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Lithuania's human rights obligations in relation to the *Kaunas Seaways* incident in the Black Sea

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Litauens menneskeretlige forpligtelser i forbindelse med *Kaunas Seaways*-hændelsen i Sortehavet

UNIVERSITY OF SOUTHERN DENMARK

Master's thesis

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Sworn Statement

I hereby solemnly declare that I have personally and independently prepared this paper. All quotations in the text have been marked as such, and the paper or considerable parts of it have not previously been subject to any examination or assessment.

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Resumé

I sommeren 2017 sneg tolv blinde passagerer sig om bord på færgen *Kaunas Seaways*, en færge ejet af DFDS og som sejler under litauisk flag, under dens rute mellem Ukraine og Tyrkiet. De tolv blinde passagerer viste sig at være migranter fra Algeriet og Marokko, men ingen stat ønskede at tage imod dem. Da de forsøgte at sætte ild til færgen, var voldelige om bord og truede med at begå selvmord, valgte kaptajnen og besætningen at låse dem inde i fire kahytter. Her opholdt de sig i tre måneder, indtil det lykkedes Litauen at forhandle en aftale i stand med Algeriet og Marokko, som indebar, at migranterne blev fløjet tilbage til deres hjemlande.

Efter FAL-konventionen var Tyrkiet og Ukraine forpligtede til at tage imod de blinde passagerer, men det var ikke muligt at få staterne til at modtage migranterne. Udgangspunktet for dette speciale er derfor at belyse, hvilke menneskeretlige forpligtelser Litauen som flagstat havde under hændelsen, når ingen anden stat kunne pålægges at tage imod migranterne. Specialet fokuserer således på forholdet mellem havretten, herunder Havretskonventionen og FAL-konventionen, og menneskerettighederne, som disse kommer til udtryk i Den Europæiske Menneskerettighedskonvention.

Specialet belyser, hvorvidt Litauen kan holdes ansvarlig for krænkelser af Menneskerettighedskonventionens Artikel 5, om retten til frihed og personlig sikkerhed, begået ekstraterritorielt om bord på et privatejet skib.

Opgaven konkluderer, at Menneskerettighedskonventionen finder anvendelse ekstraterritorielt, såfremt staten har *de facto* eller *de jure* jurisdiktion, hvilket udledes af en række domme fra Den Europæiske Menneskerettighedsdomstol. Det konkluderes i den forbindelse, at Litauen havde *de jure* jurisdiktion som følge af flagstatsprincippet, hvorimod det kan diskuteres, om staten havde *de facto* kontrol over situationen om bord på *Kaunas Seaways*. Dette er af betydning, når det skal vurderes, om staten kan holdes ansvarlig for dens negative eller positive forpligtelser under Menneskerettighedskonventionen. Såfremt staten alene har *de jure* jurisdiktion, kan den holdes ansvarlig for dens positive forpligtelser, hvorimod *de facto* jurisdiktion også giver mulighed for ansvar for krænkelser af dens negative forpligtelser.

Foruden de negative og positive forpligtelser, som fremgår direkte af Artikel 5's ordlyd, er der udledt en række positive forpligtelser af bestemmelsen, som er kommet til udtryk i Menneskerettighedsdomstolens retspraksis. Staterne skal således ikke kun afholde sig fra at krænke individets ret til frihed, men skal ligeledes positivt beskytte denne rettighed og forsøge at forhindre frihedsberøvelse begået af private.

Såfremt Litauen i den konkrete sag havde *de facto* jurisdiktion, må det konkluderes, at Artikel 5 er krænket, da indgrebet mod de tolv migranter ikke faldt ind under én af de legitime grunde, som er oplistet i Artikel 5, stk. 1, litra a-f, og da indgrebet var vilkårligt.

Litauen har *de jure* jurisdiktion og kan derfor holdes ansvarlig for statens positive forpligtelser under Artikel 5. Disse må anses for at være krænket, da Litauen havde kendskab til, at de tolv migranter blev frihedsberøvet om bord på færgen, og da staten ikke kan antages at have gjort nok for at forhindre fortsat frihedsberøvelse, på trods af at staten havde mulighed herfor. Staten har således indirekte accepteret frihedsberøvelsen om bord på *Kaunas Seaways* og dennes længde.

Content

Abbreviations

App. no.	Application number
Ed.	Edition
E.g.	Exempli gratia
Et al.	Et alii
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
FAL Convention	Convention on the Facilitation of International Maritime Traffic
Ibid.	Ibidem
I.e.	Id est
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
No.	Number
P./Pp.	Page/Pages
Para./Paras.	Paragraph/Paragraphs
PCIJ	Permanent Court of International Justice
UNCLOS	United Nations Convention on the Law of the Sea
V.	Versus
Vol.	Volume

1. Introduction

In the summer of 2017, an incident occurred in the Black Sea when twelve migrants managed to get on board *Kaunas Seaways*, a Lithuanian-flagged vessel, without the crew's consent or knowledge.[1] When the stowaways were discovered, they were detained in four of the vessel's cabins for three months before being returned to their African home states as a result of diplomatic negotiations between Lithuania, Algeria, and Morocco.[2]

The episode drew and continues to draw attention to the need for serious reflection on the fundamentals of the law of the sea, especially regarding flag state duties and stowaways. However, human rights law also played an essential role in the incident, as this field sets forward some standards for the treatment of any individual, including stowaways and migrants.

This thesis deals with the aspects of and relations between the law of the sea and human rights law pertinent to the incident involving *Kaunas Seaways*. It is important to note that although the law of the sea is not explicitly linked to human rights law, the human rights must be accounted for when handling cases that raise issues within both fields of law and vice versa. This has been established in case law from the International Tribunal for the Law of the Sea (henceforth: ITLOS).[3] It is also seen in human rights law, where cases before the European Court of Human Rights (henceforth: the ECtHR or the Court) are decided in light of the law of the sea.[4] It may be suggested that human rights law takes over when the regulations contained in the law of the sea prove insufficient in covering complex cases like the one in question.

