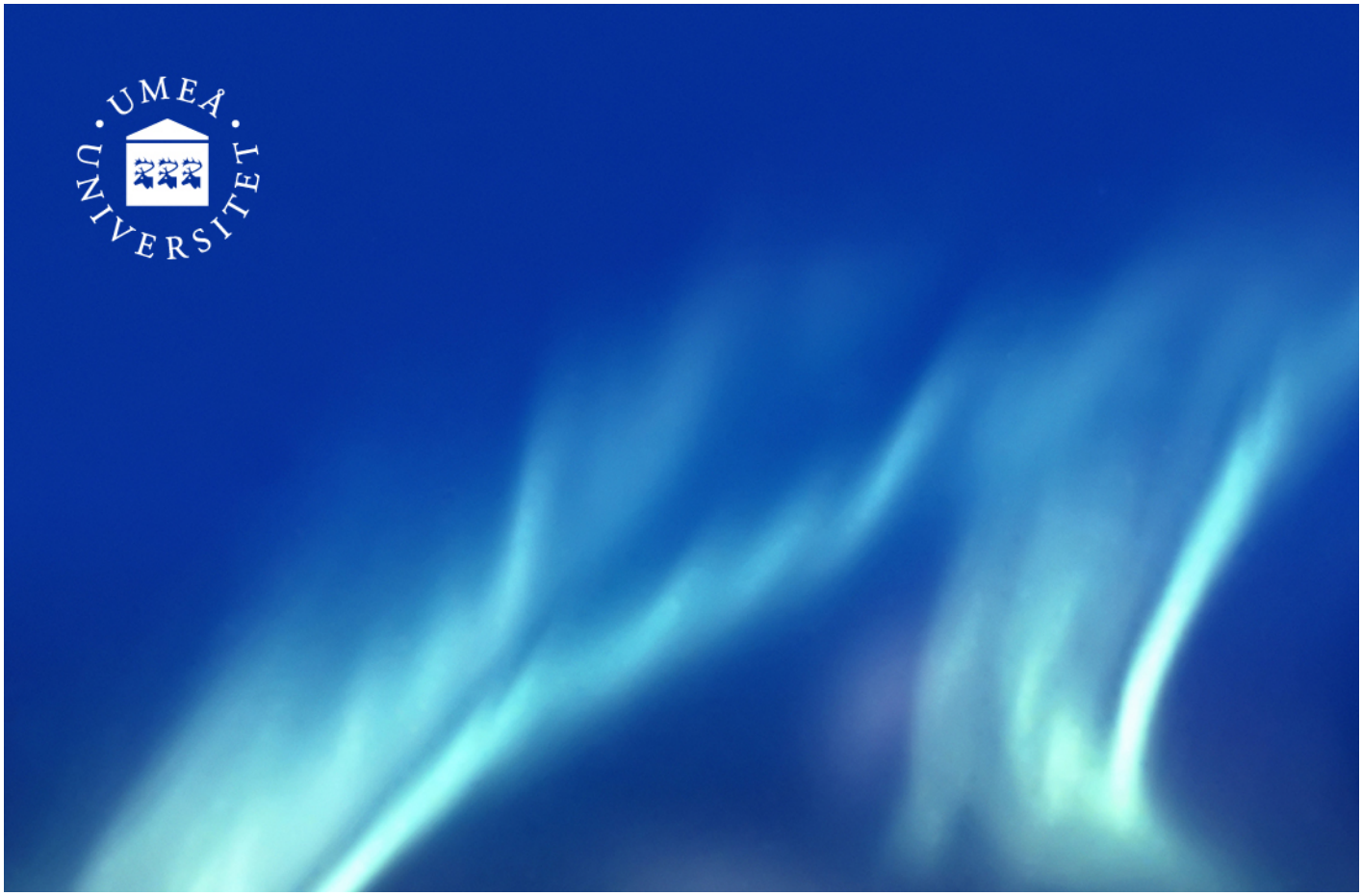

Imputability under the ECHR of EU Assistance to Libya

State jurisdiction and obligations when the EU's assistance to the Libyan Coast Guard has rights-violating effects on torture

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Table of contents

Abbreviations

ARIO	Draft articles on the Responsibility of International Organizations
ASR	Draft articles on Responsibility of States for Internationally Wrongful Acts
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EUTF for Africa	Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa
The Charter	The Charter of Fundamental Rights of the European Union
GRC	The 1951 Geneva Refugee Convention
ICCPR	The International Covenant on Civil and Political Rights
ILC	International Law Commission
LCG	Libyan Coast Guard
UDHR	The 1948 Universal Declaration of Human Rights
VCLT	The 1969 Vienna Convention on the Law of Treaties

Executive summary

EU migration policy is increasingly externalized to third state actors. The most emblematic of these initiatives, is the EU's assistance to improve the Libyan Coast Guard's capacity to rescue and intercept migrants attempting to leave Libya by sea and sail for Europe. An ever-increasing number of reports show however that the migrants brought back to Libya by the LCG, are arbitrarily and systematically detained and suffer abuse and other ill-treatment, including torture. To abuse an individual using torture is an action prohibited by the absolute right of Article 3 ECHR. The Contracting Parties to the ECHR are therefore obligated to take action against the use of torture. The EU itself is not a Contracting Party to the ECHR and can therefore not be held legally responsible for actions under the ECHR. The EU Member States must however, as Contracting Parties to the ECHR, continue to secure the rights and freedoms of the ECHR within the EU. An individual EU Member State could therefore, under certain limitations, become legally responsible for an imputable action committed by the EU, when it has direct extraterritorial rights-violating effects.

In order to activate its state obligations under Article 3 ECHR, the Contracting Party must however have exercised jurisdiction under Article 1 ECHR. The concept of jurisdiction in the ECHR refers primarily to whether one or several Contracting Parties were in control over the situation of an alleged violation of the Convention. State jurisdiction, and therefore its obligations under the ECHR, is according to the ECtHR primarily limited to within of the Contracting Parties' territorial boundaries. It is however, in exceptional circumstances, possible for a state to exercise jurisdiction outside of its territorial boundaries. Extraterritorial jurisdiction is primarily evaluated through two models, according to which the Contracting Party must either have exercised effective control over the relevant territory or the individual.

In regard to extraterritorial effects of the EU's assistance to the LCG, extraterritorial jurisdiction appears however not possible to establish under these models. The thesis therefore discusses the still nascent case law of the ECtHR, regarding extraterritorial effects jurisdiction in a situation where a Contracting Party's domestic action has "sufficiently proximate repercussions" on the rights of the ECHR. The thesis argues, that the current case law could support that an EU Member State exercises jurisdiction, in a situation where the EU's assistance is provided with the knowledge of a risk that the assistance will be used to support treatment contrary to Article 3 ECHR. If such jurisdiction could be established, the EU's assistance to the Libyan Coast Guard would become imputable towards an individual EU Member State and therefore potentially be held legally responsible for not acting to halt this assistance.

1 Introduction

1.1 *Background*

In our globalized world, states and international organisations appear increasingly less restricted by the traditional notion of territorial sovereignty as a limitation on their exercise of authority and power. One aspect of this trend, is the EU and its Member States providing assistance to third states[1] in order to improve their capability and incentive to conduct migration controls.[2] Such assistance is part of a policy phenomenon in EU migration policy that has been called externalization, which consist of the "outsourcing" of migration controls through bi- and multilateral border arrangements to third states.[3]

In response to the high number of migrants seeking access to Europe during 2015, the EU launched an emergency trust fund, the EUTF for Africa.[4] The overall objective of this fund is to provide assistance to states in northern Africa, to address irregular migration to Europe.[5] Though the EUTF for Africa in large parts has provided economic opportunities and support to migrants,[6] the most emblematic of its policies is the assistance provided to the Libyan Coast Guard (LCG). According to the European Commission, this policy has significantly improved the LCG's capability to rescue and intercept migrants at sea who are trying to leave Libya and sail for Europe.[7] While this policy has led to a reduced number of migrants arriving to Europe, it has come at a "terrible human cost,"[8] with reports of torture and other abuse of the migrants brought back to Libya after being intercepted by the LCG.[9]

Such torture, inhuman or degrading treatment are actions that are prohibited by Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or the Convention). The EU and its Member States have therefore recently been criticized by the Council of Europe for potentially assisting to human rights violations in Libya.[10] The use of

[1] A third country refers to a state that is not an EU Member State nor a Contracting Party to the ECHR.
[2] See Hathaway & Gammeltoft-Hansen, 2015, pp. 236–237, who calls migration control a near-obsession of states in the Western hemisphere. Changing aspects of such policies of deterrence have been a principal issue for international refugee law for the past three decades, see Gammeltoft-Hansen, 2018, p. 374; Pijnenburg, Gammeltoft-Hansen & Rijken, 2018, p. 365; C.f. Spijkerboer, 2018, p. 453.
[3] Gammeltoft-Hansen, 2011, pp. 2 and 242; See also Costello, 2016, p. 231; See Den Heijer, 2010, p. 170.
[4] See European Commission, 2015, p. 1: Oxfam, 2017, pp. 4–5.
[5] See European Commission, 2015, pp. 1–2; European Commission, 2018, p. 1.
[6] See Oxfam, 2017, p. 2.
[7] European Commission, 2018, p. 2, regarding the results of the program *Support to Integrated border and migration management in Libya - first phase* in 2018; See also Amnesty International, 2017, p. 45. For previous engagement of the EU in Libya's migration policy, see Costello, 2016, p. 247 regarding the European External Action Service's *European Neighbourhood and Partnership Instrument, Libya: Strategic Paper and National Indicative Programme 2011–2013*.
[8] Council of Europe, 2019, p. 15; See also Oxfam, 2017, p. 2.
[9] Council of Europe, 2019, pp. 16 and 43.
[10] See Council of Europe, 2019, pp. 42–43.

third states to conduct certain migration related activities, puts into question the imputability under the ECHR of its Contracting Parties. This is especially problematic, when conducted through an international organisation, as the EU.[11] While the EU is not yet a Contracting Party to the ECHR, so are all of its Member States.[12] Contracting Parties to the ECHR must continue to secure its rights and freedoms within an international organization, to whom they have transferred part of their sovereignty.[13] The thesis will therefore analyse the imputability, under the ECHR, in a situation where the EU's assistance to the LCG has rights-violating effects on the prohibition of torture under Article 3 ECHR.

1.2 *Aim and research questions*

The overall aim of the thesis is to analyse, the EU's policy of providing assistance to the LCG to improve its capability of intercepting migrants at sea, could become imputable towards an EU Member State under Article 1 ECHR, in a situation where the assistance has rights-violating effects on the prohibition of torture under Article 3 ECHR.

To achieve the overall aim, the following research questions will be analysed:

1. Which effects on the prohibition of torture under Article 3 ECHR does the EU's assistance to the LCG have for migrants in Libya and how does this assistance relate to the phenomenon in EU migration policy of externalizing border controls to third states?
2. Could the EU's assistance to the LCG become imputable under Article 1 ECHR towards an EU Member State, as a Contracting Party to the ECHR, if it assists to treatment that would have constituted a violation of Article 3 ECHR if perpetrated by the EU Member State?
3. In view of this potential imputability, does an EU Member State have a positive obligation under Article 3 ECHR of halting the EU's assistance to the LCG?

[11] See Heschl, 2018, p. 10 for similar analysis from a universalist perspective of the present difficulty to establish any legal responsibility for certain state actions in human rights law, due to the territorial understanding of sovereignty and jurisdiction. Imputability is a term within the ECHR, which describes an action or omission by a Contracting Party for which it may be held responsible under the rights and freedoms of the ECHR, see e.g. *Catan and Others v. the Republic of Moldova and Russia* [GC], 19 October 2012, ECtHR, § 104.

[12] See e.g. Bernitz, 2018, p. 152. The ECHR forms however part of EU law as general principles, Bernitz & Kjellgren, 2018, p. 157.

[13] See case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], 30 June 2005, ECtHR, §§ 152–155; Case of *Waite and Kennedy v. Germany* [GC], 18 February 1999, ECtHR, § 67; Case of *Matthews v. the United Kingdom* [GC], 18 February 1999, ECtHR, § 32; Brownlie, 2005, p. 361; Bernitz, 2018, p. 157; But see decision of *Behrami v. France and Saramati v. France, Germany and Norway* [GC], 2 May 2007, ECtHR; Klein, 2010, p. 303, regarding the inadmissibility of acts or omissions due to decisions by the UN Security Council.

1.3 *Material and method*

1.3.1 Externalisation and the EU's assistance to the LCG

To answer the overall aim of the thesis, it has been divided into three research questions, which all cover a distinctive part of the overall aim's analysis. The thesis analyses the effects of the EU's policy of assisting the LCG through the EUTF for Africa and how it relates to the phenomenon in EU migration policy of externalization. This examination is primarily of importance to answer the aim's first research question. A secondary objective of this analysis is to provide a clear outline in which to analyse the remaining two research questions.

To analyse this subject of the thesis, EU material has been the primary source regarding the financial and material assistance provided through the EUTF for Africa and EU migration policy. Analyses by Oxfam and CONCORD, which are civil-society organizations specialized in economic assistance, regarding the use and impact of economic aid provided by the EU in migration related matters has also been examined. While this EU material in some parts comment upon the possible human rights concerns related to this assistance, further information of the effects this assistance has had on human rights of migrants have been sought through other material, such as reports from the Council of Europe. These reports have in large part been focused on the situation for migrants and refugees in Libya and the EU's financing of the LCG.[14] Similar conclusions have thereafter also been examined in reports by civil-society organisations of Human Rights Watch, Amnesty International and the Office of the United Nations High Commissioner for Human Rights.

Literature is also examined regarding externalisation but has been evaluated with regards to the fact that the policy phenomenon of externalization is a rapidly evolving subject matter.[15] Literature from a sociological and historical perspective has also been examined, to analyse what impact externalisation has on individuals and identify trends in EU migration policy. Third party interventions in the communicated case before the ECtHR of *S.S. and Others v. Italy*,[16] from the Human Rights Commissioner of the European Council and the AIRE Centre has lastly been examined regarding the co-operation between the EU and Libya and the impacts this co-operation has had on migrants' human rights in Libya and extraterritorial application of the ECHR.

[14] See e.g. Moreno-Lax & Giuffrée, 2019, p. 87, for further information on financial support provided by the EU to the Libyan Coast Guard. For further information, see Human Rights Watch, 2019, pp. 21–30, regarding the impact on human rights of migrants in Libya due to such financial support from the EU to the Libyan Coast Guard.

[15] See e.g. Heschl, 2018, p. 9; Costello, 2016, p. 232.

[16] See communicated case *S.S. and Others v. Italy*, communicated the 26 June 2019, ECtHR.

1.3.2 Imputability before the ECHR and state obligations

Imputability means to analyse the possibility of a state being legally responsibility under the ECHR, for an action it has committed that is incompatible with the Convention.[17] The thesis will therefore first analyse, whether EU assistance to the LCG can be defined as an action by an EU Member State, that is potentially contrary to state obligations under the Convention and, whether such an action could fall under an EU Member State's jurisdiction of Article 1 ECHR.

