

BEFORE THE FIRST SECTION
OF THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 21660/18

S.S. and Others v. Italy

WRITTEN SUBMISSIONS ON BEHALF OF THE AIRE CENTRE (ADVICE ON INDIVIDUAL RIGHTS IN EUROPE), THE DUTCH REFUGEE COUNCIL (DCR), THE EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) AND THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENERS

pursuant to the Registrar's notification dated 14 October 2019 that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

11 November 2019

1. Jurisdiction under the Court's jurisprudence and international human rights law

The jurisprudence of this Court affirms that, as a general rule, individuals who are present on a State's territory, lawfully or otherwise, fall within that State's jurisdiction, within the meaning of article 1 of the European Convention on Human Rights (ECHR).¹ However, the Court has long recognized that such jurisdiction is not exclusively territorial, but there are circumstances in which the scope of the ECHR will reach beyond the territory of a State Party, particularly through State agents' authority and control or effective control over an area.² In this respect, the Court has emphasized that jurisdiction "may extend to acts of its authorities which produce effects outside its own territory."³ In addition, a "State's responsibility may ... be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction".⁴ Jurisdiction is exercised not only over any territory over which a State Party to the Convention claims actual sovereignty, but also over those territories that the State exercises the functional attributes of sovereignty⁵ and/ or any individuals over whom it exercises authority or effective control regardless of whether the individuals are located outside of the State's territory.⁶ In *Al-Skeini*, the Court has ruled that, "where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State."⁷ People in situations where States have been found to exercise their jurisdiction extraterritorially include those being intercepted on the high seas,⁸ arriving by sea at a port,⁹ or on board of an aircraft refused permission to land.¹⁰ Furthermore, people who are subject to checkpoint controls outside the territory of the State Party are also within its jurisdiction.¹¹

The Court has determined that actions carried out in one country with consequences in another country may be sufficient to trigger the jurisdictional link under the Convention. In *Rantsev v. Russia*, the Court held that, due to the international obligations undertaken by the Russian Federation, it was "for the Court to assess in its examination of the merits of the applicant's Article 2 complaint the extent of any

¹ *Louizidou v. Turkey (Preliminary Objections)*, ECtHR, Application No. 15318/89, Judgment of 23 March 1995, para. 62; *Issa and Others v. Turkey*, Application No. 31821/96, Judgment of 16 November 2004, paras. 68 and 71; *Al-Skeini and Others v. the United Kingdom*, ECtHR, Application No. 55721/07, Judgment of 7 July 2011, para. 131; *Hirsi Jamaa and Others v. Italy*, ECtHR, Application No. 27765/09, Judgment of 23 February 2012, para. 73; *Pad v. Turkey*, ECtHR, Application No. 60167/00, Judgment of 28 June 2007, para. 53.

² *Ibid.*

³ *Al-Skeini and Others v. the United Kingdom*, ECtHR, *op. cit.*, para. 133.

⁴ *Ilascu and others v. Moldova and Russia*, ECtHR, Application No. 48787/99, Judgment of 8 July 2004, para. 317.

⁵ *Al-Skeini and Others v. the United Kingdom*, *op. cit.*, paras. 135, 138 and 149.

⁶ *Issa and Others v. Turkey*, *op. cit.*, para. 72; *Öcalan v. Turkey* (GC), ECtHR, Application No. 46221/99, Judgment, para. 91.

⁷ *Al-Skeini and Others v. the United Kingdom*, *op. cit.*, paras 133-140. Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory. See, *Issa and Others v. Turkey*, *op. cit.*, para. 71; CCPR, *Lopes Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981, para. 12.3.

⁸ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, paras. 78 and 180. In *Medvedyev and Others v. France*, ECtHR [GC], Application No. 3394/03, para. 67, the Court held that the applicants were within French jurisdiction for the purposes of Article 1 by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. "The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question."

⁹ *Sharifi and Others v. Italy and Greece*, ECtHR, Application No. 16643/09, Judgment of 21 October 2014.

¹⁰ *East African Asians (British protected persons) v. the United Kingdom*, ECtHR, Application Nos. 4715/70, 4783/71 and 4827/71, Judgment of 6 March 1978.

¹¹ *Ibid.*

procedural obligation incumbent on the Russian authorities and whether any such obligation was discharged in the circumstances of the present case.”¹² In *Andreou v. Turkey*, the Court explained that, “even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as “within [the] jurisdiction””¹³ The jurisdictional links may be even tighter when the actions are based on an international agreement binding upon the States. Thus, the Court found a jurisdictional link in *Aliyeva and Aliyev v. Azerbaijan*, where Azerbaijani authorities had begun investigations into a murder committed in Ukraine based on a criminal cooperation agreement, the 1993 Minsk Convention. This Court held that “Azerbaijani jurisdiction under Article 1 was engaged ..., in accordance with the applicable international treaty and their national law.”¹⁴ The Grand Chamber in *Güzelyurtlu and others v. Cyprus and Turkey*, held that “the institution of ... investigation or ... proceedings [by the authorities of one State on facts occurred in another State] is sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim’s relatives who later bring proceedings before the Court.”¹⁵ This basis for jurisdiction, in *Romeo Castaño v. Belgium*, was extended to a situation where the existence of competence under the European Arrest Warrant was sufficient to trigger the jurisdictional link under article 1 ECHR in relation to the procedural obligations under article 2 ECHR.¹⁶