The Court has established that "*the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable*

[1] DFDS. Press release. *Migrants on Kaunas Seaways flown to Algeria.* 1 November 2017.
[2] *Ibid*.
[3] ITLOS, *M/V "Louisa"* (Saint Vincent and the Grenadines v. Kingdom of Spain), paras. 154-155; ITLOS, *"Juno Trader"* (Saint Vincent and the Grenadines v. Guinea-Bissau), para. 77; ITLOS, *M/V "Saiga" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), para. 155.
[4] ECtHR, *Medvedyev and Others v. France*, (app. no. 3394/03), Grand Chamber judgment, 29 March 2010, para. 28; ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09), Grand Chamber Judgment, 23 February 2012 paras. 24-26.

of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction".[5]

As the quotation suggests, any individual under the jurisdiction of a contracting state to the European Convention on Human Rights (henceforth: the ECHR or the Convention) must be protected under the Convention at sea. In its history, the Court has established that a state is not only obliged to honour its human rights obligations within its territory but increasingly outside it as well. Extraterritorial application of human rights remains important as states continue to operate outside their borders in numerous ways due to the ever-increasing globalisation of the world.

The incident in the Black Sea raises another issue within human rights law; one that concerns the states' positive obligation to actively protect human rights against violations by private parties. It is relevant to this thesis because the detention of the twelve stowaways was carried out by a crew and a shipmaster hired by the private shipping company DFDS. It is especially important because stowaways have a tragic history of being ill-treated, murdered on board vessels, or being thrown overboard.[6]

1.1. Research question

This thesis takes as its point of departure the *Kaunas Seaways* incident, *i.e.* the situation where a privately-owned vessel registered in a European state carried out extraterritorial activities that violated the human rights of a number of third-state citizens. Consequently, this study revolves around a case that falls outside the typical scope of the ECHR.

The purpose of this thesis is to analyse and comment upon the extraterritorial application of the ECHR and the flag state's positive obligations under the Convention by answering the following research question:

[5] ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09), para. 178, with reference to ECtHR, *Medvedyev and Others v. France*, (app. no. 3394/03), para. 81.
[6] Steglich, Elissa. *Hiding in the Hulls: Attacking the Practice of High Seas Murder of Stowaways through Expanded Criminal Jurisdiction*, p. 1323ff.

Can Lithuania as a flag state be held responsible for potential breaches of Article 5 of the European Convention on Human Rights, that were committed extraterritorially on a vessel owned by a private shipping company?

1.2. Factual background

Kaunas Seaways is a DFDS-owned ferry registered in and flying the flag of Lithuania and sailing from Istanbul in Turkey to Chernomorsk near Odessa in Ukraine.[7] The shipmaster at the time of the incident was of East European descent.[8]

On 27 July 2017, twelve migrants boarded the vessel in Turkey by hiding in loaded trailers.[9] However, the twelve migrants allegedly boarded the ferry with the intention of going to Romania and did not realize their mistake before it was too late.[10] Both Turkey and Ukraine refused to receive the migrants because they were not in possession of any documents.[11]

The situation escalated when the twelve migrants went violent, tried to set the ferry on fire by torching bed linen, and threatened to commit suicide by jumping overboard.[12] As a consequence, the migrants were locked inside four cabins with barred windows and doors that had been stripped of their handles.[13] Furthermore, guards were positioned at the cabins to ensure the safety of the migrants, the other passengers, and the crew,[14] while the vessel continued its usual business of sailing goods and passengers between Turkey

[7] Ministry of Foreign Affairs of the Republic of Lithuania. Press release. *Immigrants on board the Kaunas Seaways ferry return to their countries of origin*. 3 November 2017.
[8] Sommer, Mathias. *DR besøger drama på færge: Desperate migranter banker for at komme ud*. DR.dk. 13 September 2017.
[9] DFDS. Press release. *Migrants on Kaunas Seaways flown to Algeria*. 1 November 2017.
[10] Thomas, Julie Astrid. *No country for migrant stowaways caught on ferry between Ukraine and Turkey*. Reuters.com. 14 September 2017.
[11] Thomas, Julie Astrid. *No country for migrant stowaways caught on ferry between Ukraine and Turkey*.
[12] Sommer, Mathias. *DR besøger drama på færge: Desperate migranter banker for at komme ud*.
[13] Pedersen, Mette Stender. *Dansk rederi kan ikke slippe af med 12 migranter: - Alle vasker hænder*. Nyheder.tv2.dk. 5 September 2017; Sommer, Mathias. *Udenrigsministeriet knokler for at løse færgedrama i Sortehavet*. DR.dk. 6. september 2017. Sommer, Mathias. *DR besøger drama på færge: Desperate migranter banker for at komme ud*.
[14] DFDS. Press release. *Migrants on Kaunas Seaways flown to Algeria*.

and Ukraine.[15] The guards were unarmed,[16] and while the twelve migrants were on board, DFDS provided them with food, clothes, and medical assistance, as well as made sure that they could contact their families.[17]

Due to doubts about the nationalities of the migrants who claimed to be stateless Palestinians,[18] DFDS invited authorities from the United Nations aboard the vessel to question the men.[19] Six of the migrants were from Algeria, while the other six were from Morocco.[20] The twelve men were estimated to be between 18 and 30 years old.[21]

It must be assumed that the shipmaster of *Kaunas Seaways* or DFDS notified Lithuanian authorities when the stowaways were discovered, as diplomatic relations were in process on 4 September 2017.[22] Lithuania cooperated with diplomatic representatives of Turkey, Ukraine, Algeria, and Morocco and received assistance from representatives of the EU, Frontex Agency, the United Nations High Commissioner for Refugees, and the International Organization for Migration.[23] Because the shipping company DFDS is Danish, The Danish Foreign Ministry supported the diplomatic negotiations with Danish ambassadors in Turkey, Ukraine, and Lithuania.[24] DFDS also tried to make agreements with Rumania and Bulgaria since these states were situated closely to *Kaunas Seaways'* route in the Black Sea.[25] These attempts, however, were unsuccessful.[26]