This has primarily required the analysis of the ECHR and the case law of the European Court of Human Rights (ECtHR) as well as academic literature analysing this case law. Other international treaties that have been of interest are the International Law Commission's (ILC) Draft Articles on State Responsibility (ASR), ILC's Draft articles on the responsibility of international organizations (ARIO), the EU Charter of Fundamental Rights (the Charter), The Universal Declaration of Human Rights (UDHR) and the Convention on the Rights of the Child (CRC) the International Covenant on Civil and Political Rights (ICCPR). Libyan national law has also been examined regarding detention of migrants.

The ECHR is interpreted in light of Article 31 (1) of the 1969 Vienna Convention on the Law of Treaties (VCLT). In view of this article, the ECHR's text is the primary source of interpreting the Convention, but the text must be interpreted in its context and in light of its object and purpose. The analysis has also taken consideration to the ECHR's general principles that the Convention must be interpreted as a whole, in light of societal changes and has as its objective to provide a practical and effective protection of its rights and freedoms.[18]

In light of Article 31 (2b) VCLT, the case law from the ECtHR can be regarded as an instrument to interpret the ECHR. The ECtHR has produced more case law regarding extraterritorial jurisdiction than any other international court.[19] In choosing which cases to examine, in view of the ECtHR's significant amount of case law,[20] a certain limitation has been necessary. The case law examined has therefore been chosen due to their prevalence in the academic literature regarding jurisdiction, the fundamental essence of the Convention and state responsibility for acts of international organisations or other third parties. While Article 46 (1) ECHR only forces Contracting Parties to the ECHR to adhere to judgements where they a part, the case law is often relevant for all Contracting Parties, as the judgement can be applied

[17] See e.g. case of *Loizidou v. Turkey* (merits), 18 December 1996, ECtHR, § 52. Such imputability is in most cases examined as part of the examination of the merits in a case, see e.g. *Assanidze v. Georgia* [GC], 8 April 2004, ECtHR, § 144.
[18] See Danelius, 2015, p. 55; Bernitz & Kjellgren, 2018, p. 156.
[19] Milanovic, 2018, p. 55.
[20] See Bernitz & Kjellgren, 2018, p. 154, regarding the approximate amount of 1 000 new cases being proclaimed by the ECtHR every year.

analogously to similar situations.[21] When examining this case law, special importance has also been given to statements made by the ECtHR in cases and decisions decided by its Grand Chamber, due to their special character as precedent and guidance to future case law.[22]

The thesis will thereafter use the findings of the analysis to discuss the possibility of creating a jurisdictional link, when domestic actions have extraterritorial effects. To formulate a clear foundation upon which to discuss extraterritorial effects jurisdiction, the model discussed is constructed around the ECtHR's statements regarding jurisdiction in those cases where a Contracting Party's actions have "sufficiently proximate repercussions" on the rights and freedoms of the ECHR.[23] This discussion uses the same analytical method and material as the analysis, but relies, due to lacking academic literature on the subject, to a greater degree upon analysis of relevant case law of the ECtHR, in view of Article 6 ASR and the close connection between Article 3 ECHR and underlying value of the ECHR of human dignity.

1.4 *Previous research*

The issue of jurisdiction in relation to assistance to third state actors as part of externalization policies is increasingly in need of further research.[24] Existing research has primarily focused has however been on actions conducted directly by EU institutions, such as Frontex.[25] The academics Milanovic and Heschl have previously researched the applicability of the ECHR in extraterritorial situations and discussed distinct solutions on how the concept of jurisdiction could apply to situations where the state assists to abuses committed by a third actor or state. The concept of extraterritorial jurisdiction in general has been the subject of a large amount of literature.[26] Heschl has researched extraterritorial jurisdiction in relation to the acts of EU personnel and has presented a model of extraterritorial jurisdiction based upon a positive obligation of due diligence for Contracting Parties to the ECtHR.[27] Milanovic has researched the extraterritorial applicability of human rights treaties in general, and has presented a model of extraterritorial jurisdiction under the ECHR that territorially limits the Contracting Party's positive obligations to areas where the state exercises territorial control, but views negative obligations as territorially unlimited.[28]

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[21] See Danelius, 2015, p. 60.
[22] See Bernitz & Kjellgren, 2018, p. 154.
[23] See case of *Ilaşcu and Others v. Moldova* and *Russia* [GC], 8 July 2004, ECtHR, § 317.
[24] See Gammeltoft-Hansen, 2018, p. 395.
[25] See e.g. Heschl, 2018, pp. 141–220. For an analysis of the extraterritorial application of the EU Charter with regards to external migration controls conducted by EU institutions, see Heschl, 2018, pp. 190–192
[26] See Milanovic, 2017, p. 54.
[27] See Heschl, 2018, pp. 223–232.
[28] See Milanovic, 2018, pp. 58–59; Milanovic, 2011, pp. 209–222.

On the subject of extraterritorial effects jurisdiction however, the possibility of a Contracting Party to the ECHR to exercise jurisdiction through the extraterritorial effects of its domestic actions has not been subject of research and remains largely an undeveloped field within the ECHR.[29]

1.5 *Delimitations*

The concept of jurisdiction and its applicability in extraterritorial situations can be divided in several different categories and models.[30] This thesis will therefore delimit the analysis to the models of spatial and personal control and then to discuss the feasibility of a model of extraterritorial jurisdiction based upon the extraterritorial effects of a Contracting Party to the ECHR's domestic actions. The spatial and personal models have been chosen due to the ECtHR's explicit acknowledgement of these models.[31] To delimit the further discussion to a model of extraterritorial effects jurisdiction, has been motivated by the legal uncertainty and lacking available research regarding its applicability within the ECHR.

1.6 *Disposition*

The thesis's analysis commences from Chapter 2, which will provide an overview of the ECHR and the concept of state obligations of the Contracting Parties to the ECHR. Chapter 3 analyses the EU's assistance under the EUTF for Africa to the LCG and its possible harmful effects on the rights of migrants, in view of the larger phenomenon in EU migration policy of externalizing migration controls to third states. Chapter 4 analyses the protection provided by Article 3 ECHR and if a Contracting Party has a positive obligation to halt EU assistance if the state is aware it has rights-violating effects, especially in view of the principle of *non-refoulement*. Chapter 5 will analyse the imputability, under the ECHR, of an individual EU Member State for an action committed by the EU. Chapter 6 will analyse the concept of jurisdiction in Article 1 ECHR, especially in view of the territorial understanding of jurisdiction. Chapter 7 analyses the models under which the concept of jurisdiction, and therefore the Contracting Parties' state obligations, can reach beyond the Contracting Party's territorial boundaries. Chapter 8 will then discuss the applicability of a model of extraterritorial effects jurisdiction. Chapter 9 will finally conclude the thesis, offering conclusions and reflections.

[29] See Gammeltoft-Hansen, 2018, p. 385; Gammeltoft-Hansen, 2017, p. 9.
[30] See further in section 7.2.
[31] See e.g. *Al-Skeini and Others v. the United Kingdom* [GC], §§ 133–139.

2 Overview of the ECHR

2.1 *The ECHR in the context of migration*

All migration is, in its essence, about crossing borders.[32] While states have a sovereign right to control the entry of migrants through their borders, such control must be in accordance with the obligations under the international law that the state has ratified and therefore agreed to adhere to.[33] Under the ECHR, the crossing of a border into a Contracting Party, also has significant implications on that state's obligations toward the individual. This is due to Article 1 ECHR regarding jurisdiction,[34] as the State in question must have exercised jurisdiction over the alleged violation of the Convention in order to activate its legal obligations and, therefore, potential responsibility and imputability under the Convention.[35]

The ECHR was created the year 1950,[36] in view of the horrors that transpired in Europe during the Second World War, and came into effect the year 1953.[37] A primary objective of the Convention is to provide a more extensive human rights protection for a chosen number of the rights in the Universal Declaration of Human Rights (UDHR).[38]

While the Convention is primarily meant to be respected by the Contracting Parties on their own accord,[39] the core mechanism of the Convention's human rights protection is the possibility of individual complaint before the ECtHR.[40] The rights and freedoms of the Convention are therefore directed to the Contracting Parties[41] and describe the states' legal obligations towards all individuals under their jurisdiction.

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[32] den Heijer, 2010, p. 169; See also Heschl, 2018, p. 36.

[33] See e.g. Dastyari & Hirsch, 2019, p. 3; C.f. Costa, 2010, p. 766. The right of states to hinder access at their borders is primarily founded upon the Westphalian concept of territorial sovereignty, Gammeltoft-Hansen, 2011, pp. 104–105; See also Costello, 2016, p. 25; C.f. von Bogdandy, 2012, p. 9, regarding how the concept of sovereignty forms the relationship between national and international law.

[34] See e.g. the case *Al-Skeini and Others v. the United Kingdom* [GC], § 131, regarding the primarily territorial understanding of jurisdiction under Article 1 ECHR.

[35] See case of *Catan and Others v. the Republic of Moldova and Russia* [GC], § 104; Case of *Soering v. the United Kingdom*, 7 July 1989, ECtHR, § 86; Decision of *Banković and Others v. Belgium and Others* [GC], 12 December 2001, ECtHR, §§ 61 and 67; See also Council of Europe, 2019, p. 5.

[36] Danelius, 2015, p. 17; See also Bernitz & Kjellgren, 2018, p. 152.

[37] Lindholm, Derlén, Naarttijärvi, 2016, p. 111.

[38] See Bates, 2010, p. 40.

[39] For further on the meaning and importance of the principle of subsidiarity see e.g. the case *De Souza Ribeiro v. France* [GC], 13 December 2012, ECtHR, § 77; Case of *Cocchiarella v. Italy* [GC], 29 March 2006, ECtHR, § 38.

[40] See Bernitz & Kjellgren, 2018, p. 153.

[41] C.f. Lindholm, Derlén, Naarttijärvi, 2016, p. 263.

2.2 *Jurisdiction and state obligations under the ECHR*

The wording of Article 1 ECHR defines the conditions for when a state to have exercised jurisdiction, and states the following:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

The concept of jurisdiction can be understood as a responsibility towards individuals that give rise to specific legal obligations.[42] During the creation of the Convention, it was left up to the supervisory bodies of the Convention to fill the deliberately undefined concept of jurisdiction in the ECHR. This left the ECtHR with the possibility of interpreting the of the concept of jurisdiction in step with the changing European society.[43] The article sets the limitations and therefore the scope of in which situations the Convention can become applicable,[44] which in turn delimits state's spheres of action and therefore reduce potential conflicts between states.[45] However, while the term "jurisdiction" might appear easy to summarize in this way, it might be the most important and theoretically advanced concept in the entire Convention.[46]

As shown, the wording of Article 1 ECHR, provides that states must "secure" the Convention's rights and freedoms to everyone within their jurisdiction. This is a reference to the latter articles of the Convention, which have been interpreted to impose different state obligations upon the Contracting Parties.[47]

State obligations can be divided in different categories, in order to further inform what they require of the State. The most common categorization is to divide state obligations under the ECHR into negative and positive obligations.[48] Negative obligations primarily provide for prohibitions on the state from intervening in individual rights. This is in order to create a protective sphere around the individual from possible state intervention that would interfere with the individual's rights and freedoms.[49]

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[42] See Ryngaert, 2015, pp. 22–26; Altwick, 2018, p. 588.
[43] Rozakis, 2006, p. 59; C.f. Gałka, 2015, p. 478.
[44] Gałka, 2015, p. 477.
[45] Ryngaert, 2008 p. 21.
[46] See Motoc & Vasel, 2018, p. 199. How the term jurisdiction should be interpreted has led to an intense academic debate and conflicting case law from various international courts, including the ECtHR, see e.g. Milanovic, 2017, p. 54.
[47] Harris, O'Boyle & Bates, 2014, p. 21.
[48] See e.g. Heschl, 2018, p. 94.
[49] See Danelius, 2015, p. 58.

An example of negative obligations can be found in Article 3 ECHR, regarding the prohibition of torture, which states the following:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 3 ECHR is one of the articles in Section I of the ECHR, that Article 1 ECHR refers to. In order for a Contracting Party to not interfere with its negative obligations under Article 3 ECHR, the state must refrain from all actions that would infringe upon the individual's right under the article.[50] The obligations under Article 3 is therefore considered absolute, which means that the protection provided by the article cannot to be reduced or interfered with for any circumstance or reason.[51]

A positive obligation entails instead an obligation for the state to take action, to protect the individual's rights and freedoms under the Convention.[52] Positive obligations are often an expression of the state's obligations to ensure that the individual's negative rights are indeed fulfilled, not only in theory, but in practice.[53] Although positive obligations often have a strong connection to economic, social and cultural rights and principally might have financial implications,[54] they might also include an obligation to protect individuals from acts by third states, that would have been a violation against the Convention if it were committed by a Contracting Party.[55] The ECtHR has however been careful in case law to point out that obligations under the Convention not always be subject of such clear categorizations.[56]

[50] Case of *Ilaşcu and Others v. Moldova* and *Russia* [GC], §§ 320–321.
[51] Reid, 2015, p. 723; See also e.g. Lindholm, Derlén, Naarttijärvi, 2016, p. 269, regarding the concept of absolute rights.
[52] Case of *Ilaşcu and Others v. Moldova and Russia* [GC], § 322.
[53] See Lindholm, Derlén, Naarttijärvi, 2016, p. 271; Heschl, 2018, p. 94–95; Harris, O'Boyle & Bates, 2014, p. 22; Danelius, 2015, p. 58.
[54] See Harris, O'Boyle & Bates, 2014, p. 21–22; Alston & Tomasevski, 1984, p. 97.
[55] Heschl, 2018, p. 94; Harris, O'Boyle & Bates, 2014, p. 22.
[56] See e.g. case of *Keegan v. Ireland*, 26 May 1994, ECtHR, § 49; Case of *S.H. and Others v. Austria* [GC], 3 November 2011, ECtHR, § 87. See the dissenting opinion of judge Russo in the case of *Gül v. Switzerland*, 19 February 1996, ECtHR, §§ 7–8, regarding an overview of the Court's view of positive and negative obligations.

3 EU assistance to the LCG in view of Externalization

The EU and its Member States are increasingly cooperating with third states to conduct migration controls at sea.[57] Before analysing in further detail, the specific EU policy under the EUTF for Africa to assist the LCG, such assistance should be understood in context of the larger policy phenomenon of which it takes part. The following in section will therefore first examine the EU Member States' use of externalizing migration related control measures and then turn to examining the specific financial and material assistance that the EU provides to the LCG and its possible effects on the prohibition of torture of migrants in Libya.