This Court further found that jurisdiction may be engaged where the State authorities take action “the effect of which is to prevent non-nationals from reaching the borders of the State or even to push them back to another State.”¹⁷ Construing obligations in this manner is necessary in order to avoid depriving the Convention rights of effectiveness.¹⁸ In *Xhavara and Others v. Italy and Albania*,¹⁹ the Court implicitly found it had jurisdiction (having ruled only on the issue of admissibility *ratione personae*) when an Italian navy vessel collided into a boat outside territorial waters (35 nautical miles). In *Hirsi*, the Grand Chamber concluded that, “as regards the exercise by a State of its jurisdiction on the high seas, ... 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.”²⁰

The Court’s jurisprudence is buttressed by the assertions of other Council of Europe (CoE) authorities. The Committee of Ministers of the CoE has recognised its Member States’ “increased responsibility for their protection and requires careful consideration from a human rights perspective, taking into account States’ positive obligations to protect children at risk of losing their lives at sea, whether stemming from the law of the sea or human rights treaties.”²¹ The CoE’s Commissioner for Human Rights has recently affirmed in its Recommendation *Lives Saved. Rights Protected* that “the effective protection and promotion of the human rights of refugees, asylum seekers and migrants, at sea and on land, should always prevail over any dilemma or

¹² *Rantsev v. Russia*, ECtHR, Application No. 25965/04, Judgment of 7 January 2010, paras. 207-208.

¹³ *Andreou v. Turkey*, ECtHR, Application No. 45653/99, Decision on Admissibility, 3 June 2008.

¹⁴ *Güzelyurtlu and others v. Cyprus and Turkey*, ECtHR [GC] Application No. 36925/07, Judgment of 29 January 2019, para. 186, summarising the reasoning in *Aliyeva and Aliyev v. Azerbaijan*, ECtHR, Application No. 35587/08, Judgment of 31 July 2014, paras. 56-57.

¹⁵ *Güzelyurtlu and others v. Cyprus and Turkey*, *op. cit.*, para. 188.

¹⁶ *Romeo Castaño v. Belgium*, ECtHR, Application No. 8351/17, Judgment of 9 July 2017, para. 42.

¹⁷ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 180.

¹⁸ *Sharifi and Others v. Italy and Greece*, *op. cit.*, para 210.

¹⁹ *Xhavara and Others v. Italy and Albania*, ECtHR, Application No. 39473/98, Admissibility Decision, 11 January 2001

²⁰ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 178

²¹ Reply to Recommendation, CoE Doc. 14831, 14 February 2019, *International obligations of Council of Europe member States: to protect life at sea*, para. 5.

uncertainty that the interaction of different legal regimes, practices and policies may cause.”²² Finally, in international refugee law, it is argued that the exercise of public powers, regardless of the territory, triggers jurisdiction.²³

Under article 53 of the Convention, related jurisprudence of other international authorities in relation to CoE member States is also applicable. International human rights bodies have recognised extra-territorial jurisdiction on the basis of authority or control of either persons or territory, including in relation to consular assistance. The International Court of Justice (ICJ) has repeatedly affirmed that international human rights treaties have extraterritorial application for jurisdictional purposes.²⁴ In *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ found that responsibility was triggered when the persons performing the contested act “acted in accordance with that State’s instructions or under its “effective control.”²⁵ In *Georgia v. Russian Federation*, the ICJ further held that human rights treaty obligations apply extraterritorially.²⁶ The Human Rights Committee has held that a State party may be responsible for extra-territorial violations of the Covenant, if there is a link in the causal chain that would make possible violations on the territory of another State. The risk of an extraterritorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time.²⁷ In its recent General Comment No. 36 on the right to life, with regard to jurisdiction, it stressed that “States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.”²⁸ Similarly other UN bodies have also recognised extra-territorial jurisdiction.²⁹

While not binding under article 53 on the ECHR Contracting parties, but nonetheless of significance as source of comparative international law, the Inter-American Court of Human Rights has outlined, in an advisory opinion, that jurisdiction of States is not limited to its territory and includes situations beyond their territorial limits.³⁰ It concluded that “[t]he concept of jurisdiction ... encompasses any situation in which a State exercises effective authority or control over an individual or individuals, either within or outside its territory”. Under this principle, “a person is under the jurisdiction of the State [in which the acts originated] if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the

²² CoE’s Commissioner for Human Rights, Recommendation, *Lives Saved. Rights Protected*, p. 17.