On 29 October 2017, approximately three months after the migrants boarded the vessel, six of the migrants were taken off the ferry and flown to their home state Algeria through

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[15] Sommer, Mathias. *DR besøger drama på færge: Desperate migranter banker for at komme ud*.
[16] Pedersen, Mette Stender. *Dansk rederi kan ikke slippe af med 12 migranter: - Alle vasker hænder*.
[17] Sommer, Mathias. *Migranter fanget ombord på dansk færge i over en måned*. DR.dk. September 4 2017.
[18] Sommer, Mathias. *Udenrigsministeriet knokler for at løse færgedrama i Sortehavet*.
[19] Thomas, Julie Astrid. *No country for migrant stowaways caught on ferry between Ukraine and Turkey*.
[20] Thomsen, Julie Astrid. *Twelve North African stowaways sent home after three-month ferry ordeal*. Reuters.com. 1 November 2017.
[21] Sommer, Mathias. *DR besøger drama på færge: Desperate migranter banker for at komme ud*.
[22] Sommer, Mathias. *Migranter fanget ombord på dansk færge i over en måned*.
[23] Ministry of Foreign Affairs of the Republic of Lithuania. Press release. *Immigrants on board the Kaunas Seaways ferry return to their countries of origin.*
[24] Thomas, Julie Astrid. *No country for migrant stowaways caught on ferry between Ukraine and Turkey*; Ministry of Foreign Affairs of the Republic of Lithuania. Press release. *Immigrants on board the Kaunas Seaways ferry return to their countries of origin.*
[25] Sommer, Mathias. *Migranter fanget ombord på dansk færge i over en måned*.
[26] *Ibid*.

airports in Turkey and Ukraine in accordance with a diplomatic agreement reached by Lithuania and the African home states.[27] On 31 October 2017, the last six men were flown to Morocco.[28]

1.3. Delimitations

This thesis shall focus on the extraterritorial application of the ECHR, mainly at sea, and the state's positive obligation under the Convention; both areas of interest primarily regarding Article 5. As this being the outset the flag state's obligations will be examined.

The research question and the overall approach employed in answering it is based on two prerequisites. Firstly, it is chosen to take on the view of the flag state and examine its obligations under the ECHR. Secondly, it is chosen to focus on the public international law aspects of the incident.

In more detail, this means that the thesis will revolve around the flag state Lithuania, which played an essential and necessary role in the process of solving the situation. This means that the thesis will not address the state of embarkation or the state of the first port of call and their obligations based on the Convention on the Facilitation of International Maritime Traffic (henceforth: the FAL Convention). The FAL Convention proved to be inefficient in the particular situation, as neither Ukraine nor Turkey wanted to participate in the disembarkation of the migrants within their territories. That the FAL Convention does not provide any forum for dispute settlement only confirmed its insufficiency. Consequently, Ukraine and Turkey's obligations under the FAL Convention and also the ECHR, which both states are parties to,[29] will not be addressed.

Furthermore, the prerequisites for this thesis mean that DFDS' potential claim for reparations against Turkey and Ukraine will not be addressed. Focus shall remain on the

[27] DFDS. Press release. *Migrants on Kaunas Seaways flown to Algeria*.
[28] *Ibid*.; Thomsen, Julie Astrid. *Twelve North African stowaways sent home after three-month ferry ordeal*.
[29] IMO, Status of IMO Treaties, Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions, 8 February 2018, p. 178; Council of Europe, Treaty Office, Chart of signatures and ratifications of Treaty 005, Convention for the Protection of Human Rights and Fundamental Freedoms.

ECHR and international instruments to which the flag state complies. Nevertheless, it will not be addressed whether the migrants were in fact refugees or asylum seekers covered by the Refugee Convention and its Protocol,[30] who should have been referred to appropriate follow-up processes, where their international protection needs could have been addressed and assessed. Nor shall this thesis examine whether the return of the migrants to their home states was contrary to the prohibition of *non-refoulement* under Article 33(1) of the Refugee Convention. The reasoning behind this choice was the shortage of available information describing what exactly happened on board the ferry, including whether the migrants claimed asylum during their three months stay on the vessel. In accordance with this choice, it will not be examined whether the return of the migrants was contrary to the prohibition of collective expulsion of aliens under Article 4 of the Fourth Protocol of the ECHR and whether the migrants were exposed to a risk of torture, inhuman and degrading treatment under Article 3 of the ECHR upon their return to Algeria and Morocco. The shortage of accessible information on the conditions aboard the ferry also precludes a thorough examination of whether the detention conditions and the prolonged period of detention or uncertainty as to the length of the detention amounted to inhuman or degrading treatment under Article 3 of the ECHR.[31]

Due to its focus on public international law, this thesis will not address *drittwirkung*; the so-called horizontal effect of human rights. *Drittwirkung* covers the inter-individual relationship between the twelve migrants and the individuals who potentially breached their human rights.[32] The principle of *drittwirkung* enables the migrants to lodge a civil claim in a Lithuanian court against *Kaunas Seaways'* shipmaster and crew or in a Danish court against the Danish parent company DFDS, and it deals with the application of private law principles in matters such as tort, contract, etc.[33] The principle does not concern the public law relationship between the individuals and the authorities

[30] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 and UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.
[31] See Ktistakis, Yannis. *Protecting migrants under the European Convention on Human Rights and the European Social Charter*, pp. 33 and 35.
[32] Drzemczewski, Andrew. *Drittwirkung and the European Human Rights Convention – An Interim Assessment*, p. 197.
[33] *Ibid*., p. 198.

constituting one of the focuses of this thesis that will reveal whether the flag state can be held responsible for the incident.

