for the violation of Art 2 and Art 3 of the Convention, since it aided and assisted the Libyan Coast Guard in performing the SAR operation which caused the death of at least twenty individuals, and the return of forty-seven persons to Libya – which, as above-mentioned, is a country that systematically violates migrants’ fundamental rights.¹⁸²

Although this assessment could be deemed as correct from the standpoint of general international law, the Strasbourg Court had invoked the ILC works on attribution of acts and on state responsibility in only a small number of judgments.¹⁸³ Beside this lack of practice, another question is whether or not

¹⁷⁹ See eg V. Moreno-Lax and M. Giuffré, n 12 above, 21; J.P. Gauci, ‘Back to Old Tricks? Italian Responsibility for Returning People to Libya’ (6 June 2017), available at <https://tinyurl.com/ya3oafle> (last visited 27 December 2018).

¹⁸⁰ H.P. Aust, n 170 above, 261-266; J. Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), 410.

¹⁸¹ Section II above.

¹⁸² Eg UNMSIL and OHCHR, n 178 above; International Criminal Court, ‘Statement of the ICC Prosecutor’ n 178 above; HRC, ‘Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya’ n 56 above, para 46.

¹⁸³ See eg Eur. Court H.R., *Al Nashiri v Poland*, Judgment of 24 July 2014, para 207; Eur. Court H.R., *Husayn (Abu Zubaydah) v Poland*, Judgment of 24 July 2014, para 201; Eur. Court H.R. (GC), *El-Masri v The Former Yugoslav Republic of Macedonia*, Judgment of 13 December 2012, para 97; Eur. Court H.R., *Nasr and Ghali v Italy*, Judgment of 23 February 2016, para 187. These judgments are available at www.hudoc.echr.coe.it. It has to be noted that in these cases, the ECtHR simply mentioned Art 16 ARSIWA in the section of the judgment entitled ‘Relevant International Law and Other Public Materials’, whilst the Court did not refer to this Article in the sections addressing the violation of the Convention and the responsibility of the respondent state. Furthermore, the violations under inquiry either were directly attributable to the organs and agents of the state parties to the Convention, or took place within their territory by agents of a third country not bound by the ECHR. See also M. Evans, ‘State

the Monetary Gold Principle could obstruct the assessment concerning the Italian responsibility for aiding and assisting Libya before the ECtHR. This rule concerns the admissibility of claims before international dispute settlement bodies and is meant to prevent these organs from deciding on the international responsibility of a state if, as a prerequisite of this assessment, they would have to rule on the lawfulness of the conduct of another country, which is not a party of the dispute and did not provide its consent.¹⁸⁴

Under Art 16 ARSIWA, the responsibility of the supporting state relies on the circumstance that the third country had committed an internationally wrongful act by virtue of the former assistance: as a consequence, in order to assess the accountability of the supporting state, the relevant mechanism must preliminarily adjudge on the third country responsibility.¹⁸⁵ However, if this latter is not a party of the dispute (or did not provide its consent for this evaluation), then the claim is inadmissible according to the Monetary Gold Principle. As for the case at hand, Libya is not a party of the ECHR and cannot be sued before the ECtHR, which should declare the case inadmissible.¹⁸⁶

Therefore, as long as the Strasbourg Court is the dispute settlement mechanism seized by the applicants, the necessity to determine the exercise of jurisdiction is still at issue. A criterion that could be used in order to assert that Italy exercised extraterritorial jurisdiction is the standard of 'decisive influence', which was developed by the ECtHR case-law concerning the various violations perpetrated in the separatist region of the 'Moldovan Transdnestrian Republic' (MRT).¹⁸⁷ This territory is a region of Moldova that had declared its independence

Responsibility and the European Convention on Human Rights: Role and Realm', in M Fitzmaurice and D Sarooshi eds, *Issues of State Responsibility before International Judicial Institutions (The Clifford Chance Lectures, Vol VII)* (London: Hart Publishing, 2004), 139, 159, in which Author affirms that the circumstance that the ECHR is a human rights treaty 'makes the international principle of State responsibility irrelevant to its operation, so it is not clear why they should referred to at all' (emphasis added); on the relation between state responsibility under general international law and the ECHR, see also J. Crawford and A. Keen, 'The Structure of State Responsibility under the European Convention on Human Rights', in A. van Aaken and I. Motoc eds, *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018).

¹⁸⁴ ICJ, *Case of the Monetary Gold Removed from Rome in 1943 (Italy v France et al) (Preliminary Question)*, 15 June 1954, ICJ Rep 19, 32; ICJ, *East Timor (Portugal v Australia)*, Judgment of 30 June 1995, I. C.J. Reports 1995, 90, para 32. The ECtHR had the chance to examine the application of this rule in the *Bankovic* case, but deemed it not necessary in the light of the other grounds of admissibility: Eur. Court H.R., *Banković and others v Belgium and others* n 120 above, paras 31, 83.