²³ EU Fundamental Rights Agency, *The Scope of the Principle of Non-Refoulement in Contemporary Border Management: Evolving Areas of Law*, 2016, p. 31.

²⁴ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, paras 400-401; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, para 111; *Armed Activities on the Territory of the Congo*, Judgment, para 216; *Provisional Measure in the case of Georgia v. Russian Federation*, No. 35/2008, para 109. See, H. Battjes, ‘Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses’, *Netherlands Yearbook of International Law* 2016 (2017).

²⁵ *Ibid.*

²⁶ ICJ, *Provisional Measure in the case of Georgia v. Russian Federation*, No. 35/2008, 1009.

²⁷ *Mohammad Munaf v. Romania*, CCPR, Communication No. 1539/2006; *A.R.J. v. Australia*, Communication no. 692/1996; *Judge v. Canada*, Communication no. 829; *Samuel Lichtensztejn v Uruguay*, CCPR/C/OP/2, para. 6.1. Also see *Delia Saldias de Lopez v. Uruguay*, CCPR/C/13/D/52/1979, para 12.3.

²⁸ CCPR, *General Comment no. 36*, CCPR/CO/GC/36 para. 64.

²⁹ CCPR, *General Comment no. 31*, para 10. See, CAT, *J.H.A v Spain*, CAT/C/41/D/323/2007, para 8.2: “In particular, it considers that such jurisdiction must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention. This interpretation of the concept of jurisdiction is applicable in respect not only of article 2, but of all provisions of the Convention.” *Joint General Comment No. 4 of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child*, para. 12: “Jurisdiction cannot be limited/excluded in zones or areas subjected to migration control operations, including international waters or other transit zones and can arise in presence of children ‘attempting to enter its territory’; *Maastricht ETO principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*.

³⁰ IACtHR, *Environment and human rights*, Advisory Opinion, OC-23/17, 15 November 2017, para 74.

consequent human rights violation.”³¹ The Inter-American Commission refers to jurisdiction “as a notion linked to authority and effective control, and not merely to territorial boundaries.”³² Likewise, pursuant to obligations under the African Charter on Human and Peoples Rights “circumstances may obtain in which a State assumes obligations beyond its territorial jurisdiction such as ... [when] the State exercises control or authority over an individual.”³³

The UN Human Rights Council’s Special Rapporteur on extrajudicial, arbitrary and summary executions has affirmed that, since the “European Union and its member States have put in place an extensive surveillance system focused on security and border patrol [and have] chosen to provide security in the Mediterranean, the States members of the European Union ... are exercising sufficient functional control to be subject to the one obligation inextricably linked to ocean surveillance: an adequate and effective system of rescue. This includes the implementation of the principle of non-refoulement, including to unsafe third countries, the protection of refugees and migrants, including against preventable and foreseeable loss of lives, and support to ships operated by non-governmental organizations.”³⁴

In light of the rescue obligation and of the Court’s and other international human rights bodies’ jurisprudence, the interveners submit that, under article 1 ECHR, States establish jurisdiction on the high seas when their agents exercise authority in a manner that has proximate and foreseeable effects on Convention rights. Such authority is particularly manifest when the authorities’ power to issue the decisions and take action with extraterritorial effect is based on international legal obligations. Finally, a jurisdictional link is established whenever a State’s authority, due to its powers under international law – and, on the high seas, under the international law of the sea –, issues instructions to a third actor with extraterritorial effect.

2. Other applicable rules of international and European law, in particular international maritime law

This Court has consistently held that the ECHR does not exist in a vacuum and States necessarily remain bound by and must continue to give effect to their other obligations under international law when implementing the Convention.³⁵ In this respect, particular importance should be given, under article 53 ECHR, to other international human rights obligations of States Parties.

Under international human rights law, the duty to search and rescue people in distress at sea may be derived from States’ positive obligations to protect the life of those subject to their jurisdiction.³⁶ Indeed, the object and purpose of the *1974 International Convention for the Safety of Life at Sea (SOLAS)*³⁷ is “promoting safety of life at sea by establishing in a common agreement uniform principles and rules”.³⁸ The

³¹ *Ibid.*, p. 44. Importantly, in a recent ‘advisory opinion, the IACTHR stressed that receiving States are under the obligations arising from article 1.1 of the [American] Convention, as long as they are exercising control, authority or responsibility over any person, regardless of whether he or she is on the territorial, fluvial, maritime or aerial territory of such State, *Advisory opinion on the institution of asylum and its recognition as a human right in the Inter-American system of protection*, 30 May 2018, OPINIÓN OC-25/18, para 177.

³² Inter-American Commission on Human Rights, *Victor Saldaño v. Argentina*, Case no 38/00, 11 March 1999.

³³ *Mohammed Abdullah Saleh Al-Asad v. Republic of Djibouti*, African Commission on Human and Peoples’ Rights (ACHPR), Communication 383/10, 55th Ordinary Session, May 2014.