Lastly, this thesis does not inspect Lithuania's responsibility for DFDS' actions as a corporation since it is neither owned or controlled by nor registered in Lithuania. This subject could have been examined by reviewing Denmark's responsibility due to the fact that DFDS is a transnational company domiciled in Denmark under the United Nations Guiding Principles on Business and Human Rights.[34] However, the aim of this thesis remains to study flag states' human rights obligations, which is why Lithuania is the state in question.

1.4. Research methodology

This thesis is based primarily on the doctrinal approach. In a legal context, the doctrinal approach is used "*to give a systematic exposition of the principles, rules and concepts governing a particular legal field* […] *and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law*."[35] The doctrinal approach includes systematization of the present law as well as considering recent case law in light of changes in society.[36]

The doctrinal approach is used in this thesis because its purpose is to describe and illustrate Lithuania's legal obligations under the ECHR, more specifically under Article 5 of the Convention, as a flag state under the United Nations Convention on the Law of the Sea (henceforth: UNCLOS). This approach occasionally consists of more thorough, traditional analyses, especially when the current state of law is considered in form of case law from the ECtHR. The findings of these analyses are consistently followed by contemplations on how the state of law can be applied to the case involving *Kaunas Seaways*.

The relevant law of the sea, namely articles of UNCLOS and Section 4 of the FAL Convention, and the ECHR, especially the right to freedom and security under Article 5,

[34] See Lagoutte, Stéphanie. *New Challenges Facing States within the Field of Human Rights and Business*, in which the United Nations Guiding Principles on Business and Human Rights are examined.
[35] Smits, Jan M. *What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research*, p. 5.
[36] *Ibid*., p. 7.

extraterritoriality, and the positive obligations, are established through a wide range of sources. These sources include the regional and international conventions, reports, and other documents from regional and international organisations, judgments from the ECtHR and ITLOS, as well as academic books, journals, convention commentaries, and articles. In terms of the factual background for the present case, the primary sources are of journalistic and diplomatic character.

In order to establish the content of the right to freedom and security under Article 5, many judgments and decision from the ECtHR and the former European Commission of Human Rights (henceforth: the EComHR) are used. Both Chamber Judgments and Grand Chamber Judgments are quoted and there is made no distinction in relation to the value of these judgments. This is done because the ECtHR often justifies its judgments by quoting its own prior judgments from both the Chambers and the Grand Chamber despite the fact that there is no norm of *stare decisis* within the ECHR system.[37] Based on the Court's use of precedent, it is assumed that if the Court should decide the present case, it would use relevant prior judgments to assess the principles established in the Court's case law. This also applies to the establishment of the extraterritorial application of the Convention and the positive obligations.

Where other sources of law have proven insufficient in establishing the content of the relevant law to this thesis, academic literature, including books, commentaries, and articles, have been used as a subsidiary mean of interpretation. Primarily highly qualified publicists have been chosen in accordance with the principle of Article 38 of the Statute of the International Court of Justice. This principle applies to the thesis because human rights law forms part of the public international law.

Several news articles have been used to set the factual background for the incident. DFDS has been contacted so as to obtain official documents or reports on the incident; this attempt, however, remains unanswered. The news articles are mostly in Danish, yet some are in English. The source value of these news articles is not high. However, they were a requirement for this thesis to provide as many facts as possible on the incident. The

[37] Lupu, Yonatan and Voeten, Erik. *The Role of Precedent at the European Court of Human Rights: A Network Analysis of Case Citations*, p. 1.

episode lacks international attention and has mainly been addressed by Danish news media due to *Kaunas Seaways*' Danish parent company.

1.5. Layout of the thesis

This thesis consists of six chapters.

Chapter 1, the introduction, provides an overall insight into the purpose of the thesis.

Chapter 2 focuses on the international law relevant to determining Lithuania's obligations. The chapter includes relevant articles and sections from UNCLOS and the FAL Convention, seeing they help determine whether human rights obligations accrued because of Lithuania's status as the vessel's flag state. Article 5 of the ECHR is analysed as well with the purpose of establishing the state's obligations under it.

Chapter 3 explores the extraterritorial application of human rights at sea. As the extraterritorial application relies on Lithuanian jurisdiction, both *de jure* and *de facto* jurisdiction are examined.

Chapter 4 aims at illuminating the positive obligations under the ECHR in general and specifically under Article 5.

Building on the foregoing chapters, chapter 5 evaluates whether Lithuania as a flag state breached its negative and positive obligations under Article 5 of the ECHR in the *Kaunas Seaways* incident in the Black Sea.

Finally, chapter 6 offers a conclusion and hopefully answers the research question satisfactorily.

This structure resembles the one used by the ECtHR. Firstly, the Court establishes the facts and particular circumstances of the case. Secondly, the relevant law is described. Thirdly, the Court decides on preliminary issues raised by the government, typically regarding jurisdiction. Lastly, the Court decides on the merits, *i.e.* whether there has been a violation of the relevant article.

2. The relevant legal framework for the solution of the *Kaunas Seaways* incident

2.1. United Nations Convention on the Law of the Sea

UNCLOS was opened for signature at Montego Bay, Jamaica, on 10 December 1982 and entered into force on 16 November 1994. Lithuania acceded to UNCLOS on 12 November 2003.[38]

UNCLOS defines the rights and responsibilities of the state parties in their use of the oceans.[39]

The relevant articles of the convention to the present case are Article 91, 92, and 94.

Article 91 provides the nationality of ships and enshrines the flag state principle by stating that:

> "1. *Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship* […]"

In other words, a vessel is jurisdictionally connected with the flag state.[40] The aim of this article on the need for a genuine link between the flag state and the ship is to guarantee the effective implementation of the flag state duties contained in Article 94.[41] It is not to be understood that a genuine link is a condition for the granting of nationality to the vessel, though.[42]

[38] UN Treaty Collection, 6. United Nations Convention on the Law of the Sea, Chapter XXI Law of the Sea.
[39] Grosdidier de Matons, Jean. *A Review of International Legal Instruments, Facilitation of Transport and Trade in Africa*, p. 24.
[40] Proelss, Alexander. *United Nations Convention on the Law of the Sea – A Commentary*, p. 693.
[41] ITLOS, *M/V "Saiga" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), para. 83. Reaffirmed in the case of ITLOS, *M/V "Virginia G"* (Panama/Guinea-Bissau), para. 112.
[42] ITLOS, *M/V "Saiga" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), para. 83. Reaffirmed in the case of ITLOS, *M/V "Virginia G"* (Panama/Guinea-Bissau), para. 110.