3.1 *Externalisation - Before and after Hirsi Jamaa v. Italy*

In the case of *Hirsi Jamaa v. Italy*, the ECtHR for the first time had to deal directly with a state's use of such external migration controls.[58] In this case the Italian Coast Guard intercepted a ship with migrants on the high seas outside of Libya and brought them back to land in Libya, in accordance with its bilateral agreement with the latter. This was considered a violation of the ECHR, as the ECtHR considered the migrants risked treatment contrary to Article 3 ECHR upon return to Libya. The case had immediate repercussions on the EU Member States' migration policy regarding interception of migrants on the high seas, instituting changes to EU's Common European Asylum System, the legal framework for Frontex-coordinated operations and contributed to Italy's launch of the largest sea-and-rescue operation in Europe, *Mare Nostrum*.[59]

After *Hirsi Jamaa*, EU Member States have been criticised for continuing to strategically shift certain aspects of migration management, in a two-folded manner. First, increased reliance on third state actors with no physical presence of EU Member States' officials, and secondly, increased to reliance on the EU, in order to avoid the potential legal obligations, they would otherwise have had as an individual state.[60] The prevalence and increased use of such policies present the international human rights regime with grave challenges.[61]

[57] Markard, 2016, p. 591.
[58] Heschl, 2018, p. 80, regarding the case of *Hirsi Jamaa and Others v. Italy* [GC].
[59] See Heschl, 2018, pp. 81–82.
[60] See Fitzgerald, 2019, p. 161.
[61] See Moreno-Lax & Giuffré, 2019, p. 88. The extent to which a state's human rights treaty obligations go beyond its territorial boundaries has been called one of the most pressing issues in contemporary public international law, see Milanovic, 2017, p. 54; Laval, 2012, p. 61.

3.2 *Non-entrée measures - Moving traditional borders*

To describe the concrete measures that are taken by states within the policy of externalization, they have been given the term of *non-entrée*.[62] A few examples of such *non-entrée* measures include carrier sanctions, impeding legal pathways to the state and extraterritorial patrols of sea borders. According to certain academics, the basis for a *non-entrée* measures is to hinder the irregular arrival of migrants and is founded upon the basis that they pose a threat to the destination state and its society.[63] An effect of these measures with respect to Libya has been identified from data from the year of 2016. While the number of migrants crossing the Mediterranean to reach Europe plunged to less than half, the number of migrants drowning rose sharply.[64]

Paradoxically, while these policies are often motivated by the need of stronger borders, the concept of a border as a dividing line between different sovereign communities appears in this context to have become increasingly blurred.[65] In the case of EU-led maritime operations, the activities of states have even led to the notion of borders as simply not existing as they are commonly understood.[66] A state's borders are through these measures, in a sense, able to move. A person may even encounter a foreign border control within his own country, hindering him access to specific areas in order to dissuade or hinder migration.[67] As migrants affected by this policy cannot arrive to their destination state, the state's legal obligations under the ECHR might not become activated due to lacking jurisdiction.[68]

3.2.1 An ever-closer union, in matters of externalisation

One aspect of such externalisation is the engagement of the EU as a non-party to the ECHR, and therefore further disassociate legal responsibility of possible violations to an EU Member State.[69] According to Fitzgerald, EU Member States in this way are strategically shifting some aspects of migration control to the EU level to escape the constraints placed upon them by national political culture and legal obligations.[70] This is primarily achieved due to the additional

[62] Hathaway, 1992, pp. 41–42, for the first use of the term to describe legalized measures by states to refugees' access to their territories; See also Gammeltoft-Hansen, 2018, p. 374; Spijkerboer, 2018, p. 453.
[63] Klein, 2017, pp. 39–40; See also Ciliberto, 2018, p. 482; Rijpma & Cremona, 2007, p. 17.
[64] Moreno-Lax & Giuffré, 2019, p. 87; See also Papastavridis, 2017, p. 162.
[65] C.f. Brouwer, 2010, p. 199.
[66] See Guilfoyle, 2017, p. 115.
[67] See den Heijer, 2010, p. 170; Brouwer, 2010, p. 199; C.f. Costello, 2016, p. 235, regarding the EU Network of Immigration Liaison Officers sent to third countries.
[68] See Hathaway & Gammeltoft-Hansen, 2015, p. 241.
[69] See Gammeltoft-Hansen, 2018, p. 375 for a similar statement in regard to the so-called migration policy of cooperative deterrence.
[70] Fitzgerald, 2019, p. 161.

complications that arise with regards to establishing a jurisdictional link to a state, when such measures are not implemented by the state itself, but through an international organization as the EU.[71]

The EU has in this context chosen to enact policies that externalizes migration and border controls to third states. This has been criticised as being indirectly enacted through financial and technical support or political promises by the EU to these third counties and as being part of a policy with the purpose of hindering migrants from arriving to Europe.[72] The implementation of such policies has been noted as a drastically changed strategy of the EU since the year 2016.[73] While the focus of such policies previously has been regarding the bilateral agreements between EU Member States and third states, for example between Italy and Libya,[74] the EU has also worked on such projects with third states under the concept of "integrated border management".[75] As a sign of the increased importance to the EU of migration management, the EU has announced to more than double the funds for migration and border management in the proposed EU long-term budget for the period of 2021 to 2027.[76]

3.2.2 Contactless control of third state actors

EU Member States therefore increasingly rely on the cooperation of third states in implementing the policies of externalizing migration control.[77] This cooperation between different states of has been called "contactless control" and as has been criticized aiming to avoid the legal responsibility of the sponsoring EU Member States[78] and of having as an indirect aim to hinder and dissuade the arrival of migrants to the supporting state's territory.[79] From this viewpoint, the sponsoring state will not become legally responsible for potential violations of its legal obligations when the action is carried out by the third state.[80]

This is primarily achieved through the elimination of any physical contact and therefore the primary jurisdictional link, between the sponsoring EU Member States and the migrants

[71] See Costello, 2016, pp. 247–248.
[72] Moreno-Lax & Giuffré, 2019, p. 87. Such economic support of external migration controls with harmful impacts on individual human rights might also be contrary to the humanitarian principles of economic assistance, see Papp, 2013, p. 152 for an analysis of these principles.
[73] See Moreno-Lax & Giuffré, 2019, p. 104.
[74] See e.g. Brouwer, 2010, p. 211, regarding the previous bilateral migration agreement between Libya and Italy.
[75] See Brouwer, 2010, p. 210.
[76] See European Commission, A Modern Budget for a Union that Protects, Empowers and Defends - The Multiannual Financial Framework for 2021-2027, 2 May 2018, pp. 14-15.
[77] See Gammeltoft-Hansen, 2018, p. 374.
[78] See Gammeltoft-Hansen, 2018, p. 379; Dastyari & Hirsch, 2019, p. 2.
[79] Moreno-Lax & Giuffré, 2019, p. 86.
[80] See Gammeltoft-Hansen, 2017, p. 6; Gammeltoft-Hansen, 2018, p. 381.

affected by such external migration controls.[81]The policy tendency seems to be of an increasingly active role in polices of the partnering third country and a more passive role of the sponsoring state. This makes it ever more difficult under the current understanding of extraterritorial human rights obligations to bring any legal responsibility to the sponsoring state.[82] To this effect, the external migration controls are carried out outside of the sponsoring state's territorial boundaries and using third country officials.[83]

The exercise of these policies might however involve the assisting state more than they appear. Assisting EU Member States generally retain substantial control over the migration controls conducted by third states[84] and such reliance on third states appears to have coalesced into a multinational system of cooperative deterrence towards migrants attempting to reach Europe.[85]

3.3 *The EU's assistance to the LCG*

The policy of providing assistance to the LCG and improving their capability of intercepting migrants attempting to leave Libya, might have effects that the LCG perform measures that would have been a violation of Article 3 ECHR if it had been performed by an EU Member State. Indeed, the ECtHR has stated that such pullbacks to a third country as Libya could in and of itself constitute a violation of Article 3 ECHR, if the country cannot be considered a place of safety.[86] The majority of migrants that have been intercepted trying to leave Libya by the LCG are detained on the basis of Libyan laws that criminalise undocumented entry, stay and exit and can be sentenced with prison, a fine and ultimately deportation.[87] The EU appears to condition this financial and technical support to Libya, on its cooperation in matters of hindering or "pulling back" migrants attempting an unauthorized entry into Europe.[88]

The migrants detained in this manner are held in deplorable conditions.[89] The majority of migrants that attempt to leave Libya for Europe are intercepted by the LCG and placed in arbitrary and indefinite detention, with severe risks for human rights abuses. Several reports

[81] Violeta-Lax & Giuffré, 2019, p. 87.
[82] See Gammeltoft-Hansen, 2018, p. 375.
[83] See Ciliberto, 2017, p. 493; Moreno-Lax & Giuffré, 2019, p. 85.
[84] Hathaway & Gammeltoft-Hansen, 2015, p. 243; Baxewanos, 2018, p. 194.
[85] Moreno-Lax & Giuffré, 2019, p. 86.
[86] See Moreno-Lax & Giuffré, 2019, p. 94. In the case of *Hirsi Jamaa and Others v. Italy* [GC], §§ 127–138, Libya was not considered a "place of safety" due to the real risk of ill-treatment of migrants; See also Dastyari & Hirsch, 2019, p. 26.
[87] Amnesty International, 2017, p. 20, referring to the Libyan law no. 6 of 1987 Organizing the Exit, Entry and Residence of Foreign Nationals in Libya of 20 June 1987.
[88] See Moreno-Lax & Giuffré, 2019, pp. 93–94.
[89] See Council of Europe, 2019, p. 43; Council of Europe Commissioner for Human Rights, 2019, p. 3.

have witnessed the prevalence of torture, inhuman or degrading treatment, rape and other sexual violence, forced labour, extorsion and unlawful killings in Libyan detention centres [90] Since the year 2017, numerous international bodies and civil rights organisations have called upon the EU and EU Member States to review whether this support provided to the LCG contributes to serious human rights abuses. No such review has however been performed as of 2019.[91]

In the EU's Malta declaration of 2017 regarding the policy of assisting Libya in migration related matters, the declaration stated that the objective was to "significantly reduce migratory flows", to "combat transit" and of "preventing departures".[92] In the case of Libya, which is not a Contracting Party to the ECHR, the state has no legal obligation to respect the rights and freedoms of the Convention. The objective of the assistance provided to such measures appears to not only dissuade or hinder entry, as in regular *non-entrée* measures, but also to hinder migrants from leaving Libya.[93]

The overarching logic of policies of promoting cooperative deterrence, is that the engagement of another state's sovereignty will legally insulate the sponsoring state from legal responsibility under human rights regimes.[94] The use of such policies by the EU raise certain risks, as gaps in the legal framework of third countries may create situations where a migrant whose rights under the Convention may not have access to a legal remedy due to lacking jurisdiction.[95] The policy of externalization appears to possibly insulate the assisting EU Member States from their state obligations under the Convention.[96] It appears also that the EU and EU Member States are aware of the possible rights-violating effects that the assistance provided to the LCG might have, as the EUTF for Africa itself has decried the present situation and recommended further actions to improve the human rights situation of intercepted migrants in Libyan detention centres.[97]

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[90] Council of Europe, 2019, p. 16 and 43; See also Gammeltoft-Hansen, 2018, p. 374; Heller & Pezzani, 2018, p. 84; Office of the United Nations High Commissioner for Human Rights, 2016, pp. 14–19; Human Rights Watch, 2019, pp. 35–57; Andersson & Keen, 2019, pp. 28–31; Concord, 2018, p. 9.

[91] Council of Europe, 2019, pp. 42–43.

[92] The *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, 2017, §§ 3, 5 & 6.

[93] Moreno-Lax & Giuffré, 2019, pp. 87–88; See also Spijkerboer, 2018, pp. 452–469, regarding a reconceptualization of external migration policies through a perspective of access to the global mobility structure.

[94] Hathaway & Gammeltoft-Hansen, 2015, p. 243; See also Markard, 2016, p. 594.

[95] C.f. Council of Europe, 2019, p. 41.

[96] C.f. Hathaway & Gammeltoft-Hansen, 2015, p. 242, regarding the difficulty of applying the principle of *non-refoulement* to assistance provided by EU Member States to third states' migrations control measures.

[97] See European Commission, 2018, p. 10. The situation in Libyan detention centres are described as being "…of great concern: there is a lack of food, hygiene is abhorrent and there is a situation of total despair", European Commission, 2018, p. 5.

4 Article 3 ECHR in the context of rights-violating effects

The EU's assistance to the LCG has been criticised as assisting to human rights abuses that potentially would constitute a violation of Article 3 ECHR, if they were committed by a Contracting Party to the ECHR. However, while migration controls can be conducted extraterritorially or through other actors, a state's obligations to provide human rights protections is principally limited to the state's territorial boundaries.[98] This in turn raises the question, of EU Member States' legal responsibility under the ECHR for this assistance of the EU if it were to assist to such human rights abuses.

4.1 *Non-refoulement - The foundation of international refugee law*

The ECtHR has stated that the Convention cannot be interpreted in a legal vacuum but must be understood in harmony with other relevant international law. Special importance during such interpretation is to be given other human rights instruments, that the relevant Contracting Party has ratified and therefore accepted to uphold.[99] In order to understand the obligations that Article 3 ECHR imposes on Contracting Parties, the principle of *non-refoulement*, as the centrepiece of international refugee law,[100] and how it has influenced Article 3 ECHR should first be examined.

The principal legal basis for the principle of *non-refoulement* is Article 33 (1) of the 1951 Convention Relating to the Status of Refugees (the Refugee Convention).[101] The principle of *non-refoulement* acts as a prohibition on states to return any individual to a country where they will be at risk of torture or other serious human rights abuses. The Refugee Convention therefore prohibits states from returning (*refouler*) refugees or asylum seekers to a territory where the individual's life or freedom would be threatened due to race, religion, nationality, membership of a particular social group or political opinion.[102] However, while refugees and asylum seekers are protected from being sent back to their country of origin if they could face risk of persecution, the principle of *non-refoulement* is applicable to any migrant at risk.[103]

[98] See Moreno-Lax, 2017, p. 247.
[99] Case of *Saadi v. the United Kingdom* [GC], 29 January 2008, ECtHR, § 55; Case of *Al-Adsani v. the United Kingdom* [GC], 21 November 2001, ECtHR, § 55; Case of *Pini and Others v. Romania*, 22 June 2004, ECtHR, § 138.
[100] UNHCR, 2007, §§ 5 and 12; European Union Agency for Fundamental Rights, 2016, p. 13.
[101] *The 1951 Convention relating to the Status of Refugees*, 189 U.N.T.S. 137, entered into force 22 April 1954; See also Lauterpacht & Bethlehem, 2003, p. 90.
[102] See Lauterpacht & Bethlehem, 2003, pp. 89 and 107.
[103] Office of the United Nations High Commissioner for Human Rights, 2016, p. 10.