³⁴ UN Special Rapporteur on extrajudicial, arbitrary and summary executions, *Unlawful deaths of refugees and migrants*, UN Doc. A/72/335, para. 64

³⁵ *Pini and Others v. Romania*, ECtHR Application No. 78028/01, para. 138.

³⁶ CMCE, Reply to Recommendation, *op. cit.*, para. 2. PACE, Resolution 2229 (2018), *International obligations of Council of Europe member States to protect life at sea*, para. 3

³⁷ See, Chapter V, Regulation 33.1 of the *International Convention for the Safety of Life at Sea, 1974 (SOLAS)*.

³⁸ SOLAS, Preamble.

international law of the sea is linked with a State's obligations to protect the right to life as previously recognized by this Court relying on this body of law to interpret Convention obligations.³⁹

International Law of the Sea

Obligations to impose assistance duties to the masters of the ship

Article 98 of the *1982 UN Convention on the Law of the Sea* (UNCLOS) codifies into law a long-observed principle of maritime tradition: the duties of shipmasters to render assistance to any person found at sea in danger of being lost and to proceed to the rescue of persons in distress, if informed of their need of assistance.⁴⁰ This duty is enshrined as well in Regulation 33 of Chapter V of the *1974 International Convention for the Safety of Life at Sea* (SOLAS).⁴¹ The International Maritime Organisation (IMO) *Guidelines on the Treatment of Persons Rescued at Sea* affirm that shipmasters should "comply with any relevant requirement of the Government responsible for the [Search and Rescue] SAR region where the survivors were recovered, or of another responding coastal State, and seek additional guidance from those authorities where difficulties arise in complying with such requirements."⁴²

Obligation of coastal States⁴³

While shipmasters must render immediate assistance pursuant to State obligations, coastal States also have the obligation to "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, [to] cooperate with neighbouring States for this purpose".⁴⁴ The SAR Convention (*1979 International Convention on Search and Rescue*) obliges States to "ensure that assistance be provided to any person in distress at sea ... regardless of the nationality or status of such a person or the circumstances in which the person is found".⁴⁵ According to the SAR Convention, it is a duty upon States "having accepted responsibility to provide search and rescue services for a specified area [to] use search and rescue units and other available facilities for providing assistance to a person who is, or appears to be, in distress at sea."⁴⁶

According to SOLAS,⁴⁷ the search and rescue service concerned (Search and Rescue (SAR) Coordinator or the Search and Rescue Mission Coordinator (SMC)) has the right to requisition ships "and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress."⁴⁸ It is the SMC that has the power to release the masters of the ships from such obligation.⁴⁹ The SAR Coordinator and the

³⁹ *Hirsi Jamaa and Others v Italy*, *op.cit.*, para. 77

⁴⁰ Article 98.1, *United Nations Convention on the Law of the Sea*, adopted on 10 December 1982 (UNCLOS).

⁴¹ See Chapter V, Regulation 33.1, SOLAS.

⁴² *IMO Guidelines on the Treatment of Persons Rescued at Sea*, para. 5.1.6-7.

⁴³ See also, Lea Main-Klingst (2017) "Fleeing by sea: the legal way forward", at <https://lawofnationsblog.com/2017/12/07/fleeing-sea-legal-way-forward/>; Gombeer and M. Fink, "Non-Governmental Organisations and Search and Rescue at Sea", *Maritime Safety and Security Law Journal* (Issue 4, 2018); *FRA, Scope of the principle of non-refoulement*, *op. cit.*; P. Biondi, "Italy Strikes Back Again: A Push-Back's Firsthand Account" (2017) *Border Criminologies*.

⁴⁴ See, Article 98.2 UNCLOS. The same obligation is recalled in Chapter V, Regulation 7 SOLAS; *International Convention on Maritime Search and Rescue*, 1979 (SAR), Regulation 1.3.1. 37 *Ibid.*, Ch. 1.3.2. See, SAR Convention, Annex 1 Chapter 1, para. 2.1.2.

⁴⁵ Chapter 2.1.10, SAR Convention.

⁴⁶ Annex 1 Chapter 1, para. 2.1.9, SAR Convention. See also, paras. 2.3.1-2 and 2.4.1.

⁴⁷ See, Chapter V, Regulation 33.1 SOLAS.

⁴⁸ Regulation 33 of Chapter V SOLAS, para. 2.

⁴⁹ *Ibid.*, paras. 3-4: "Masters of ships shall be released from the obligation imposed by paragraph 1 on learning that their ships have not been requisitioned and that one or more other ships have been requisitioned and are complying with the requisition. This decision shall, if possible, be communicated to the other requisitioned ships and to the search and rescue service. ... The master of a ship shall be released from the obligation imposed by paragraph 1 and, if his ship has been requisitioned, from the obligation imposed by paragraph 2 on being informed by the persons in distress or by the search and rescue service or by the master of another ship which has reached such persons that assistance is no longer necessary."