¹⁸⁵ J. Crawford, 'The International Law Commission's Articles on State Responsibility' n 172 above, 151.

¹⁸⁶ On the different situation stemming from the direct responsibility of the respondent state for the breach of the principle of *non-refoulement* and, hence, on the non-applicability of the Monetary Gold Principle, see M. Den Heijer, 'Refoulement', in A. Nollkaemper and I. Plakokefalos eds, *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017), 481, 496.

¹⁸⁷ Eur. Court H.R. (GC), *Ilaşcu and others v Moldova and Russia*, Judgment of 8 July

in 1992-93, with Russian support; this notwithstanding, under general international law the MRT is still recognised as a part of Moldova's territory.¹⁸⁸ According to the Strasbourg Court, Russia exercised extraterritorial jurisdiction over the region for four reasons: (i) the MRT was created with Russian support; (ii) the MRT was under the effective control or authority, or 'at very least under the decisive influence', of Russia; (iii) in any event, the MRT survived 'by virtue of the military, economic, financial and political support' provided by Russia; (iv) Russia continued to support and collaborate with MRT beyond the date of the illicit conduct, and neither acted 'to prevent' nor attempted 'to put an end' to the violations.¹⁸⁹ This case-law may be interpreted as holding Russia responsible for its failure to comply with its positive obligations under the Convention – and not as attributing to Russia each of the conducts performed by MRT agents.¹⁹⁰

Putting aside for one moment the differences between the facts of these cases and the event in question, it is worth examining whether these criteria may constitute the basis to determine the exercise of extraterritorial jurisdiction by Italy during the pull-back of 6 November 2017. Firstly, although the Libyan Coast Guard was not created with the Italian support, until 2016 this agency was barely functional due to limited assets, poor equipment and institutional weakness caused by the 2011 civil war. Against this background, Italy provided a fundamental support in reinforcing the Libyan Coast Guard operational capacity.¹⁹¹ Secondly, while it is true that the Libyan Coast Guard is not under the Italian effective control or authority (since it is within the Libyan Ministry of Defence), it is also true that the circumstances of the several pull-backs performed by the Libyan Coast Guard, and the specific facts of the case at hand, could be read as to suggest that Italy had exercised 'decisive influence' over the Libyan Coast Guard unit that performed the interception and the return to Libya. Thirdly, it is undeniable that the Libyan agency operates thanks to the funding, equipment and training provided by Italy under the MoU. Lastly, Italy

2004; Eur. Court H.R., *Ivanțoc and Others v the Republic of Moldova and Russia*, Judgment of 15 November 2015; Eur. Court H.R. (GC), *Catan and others v The Republic of Moldova and Russia*, Judgment of 19 October 2012; Eur. Court H.R. (GC), *Mozer v the Republic of Moldova and Russia*, Judgment of 23 February 2016; Eur. Court H.R., *Sandu and Others v the Republic of Moldova and Russia*, Judgment of 17 July 2018. All these judgments are available at www.hudoc.echr.coe.it.

¹⁸⁸ See eg most recently Eur. Court H.R. (GC), *Mozer v the Republic of Moldova and Russia* n 187 above, para 100.

¹⁸⁹ Eur. Court H.R. (GC), *Ilașcu and others v Moldova and Russia* n 187 above, paras 392-393; Eur. Court H.R., *Ivanțoc and Others v the Republic of Moldova and Russia* n 187 above, paras 121-122; Eur. Court H.R. (GC), *Mozer v the Republic of Moldova and Russia* n 187 above, para 110; Eur. Court H.R., *Sandu and Others v the Republic of Moldova and Russia* n 187 above, para 36.

¹⁹⁰ M. Milanovic, *Extraterritorial Application* n 111 above, 140; M. Milanovic, 'Grand Chamber Judgment in *Catan and Others*' (12 October 2012) available at <https://tinyurl.com/y7fekwzn> (last visited 27 December 2018).

¹⁹¹ Forensic Oceanography, n 7 above, 29-33.

continued to support Libya and to cooperate with this beyond 6 November 2017, and did not act to prevent, nor try to cease, the conduct of the Libyan authorities during the episode at hand. If the Strasbourg Court decides to apply this case-law to the pull-back at stake, then Italy could be held responsible for a breach of its positive obligations: more in detail, Italy will be responsible for failing to prevent the Libyan Coast Guard from intercepting and returning migrants to Libya (eg by communicating the position of the boat migrant to this agency), and for not trying to stop the Libyan Coast Guard during the operations (eg by designating Sea-Watch 3 as on-scene commander, rather than accepting the assignment of this role to the Libyan unit).