Additionally, while the ordinary meaning of *refouler* is to drive-back, repel or re-conduct, the principle is not limited to the physical presence by the migrants within the states boundaries.[104] According to the UNHCR, *non-refoulement* under the Refugee convention is not restricted by the territorial boundaries of the state in question but is applicable wherever the state exercises jurisdiction.[105] The principle prohibits also, according to Lauterpacht, any state action which has the effect to expose an individual to the risk of treatment contrary to the principle, by removing them from a place of safety to a place of threat.[106]

The foundation of *non-refoulement* can therefore be found in the CSR, but its limits are not defined there. Instead, other human rights norms also form part of the principles, prohibiting the return of a person to a territory where he or she faces torture, inhuman or degrading treatment.[107]

4.2 *Article 3 ECHR in view of the principle of non-refoulement*

While the principle of *non-refoulement* is an integral part of the protection provided by Article 3 ECHR,[108] the article provides a wider protection than the principle of *non-refoulement* under the Refugee Convention.[109] Article 3 ECHR includes indirect and chain-*refoulement*,[110] and in relation to Libya, the ECtHR has stated that Article 3 ECHR "…is all the more important when the intermediary country is not a State Party to the Convention".[111] The EU policy of providing assistance to the LCG appears to make it difficult to place legal responsibility on any individual EU Member State as a contracting Party to the ECHR.

Nonetheless, as mentioned by the seminal case of Court in *Hirsi Jamaa v. Italy,* any action by the state must not have "the effect of which is to prevent migrants from reaching the borders of the… State".[112] This view of state obligations could be seen as necessary, in order for the Convention to provide an effective and practical protection to migrants intercepted on the high seas.[113] Such a statement by the ECtHR appears difficult to reconcile with the EU's policy of

[104] Moreno-Lax & Giuffré, 2019, p. 88; See also Costello, 2016, p. 236.
[105] UNHCR, 2007, p. 4.
[106] Lauterpacht & Bethlehem, 2003, p. 159; See also Human Rights Committee, 1994, § 9, for General Comment No. 20 regarding *non-refoulement* as part of the prohibition of torture in Article 7 ICCPR.
[107] Moreno-Lax & Giuffré, 2019, p. 88; See also Harvey, 2014, p. 49, who further remarks that human rights norms are the principal drive for the future evolution of the interpretation of *non-refoulement*.
[108] Heschl, 2018, p. 85.
[109] Case of *Chahal v. the United Kingdom*, § 80; See also UNHCR, 2006, p. 7.
[110] See case of *Hirsi Jamaa and Others* v. Italy [GC], § 146.
[111] See case of *Hirsi Jamaa and Others* v. Italy [GC], §§ 146–147.
[112] See case of *Hirsi Jamaa and Others v. Italy* [GC], § 180; Violeta-Lax & Giuffrée, 2019, p. 95.
[113] See case of *Sharifi and Others v. Italy and Greece*, 21 October 2014, ECtHR § 210.

assisting the LCG to improve their capacity to intercept migrants, if they then risk human rights abuses.

The wording of Article 3 ECHR therefore implies a prohibition, as in the principle of *non-refoulement*, on returning individuals to a situation where they risk suffering treatment contrary to the article.[114] However, while the principle of *non-refoulement* is an integral part of the protection provided by Article 3 ECHR,[115] the article provides a wider protection than the principle of *non-refoulement* under the Refugee Convention.[116] Article 3 ECHR includes indirect and chain-*refoulement*,[117] and in relation to Libya the ECtHR has stated that Article 3 ECHR "…is all the more important when... the intermediary country is not a State Party to the Convention".[118]

Article 3 applies to every person within a Contracting Party's jurisdiction, which in turn signifies an obligation on the state to not expose individuals to an irremediable situation of objective danger, even if this danger would manifest itself outside of the state's jurisdiction.[119] As first noted by the ECtHR in the case of *Soering v. the UK*,[120] while the wording of Article 3 ECHR does not refer to extradition or removal of individuals it also does not exclude the possibility of incurring a state's jurisdiction when the risk of ill-treatment would appear after the affected person has left the state's territorial boundaries.[121] Indeed, an interpretation of Article 3 ECHR that a Contracting Party could not be held responsible for such risks, was deemed to not be in accordance to the underlying values of the Convention" and that such an interpretation would be "contrary to the spirit and intendment of the article".[122]

The ECtHR has however been careful to elaborate that in order to activate the protection of Article 3 ECHR, there must be present substantial grounds for believing that the individual would face a real risk of torture, inhuman or degrading treatment.[123] The ECtHR's possibility to examine such circumstances, even if the violation occurs outside the state, is connected to the Convention's principle of providing effective, practical and not illusory protection of its

[114] See case of *Hirsi Jamaa and Others* v. Italy [GC], § 123.
[115] Heschl, 2018, p. 85.
[116] Case of *Chahal v. the United Kingdom*, 15 November 1996, ECtHR, § 80; See also UNHCR, 2006, p. 7.
[117] See case of *Hirsi Jamaa and Others* v. Italy [GC], § 146.
[118] See case of *Hirsi Jamaa and Others* v. Italy [GC], §§ 146–147.
[119] Reid, 2015, p. 719.
[120] Vermeulen & Battjes, 2018, p. 417; case of *Soering v. the United Kingdom*.
[121] Case of *Soering v. the United Kingdom*, § 91.
[122] Case of *Soering v. the United Kingdom*, § 88; See also Vermeulen & Battjes, 2018, p. 417.
[123] See Lauterpacht & Bethlehem, 2003, p. 161, regarding their analysis of the cases of *Soering v. the United Kingdom* and *Chahal v. the United Kingdom*, 15 November 1996, ECtHR, and the decision of *T.I. v. the United Kingdom*, 7 March 2000, ECtHR; See also Danelius, 2015, p. 93.

rights and freedoms.[124] The rights and freedoms of the convention can therefore have an extraterritorial application,[125] meaning that a state which exercises jurisdiction could become responsible for acts or omissions that occur outside of the state's territorial boundaries.

As mentioned above, the Contracting Parties to the ECtHR's measures to "push back" boats with migrants attempting to reach Europe to Libya was condemned by the ECtHR in the case of *Hirsi Jamaa v. Italy*, as a violation of Article 3 ECHR.[126] This tension between Contracting Parties' legal obligations under the Convention and their political interest in reducing migration, has the potential effect of creating a considerable incentive to assist third states in migration related matters. Especially as such cooperation might avoid activating the Contracting Party's jurisdiction under the Convention.[127] However, the assistance to third states by the EU in the purpose of those states "pulling back" migrants to the state they attempted to leave, has so far been largely neglected.[128]

Regional human rights courts have taken an increasing interest of the state practices outlined above and states have several times had to substantially adjust or stop altogether their assistance of external migration controls. States appear however to be learning from the manner that their previous policies were brought under their jurisdiction of the ECHR and are changing their policies accordingly.[129] In this regard, there is an ongoing "cat-and-mouse game" between EU Member States' migration policies and the ECtHR, regarding the reach of state's human rights obligations under the Convention.[130]

4.3 *A positive obligation to prevent violations of Article 3 ECHR*

In the case of *Z and Others v. the United Kingdom*, the ECtHR stated that Article 3 ECHR entails a positive obligation of the Contracting Parties to actively provide adequate protection against torture, inhuman and degrading treatment of individuals under their jurisdiction.[131] This includes such circumstances where the Contracting Party's authorities that, through acquiescence or connivance, permits the actions of private individuals to violate the Convention

[124] See Danelius, 2015, p. 92.
[125] See e.g. Lindholm, Derlén, Naarttijärvi, 2016, p. 266.
[126] See *Hirsi Jamaa and Others v. Italy* [GC].
[127] See Markard, 2016, p. 593.
[128] See Markard, 2016, p. 592.
[129] See Gammeltoft-Hansen, 2018, pp. 378–379; Gammeltoft-Hansen, 2017, p. 2 and 6, regarding state's use of "creative legal thinking" to avoid legal responsibilities for such external migration controls.
[130] See Gammeltoft-Hansen, 2017, p. 3; Hathaway & Gammeltoft-Hansen, 2015, p. 246; Gammeltoft-Hansen, 2011, p. 8.
[131] Case of *Z and Others v. the United Kingdom* [GC], 10 May 2001, ECtHR, § 72; See also Marks & Azizi, 2010, p. 730.

within its jurisdiction.[132] Additionally, this positive obligation includes that reasonable measures be taken to prevent ill-treatment of which the state was or should have been aware of.[133]

This was also the ECtHR's conclusion in the case of *Husayn v. Poland*, as the Polish authorities were aware that the extrajudicial transfer of the applicant to another secret detention facility of the CIA exposed him to a "…exposed him to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3…" ECHR.[134] By enabling the transfer despite its awareness of the risks involved, Poland had violated Article 3 ECHR.[135] Lastly, a similar conclusion was found in the case of *Ilaşcu and others v. Moldova*, where Moldova had a positive obligation within their jurisdiction to prevent third actors from perpetrating violations of the Convention.[136] As the ECtHR stated in the case of *M.S.S. v. Belgium and Greece*, the fact that an individual has entered a country irregular cannot be held against them, when it comes to securing their rights under the Convention. This statement is indeed of particular importance when the individual entered the country in order to avoid treatment contrary to Article 3 ECHR.[137]

Article 3 ECHR therefore implies a positive and negative state obligations, to refrain from and prevent treatment that amounts to torture, inhuman or degrading treatment. When a state is aware of a foreseeable serious risk that an individual will suffer treatment contrary to this article, it has an obligation to take measures to prevent this from occurring. These state obligations are absolute, meaning that the protection provided by the article be limited. In order to activate such obligations, the situation at hand must however be within the jurisdiction of the state. While the issue of jurisdiction will be analysed further below, an additional complication arises whether a Contracting Party to the ECHR can become legally responsible for acts or omissions committed by an international organisation as the EU.

[132] Case of *Ilaşcu and Others v. Moldova and Russia* [GC], § 318; See also case of *Cyprus v. Turkey* [GC], 10 May 2001, ECtHR, § 81.
[133] Case of *Z and Others v. the United Kingdom* [GC], 10 May 2001, ECtHR, § 73.
[134] Case of *Husayn (Abu Zubaydah) v. Poland*, 24 July 2014, ECtHR, § 513; See also Vedel Kessig, 2017, p. 86.
[135] See case of *Husayn (Abu Zubaydah) v. Poland*, §§ 451 and 514.
[136] Case of *Ilaşcu and Others v. Moldova and Russia* [GC]; See also Fernandez, 2017, p. 255.
[137] Case of *M.S.S. v. Belgium and Greece* [GC], 21 January 2011, ECtHR, § 315; See also Moreno-Lax & Giuffré, 2019, p. 96.

5 State responsibility under the ECHR for EU actions

5.1 *EU Member States' responsibility under the ECHR*

Legal responsibility under the ECHR can only be incurred by its Contracting Parties.[138] The EU is therefore not directly legally responsible before the obligations of the ECHR.[139] The first case of the ECtHR in which such an issue was considered, was the case of *Hess v. the United Kingdom*. The case was in regard to the joint administration by the United Kingdom, France, the United States and the Soviet Union of the prison where Rudolf Hess, the former chancellor of the German Nazi party. The then Commission found that the joint administration of the prison could not interpreted as a division of the prison into four separate jurisdictions, and that Hess therefore had not been under the United Kingdom's jurisdiction.[140] This case has been interpreted to entail that a single state cannot be held responsible for the actions of an international organization, solely for the fact that the state holds a right to vote in that organization.[141] Any EU Member State could therefore not become potentially responsible for only forming part of the EU, in the case of EU actions that are contrary to the ECHR.

This does however not mean that an EU Member State cannot be held responsible under any circumstances.[142] It appears instead that such responsibility, to secure the rights and freedoms of the ECHR, must be connected to an imputable action. An action that creates a sufficiently causal link between the EU Member State actions or omissions, the actions of the EU as an international organization and the potential rights-violating effects of the EU's actions. The following sections will therefore analyse whether the EU's assistance to the LCG could become characterized as an imputable action towards an EU Member State.

5.2 *Characterization of EU assistance as an imputable action*

Generally, states transfer competences to international organisations in order to achieve specific objectives.[143] However, when a Contracting Party to the ECHR has transmitted some of its competences to the EU, they continue to be responsible for securing that these competences are

[138] See case of *Saadi v. Italy* [GC], 29 January 2008, ECtHR, § 126.
[139] Walkila, 2016, p. 78. The EU, in spite of arguably being subject to high human rights obligations in terms of extraterritorial effects under the Charter, is not likely to judicially enforce such obligations. This is primarily due to the individuals being hindered through restrictive standing rules in EU law to challenge EU legal acts or policies, Bartels, 2015, pp. 1090–1091; See also Altwicker, 2018, p. 587.
[140] Decision of *Ilse Hess v. United Kingdom*, 28 May 1975, ECtHR.
[141] See Guide on Article 1 - Obligation to respect human rights: The Concepts of "jurisdiction" and impunity, 30 April 2019, p. 26; C.f. decision of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], 2 May 2007, ECtHR; Brouwer, 2010, p. 217.
[142] See e.g. Cameron, 2014, p. 53.
[143] Saroochi, 2013, p. 79.

used in respect of the rights and freedoms of the Convention.[144] The acts of an international organisation, such as the EU, can have extraterritorial effects on the human rights of individual in two forms: first, extraterritorial conduct that triggers human rights obligations, for example kidnappings,[145] the use of armed forces[146] or actions on the high seas[147] and, second, the extraterritorial effects of domestic acts.[148]

As this thesis analyses the potential imputability of providing assistance to the LCG, a state's extraterritorial conduct through its own agents that triggers human rights obligations, falls outside the scope of the aim of this thesis. This is due to the fact that such extraterritorial conduct requires the defendant state's own officers to have taken part of the alleged violation. In the second case, regarding the extraterritorial effects of domestic acts, a distinction can also be made between two forms, a) domestic acts with indirect extraterritorial effects and b) domestic acts with direct extraterritorial effects.[149] The first one of these, called the "Soering-constellation", entails the responsibility of a state towards an individual that risks facing human rights violation in a third state. This is typically the form used when a person is extradited or expulsed from a country and is first and primarily connected to Article 3 ECHR.[150]

The second form, regarding extraterritorial harmful effects of domestic policy, entails the type of situation where a state has a more direct connection to impacts on individual human rights in a third state.[151] However, a state's responsibility for the acts of an international organisation may also be engaged, when the state aids or assists the organisation to commit an internationally wrongful act.[152] For the purposes of this thesis, the EU's assistance to the LCG has been identified as a possible example of a domestic action with direct extraterritorial harmful effects.