SMC are typically (such as is the case in Italy) a public authority designated as a rescue coordination centre and rescue sub-centres. In Italy, specifically, this is the Maritime Rescue Coordination Centre (MRCC) in Rome, which is the relevant rescue co-ordination centre (RCC). The MRCC is clearly what is known in EU law as an "emanation of the State".⁵⁰

According to the SAR Convention, the State has the "primary responsibility for ensuring ... co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the [International Maritime Organization]."⁵¹ In principle, it is the rescue coordination centres and sub-centres that determine the phase of emergency and the extent of the operation required⁵² and "proceed as prescribed in [their] plans of operation."⁵³ All search and rescue units must "notify the rescue co-ordination centre or rescue sub-centre in whose area the incident has occurred."⁵⁴

The IAMSAR Manuals⁵⁵ affirm that "SAR operations are normally carried out under the direction and supervision of an SMC."⁵⁶ The "SMC is in charge of a SAR operation until a rescue has been effected or until it has become apparent that further efforts would be of no avail, or until responsibility is accepted by another RCC."⁵⁷ The *IMO Guidelines on the Treatment of Persons Rescued at Sea* state that, until delivery to a place of safety, "RCCs are responsible for co-operation with any national or international authorities or others involved in the situation."⁵⁸

In case of multiple rescuers, according to the SAR Convention and the IAMSAR Manuals, it is the search and rescue centre involved that designates which unit is the on-scene coordinator, and this should be "the most capable person".⁵⁹ The

⁵⁰ See *Foster, A. and others v. British Gas plc*, Case C-188/89, [1990] as: "a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers ...The government, local authorities, health authorities and the police are emanations of the state. A body carrying out a public service which is in the control of the state (such as managing a prison or governing a school) may also be classed as an emanation of the state." In Italy, it is a body of the Ministry of Infrastructure, see <https://www.guardiacostiera.gov.it/organizzazione/Pages/organigramma.aspx>. See also, FRA, *Scope of non-refoulement*, *op. cit.*, p. 3; Lea Main-Klingst (2017) "Fleeing by sea: the legal way forward" <https://lawofnationsblog.com/2017/12/07/fleeing-sea-legal-way-forward/>.

⁵¹ SAR Convention, Annex 1 Chapter 1, para. 3.1.9. See also, para. 3.1.6 : States must provide search and rescue centres, among other powers, with the powers "to request from other rescue co-ordination centres such assistance, including vessels, aircraft, personnel or equipment, as may be needed; ...[and] to make the necessary arrangements in co-operation with other RCCs to identify the most appropriate place(s) for disembarking persons found in distress at sea."

⁵² *Ibid.*, para. 4.2.4.

⁵³ *Ibid.*, para. 4.5.3.

⁵⁴ *Ibid.*, para. 4.3.

⁵⁵ As provided in the SAR Convention, States parties must follow the guidelines of the International Maritime Organisation (IMO) in search and rescue operations. The IMO's IAMSAR manuals, whose Volume III must be carried onboard by all ships (SOLAS Chapter V Regulation 21.2.), are effectively followed by masters of ships. Volume II, whose principles are reflected in all Volumes I, II and III states that SAR Coordinators (RCCs) have "the overall responsibility for establishing, staffing, equipping, and managing the SAR system, including providing appropriate legal and funding support, establishing RCCs and rescue sub-centres (RSCs), providing or arranging for SAR facilities, co-ordinating SAR training, and developing SAR policies."

⁵⁶ Volume II, Chapter 1.2.3.

⁵⁷ It is the SMC's competence to "dispatch and co-ordinate the resources which will carry out SAR missions, ... ascertain movements and location of vessels and alert shipping in likely search areas for rescue, ... develop the search action plan (and rescue action plan as appropriate), i.e., allocate search areas, designate the OSC, dispatch SAR facilities and designate on-scene communications frequencies, ... co-ordinate the operation with adjacent RCCs when appropriate; arrange briefing and debriefing of SAR personnel;... recommend to the RCC chief the abandoning or suspending of the search; release SAR facilities when assistance is no longer required," MSC.1/Circ.1594, p. 169.

⁵⁸ *IMO Guidelines on the Treatment of Persons Rescued at Sea*, para. 6.19-21: "Governments should be aware of assistance that international organizations or authorities of other countries might be able to provide in [cases of asylum seekers, refugees or migratory status], be able to contact them rapidly, and provide any instructions that their RCCs may need in this regard, including how to alert and involve appropriate national authorities. States should ensure that their responses mechanisms are sufficiently broad to account for the full range of State responsibilities."