Article 92 concerns the status of ships and states that:

> "1. *Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for* […] *in this Convention, shall be subject to its exclusive jurisdiction on the high seas.* […]"

This article confirms that a vessel is under the exclusive jurisdiction of its flag state while on the high seas. In this thesis, the high seas are defined as the open ocean, which is outside any state's internal waters, territorial sea or exclusive economic zone, as these maritime zones are defined in UNCLOS.[43] The principle on exclusive flag state jurisdiction is considered customary international law.[44]

Lastly, Article 94 describes the duties of the flag state, including that:

> "1. *Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag* […]"

Under this article the flag state is obligated to exercise effective jurisdiction and control over the vessel to secure that it complies "*with generally accepted international regulations, procedures and practices.*"[45] These obligations must be fulfilled by the flag state once the vessel has been registered and shall be seen in connection to Article 91 as they are the meaning of the term 'genuine link'.[46]

Article 94 requires the flag state to apply relevant shipping and maritime laws to the registered vessels and criminal and civil laws to the crews.[47] Furthermore, the flag state is obligated to take certain measures in conformity with international regulations, such as the relevant conventions made by the International Maritime Organization,[48] for instance the FAL Convention.

Thus, the vessel is under UNCLOS seen as a unit, and the ship, its crew, and its passengers, regardless of their nationalities, are to be treated as an entity linked to the

[43] See UNCLOS, Articles 2-4 on the territorial sea, Article 8 on internal waters and Article 55 and 57 on the exclusive economic zone.
[44] Proelss, Alexander. *United Nations Convention on the Law of the Sea – A Commentary*, p. 701.
[45] ITLOS, *M/V "Virginia G"* (Panama/Guinea-Bissau), para. 113.
[46] *Ibid*.; Rothwell, Donald R., *et al*. *The International Law of the Sea*, p. 169.
[47] Rothwell, Donald R., *et al*. *The International Law of the Sea*, p. 169.
[48] *Ibid*.

flag state.[49] The flag state's domestic law therefore applies to all persons on board the vessel, irrespective of the legality of their stay, wherefore it also applies to stowaways.[50]

2.2. Convention on Facilitation of International Maritime Traffic

The FAL Convention was created under the auspices of the International Maritime Organization, was adopted on 9 April 1965, and entered into force on 5 March 1967.[51] Lithuania acceded to the FAL Convention on 25 January 2000, and it entered into force in this state on 25 March 2000.[52]

The purpose of the FAL Convention is to facilitate international maritime traffic by minimising formalities, documentary requirements, and procedures upon the arrival, stay, and departure of ships within international trade.[53] The FAL Convention consists of a number of articles and an annex, which contains 'standards' and 'recommended practices'. These terms are defined in Article VI. 'Standards' are defined as "*those measures the uniform application of which by Contracting Governments in accordance with the Convention is necessary and practicable in order to facilitate international maritime traffic*", whereas 'recommended practices' are defined as "*those measures the application of which by Contracting Government is desirable in order to facilitate international maritime traffic*."[54]

The FAL Convention has introduced some standards and recommended practices regarding stowaways of relevance to this thesis. Section 4 of the Annex to the FAL Convention concerns in its entirety stowaways. A stowaway is defined in Section 1, subsection A of the Annex, as:

[49] ITLOS, *M/V "Saiga" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), para. 106.
[50] Proelss, Alexander. *United Nations Convention on the Law of the Sea – A Commentary*, p. 711.
[51] IMO, Status of IMO Treaties, Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions, 8 February 2018, p. 174.
[52] *Ibid*., p. 178.
[53] Grosdidier de Matons, Jean. *A Review of International Legal Instruments, Facilitation of Transport and Trade in Africa*, p. 41.
[54] FAL Convention, Article VI.

> "*A person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities*."

Section 4, subsection A of the Annex, concerns general principles regarding stowaways, and Section 4.1. contains a standard ensuring that a stowaway is being treated in accordance with international protection principles set out in international instruments such as the Refugee Convention and its Protocol. Another standard, Section 4.2., prescribes the cooperation of relevant authorities, shipowners, and shipmasters in order to prevent stowaway incidents as well as "*resolve stowaway cases expeditiously and secure that an early return or repatriation of the stowaway will take place. All appropriate measures shall be taken in order to avoid situations where stowaways must stay on board ships indefinitely*."[55]

If a contracting state to the FAL Convention detects stowaways on board a vessel flying its flag, the state should prosecute stowaways and attempted stowaways under its national legislation as set forth in Section 4.3.3.1. Under Section 4.13.1. the flag state is responsible for the identification and determination of the nationality of the stowaway and for making representations to the relevant public authority in order to remove the stowaway from the ship at the first available opportunity as well as making arrangements for the removal or repatriation of the stowaway. When a state detects a stowaway incident, it is recommended practice to report it to the International Maritime Organization.[56]

Section 4, subsection C of the Annex, concerns the treatment of stowaways on board a vessel. Section 4.4.1. states that stowaways should be treated humanely and in accordance with humanitarian principles and Section 4.4.2. prescribes that the stowaway must have access to adequate food, accommodation, medical attention, and sanitary facilities on board the vessel.

[55] FAL Convention, Annex, Section 4.2.
[56] *Ibid*., Section 4.7.