The case law, in which the ECtHR has found that a Contracting Party had breached its state obligations under the Convention after having transferred competencies to an international organization is very scarce.[153] The issue of Contracting Party's responsibility for acts

[144] Bernitz & Kjellgren, 2018, p. 157.
[145] See e.g. case of *Öcalan v. Turkey* [GC], 12 May 2005, ECtHR.
[146] See e.g. case of *Al-Skeini and Others v. the United Kingdom* [GC].
[147] See e.g. case of *Hirsi Jamaa and Others* v. Italy [GC], § 123; Case of *Medvedyev and Others v. France* [GC], 29 March 2010, ECtHR.
[148] See Altwicker, 2018, p. 585.
[149] Altwicker, 2018, p. 585.
[150] See Altwicker, 2018, p. 585–586: Lindholm, Derlén, Naarttijärvi, 2016, p. 267; See generally the case of *Soering v. the United Kingdom*, regarding the responsibility of the United Kingdom towards a German citizen, suspected of murder, for the risk of capital punishment if extradited to the United States.
[151] Altwicker, 2018, p. 586.
[152] Saroochi, 2013, p. 83; See also Article 16 ASR.
[153] C.f. Klein, 2010, p. 313.

committed under the organizational umbrella of an international organization, as the EU, has however previously been raised before the ECtHR. The defendant state cannot successfully argue that its hands were tied by the international organisation's exercise of transferred powers.[154] According to the ECtHR in *Waite and Kennedy v. Germany*, a Contracting Party cannot avoid its responsibilities under the Convention, by means of acting through an international organization in which it takes part. Such an arrangement would be incompatible with the purpose and object of the Convention, as the state would therefore be absolved from any responsibility for the actions of the organization.[155]

Such an absolution would impede the fulfilment of the Convention's intent, to provide rights that are practical, effective and not illusory. This is particularly important when the right of access to court is affected, due to its prominent place in a democratic society.[156] In the case of *Matthews v. the United Kingdom* the ECtHR also stated that while the Convention does not prohibit a Contracting Party from transferring competencies to an international organisation, it does require that the Convention's articles are "secured". The state's responsibility under the convention therefore "continues even after such a transfer".[157]

According to the ECtHR in the Grand Chamber case of *M.S.S. v. Belgium and Greece*, states regarding cooperation between states in areas which might have implications on fundamental rights, that "it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility vis-à-vis the Convention in the area concerned".[158] EU Member States therefore appear, with regards to their residual positive obligations, to be potentially responsible for indirect violations committed by another state. This might be the case even if only assistance is provided and no direct control over the actions of the third state actor was exercised by neither the EU or an EU Member State.[159]

5.3 *Imputability of EU assistance with rights-violating effects*

It appears, therefore, that actions of a Contracting Party to the ECHR that has extraterritorial harmful effects on the rights of migrants in Libya, could potentially become imputable towards the assisting state. While a number of cases have touched upon the applicability of the ECHR through extraterritorial conduct, in regard to extraterritorial effects there exist in principle no or

[154] See Saroochi, 2013, p. 84.
[155] Brownlie, 2005, p. 361; *Waite and Kennedy v. Germany* [GC], § 67; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 154.
[156] *Waite and Kennedy v. Germany* [GC], § 67.
[157] See *Matthews v. the United Kingdom* [GC], §§ 26 and 32; Saroochi, 2013, p. 84.
[158] *M.S.S. v. Belgium and Greece* [GC], § 342; See also *Waite and Kennedy v. Germany* [GC], § 67.
[159] See Fernandez, 2017, p. 255.

contradictory guidance from the ECtHR.[160] Additionally, the legal responsibility of a single EU Member State appears to become even more obscure when the sponsoring is carried out under the organizational umbrella of the EU. This is similar to what been called the "many hands issue", which states that, when the responsibility for any given instance of conduct, is scattered among more people, the responsibility of every individual diminishes proportionately.[161] While Bovens when writing on this subject appears to principally have thought of individuals, the same issue appears to be relevant when attempting to hold individual states responsible within an international organization.

The distinguishing feature of the scenario of the EU's assistance to the LCG, is however that the affected individuals re not located within the territorial bounds or under the direct control of the sponsoring state. These individuals are rather under the control of a third state actor.[162] The ECtHR has in the past analysed similar situations, but with regard to states' use of private individuals to commit acts that infringe the Convention. The ECtHR has in these cases found that Contracting Party cannot avoid their legal responsibility under the Convention by delegating its obligations under Article 3 ECHR to private actors or other individuals.[163] This reasoning appears to be based upon the Convention's aim of providing an effective and practical human rights protection.

The effects of policies of externalization should also be seen in the context of the ECtHR's view that the Contracting Parties' "…problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention."[164] This case would appear to be a signal that Contracting Party to the ECtHR, has a positive obligation of due diligence, to ensure that international organizations, of which they are a member, does not act contrary to the Convention.[165] This positive obligation is however not the same as the Contracting Party being responsible for the actions of the international organization, but is an omission to act by the respondent state itself.[166] A similar conclusion can also be drawn from Article 61 of the Draft articles on the responsibility of international organizations (ARIO), regarding international responsibility when a state circumvents its

[160] Bartels, 2015, pp. 1077–1078, regarding the case of *Kovačić and Others v. Slovenia* [GC], 3 October 2008, ECtHR and the decision of *Ben El Mahi and Others v. Denmark*, 11 December 2006, ECtHR.
[161] See Bovens, 1998, p. 46; Nollkaemper, 2013, 392; But see Article 47 ASR, which indicates that individual state responsibility is not diminished or reduced when several states act in unison.
[162] See Milanovic, 2011, p. 124.
[163] Case of *Costello-Roberts v. the United Kingdom*, 25 March 1993, ECtHR, § 27; See also case of *Van der Mussele v. Belgium*, 23 November 1983, ECtHR, §§ 28–39.
[164] *Hirsi Jamaa and Others v. Italy* [GC], § 179.
[165] C.f. Klein, 2010, p. 313.
[166] C.f. Klein, 2010, pp. 313–314.

international obligations, as the ECHR, by means of taking advantage of having transferred certain competences to an international organization to commit an act which would otherwise have been contrary to its international obligations.

A state can become responsible for the internationally wrongful acts of another state, if it knowingly provides assistance to an act that would also have been internationally wrongful if it was committed by the supporting state, according to Article 16 ASR. The ECtHR has previously chosen to interpret the ECHR in light of the ASR.[167] It is not necessary for such assistance to have been essential for the perpetration of the act or that without the assistance the act would not have been perpetrated.[168] Assistance that has an eventual possibility of assisting to an internationally wrongful act, is not sufficient to establish a link between this assistance and the wrongful act. Instead, in line with the International Court of Justice's conclusions, that an assisting state must have accepted, with knowledge of the facts, that a serious risk of wrongdoing existed.[169]

The preparatory works of the ASR states that the term "aid or assistance" is primarily understood as material means that facilitates the wrongful act but may also consist of a legal or political nature. Even an assisting state's actions that incites another state to commit a wrongful act may therefore be encompassed by Article 16 ASR. It appears therefore that quite a large degree of state actions, possibly could be encompassed by the term of "aid or assistance".[170] Solely the possibility that a state's assistance could lead to the committal of an internationally wrongful act has however not been deemed as sufficient of a causal link between the assistance and its consequences.[171] It must instead have been established that the assistance provided would be used to commit an internationally wrongful act.[172]

The ECtHR appears to be guided by Article 16 ASR but has established a lower threshold for establishing the its complicity with the actions of a third state. In the above-mentioned case of *Husayn v. Poland*, the ECtHR found that Poland had facilitated and made no attempt of halting treatment contrary to Article 3 ECHR by US operatives toward detainees at a CIA compound in Poland. Poland's acquiesce and connivance, therefore activated its responsibility for the actions of a third state under the ECHR.[173]

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[167] See e.g. case of *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], 29 January 2019, ECtHR, §§157–158; Case of *Jaloud v. the Netherlands* [GC], 20 November 2014, ECtHR, § 151.
[168] Markard, 2016, p. 615, regarding the ILC's commentary on Article 16 ASR.
[169] Moreno-Lax & Giuffré, 2019, p. 104.
[170] See International Law Commission, 1978, p. 102.
[171] See Moreno-Lax & Giuffré, 2019, p. 105.
[172] See International Law Commission, 1978, p. 104.
[173] *Husayn (Abu Zubaydah) v. Poland*, §§ 470 and 512; Vedel Kessig, 2017, pp. 86–87.

5.4 *Restrictions on imputability for EU actions*

It appears therefore possible for an EU Member State to become legally responsible for actions by the EU. This possibility of imputing Contracting Parties for the actions of an international organization where they take part, as the EU, is however not without certain restrictions. In the case of *Bosphorus v. Ireland*, the ECtHR held that EU Member States can be held responsible for measures that they adopt under a legal obligation from an international organization to which the state has transferred part of its sovereignty.[174]

In the words of the ECtHR, "…a Contracting Party *is responsible under Article 1* of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does *not exclude any part of a Contracting Party's "jurisdiction" from scrutiny* under the Convention…".[175]

In order for this *Bosphorus* doctrine to come into effect, the state must first have been found to have exercised jurisdiction over the circumstances.[176] The situation in case law of the ECtHR appears however unclear how such assistance that, due to direct extraterritorial harmful effects, can fall under an EU Member State's jurisdiction.

Additionally, in the latter case of *Michaud v. France* the ECtHR clarified that the presumption only is applicable when the question has been previously examined by the European Court of Justice (CJEU). Otherwise the ECtHR will conduct a full examination of the merits in the alleged violation.[177] However, if the concept of jurisdiction under the ECHR cannot encompass the use such policies as providing assistance to the LCG, a *de facto* impunity could arise for EU Member States in the case that such externalization of border controls have harmful extraterritorial effects, especially with the view that Article 3 ECHR should provide a more extensive protection than that of *non-refoulement*.[178]

Therefore, in order for an EU Member State to potentially become legally responsible for an act that it has supported by means of the EU, it must have exercised jurisdiction. While EU Member States according to the ECtHR´s cited case law, should not be able to commit actions that they could not do as an individual Contracting Party, the difficulty of imputing an EU

[174] See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], §§ 152–155.
[175] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 153, (emphasis added).
[176] See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 137, where Ireland is found to have exercised jurisdiction due to actions taken by Irish officials on Irish territory.
[177] See Bernitz, 2018, p. 157; Case of *Michaud v. France*, 6 December 2012, ECtHR.
[178] C.f. Gammeltoft-Hansen, 2018, p. 375.

Member State speaks for the need of a broader analysis of the concept of jurisdiction and how it applies to extraterritorial actions. In view of these externalisation policies of contactless control and the harmful impacts it can have on Article 3 ECHR, the following analysis will focus on analysing the concept of jurisdiction.

In conclusion, while an EU Member State can become legally responsible for action by the EU, the applicant must be able to rebut the presumption of "equivalent protection" in EU law.[179] In the case of EU assistance to the LCG, it appears therefore that neither the EU nor Libya is able to assume or exonerate the EU Member States from their responsibilities under the Convention. However, the ECtHR has stated that to absolve a Contracting Party from their responsibility under the Convention due to an agreement, would run contrary with the object and purpose of the Convention.[180]

The ECtHR was also careful to rebut Italy's similar argument in the case of *Hirsi Jamaa v. Italy*, stating that the Contracting Party's responsibility under the Convention continues even after its entering into subsequent treaty commitments.[181] In the case of EU assistance to the LCG, this presumption of *Bosphorus* appears however to not yet have become activated, in view of the clarification of this presumption by the ECtHR in *Michaud*, as the issue has not yet become examined by the CJEU. Additionally, in Bosphorus Ireland's exercise of jurisdiction was not at issue, as the State's actions were taken on Irish territory.[182]

It appears possible that the EU's assistance can be defined as assistance that has direct extraterritorial harmful effects on the rights and freedoms protected by Article 3 ECHR and could, in connection to factual circumstances of a potential application to the ECtHR, be considered an imputable action towards an EU Member State. In order for a Contracting Party to the ECHR to become responsible for an imputable action, as mentioned above, the action must however have fallen under the defendant state's jurisdiction.

[179] See Costello, 2016, p. 247.
[180] Decision of *K.R.S. v. the United Kingdom*, 2 December 2008, ECtHR, § 15; See also case of *Waite and Kennedy v. Germany* [GC], 18 February 1999, ECtHR § 67.
[181] Case of *Hirsi Jamaa and Others v. Italy* [GC], § 129; See also case of *Al-Saadoon and Mufdhi v. the United Kingdom*, 2 March 2010, ECtHR, § 138.
[182] See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 137.

6 Jurisdiction - The threshold to having rights

6.1 *Jurisdiction as a limitation on state obligations*

The concept of jurisdiction can be seen as a steppingstone, a threshold criterion, which must first be cleared in order to activate a Contracting Party's responsibilities toward an individual under the ECHR, which in turn gives rise to specific legal obligations.[183] The means of evaluating whether an individual is within the jurisdiction of a state, is connected to the Contracting Party's effective control over the alleged violation. Jurisdiction can be seen as an "all or nothing" concept, either an individual is within a state's jurisdiction or not, there can be no in-between.[184] Once the conditions for jurisdiction are fulfilled, the rights of the specific human rights regime become applicable towards the individual.[185] It is however important to make a distinction between the concepts of jurisdiction and that of imputability. While jurisdiction concerns the control between the state and the individual, imputability however concerns the connection between the victim and the alleged perpetrator.[186]

In general, the concept can therefore be summarized as the threshold criterion which must be fulfilled in order for states' treaty obligations to become applicable to the circumstances of the situation in issue.[187] Jurisdiction is therefore necessary for a state to be held responsible for acts or omissions that could give rise to a violation of the convention.[188] The ECtHR can after concluding that the issue at hand falls within the state's jurisdiction and examination of the merits conclude that a certain article of the Convention has or has not been violated. If a violation is found, the state must as far as possible eliminate the consequences of the particular act or behaviour.[189] The article therefore restricts the applicability or the scope of the convention.[190] The state's obligations under the ECHR is therefore restricted through the

[183] See Milanovic, 2011, p. 19; Altwick, 2018, 588; Besson, 2018, p. 161; Gałka, 2015, p. 478; See also *Al-Skeini and Others v. the United Kingdom* [GC], § 130; *Ilaşcu and Others v. Moldova and Russia* [GC], § 311; *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], § 178. Jurisdiction has however been given several different and disparate meanings, see e.g. Milanovic, 2011, pp. 21–40. Within the context of private international law, jurisdiction refers to a state's power over individuals and property within its own territorial boundaries, Bring, Mahmoudi & Wrange, 2014, p. 100.
[184] See Besson, 2015, p. 254.
[185] See Besson, 2018, p. 161; Laval, 2012, p. 63; *Al-Skeini and Others v. the United Kingdom* [GC], § 130.
[186] See e.g. Milanovic, 2008, 446.
[187] Milanovic, 2011, p. 19; See also case of *Catan and Others v. the Republic of Moldova and Russia* [GC], 19 October 2012, ECtHR, § 103.
[188] *Catan and Others v. the Republic of Moldova and Russia* [GC], § 104; *Soering v. the United Kingdom*, § 86; *Banković and Others v. Belgium and Others* [GC], §§ 61 and 67; See also Council of Europe, 2019, p. 5.
[189] See Bernhardt, 2005, p. 243.
[190] Gałka, 2015, p. 477.