⁵⁹ SAR Convention, Annex 1 Chapter 1, para. 4.7. See, IAMSAR Manual Volume II, 1.2.4: When two or more SAR units are working together on the same mission, there is sometimes an advantage if one person is assigned to co-ordinate the activities of all participating units. The SMC designates this on-scene co-ordinator (OSC), who may be the person in charge of a search and rescue unit (SRU), ship or aircraft participating in a search, or someone at another nearby facility in a position to handle OSC duties. The person in charge of the first SAR facility to arrive at the scene will normally assume the function of OSC until the SMC directs that the person be relieved. Conceivably, the OSC may have to assume SMC duties and actually plan the search if the OSC becomes aware of a distress situation directly and communications cannot be established with an RCC. The OSC should be

“responsible rescue co-ordination centre or rescue sub-centre concerned shall normally decide when to discontinue search and rescue operations,”⁶⁰ terminate it or suspend it. The rescue coordination centres and sub-centres also have the duty to identify the most appropriate place(s) for disembarking persons found in distress at sea in line with international human rights law standards and shall inform the ship or ships concerned thereof.⁶¹

The interveners submit that jurisdiction under article 1 ECHR in search and rescue cases on the high seas must be interpreted, under article 53 ECHR, in the light of the international maritime law applicable to Italy. The interveners submit that, taking into account international maritime law, a sufficient degree of effective control or authority exists over the actors on the high seas to establish jurisdiction under article 1 ECHR. The relevant elements of international maritime law are: the shipmasters’ duties and the cumulative effect that the control the Search and Rescue Mission Coordinator has on shipmasters’ actions during SAR operations. This includes alerting ships in likely search areas for rescue, coordinating SAR operations, and identifying a place of safe disembarkation.

3. The determination of the competent Search and Rescue Mission Coordinator and *non-refoulement*

Under international human rights law, and this Court’s jurisprudence, individuals cannot be transferred to a place where there are substantial grounds for believing that they are at real risk of facing serious violations of human rights, including of the right to life, the prohibition of torture or inhuman or degrading treatment or punishment, or flagrant denial of justice, including in respect of the right to liberty.⁶² This Court has recognised that “the rules for the rescue of persons at sea and those governing the fight against people trafficking impose on States the obligation to fulfil the obligations arising out of international refugee law, including the *non-refoulement* principle.”⁶³

The *IMO Guidelines on the Treatment of Persons Rescued at Sea* state that, “[t]he first RCC [contacted] is responsible for co-ordinating the case until the responsible RCC or other competent authority assumes responsibility.”⁶⁴ Importantly, the Guidelines define a place of safety, as referred to by the SAR Convention, as “a location where rescue operations are considered to terminate. It is also a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.”⁶⁵ More precisely, “the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea,”⁶⁶ as well as the risk of being exposed to torture.⁶⁷ This duty includes a rigorous assessment of the situation and treatment

the most capable person available, taking into consideration SAR training, communications capabilities, and the length of time that the unit the OSC is aboard can stay in the search area. Frequent changes in the OSC should be avoided. Duties which the SMC may assign to the OSC, depending on needs and qualification, include any of the following: assume operational co-ordination of all SAR facilities on-scene; receive the search action plan from the SMC; modify the search action plan based on prevailing environmental conditions and keeping the SMC advised of any changes to the plan (do in consultation with the SMC when practicable); provide relevant information to the other SAR facilities; implement the search action plan; monitor the performance of other units participating in the search; co-ordinate safety of flight issues for SAR aircraft; develop and implement the rescue plan (when needed); and make consolidated reports (SITREPs) back to the SMC.

⁶⁰ SAR Convention, Annex 1 Chapter 1, para. 4.8.2.

⁶¹ *Ibid.*, para. 4.8.2-3.

⁶² *Hirsi Jamaa and Other v. Italy*, *op. cit.*, para 114.

⁶³ *Ibid.*, para. 134.

⁶⁴ *IMO Guidelines on the Treatment of Persons Rescued at Sea*, para. 6.7.

⁶⁵ *Ibid.*, para. 6.12.

⁶⁶ *Ibid.*, para. 6.17.

⁶⁷ In this regard the IMO comments on the guidelines make express reference to article 33.1 of the Refugee Convention 1951 as well as to “[o]ther relevant international law [that] also contains prohibition on return to a place where there are substantial

of rescued persons in the State of disembarkation, including information which is known and ought to be known by the Search and Rescue Coordinator.⁶⁸ The UNHCR ExCom has also stated that States have an obligation “to ensure that masters of vessels sailing under their flag scrupulously observed established rules regarding rescue at sea, and to take all necessary action to rescue refugees and displaced persons leaving their country of origin on boats in order to seek asylum and who are in distress.”⁶⁹ UNHCR position on returns to Libya confirms this position.⁷⁰