2.3. The European Convention on Human Rights

The ECHR was made by the Council of Europe in 1950 and entered into force on 3 September 1953 when it had been ratified by ten states.[57] Lithuania ratified the Convention on 20 June 1995.[58]

The Convention contains civil and political rights that are continuously secured by the ECtHR.[59]

2.3.1. Article 5: The right to liberty and security

Article 5 of the ECHR provides for the right to liberty and security. The guarantees of Article 5 are threefold in the sense that Article 5(1), first sentence, contains the general right to liberty and security, Article 5(1), second sentence, provides the conditions for restrictions on that right, and Article 5(2)-(5) provides the procedural safeguards applicable to deprivations of liberty.[60]

The purpose of the provision is to prevent arbitrary detention,[61] and it guarantees that the lawfulness of any measure of deprivation of liberty will be judicially reviewed.[62] The wording of the article provides that it applies to 'everyone' within the state's jurisdiction, meaning all persons of any age.[63]

In cases regarding breaches of the right to liberty and security, the Court's assessment often begins with the following words:

> "*The Court stresses the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities.* […] *In order to minimise the risks of arbitrary detention,*

[57] Council of Europe, Treaty Office, Chart of signatures and ratifications of Treaty 005, Convention for the Protection of Human Rights and Fundamental Freedoms.
[58] *Ibid.*
[59] See Article 19 of the ECHR on the establishment of the Court.
[60] Grabenwarter, Christoph. *European Convention on Human Rights – Commentary*, p. 64.
[61] ECtHR, *Guzzardi v. Italy*, (app. no. 7367/76), Judgment, 6 November 1980, para. 92; ECtHR, *Engel and Others v. the Netherlands*, (app. no. 5370/71), Judgment, 8 June 1976, para. 58; ECtHR, *Bazorkina v. Russia*, (app. no. 69481/01), Judgment, 27 July 2006, para. 146.
[62] Grabenwarter, Christoph. *European Convention on Human Rights – Commentary*, p. 63.
[63] ECtHR, *Weeks v. the United Kingdom*, (app. no. 9787/82), Judgment, 2 March 1987, para. 40; ECtHR, *Nielsen v. Denmark*, (app. no. 10929/84), Judgment, 28 November 1988, para. 58.

Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty be amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure."[64]

This underlines the vital importance of guarantees against arbitrary arrest and detention in a democratic society such as lawful authority and judicial control.

The burden of proof under this article lies on those responsible for someone's deprivation of liberty, and they must establish that the deprivation falls within one of the grounds specified in Article 5(1)(a)-(f) and that deprivation of liberty was applicable in the specific situation.[65]

2.3.1.1. The concept of 'liberty'

Article 5 of the ECHR prevents deprivation of liberty save under the conditions in Article 5(1). Regarding the threshold of deprivation of liberty, the ECtHR has to distinguish between deprivation of liberty in the sense of Article 5 and restrictions on freedom of movement, seeing freedom of movement is protected separately by Article 2 of the Fourth Protocol. This distinction is made based on the degree and intensity of the infringement and not on its nature or substance.[66] In other words, less absolute forms than confinement to a cell may violate Article 5 and thereby constitute deprivation of liberty.

Article 5 of the ECHR regards the physical liberty of a person,[67] and when the Court is to consider whether a person has been deprived of his liberty in the sense of Article 5, "*the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the*

[64] ECtHR, *Bazorkina v. Russia*, (app. no. 69481/01), para. 146. This opening of the assessment has among others also been used in ECtHR, *Kurt v. Turkey*, (app. no. 24276/94), Judgment, 25 May 1998, para. 122-123; ECtHR, *Çakici v. Turkey*, (app. no. 23657/94), Grand Chamber Judgment, 8 July 1999, para. 104; ECtHR, *Akdeniz and Others v. Turkey*, (app. no. 23954/94), Judgment, 31 May 2001, para. 106.
[65] Macovei, Monica. *The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights*, p. 8.
[66] ECtHR, *Guzzardi v. Italy*, (app. no. 7367/76), para. 93; ECtHR, *Stanev v. Bulgaria*, (app. no. 36760/06), Grand Chamber Judgment, 17 January 2012, para. 115.
[67] ECtHR, *Guzzardi v. Italy*, (app. no. 7367/76), para. 92; ECtHR, *Engel and Others v. the Netherlands*, (app. no. 5370/71), para. 58.

measure in question".[68] Therefore, the period of confinement is of paramount importance, but also the intensity of other restrictions are relevant, such as the supervision and control over the individual's movements, especially if they result in isolation and lack of social contact.[69] If physical detention is present in a case, the element of coercion is indicative when establishing deprivation of liberty regardless of the length of the measure in question.[70] Furthermore, it is essential that the result of the measure is a lack of liberty, not what the measure is called.[71]

The Court has stipulated that deprivation of liberty comprises both an objective and a subjective element.[72] The objective element involves the confinement of the individual in a restricted space for a significant length of time, whereas the subjective element is manifested by the lack of valid consent of the individual.[73] However, the subjective element is only relevant in relation to the institutionalising of mentally disordered persons.[74]

Consequently, in the assessment of whether there has been a deprivation of liberty, the Court should take into account the context and circumstances surrounding the restriction.[75]

When determining whether a person has been deprived of his liberty within the scope of Article 5 of the ECHR, the public interest behind the deprivation is irrelevant, as this is only important regarding the justification of the measure.[76]

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[68] ECtHR, *Guzzardi v. Italy*, (app. no. 7367/76), para. 92; ECtHR, *Engel and Others v. the Netherlands*, (app. no. 5370/71), para. 59.
[69] ECtHR, *H.M. v. Switzerland*, (app. no. 39187/98), Judgment, 26 February 2002, para. 45; ECtHR, *H.L. v. the United Kingdom*, (app. no. 45508/99), Judgment, 5 October 2004, para. 91.
[70] ECtHR, *Gillan and Quinton v. the United Kingdom*, (app. no. 4158/05), Judgment, 12 January 2010, para. 57.
[71] Macovei, Monica. *The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights*, p. 17.
[72] ECtHR, *Storck v. Germany*, (app. no. 61603/00), Judgment, 16 June 2005, para. 74; ECtHR, *Stanev v. Bulgaria*, (app. no. 36760/06), para. 117.
[73] ECtHR, *Storck v. Germany*, (app. no. 61603/00), Judgment, 16 June 2005, para. 74; ECtHR, *Stanev v. Bulgaria*, (app. no. 36760/06), para. 117.
[74] Van Dijk, Pieter, *et al. Theory and Practice of the European Convention on Human Rights*, p. 443.
[75] ECtHR, *Austin v. the United Kingdom*, (app. no. 39692/09), Grand Chamber Judgment, 15 March 2012, para. 59.
[76] *Ibid*., para. 58.