concept of jurisdiction under Article 1 ECHR.[191] The case law of the ECtHR regarding jurisdiction under Article 1 ECHR has however evolved significantly in the years.[192]

As noted by the ECtHR in seminal case of *Loizidou v. Turkey*, it is of importance to differentiate between whether a state has exercised jurisdiction over certain events and whether the state is in fact responsible for those actions. The responsibility of a state is instead to be judged on the merits, after jurisdiction has already been established.[193] In practical terms however, the Court usually evaluates the issue of responsibility and that of imputability together, as the state only can become responsible for an action, if the action is imputable to it.[194]

6.2 *Rights-holders and bearers - Sovereignty and Universality*

As shown above, when a state's jurisdiction has become activated, the legal relationship between the defendant state and individual changes significantly. This entails that an individual, as a rights-holder, gain claim to a duty by the state, as the rights-bearer, that the individual's right will be respected.[195] Such duties in turn acts as a constraint on the state´s sovereignty,[196] meaning that the state cannot act in ways that would be contrary to this duty. In the area of migration control, there exists therefore a tension between the two concepts of the state's sovereignty and its international legal obligations.[197] In this tension, the status of the refugee is the stand-out exception to states' sovereign right of controlling access to the state in view of their international legal obligations.[198]

The concepts of universality and human dignity are the foundational principles of human rights law. These concepts cannot however, in of themselves, answer the question of when a certain action falls within a state's jurisdiction or not. This is, according to Milanovic, because statutes regarding jurisdiction have the purpose of limiting states' responsibility to situations

[191] C.f. Danelius, 2015, p. 46.
[192] See e.g. Costello, 2016, p. 239. According to the ECtHR's former president Jean-Paul Costa, the primary objective of the ECtHR when deciding *Banković* was to limit an excessive extraterritorial application of the Convention, see Costa, 2010, p. 767. According to de Boer, the most important cases to understand the ECtHR's current understanding of extraterritorial jurisdiction is the case *Al-Jedda v. the United Kingdom* [GC], 7 July 2011, ECtHR, the case *Al-Skeini and Others v. the United Kingdom* [GC], 7 July 2011, ECtHR and the case *Hirsi Jamaa and Others v. Italy* [GC], 23 February 2012, ECtHR, see de Boer, 2014, p. 121.
[193] See case of *Loizidou v. Turkey* (preliminary objections), 23 March 1995, ECtHR, §§ 61 and 64; Council of Europe, 2019, p. 5.
[194] See Council of Europe, 2019, p. 6.
[195] See Besson, 2015, p. 248.
[196] See Besson, 2015, p. 249.
[197] Ciliberto, 2018, p. 491.
[198] Costello, 2016, p. 10; See also Fitzgerald, 2019, p. 5.

where they can realistically and effectively fulfil their legal obligations.[199] The universality of human rights law is given expression in the UDHR,[200] as well as in a number of other human rights treaties.[201] The recognition of individual human rights does however not mean that states also have a universal duty to respect and protect such rights without a normative basis.[202] This universality clashes however with the presumption of every state as sovereign, especially in view of the state's right to control access to its territory. This concept of territorial sovereignty is based upon the Westphalian international order of state sovereignty within a defined territory,[203] and the ECtHR has been careful to point out that migration control falls within the ambit of a state's sovereignty.[204]

In order for the ECtHR to determine whether a certain situation has been within the Contracting Party's jurisdiction and therefore imputable to it, special importance is therefore placed upon whether the situation occurred within the its territorial boundaries.

6.3 *A territorial understanding of jurisdiction*

In the same manner as international human rights law is centred around the state, the obligations that human rights law aims to promote are primarily tied to the specific territory of the relevant state.[205] In fact, in human rights law there is a prevalent notion of the importance of territoriality when evaluating the state's human rights obligations.[206] This is a viewpoint that the ECtHR also has preferred, when interpreting Article 1 ECHR regarding the exercise of state's jurisdiction. Article 1 of the ECHR contains the obligation of the signatory states to guarantee the rights contained in the convention to all individuals "within their jurisdiction".[207]

The ECtHR has interpreted the words "within their jurisdiction" in Article 1 ECHR as referring to a state's jurisdictional competences as primarily being territorial.[208] This view derives from the interpretation that jurisdiction is to be understood according to its meaning in

[199] Milanovic, 2011, p. 56.
[200] See especially the first segment of the declaration's preamble and Articles 1 and 2.
[201] See e.g. the preambles of the Convention on the Rights of the Child (CRC) of 2 September 1990, the International Covenant on Civil and Political Rights (ICCPR) of 23 March 1976 and the ECHR of 4 November 1950; See also Papp, 2013, p. 176.
[202] See Papp, 2013, p. 176.
[203] Milanovic, 2011, p. 60; See also Schaffer, 2013, p. 3.
[204] See e.g. case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, ECtHR, § 67; But see Milanovic, 2011, pp. 83–86 for a summary of relativistic and rationalistic criticism of universality.
[205] See Altwicker, 2018, p. 583.
[206] See Vandenhole & van Genugten, 2015, p. 1.
[207] The French text version uses "*reconnaître*", which translates closer to "recognize".
[208] See case of *Belozorov v. Russia and Ukraine*, 15 October 2015, ECtHR § 86; *Banković and Others v. Belgium and Others* [GC], § 59; *Al-Skeini and Others v. the United Kingdom* [GC], § 131; *Soering v. the United Kingdom*, § 86; Cameron, 2014, p. 52.

public international law and therefore primarily to be territorial. This view seems however to indirectly entail that, the further away from the state's territory a certain act is committed, the weaker is the human rights obligation of the specific state.[209]

On the other hand, the expression of "everyone" in Article 1 ECHR has on this territorial basis been interpreted to entail that the article makes no distinction between the state's citizens and foreigners within the state's jurisdiction.[210] When the ECtHR examines whether a state has exercised jurisdiction, there is therefore a presumption that the defendant state had jurisdiction if the action was committed within the state's territory.[211] This presumption is due to the state being expected to have effective control over individuals within its territory.[212] This focus of the ECtHR on the state's territorial control is not surprising, as adherence to a human rights regime, such as the ECHR, is not compulsory. It is the state that must consent to joining the regime where an international court applies compulsory jurisdiction.[213]

6.3.1 Criticism of the current understanding of jurisdiction

The above mentioned tension between sovereignty and international legal obligations, has been criticised as incentivizing Contracting Party to cooperate with third countries in the area of migration control and in that way avoid the jurisdiction of the ECHR.[214] The use of territoriality as the basis for human rights obligations has also in recent years met resistance due to its restrictive nature.[215] If human rights law is not capable to meet the conceptual and practical challenges that state policy to circumvent its obligations pose, it risks steadily losing in importance and legitimacy.[216] Academic literature has therefore increasingly started to move away from the notion that a state's territorial control should be the principal viewpoint in the determination of a state's jurisdiction. Increased importance has instead been placed upon extraterritorial jurisdiction in international human rights law and international organizations as duty bearers of rights. [217] Indeed, there appears to exist a general agreement among academics

[209] Baxewanos, 2018, p. 197; But c.f. Mantouvalou, 2005, p. 157; Milanovic, 2011, p. 262.
[210] See Costa, 2010, p. 765.
[211] See *Ilaşcu and Others v. Moldova and Russia* [GC], § 312; B*anković and Others v. Belgium and Others* [GC], § 59–61; *Assanidze v. Georgia* [GC], § 137. See also Ryngaert, 2008, pp. 42–84, for a historical overview of the territoriality principle in jurisdiction.
[212] See e.g. Besson, 2018, p. 161.
[213] Klabbers, 2017, p. 162.
[214] Markard, 2016, p. 593.
[215] See e.g. Vandenhole & van Genugten, 2015, p. 1; Vandenhole, 2015, p. 115.
[216] C.f. Vandenhole & van Genugten, 2015, pp. 1 and 3.
[217] See Altwick, 2018, p. 583.

that the ECtHR's case law is confusing and incoherent regarding the extension of Contracting Parties' jurisdiction to extraterritorial situations.[218]

The conceptualization of jurisdiction under the ECHR is also not without its critics, even from within the ECtHR. The ECtHR judge Bonello expressed in his concurring opinion of the case of *Al-Skeini and Others v. The United Kingdom*, that the Court has been incapable of creating a coherent regime of how jurisdiction is to be applied and called for the Court to "return to the drawing board".[219] Judge Bonello therefore argued for a "functional model" of jurisdiction, basing instead the evaluation of a Contracting Party's extraterritorial jurisdiction on the state's capability of observing or breaching its obligations under the ECHR,[220] in order to avoid the creation of a legal void, a legal black hole.[221] Milanovic is similarly critical, saying that the ECtHR's case law has been especially plagued with inconsistencies and uncertainties, and as being in need of "radical surgery".[222]

When jurisdiction is conceptualized as a threshold criterion based on territoriality, it creates exploitable gaps in the protection provided by the Convention which might contradict the underlying values of the Convention. As stated by the ECtHR judge Albuquerque in his concurring opinion in the case of *Hirsi Jamaa and Others v. Italy*, regarding the Italian coast-guard's push-back of migrants to Libya, "…the full range of conceivable immigration and border policies, including denial of entry to territorial waters, denial of visa, denial of pre-clearance embarkation or *provision of funds, equipment or staff to immigration control operations performed by other States* or international organisations on behalf of the Contracting Party, remain subject to the Convention standard. They all constitute forms of exercise of the State function of border control and *a manifestation of State jurisdiction*, wherever they take place and whoever carries them out."[223]

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[218] See Motoc & Vasel, 2018, pp. 199–200.

[219] *Al-Skeini and Others v. the United Kingdom* [GC], concurring opinion of judge Bonello, §§ 4 and 8; See also Costello, 2016, p. 240.

[220] See *Al-Skeini and Others v. the United Kingdom* [GC], concurring opinion of judge Bonello, §§ 10–13. Bonello designates five minimum functions that state's must adhere to, to uphold the ECHR: 1) not violating (through their agents) human rights, 2) having in place systems which prevent breaches of human rights, 3) investigating complaints of human rights abuses, 4) removing agents who infringe human rights and, 5) by compensating the victims of breaches of human rights, See *Al-Skeini and Others v. the United Kingdom* [GC], concurring opinion of judge Bonello, § 10.

[221] See *Al-Skeini and Others v. the United Kingdom* [GC], concurring opinion of judge Bonello, §§ 4 and 8.

[222] See Milanovic, 2018, p. 98; Milanovic, 2011, p. 264.

[223] *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012, concurring opinion of judge Albuquerque (emphasis added); See also Costello, 2016, p. 248.

7 Extending jurisdiction to extraterritorial situations

7.1 *The ECtHR's view on extraterritorial jurisdiction*

When states use their public powers to act extraterritorially, this raises several, not only legal, but also political questions regarding the act itself and in what manner it has been conducted.[224] In the case of *Loizidou v. Turkey*, the ECtHR stated that Contracting Parties' actions outside of their territory, in exceptional circumstances, could amount to that state exercising jurisdiction within the meaning of Article 1 ECHR.[225] States attempting to place certain situations outside of their jurisdiction is not a new phenomenon,[226] and the ECtHR has in several cases had to examine the extent and manner to which the state's jurisdiction can reach beyond their territorial boundaries.

An important aspect of the ECtHR's view on extraterritorial jurisdiction is that Article 1 ECHR cannot be interpreted so as to allow Contracting Parties to perpetrate actions in the territory of another state which it could not have perpetrated in its own territory.[227] In comparison with other international human rights courts, the ECtHR has however placed a high threshold under Article 1 ECHR regarding the Contracting Party's "control" over the circumstances of the alleged violation, in order for the state to have exercised jurisdiction.[228]

In the Grand Chamber's decision of *Banković*, the issue was whether the Contracting Parties had exercised jurisdiction and therefore be held legally responsible under the Convention for NATO's bombing of Belgrade in 1999. The states were all Contracting Parties to the ECHR and members of NATO. The ECtHR judged however that jurisdiction in Article 1 ECHR, under the concept of "*espace juridique*" (legal space), was primarily limited to the Contracting Parties to the ECHR and that the Convention "…was not designed to be applied throughout the world, even in respect of the conduct of Contracting States".[229] The ECtHR also rebutted the applicants' view that the positive obligation under Article 1 ECHR to secure the Convention's rights within their jurisdiction. In the ECtHR's view, such an interpretation would have rendered the words "within their jurisdiction" as "…superfluous and devoid of any

[224] C.f. Wilde, 2005, p. 740.
[225] *Loizidou v. Turkey* (preliminary objections), § 52; *Issa and Others v. Turkey*, 16 November 2004, ECtHR, §§ 68 and 71; Case of *N.D. and N.T. v. Spain*, 3 October 2017, § 51; See also Decision of *Andreou v. Turkey*, 27 October 2009, ECtHR.
[226] See e.g. Costello, 2016, p. 238, regarding France's failed attempt in the case of *Amuur v. France*, 25 June 1996, ECtHR to designate the Paris airport as an "international zone" and therefore outside of French jurisdiction; See also Fitzgerald, 2019, pp. 4–6, regarding the use of contactless control of migration control in the EU.
[227] Decision of *Pad and Others v. Turkey*, 28 June 2007, ECtHR, § 53; Case of *Solomou and Others v. Turkey*, 24 June 2008, ECtHR, § 45.
[228] See Costello, 2016, p. 237.
[229] *Bankovic and Others* v. *Belgium and Others* [GC], § 80.

purpose."[230] Therefore, as Yugoslavia was not a Contracting Party of the Convention, Yugoslavia was not within the Convention's legal space[231] and the NATO bombing of Belgrade did not fall under the jurisdiction of the defendant states as members of NATO.[232]

7.2 *Models of extraterritorial jurisdiction under the ECHR*

The current case law of the ECHR allows for extraterritorial jurisdiction to be based upon either *de jure* or *de facto* control over territory or individuals, any of which will activate the state's legal obligations under the ECHR.[233] An example of *de jure* control, is the lawful exercise of authority extraterritorially, such as acts of diplomats or vessels that carry the state's flag.[234] The recognition of *de jure* control also marks an important distinction between the primarily territorial view of jurisdiction and the situations where a Contracting Party has placed individuals under their *de facto* effective control.[235]

Two basic models of extraterritorial jurisdiction have currently been recognized by the ECtHR: the spatial model concerning jurisdiction through the effective control over territory, and the personal model relating to jurisdiction through authority or effective control, by state agents, over a person.[236] Both models contain however serious uncertainties, in regards to a Contracting Party's assistance to third state actors with extraterritorial rights-violating effects.