The Commissioner for Human Rights of the Council of Europe has recommended that “member states should only transfer coordination to the RCC responsible for the Search and Rescue Region (SRR) if that RCC is able to fully meet its obligations under international maritime law and human rights law, including with regard to safe disembarkation. ... Where member states coordinate their activities with the Joint Rescue Co-ordination Centre (JRCC), this should only be done under the clear understanding that they **fully retain their own responsibility** (emphasis added) for the preservation of life at sea and the respect of the non-refoulement obligation. Moreover, such coordination should only be done on the clear understanding that it may not result in the disembarkation of rescued persons in Libya, or in any other place that cannot be considered safe under maritime or human rights law.”⁷¹ Finally, the Commissioner urged that “[c]oordinating authorities and any other relevant authorities should ensure instructions given in the course of rescue operations fully respect the human rights of rescued migrants, including by preventing them from being put in situations where their right to life would be threatened, or where they would be subjected to torture, inhuman or degrading treatment, or to arbitrary deprivation of liberty.”⁷²

The interveners submit that, in light of international human rights law, refugee law and maritime law, Contracting Parties have an obligation to ensure that their Search and Rescue Mission Coordinator (in SAR operations) does not transfer coordination to the authority of another State unless they are satisfied that the other State will ensure rescue, treatment and disembarkation in full respect of the obligation not to expose a person to a risk of serious violation of human rights.

Furthermore, the right to life imposes positive obligations on States to take adequate measures to prevent avoidable deaths. A coastal State is or ought to be aware of the risk to lives of those in danger at sea. If an agent pursuant to State authority acts in a manner that is manifestly detrimental to rescue operation’s success, the State will be in breach of its obligations under article 2 ECHR (or article 3 *mutatis mutandis*). The test is whether the State authorities did not do all that was reasonable to expect them to do to avoid a real and immediate risk to life (or harm) of which they had or ought to have had knowledge.⁷³

grounds for believing that the person would be in danger of being subjected to torture.” Comments, para. 7. The Facilitation Committee of the IMO specified “the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.” *IMO Rescued Guidelines*, para. 6.17.

⁶⁸ *Hirsi Jamaa and Others v Italy*, *op. cit.*, para 125-137

⁶⁹ *Conclusion No. 14 (XXX) General*, ExCom, UNHCR, 30th Session, 1979, para. (d). See also, *Practical Guidelines for Shipowners, Their Agents and Shipmasters Relating to Stowaways Asylum-Seekers*, UNHCR, January 1992 (UNHCR Stowaways Guidelines).

⁷⁰ UNHCR, *Position on Returns to Libya*, available at <https://www.refworld.org/docid/561cd8804.html>.

⁷¹ CoE’s Commissioner for Human Rights, Recommendation, *Lives Saved. Rights Protected*, Recommendations nos. 4-6, p. 22.

⁷² *Ibid.*, Recommendations 9-10, p. 30.

⁷³ See, *Osman v. United Kingdom*, ECtHR, Application No. 23452/94, Judgment; *Mastromatteo v. Italy*, ECtHR, Application No. 37703/97, Judgment.

4. Aid and assistance in wrongful conduct amounting to human rights violations

The European Court of Human Rights interprets the obligations stemming from the Convention in light of the law on State responsibility.⁷⁴ Article 16 of the International Law Commission (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts* establish that “[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.”⁷⁵ State responsibility may arise either from positive steps taken to assist another State in a wrongful act, or from failure to take action, required by international legal obligations, that would have prevented a wrongful act by another State.⁷⁶ Consistent with these principles, the Convention imposes responsibility on States for both acts and omissions that entail co-operation in acts contrary to the Convention. Furthermore, States are subject to additional obligations to refrain from co-operation in internationally wrongful acts where those acts amount to “a serious breach,” that is, “a gross or systematic failure” by a State to fulfil “an obligation arising under a peremptory norm of general international law.”⁷⁷ In those circumstances, States must not only refrain from co-operation in the wrongful acts but, irrespective of whether they have been implicated in the acts or not, they must also “co-operate to bring to an end through lawful means”⁷⁸ to such a breach. They must not recognise as lawful a situation created by the breach.⁷⁹ With regard to the way in which aid or assistance is provided, many actions can comprise the notion of ‘aid and assistance’, including financing the activity in question, or providing material support to a State that uses it to commit human rights violations.⁸⁰ Such material support can include logistical and technical assistance (i.e. training).⁸¹

Applying these principles in *El-Masri*, the Grand Chamber found that the responsibility of the North Macedonian authorities was engaged throughout the whole period of an enforced disappearance, including the unacknowledged and secret detention of the applicant in Afghanistan, because of their initial active facilitation of the operation.⁸² In *Al-Nashiri and Abu Zubaydah*, the Court found that Poland was internationally responsible for the violations that occurred during the rendition of the applicants, both within and outside its jurisdiction, “on account of its ‘acquiescence and connivance’ [and that], for all practical purposes, facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring.”⁸³ The

⁷⁴ See *Jaloud v. Netherlands*, ECtHR, Application No. 47708/08, para. 151. The ECtHR stated in *Bankovic*, that “principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law”.

⁷⁵ ILC Articles on State Responsibility, Article 16. See further Commentary to Draft Article 16, paras.1-6.