However, as mentioned above, the applications stemming from the violations perpetrated within MRT significantly differ from the pull-back at stake. The most important dissimilarity concerns the location of the events: the former occurred within MRT, a territory over which Russia exercised 'effective control', while the episode of 6 November 2017 occurred on high seas. This circumstance may jeopardise the application of the 'decisive influence' criterion as a means to determine the Italian extraterritorial jurisdiction with reference to the case at hand. The same jurisprudence of the Strasbourg Court concerning the events within the MRT seems to confirm this weakness. In one of these judgments, the ECtHR declared that, although the Republic of Moldova had no effective control over MRT, persons within this region fell within the Moldovan jurisdiction because the Transdniestrian region was within the territorial state of Moldova. As a consequence, the Court stated that while Moldova was not bound to comply with the negative obligations stemming from the Convention – due to the above-mentioned lack of effective control over MRT, it was still compelled to fulfil its positive obligations under the ECHR.¹⁹² Therefore, it seems that the Strasbourg Court anchored the duty to prevent and cease the violations to the factual circumstance that Moldova was the territorial state within which the violations occurred. Conversely, the pull-back of 6 November 2017 took place on high seas, hence in a space which was not within Italian territory (or its territorial waters).

Quite interestingly, ECtHR upheld a more extensive scope of application of the doctrine of positive obligations in – at least – two decisions, according to which

'(e)ven in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Art 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to applicants the rights guaranteed by the Convention'.¹⁹³

¹⁹² Eur. Court H.R., *Sandu and Others v the Republic of Moldova and Russia* n 187 above, para 34.

¹⁹³ Eur. Court H.R., *Manoilescu and Dobrescu v Romania and Russia*, Decision of 3

In these cases, the ECtHR seems to breach the link between, on the one hand, the exercise of extraterritorial jurisdiction based on effective control and, on the other hand, the duty to fulfil positive obligations under the Convention, an approach that could result in Italy being held responsible for the pull-back of 6 November 2017. In spite of this reflection, it has to be noted that none of the Strasbourg Court judgments declaring a state responsible for a violation the ECHR has been based on this criterion. The absence of a previous finding grounded on the ‘decisive influence’ exercised by the respondent country and, simultaneously, on the lack of effective control over a territory (or over the applicants) leaves doubt on whether the ECtHR would ever use this approach in cases concerning pull-backs performed by third countries, as the one at stake.

VI. Conclusion

During the past years, the policies aimed at lowering the migratory pressure on EU frontline member states have been based on the militarization of operations at sea, the criminalization of civil society organizations and the cooperation with third countries. This last tool encompasses also the externalization of the management of migratory movements through bilateral agreements among would-be destination states and countries of departure, a scheme which is highly problematic from the viewpoint of the effective protection of migrants’ fundamental rights. Besides reducing the arrivals, the outsourcing of border-crossing control by means of containment-flow policies performed by third countries aims at shielding putative destination states from their responsibility under international human rights law. Against this background, the pull-back practices have proved extremely successful in achieving both these objectives.

As illustrated by the pull-back of 6 November 2017, neither LOS nor treaty-based provisions of IHRL provide a solution to the challenges concerning the possibility of lodging a successful individual application stemming from these types of situations. On the one hand, although LOS provides for several obligations regarding SAR operations whose purpose is safeguarding human lives, this framework is a state-centred regime which does not provide venues for individual-state disputes. On the other hand, although individuals have standing before the bodies established under human rights treaties, the application of the provisions enshrined therein relies on the determination of whether the states involved in the operation exercise extraterritorial jurisdiction. This circumstance constitutes a condition for the obligation to arise and, consequently, for suing the state concerned before the relevant treaty-based mechanism – such as the ECtHR. Indeed, the competence of conventional human rights bodies to examine cases

with an extraterritorial character depends on the exercise of jurisdiction outside the (potential) respondent state's borders.

According to the criteria developed in the case-law of the Strasbourg Court, a state exercises jurisdiction in situations on high sea where the vessel concerned and the persons on board are under its *de jure* or *de facto* control. In the case of pull-backs, neither the boat in distress nor the migrants are under the control of the possible destination state, since the interception and return are performed by a third country. This circumstance jeopardises the possibility to trigger would-be destination state responsibility for the violations of obligations towards migrants before the Strasbourg Court. Furthermore, it is at least doubtful whether general rules of international law concerning attribution of wrongdoings could fill this accountability gap before the ECtHR, due to both the lack of practice and to the Monetary Gold Principle. This query concerns also the application of the standard of 'decisive influence' as the sole ground on which to determine the exercise of extraterritorial jurisdiction.

The application lodged by the seventeen survivors of the episode of 6 November 2017 represents the first occasion for the Strasbourg Court to examine a claim concerning pull-back practices. The outcome of this proceeding will significantly affect the implementation of *non-entrée* measures by states parties of the Convention. If the ECtHR assesses the responsibility of Italy for the violation of the ECHR, this judgment will negatively impact on the adoption and enforcement of bilateral agreements aimed at outsourcing border-crossing controls, since putative destination states will be required to regulate migration policies in a more protection-sensitive manner in order to comply with the ECHR. Conversely, by declaring either the application inadmissible or the conducts at stake in compliance with the Convention, the Strasbourg Court will uphold the employment of these policies, hence definitively tipping the scale in favour of state sovereignty.