7.2.1 Effective control over territory

The spatial model considers that a state exercises jurisdiction outside of its territory, when it has *de facto* control over the territory in question. This is due to the presumption that a state in comparable control of an extraterritorial territory as its own territory, human rights obligations towards the extraterritorial territory should follow.[237] The state's jurisdiction can therefore

[230] *Bankovic and Others* v. *Belgium and Others* [GC], § 75.
[231] *Bankovic and Others* v. *Belgium and Others* [GC], § 80.
[232] See e.g. Costello, 2016, p. 239.
[233] See Costello, 2016, pp. 240–241; See also European Union Agency for Fundamental Rights, 2016, p. 17, who adds "the exercise of public powers" as an additional indicator of jurisdiction.
[234] *Bankovic and Others* v. *Belgium and Others* [GC], § 73; Costello, 2016, p. 241.
[235] C.f. Klug & Howe, 2010, p. 98–99; Costello, 2016, p. 241.
[236] Milanovic, 2018, p. 98; See also *Al-Skeini and Others v. the United Kingdom* [GC], §§ 133–139; But c.f. Lindholm, Derlén, Naarttijärvi, 2016, p. 266, regarding jurisdiction though extraterritorial effects as an already present model. But see Besson, 2015, p. 254, regarding the view of jurisdiction as primarily functional and therefore impossible to characterize into different models.
[237] Milanovic, 2018, p. 56; See also Laval, 2012, p. 70; *Bankovic and Others* v. *Belgium and Others* [GC], §§ 70–71.

apply outside its territory, it its acts or omissions have extraterritorial effects.[238] The state's control over the territory must however be deemed as "effective".[239]

For the ECtHR to examine whether a state's extraterritorial control is effective, it must look at the *de facto* situation. Such an examination can for example take into consideration the number of deployed military forces or otherwise military, economic or political support for the local government in order to control the territory.[240] An example of this model is the situation of the previously mentioned case of *Loizidou v. Turkey* (preliminary objections), where Turkey had invaded and had effective control over the local government of northern Cyprus. Turkey was according to the ECtHR in control over the territory and must therefore secure the rights of the ECHR to all individuals within it.[241] While this model has the advantage of in the majority of cases being easy to apply, it has been criticized as too limiting. States can no doubt violate individual rights and freedoms extraterritorially, without having effective control over the territory where the action is taken.[242]

Application of the spatial model is however unlikely to determine that a state has exercised jurisdiction in a migration control measure. In the case of EU assistance to third states for them to enforce external migration controls, through the use of the third state's own officials, there is no territorial connection to the sponsoring state. The spatial model appears therefore to not be able to offer a solution of Contracting Parties providing economic, material or technical assistance to rights-violating conduct in third states. The ECHR appears however to also have realized the severe restrictions imposed by the spatial model and have instead focused on a model of effective control over the person whose rights have been interfered with, instead of the territory.[243]

7.2.2 Effective control over persons

Although extraterritorial jurisdiction primarily has been connected to effective control over territory, the effective control over persons has a long history within the ECHR.[244] In the case of *Cyprus v. Turkey* from 1975 regarding the Greek-Turkish conflict of Cyprus, the ECtHR interpreted the Convention's phrase of "within their jurisdiction" to also encompass cases

[238] *Loizidou v. Turkey* (merits), § 52.
[239] Wilde, 2008, p. 509; See *Loizidou v. Turkey* (preliminary objections), § 62; *Loizidou v. Turkey* (merits), § 52.
[240] *Al-Skeini and Others v. the United Kingdom* [GC], § 139; *Güzelyurtlu and Others v. Cyprus and Turkey* [GC]; See also Laval, 2012, p. 71.
[241] See *Loizidou v. Turkey* (preliminary objections), §§ 62–64; See also *Loizidou v. Turkey* (merits), § 52; Costello, 2016, p. 241.
[242] Milanovic, 2018, p. 56.
[243] C.f. Heschl, 2018, p. 80.
[244] Milanovic, 2018, p. 57.

where state officials extraterritorially bring individuals under their authority, which engages the state's obligations under the Convention.[245] An example of this model is the case of *Medvedyev v. France*,[246] where French military forces had taken control of a Cambodian boat and brought it to a French port. France was deemed to have had a continual, uninterrupted and decisive control over the boat and its crew.[247] Such control was in *Al-Skeini v. the UK* defined as "exercise of physical power and control over the person in question".[248]

The use of this model by the ECtHR came however in serious doubt in the Court's decision of *Banković and Others v. Belgium and Others*.[249] The ECtHR held in this decision, regarding the aerial bombing of a TV station in Belgrade by NATO forces, that the Contracting Parties as members of NATO, did not acquire effective control over the territory through the bombing. The Court however did not mention the possibility of jurisdiction though effective control over persons.[250] Additionally, it held that extraterritorial jurisdiction could only be exceptional and is an all or nothing proposition, meaning that the rights of the Convention cannot be "divided and tailored" in view of the case's circumstances.[251]

In view of mounting criticism, the ECtHR revisited this issue in *Al-Skeini v. the United Kingdom*,[252] in which the Court reaffirmed that jurisdiction can be exercised through the control over persons.[253] The ECtHR however added a limiting principle to this model, that the effective control had to be conducted through the use of "public powers".[254] The ECtHR gave an example of the use of "public powers" in *Hirsi Jamaa v. Italy*, regarding the "…full and exclusive control over a prison or a ship".[255] Importantly, the ECtHR also in the case of *Al-Skeini v. the United Kingdom* chose to reverse its statement in *Banković*, regarding the indivisibility of the Convention's rights and freedoms. The Convention can now be divided and tailored, considering the specific circumstances of the case.[256]

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[245] See *Cyprus v. Turkey* (dec.), 26 May 1975, ECtHR, § 8.
[246] *Medvedyev and Others v. France* [GC].
[247] See Costello, 2016, p. 241; *Medvedyev and Others v. France* [GC], § 67.
[248] *Al-Skeini and Others v. the United Kingdom* [GC], § 136; Costello, 2016, p. 241.
[249] *Bankovic and Others* v. *Belgium and Others* [GC].
[250] Milanovic, 2018, p. 58.
[251] Milanovic, 2018, p. 58; Besson, 2015, p. 254; Altwick, 2018, p. 588; *Banković and Others v. Belgium and Others* [GC], § 75.
[252] *Al-Skeini and Others v. the United Kingdom* [GC].
[253] Milanovic, 2018, p. 58; See also *Al-Skeini and Others v. the United Kingdom* [GC], §§ 133–137, regarding the use of state agents to exercise control extraterritorially.
[254] Milanovic, 2018, p. 59; Hathaway & Gammeltoft-Hansen, 2015, p. 262; *Al-Skeini and Others v. the United Kingdom* [GC], §§ 135 and 149–150.
[255] *Al-Skeini and Others v. the United Kingdom* [GC], § 73; See also Costello, 2016, p. 243.
[256] *Jaloud v. the Netherlands* [GC], 20 November 2014, ECtHR, § 154; *Hirsi Jamaa and Others v. Italy* [GC], § 74; *Al-Skeini and Others v. the United Kingdom* [GC], §§ 136–137; Contra *Banković and Others v. Belgium and Others* [GC], § 75.

7.3 *Spatial and personal models in view of EU assistance to the LCG*

As shown above, if a Contracting Party exercises jurisdiction under Article 1 ECHR, it must secure the rights and freedoms of the Convention. This includes a positive obligation to take measures to prevent treatment that amounts to torture, inhuman or degrading treatment. In view of the EU's assistance to the LCG, if the EU assists to treatment contrary to Article 3 ECHR, an individual EU Member State could become responsible under the Convention. For such an obligation and therefore potential responsibility to become activated, said state must however have exercised jurisdiction.

Neither of the spatial or personal models, appears however able activate a state's jurisdiction when there is no or minimal physical presence of "public powers" of that state,[257] as is the case of EU's assistance to the LCG. If seen from the ECtHR's territorial analysis in *Banković*, it is difficult to say that the supporting state would have any effective control over territory in this scenario.[258] Even in the view of the personal model from *Al-Skeini*, extraterritorial application appears difficult to establish due to the lack of "public powers".

Note should however be taken once more to the case of *Loizidou v. Turkey* (preliminary objections), where the ECtHR reasoned that Article 1 ECHR were to be interpreted in the context of the situation and in light of the object and purpose of the ECHR, as well as the practice of the Contracting Parties.[259] Additionally, Article 1 ECHR cannot be interpreted in a manner which would create a so-called legal vacuum, as affected victims of externalization policies might not be able to claim their rights towards an assisting EU, an EU Member State nor the third state conducting the migration control which potentially leads to an interference with the rights of Article 3 ECHR.[260] To interpret Article 1 ECHR, in order to avoid the creation of a legal vacuum, has in the case of *Güzelyurtlu and Others v. Cyprus and Turkey* been mentioned the ECtHR as an interpretive reason when examining jurisdiction under of Article 1 ECHR. In this case, the ECtHR also stated however, that the concerned territory of Cyprus is within the legal space of the ECHR.[261]

When border controls in a third state, following the reasoning in *Al-Skeini and Others v. The United Kingdom*, the use of arrests or detentions would likely amount to jurisdiction under

[257] See Altwick, 2018, p. 590.
[258] See Milanovic, 2011, p. 126.
[259] Scheinin, 2007, p. 146; *Loizidou v. Turkey* (preliminary objections), § 89.
[260] C.f. Wilde, 2005, p. 772, regarding extraterritorial state action of anti-terrorism and asylum procedures; Heschl, 2018 p. 50; Baxewanos, 2017, p. 194; De Boer, 2014 p. 11; But see Costello, 2016, p. 249. The characterization of a "legal black hole" can however be misleading, as it gives the impression of being an isolated occurrence. The number of extraterritorial acts and outsourcing of core law enforcement issues is instead ever increasing, Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 2; See also Klug & Howe, 2010, p. 69.
[261] *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], 29 January 2019, ECtHR, § 195.

the personal model, if committed by the Contracting Party's own agents.[262] In the case of EU assistance to the LCG and its potential rights-violating effects however, there is no physical presence of agents from a Contracting Party. As there is no physical presence, the Contracting Party does not exercise effective control over the extraterritorial territory.

An attempt could be made to draw a connection between this situation and the above-mentioned *Soering* case. In *Soering*, the domestic action of the Contracting Party of extraditing an individual to the USA, where he risked treatment contrary to Article 3 ECHR, would have been a violation of the Convention for the Contracting Party. In the case of EU assistance, the EU have also taken a domestic act with possible consequences for migrants outside of its Member States territorial boundaries and outside of the ECHR legal space, as Libya is not a Contracting Party. The ECtHR has however clarified in these situations, that the State's responsibility under the Convention in *Soering* was activated as a result of the individual being present in the state's territory and therefore clearly within its jurisdiction when a decision was taken regarding expulsion.[263] The ECtHR has stated that the Convention cannot be interpreted to allow Contracting Parties to perpetrate actions in another state, which it could not have done on its own territory.[264]

In view of the EU's assistance to the LCG, and the potential rights-violating effects on Article 3 ECHR that this assistance risks having, the following section will discuss if a jurisdictional link can be formed under the still nascent case law of the ECtHR regarding extraterritorial effects jurisdiction.

[262] See Costello, 2016, p. 245.
[263] *Banković and Others v. Belgium and Others* [GC], § 68; See also Vedel Kessig, 2017, p. 90.
[264] *Issa and Others v. Turkey*, § 10; See also Klug & Howe, 2010, p. 88.

8 Discussion on extraterritorial effects jurisdiction

8.1 *Overview of extraterritorial effects jurisdiction*

The ECHR is to be interpreted in light of present-day conditions, including the Contracting Parties' practises which are undertaken through the EU. To provide effective protection of its rights and freedoms, the ECHR should therefore be able to encompass assistance to third states that might have rights-violating effects. Especially in a situation where the assisted treatment would have constituted a violation of Article 3 ECHR, if committed by the Contracting Party itself.[265]

While the use of extraterritorial effects jurisdiction has been broadly accepted in public and private international law, in international human rights law it is still in the developing stages.[266] Yet, despite of the ECtHR's previous reluctance to base jurisdiction upon a cause-and-effect approach, [267] the use of extraterritorial effects jurisdiction is arguably well-situated in the Court's case law. Recently, some national courts of Contracting Parties have interpreted the ECtHR's case law to also apply to certain extraterritorial effects. The ECtHR itself has so-far not explicitly mentioned the applicability of a model based upon extraterritorial effects jurisdiction.[268] It appears however, in view of changing state practices, to be increasingly willing to expand the protection of the ECHR by means of argumentation based upon the same logic as extraterritorial effects jurisdiction.[269]

In the case of assistance to a third state actor that potentially causes extraterritorial effects, there might therefore be possible for a Contracting Party to exercise jurisdiction and activate its obligations under the ECHR.[270] While the application of such a model of jurisdiction would make EU assistance to the LCG potentially imputable, the model would have to be delimited by means of clear criteria. Otherwise, the objective of the concept of jurisdiction of limiting the Convention's applicability to those scenarios where Contracting States realistically and effectively can fulfil their legal obligations.[271]

[265] C.f. Moreno-Lax, 2017, p. 258.
[266] See Vedel Kessig, 2017, pp. 89 and 94.
[267] Costello, 2016, pp. 239 and 242; But see Klug & Howe, 2010, pp. 87–88, regarding the case of *Drozd and Janousek v. France and Spain*, 26 June 1992, ECtHR.
[268] See Milanovic, 2018, pp. 100–101.
[269] Milanovic, 2018, p. 110; But c.f. Kessing, 2018, p. 94.
[270] See Gammeltoft-Hansen, 2018, p. 383. C.f. Vedel Kessig, 2017, p. 91.
[271] C.f. Milanovic, 2011, p. 56, referred to above in section 6.1.