⁷⁶ ILC Commentaries, op. cit., Chapter IV, para. 4: “a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct.” See also, *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, ICJ, Judgment of 9 April 1949, para. 22.

⁷⁷ Articles 41.1 and 41.2, ILC Articles.

⁷⁸ Article 41.1, ILC Articles.

⁷⁹ Article 41.2, ILC Articles. See also, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, at p. 200, § 159.

⁸⁰ See, 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.

⁸¹ Lanovoy (2014), ‘Complicity in an Internationally Wrongful Act’, p. 9. The FRA identified as well that capacity building may trigger responsibility for aid and assistance: “If the EU or its Member States have strong leverage over the third-country actions, they can exercise control over migrants in a third country. Depending on the state’s reputation on treatment of migrants, on the type and intensity of support provided, and on whether the EU Member State takes action to mitigate possible human rights violations by the third country, the leverage to achieve the EU’s migration objectives may trigger responsibilities for violations of the principle of non-refoulement.”, FRA, *Scope of non-refoulement*, op. cit., pp. 30-32.

⁸² *El-Masri v. The Former Yugoslav Republic of Macedonia*, ECtHR, Application No. 39630/09, Judgment of 13 December 2012, para. 239.

⁸³ *Al-Nashiri v. Poland*, ECtHR, Application No. 28761/11, Judgment of 24 July 2014, para. 517; *Husayn (Abu Zubaydah) v. Poland*, ECtHR, Application No. 7511/13, Judgment of 24 July 2014, para. 512.

International Criminal Court has found that a State party to the Rome Statute may be responsible for the entirety of the crime of deportation initiated in a State not party to the Rome Statute when at least one legal element of a crime was within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, because the offence is “inherently transboundary.”⁸⁴

This Court has found, in the *Ilascu* line of cases, that a State (the Russian Federation) could be responsible for the acts of a third actor when the latter was under its “decisive influence” and/or it survived “by virtue of the military, economic, financial and political support given to it” by the former. This was sufficient to establish a “continuous and uninterrupted link of responsibility” between the two entities.⁸⁵ As stressed by this Court, States cannot evade their responsibility by creating “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.”⁸⁶ For this reason, States cannot “enter into an agreement with another State which conflicts with its obligations under the Convention.”⁸⁷

The UN Special Rapporteur on extrajudicial, arbitrary and summary executions has affirmed, that externalisation and push back policies by States in migration, which “may include assisting, funding or training agencies in other countries to arrest, detain, process, rescue or disembark and return refugees or migrants[,] raise serious concerns when the recipient agencies or States are alleged to be responsible for serious human rights violations, including violations of the right to life.”⁸⁸ She concluded that “[b]y financing and training the very agencies that commit these abuses, funding States are potentially aiding and assisting loss of life.”⁸⁹ She found that, “[i]n the face of gross, systemic failure of human rights, other States must not ‘render aid or assistance in maintaining that situation’. Given the situation in some of these transit States and countries of origin, where migrants or refugees are subject to systemic abuse, it seems appropriate to call for destination States to stop providing funding and equipment for migration control.”⁹⁰ The Council of Europe’s Commissioner for Human Rights has provided detailed recommendations on countries’ responsibility in the context of suspected aid and assistance in wrongful conduct leading to human rights violations when cooperating with third countries and, in particular, Libya.⁹¹

The interveners submit that a State may be aiding or assisting in wrongful conduct when it provides funding, training or any other material support, discretely or cumulatively, to another State. This may occur when the purpose is to strengthen their capacity to intercept boats in territorial and international waters and return people trying to leave a country, including those in need of international protection. This is particularly grave when they are being returned to a territory where they are known to risk serious violations of human rights.

⁸⁴ ICC, Pre-Trial Chamber I, Decision, Case No. ICC-RoC46(3)-01/18, para. 71.

⁸⁵ *Ilascu and Others v. Moldova and Russia*, *op. cit.*, paras. 392-394; *Ivanțoc and Others v. Moldova and Russia*, ECtHR, Application No. 23687/05; *Catan and Others v. Moldova and Russia*, ECtHR [GC], Applications nos. 43370/04, 8252/05 and 18454/06; *Mozer v. Moldova and Russia*, ECtHR [GC], Application No. 11138/10; *Turturica and Casian v. Moldova and Russia*, ECtHR, Applications Nos 28648/06 and 18832/07.

⁸⁶ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 178. ILC Commentary on State Responsibility on article 16 (p 66, para 6): “a State cannot do by another what it cannot do by itself.”

⁸⁷ *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR, Application No. 61498/08, para 138. See also, *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para 129.

⁸⁸ UN Special Rapporteur on extrajudicial, arbitrary and summary executions, *op. cit.*, para. 36.

⁸⁹ *Ibid.*, para. 37.

⁹⁰ *Ibid.*, para. 41-42.

⁹¹ CoE’s Commissioner for Human Rights, Recommendation, *op. cit.*, p. 42.