2.3.2. Limitations on the right to liberty and security

The right to liberty and security is not absolute, and derogations from the obligations in Article 5 are permitted under Article 15 of the ECHR if the conditions in the latter provision are fulfilled.

Furthermore, European human rights law permits some limitations or restrictions on the right to liberty and security. Any limitation or restriction must meet the requirements laid down in Article 5(1). Therefore, the restriction must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society.

2.3.2.1. Prescribed by law

Firstly, deprivation of liberty under Article 5(1) must be lawful and carried out "*in accordance with a procedure prescribed by law"*. This means that arrests and detentions must be carried out in conformity with substantive and procedural rules within domestic law or within relevant international law.[77]

Ensuring compliance with domestic law is typically a task for the national authorities, especially the national courts, but as it is a breach of the Convention under Article 5(1) not to act in compliance with domestic law, the ECtHR can and should exercise a certain power of review.[78]

Regarding the lawfulness of the detention or arrest, the Court requires that the domestic law is of a certain quality due to the principle of legal certainty.[79] This principle requires the law to be clear and accessible for the citizens to be able to foresee the consequences

[77] ECtHR, *Van der Leer v. the Netherlands*, (app. no. 11509/85), Judgment, 21 February 1990, para. 22; ECtHR, *Benham v. the United Kingdom*, (app. no. 19380/92), Grand Chamber Judgment, 10 June 1996, para. 40. Regarding international law, see ECtHR, *Toniolo v. San Marino and Italy*, (44583/10), Judgment, 26 June 2012, para. 46.

[78] ECtHR, *Benham v. the United Kingdom*, (app. no. 19380/92), para. 41; ECtHR, *Winterwerp v. the Netherlands*, (app. no. 6301/73), Judgment, 10 October 1979, para. 46.

[79] Harris, David, *et al. Law of the European Convention on Human Rights*, p. 302; Rainey, Bernadette, *et al. Jacobs, White, and Ovey: The European Convention on Human Rights*, p. 241.

of a certain act.[80] If the legal rules regulating the conditions of deprivation of liberty lack clarity, they violate as such Article 5.[81]

2.3.2.2. Legitimate aim

Moreover, the deprivation of liberty of a person can only happen on the grounds listed in Article 5(1)(a)-(f), as it in these situations is in the public interest.

There are six grounds on which permitted deprivation of liberty can happen:

(a) Detention following conviction by a competent court.
(b) Arrest or detention for non-compliance with a court order or an obligation prescribed by law.
(c) Pre-trial arrest or detention on suspicion of having committed a crime.
(d) Detention of minors.
(e) Detention of persons of unsound mind, alcoholics, drug addicts, etc.
(f) Arrest and detention of persons to prevent unauthorised entry or to deport or extradite.

The list of grounds on which deprivation of liberty can be carried out is exhaustive, and the grounds are to be interpreted narrowly.[82]

At first sight, Article 5(1)(c) on arrest or detention on suspicion of having committed a crime seems applicable to the detention on board *Kaunas Seaways*. However, under this part of Article 5(1), the detention must be carried out with the purpose of bringing the individual before a court. This was not the case in the *Kaunas Seaways* incident because even though Lithuania was under an obligation to prosecute the stowaways under the state's national legislation in accordance with the standard set forth in the FAL Convention, Section 4.3.3.1., it was not the purpose of the detention. The purpose of the

[80] ECtHR, *Medvedyev v. France*, (app. no. 3394/03), para. 80; ECtHR, *Baranowski v. Poland*, (app. no. 28358/95), Judgment, 28 March 2000, para. 52; ECtHR, *Jėčius v. Lithuania*, (app. no. 34578/97), Judgment, 31 July 2000, para. 56.
[81] ECtHR, *Kolevi v. Bulgaria*, (app. no. 1108/02), Judgment, 5 November 2009, para. 178.
[82] ECtHR, *Lexa v. Slovakia*, (app. no. 54344/00), Judgment, 23 September 2008, para. 119; ECtHR, *Čonka v. Belgium*, (app. no. 51564/99), Judgment, 5 February 2002, para. 42.

detention was simply to find a way to have the stowaways removed from the vessel as they posed a risk to the safety on board.

Thus, as the incident deals with the return of migrant stowaways, the only ground for deprivation of liberty of relevance to this thesis' research question is the one on detention to prevent unauthorised entry and to deport or extradite individuals, only Article 5(1)(f) will be discussed below.

2.3.2.2.1. Article 5(1)(f) With the purpose of preventing unauthorised entry or deportation or extradition

Article 5(1)(f) permits the states to control the liberty of aliens in an immigration context.[83] Three permitted grounds for deprivation of liberty are contained in this article, namely arrest or detention with the purpose of preventing a person from entering into the country unauthorised, and arrest or detention of a person against whom action is being taken with a view to deportation or extradition. Article 5(1)(f) "*does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing*".[84] The level of protection under subparagraph f is consequently different from the protection under the rest of Article 5.[85] This follows from the fact that the state parties "*have the undeniable sovereign right to control aliens' entry into and residence in their territory*."[86]

As provided in the first part of Article 5(1)(f), a person must not enter into a country unauthorised. The Court examined this part of the article for the first time in the case of *Saadi v. the United Kingdom*, where the Court inspected whether an asylum seeker's stay was authorized. The applicant in the case was an Iraqi Kurd, who had claimed asylum upon arrival in the United Kingdom.[87] The Court found "*that the first limb of Article 5 §*

[83] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), Grand Chamber Judgment, 29 January 2008, para. 64.
[84] ECtHR, *Chahal v. the United Kingdom*, (app. no. 22414/93), Grand Chamber Judgment, 15 November 1996, para. 112.
[85] *Ibid*.
[86] ECtHR, *Amuur v. France*, (app. no. 19776/92), Judgment, 25 June 1996, para. 41.
[87] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 10.