8.2 *Formulating a framework for extraterritorial effects jurisdiction*

The Court has indeed in certain situations accepted that Contracting Parties may exercise jurisdiction under Article 1 ECHR outside their territory when their acts produce extraterritorial effects.[272] In the previously mentioned seminal case of *Loizidou v. Turkey (merits)*,[273] the ECtHR stated that Article 1 ECHR is not limited to the state's territory, but also encompass the acts and omissions of states which has extraterritorial effects.[274]

The foundation for a framework of a model of extraterritorial effects jurisdiction, can be found in the case of *Ilaşcu and Others v. Moldova and Russia*. Here, the ECtHR states that a Contracting Party independently can become responsible under the Convention for actions that have "sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction."[275] According to the ECtHR in its decision of *Isaak v. Turkey* regarding state responsibility for the acts of private individuals, acting with the acquiescence of connivance of the Contracting Party, a different conclusion would be incompatible with Article 1 ECHR.[276] In the case of *Drozd and Janousek v. France and Spain*, the Court similarly indicated that the term jurisdiction, is not limited to the state's national territory. State's jurisdiction may also be triggered by acts emanating from state organs and having effect outside of its national territory.[277]

While the ECtHR in both the cases of *Drozd and Janousek v. France and Spain* and *Ilaşcu and Others v. Moldova and Russia* established the extraterritorial jurisdiction in certain situations can be established due to domestic acts of a Contracting Party that has extraterritorial effects, the cases differ in distinctive but significative ways from the situation of the EU's assistance to the LCG. In *Drozd and Janousek v. France and Spain*, extraterritorial jurisdiction was established due to domestic legislative acts that affected the judicial proceedings in Andorra, which at the time was not a Contracting Party to the ECHR,[278] as it provided for the use of French and Spanish judges in Andorran courts. In *Ilaşcu and Others v. Moldova and Russia*, Russia and Moldova are both Contracting Parties to the ECHR and Russia arguably held jurisdiction concurrently with Moldova, partly due to its territorial control over the territory through the use of military forces. It appears unsure, whether Russia would have held

[272] *Solomou and Others v. Turkey*, § 44; Decision of *Isaak v. Turkey*, 24 June 2008, ECtHR; *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], § 178.
[273] See Milanovic, 2008, p. 422 for further discussion on the importance of *Loizidou v. Turkey (merits).*
[274] *Loizidou v. Turkey* (merits), § 52. This view was later confirmed in the case of *Ilaşcu and Others v Moldova and the Russian Federation*, see Mantouvalou, 2005, p. 153.
[275] See *Ilaşcu and Others v. Moldova and Russia* [GC], § 317.
[276] *Isaak v. Turkey*; See also *Cyprus v. Turkey* [GC], § 81.
[277] *Drozd and Janousek v. France and Spain*, § 91; See also Costa, 2010, p. 767; Costello, 2016, p. 242.
[278] See *Drozd and Janousek v. France and Spain*, § 89.

jurisdiction in these cases had it only provided economic assistance with effects contrary to the rights of the ECHR.

In view of the criteria of a repercussion being "sufficiently proximate", it therefore appears that, for a Contracting Party to exercise extraterritorial effects jurisdiction, with no control over territory or individuals, a sufficiently strong causal link must be formed between the Contracting Party's domestic act and its extraterritorial effects.

8.2.1 A "sufficiently proximate" causal link

Guidance regarding a sufficiently proximate causal link can be found in the decision of *Andreou v. Turkey*. Here, the ECtHR stated that "…the acts of Contracting Parties which *produce effects outside their territory* and over which they *exercise no control or authority* may amount to the exercise by them of jurisdiction".[279] The circumstances of this case regarded a protester that had been shot by Turkish troops while within the UN neutral zone of Cyprus, stated that the applicant had been within Turkeys jurisdiction even though the state exercised no control over the territory. The ECtHR stated that Turkey had exercised jurisdiction in the shooting, as there had been a "direct and immediate" causal link between the act and its extraterritorial effects. In this case, Turkey's opening of fire was a domestic act in a territory where Turkey exercised effective control. This act had a direct and immediate effect, causing the wounding and subsequent death of a protestor in a territory outside of the effective territorial control of Turkey and outside of the legal space of the ECHR.[280]

The opposite conclusion was however drawn in the decision of *Ben El Mahi v. Denmark*, as the causal link between the act and its extraterritorial effects as too distant. In this decision, the alleged discrimination by Denmark of a group of Muslim men in Morocco and the allowance in Denmark for the publications of caricatures of Muhammed, was not deemed to be sufficiently proximate.[281] The alleged acts contrary to the ECHR, were the Danish legal system's allowance for the publication and that the Danish prosecutor had decided to not initiate criminal proceedings. The ECtHR held that no extraterritorial action by Denmark had created a jurisdictional link to the applicants and that no substantive examination of the alleged violations could therefore be performed.[282] It would therefore appear that a Danish omission to act, did not create the necessary causal link between the Danish state and the applicants outside

[279] *Andreou v. Turkey* (emphasis added).
[280] See *Andreou v. Turkey*; Vedel Kessig, 2017, p. 92.
[281] See *Ben El Mahi and Others v. Denmark*; Vedel Kessig, 2017, p. 92.
[282] *Ben El Mahi and Others v. Denmark*.

of Danish territory. On the other hand, in *Andreou* the ECtHR stated that the Turkish soldier to fire into extraterritorial territory was the "direct and immediate" cause of the applicant's death, which created a sufficiently causal link to Turkey for it to exercise extraterritorial jurisdiction over a territory that is not a Contracting Party to the ECHR.

In order to evaluate a causal link, in those situations it is not the Contracting State itself that potentially has inflicted treatment contrary to Article 3 ECHR, the ECtHR's statements in *Ilaşcu and Others v. Moldova and Russia* could be of guidance. In this case the Court stated that a "decisive influence" on either military, political, financial or economic means, of another state could be sufficient for the state to exercise extraterritorial jurisdiction.[283] The case concerned four applicants that had been arrested in June 1992 due to various accusations for acting against the State of Transdniestria, a separatist region within Moldovia. The applicants were brought to a garrison of the Russian Army and then to a police station of the Transdniestrian government, where they reportedly were tortured by its soldiers as well as suffered other subsequent ill-treatment.

To recognize a Contracting Party's exercise of jurisdiction through extraterritorial effects would therefore not require an ongoing or indirect control of the third state actor perpetrating the abuse. Instead a causal link must be formed between the act of providing assistance and its extraterritorial effects to potentially exercise jurisdiction under Article 1 ECHR. For such a causal link to be formed when the Contracting Party acts extraterritorially through its own officers, under the current case law of the ECtHR, the effects of the Contracting Party's acts must have been "immediate and direct".[284]

8.2.2 Assisting to "repercussions" on the rights of the ECHR

The ECtHR, when evaluating the general principles of jurisdiction under Article 1 ECHR, stated that a Contracting Party does not require detailed control over the policies and actions of an extraterritorial actor for the state to possibly exercise jurisdiction.[285] The Contracting Party's jurisdiction can instead, in situations of overall control over the extraterritorial territory, extend to encompass the acts of local administrations that receives and survives due to the assistance provided by the Contracting Party.[286] This in turn could create a so-called legal vacuum, as affected victims of externalization policies might not be able to claim their rights towards an

[283] *Ilaşcu and Others v. Moldova and Russia* [GC], §§ 392–394.
[284] See *Andreou v. Turkey*.
[285] *Ilaşcu and Others v. Moldova and Russia* [GC], § 315.
[286] *Ilaşcu and Others v. Moldova and Russia* [GC], § 316.

assisting EU, an EU Member State nor the third state conducting the migration control which potentially leads to an interference with the rights of Article 3 ECHR.[287] To interpret Article 1 ECHR, in order to avoid the creation of a legal vacuum, has in the case of *Güzelyurtlu and Others v. Cyprus and Turkey* been mentioned the ECtHR as an interpretive reason when examining jurisdiction under of Article 1 ECHR. In this case, the ECtHR also stated however, that the concerned territory of Cyprus is within the legal space of the ECHR.[288]

Outside of the articles of the ECHR, the ECtHR has held that the Convention is built upon underlying values. These underlying values are built upon the "common heritage of political traditions, ideals, freedom and the rule of law" present in the Convention's Preamble. These underlying values include the concept of human dignity, which the ECtHR in the case of *Pretty v. the United Kingdom* named as the "very essence of the Convention".[289] All human rights has their theoretical foundation in the concept of human dignity,[290] as all persons have a right to human dignity, simply from the fact of being human.[291]

The ECtHR has therefore held that states may become responsible for violations of the Convention, when it knowingly acts in a manner incompatible with these underlying values, even if the violations occurs outside of the state's territorial jurisdiction. As stated above, the Contracting Party's jurisdiction can also be engaged even outside its territorial jurisdiction, when its acts have a "sufficiently proximate repercussions" on the rights of the convention. It was through the interpretation of the ECHR, in view of these underlying values, that the ECtHR in the above-mentioned *Soering* case found that to knowingly extradite a person to a real risk of treatment contrary to Article 3 ECHR would be in violation of the Convention.[292] The underlying values of the ECHR is therefore befitting to discuss extraterritorial effects jurisdiction, as it relates to a broadened understanding of the universality of human rights.

Likewise, in the context of Article 3 ECHR, the ECtHR has in its case law drawn an explicitly strong connection between the protection of human dignity and Article 3 ECHR. This is primarily due to the connection drawn between human dignity, as the individual's right to be

[287] C.f. Wilde, 2005, p. 772, regarding extraterritorial state action of anti-terrorism and asylum procedures; Heschl, 2018 p. 50; Baxewanos, 2017, p. 194; De Boer, 2014 p. 11; But see Costello, 2016, p. 249. The characterization of a "legal black hole" can however be misleading, as it gives the impression of being an isolated occurrence. The number of extraterritorial acts and outsourcing of core law enforcement issues is instead ever increasing, Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 2; See also Klug & Howe, 2010, p. 69.

[288] *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], 29 January 2019, ECtHR, § 195.

[289] *Pretty v. the United Kingdom*, 29 July 2002, ECtHR, § 65; See also *Bouyid v. Belgium* [GC], §§ 89 and 100; Case of *Svinarenko and Slyadnev v. Russia* [GC], 17 July 2014, ECtHR, § 118.

[290] See e.g. Barak, 2008, p. 85; Barak, 2013, p. 362; McCrudden, 2008, p. 656.

[291] Costa, 2014, p. 402; Milanovic, 2011, p. 56; Heschl, 2014, p. 94.

[292] *Ilaşcu and Others v. Moldova and Russia* [GC], § 317; See also *Soering v. the United Kingdom*, §§ 88–91.

treated as an object by the state, and that such objectification is closely related to ill-treatment that damages the individual's physical integrity.[293]

8.3 *Applying Extraterritorial effects jurisdiction to the EU's assistance*

For a Contracting Party to exercise jurisdiction in a situation of the EU's assistance to the LCG, the assistance must therefore have constituted a domestic act with sufficiently proximate repercussions on the rights of Article 3 ECHR. The above analysis has shown the range of torture and other abuse committed in relation migrants, having been brought back to Libya by the LCG. The primary hindrance to formulate a sufficiently proximate causal link between the EU's assistance to the LCG and its potential rights-violating effects, is the level of knowledge an individual EU Member State has regarding the direct effects the EU's assistance to the LCG will have on the rights of migrants.

The above analysis has however shown that EU Member States and the EU is aware of the abuses committed in relation to migrants brought back to Libya by the LCG. Likewise, the statements made in the EU's Malta declaration of 2017 makes an explicit connection between the assistance to the LCG and of "preventing departures".[294] In view of the principles that the ECHR must be interpreted in view of its underlying values and of preventing Contracting Parties to act extraterritorially that they could not have done territorially, jurisdiction under Article 1 ECHR due to the extraterritorial effects of domestic acts does appear possible. To connect such domestic acts, through a sufficiently proximate causal link between a domestic act of a Contracting Party and its extraterritorial effects, appears to also comply with the objective of the concept of jurisdiction: To limit applicability to those scenarios where Contracting States realistically and effectively can fulfil their legal obligations.[295]

[293] See *Bouyid v. Belgium* [GC], § 90; Case of *Tyrer v. the United Kingdom*, 25 April 1978, ECtHR, § 33.
[294] The *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, 2017, §§ 3, 5 & 6, see above footnote 92.
[295] C.f. Milanovic, 2011, p. 56.

9 Conclusions and final remarks

9.1 *Conclusions on imputability of the EU's assistance to the LCG*

In conclusion, the EU's assistance to the LCG forms part of a larger policy phenomenon in the migration policy of the EU. The logic of such policies has been called to promote a system of cooperative deterrence, which serves to prevent certain migrants from arriving to Europe, while legally insulating the EU Member States due the lack of physical contact with the affected individuals. The EU's assistance to the LCG through the EUTF for Africa appears to significantly assist to the enactment of rescue and interception operations by the LCG, which systematically after being brought back to land risk arbitrary detainment, torture and other abuse. In spite of these risks and an increasing number of reports regarding such abuse, so far, no action has been taken to halt this assistance.

The EU is not a Contracting Party to the ECHR, but the obligations of the EU Member States also encompass the actions of the EU in certain situations. Even though a Contracting Party under Article 3 ECHR has state obligations to prohibit and prevent incidents of torture and similar abuse, the activation of these obligations requires the state to exercise jurisdiction under Article 1 ECHR. As the concept of jurisdiction is primarily territorial, a Contracting Party can only exercise extraterritorial jurisdiction in certain circumstances. These circumstances are primarily determined by the use the territorial and personal models. The lack of any physical presence nor direct control over the LCG appear however to not make these models applicable. The use of extraterritorial effects jurisdiction appears instead to provide a better balance between the effective protection of the rights and freedoms of the ECHR.

The use of such a model would more closely relate to the criticism forwarded by the judge Bonello, regarding the need to reconstruct the concept of jurisdiction in the ECHR to create a more functional model. To delimit a model of extraterritorial effects jurisdiction, guidance can be found within the ECtHR's previous referral to domestic acts with sufficiently proximate repercussions. Could jurisdiction be established in this manner, the EU Member States would potentially have a positive obligation under Article 3 ECHR to take measures that halts or alters the EU's assistance to the LCG.

9.2 *An unsatisfactory contrast between jurisdiction and state obligations*

The model of extraterritorial effects jurisdiction discussed above, could be criticized for creating an overlap of jurisdiction, or even to extend the concept of jurisdiction so far as to make reality the ECtHR's fear in *Banković* of making the concept superfluous. This could

damage the principal objective of the concept, to provide effective and realistic enforcement of the Contracting Parties' legal obligations under the ECHR. The above analysis of the spatial and the personal models appear to show however that the present view of extraterritorial jurisdiction, limited by a primarily territorial understanding, is not capable of encompassing situations such as the EU's assistance to the LCG.

Even tough positive state obligations under Article 3 ECHR can be identified that possibly would prohibit assistance to the LCG, a lacking jurisdiction keeps them from activating. Similarly to the situation of the applicants in the decision of *Banković*, a lacking jurisdictional link removes under present case law the possibility for the ECtHR to evaluate the merits of the application. [296] This in turn, under certain circumstances, could create such a legal vacuum or *de facto* impunity under Article 1 ECHR, that the ECtHR has stated must be avoided.[297]

A move in this regard to a model of extraterritorial jurisdiction that examines the state's jurisdiction in view of the merits, instead of primarily examining the jurisdiction, would provide a more effective protection of the ECHR's rights and freedoms. Especially, in view of the changing state practices of externalization and providing assistance to improve and incentivize certain migration related activities actions of third state actors. The ECtHR's statements regarding state responsibility for acts that have "sufficiently proximate repercussions" on the ECHR, could provide a sound foundation for the formulation of such a model. It would likewise permit for the ECtHR to in a greater extent consider the merits of the case in relation to the Contracting Party's state obligations under the ECHR, as part of its decision whether the alleged action falls within the Contracting Party's jurisdiction. To allow for such examination and context appears all the more important, in view of both the history and evolving practice of *non-entrée* measures within the EU migration policy of externalization.

[296] See *Bankovic and Others* v. *Belgium and Others* [GC], § 83.
[297] C.f. Gammeltoft-Hansen, 2018, p. 375.

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