1 (f) permits the detention of an asylum-seeker or other immigrant prior to the State's grant of authorisation to enter".[88] However, detention under this part of the article must be compatible with the overall purpose of Article 5.

In accordance with the second part of Article 5(1)(f), action must be taken with a view to deportation or extradition of the detained individual. The deportation or extradition proceedings must be in progress in order for the case to fall within Article 5(1)(f).[89] If this is not the case, the detention will cease to be permissible under this article.[90]

The second part of Article 5(1)(f) was in question in the case of *Chahal v. the United Kingdom*. The applicant was an Indian Sikh, who had entered the United Kingdom illegally in 1971.[91] He was granted indefinite leave to remain in the United Kingdom in 1974.[92] However, as he posed a risk to national security in the United Kingdom due to accusations of involvement in terror-related conspiracies, he was detained for the purposes of deportation in the years 1990-1996.[93] Despite the length of the detention, the Court found that "*in view of the exceptional circumstances of the case and the facts that the national authorities have acted with due diligence throughout the deportation proceedings against him and that there were sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of Article 5 para. 1*".[94]

Breaches of the second part of Article 5(1)(f) can therefore only be established if the applicant is able to show that the authorities did not pursue the expulsion or deportation proceedings with due diligence and thereby prolonged the detention.[95] Consequently, if

[88] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 66.
[89] ECtHR, *A and Others v. the United Kingdom*, (app. no. 3455/05), Grand Chamber Judgment, 19 February 2009, para. 164.
[90] ECtHR, *Chahal v. the United Kingdom*, (app. no. 22414/93), para. 113; ECtHR, *A and Others v. the United Kingdom*, (app. no. 3455/05), para. 164.
[91] ECtHR, *Chahal v. the United Kingdom*, (app. no. 22414/93), para. 12.
[92] *Ibid*., para. 12.
[93] *Ibid*., paras. 12 and 23.
[94] *Ibid*., para. 123.
[95] Rainey, Bernadette, *et al. Jacobs, White, and Ovey: The European Convention on Human Rights*, p. 264.

the delay is not attributable to the action of the authorities, it cannot constitute a violation of Article 5.[96]

Detention under both the first and the second part of Article 5(1)(f)

> "*must be carried out in good faith; it must be closely connected to the purpose* […]*; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"* […]*; and the length of the detention should not exceed that reasonably required for the purpose pursued.*"[97] (emphasis added)

The length of the proceedings under Article 5(1)(f) depends on the facts of the case. In the case of *Kanagaratnam and Others v. Belgium*,[98] three months of detention pending asylum procedures were considered unreasonably lengthy coupled with the inappropriate conditions under which the applicants were detained.[99] This was also the case in *Suso Musa v. Malta*, where six months of detention under inappropriate conditions pending asylum procedures was not compatible with Article 5(1)(f).[100] Whereas, in the case of *Saadi v. the United Kingdom*, seven days of detention under suitable conditions was considered appropriate despite difficult administrative problems.[101]

2.3.2.3. Necessary in a democratic society (absence of arbitrariness)

The principles of proportionality and necessity are not explicitly clear in Article 5(1). Nevertheless, the ECtHR has interpreted the word 'lawful' as containing these principles as well as a general prohibition of arbitrariness.[102] However, case law from the Court

[96] ECtHR, *Kolompar v. Belgium*, (app. no. 11613/85), Judgment, 24 September 1992, paras. 40-42.
[97] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 74; Reiterated in ECtHR, *A and Others v. the United Kingdom*, (app. no. 3455/2005), para. 164.
[98] ECtHR, *Kanagaratnam and Others v. Belgium*, (app. no. 15297/09), Judgment, 13 December 2011. (available only in French).
[99] *Ibid*., paras. 94-95.
[100] ECtHR, *Suso Musa v. Malta*, (app. no. 42337/12), Judgment, 23 July 2013, paras. 102-103.
[101] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 80.
[102] ECtHR, *Vasileva v. Denmark*, (app. no. 52792/99), Judgment, 25 September 2003, para. 41; ECtHR, *Enhorn v. Sweden*, (app. no. 56529/00), Judgment, 25 January 2005, para. 36; ECtHR, *Ladent v. Poland*, (app. no. 11036/03), Judgment, 18 March 2008, paras. 54-55; ECtHR, *Witold Litwa v. Poland*, (app. no. 26629/95), Judgment, 4 April 2000, para. 78.

shows that proportionality and necessity are only examined in regard to deprivation of liberty under Article 5(1)(b)-(e) and not regarding the subparagraphs (a) and (f).[103]

Proportionality in its clearest form was put forward by the Court in the cases of *Vasileva v. Denmark* and *Nowicka v. Poland* when it stated that "*a balance must be drawn between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty"*.[104]

The Court has never defined the principle of arbitrariness in its case law, but in the case *Saadi v. the United Kingdom*, it stressed that

> "[i]*t is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention*."[105]

Even though the state acts in accordance with its national legislation, arbitrariness is at issue if the state acts in bad faith or misleads the applicant.[106] It is stated in the *Saadi* case that both the detention order and the execution of it genuinely must conform with the purpose of Article 5 and that there must be a proper relationship between the ground for detention and the place and conditions of detention.[107] The same has been confirmed in other case law.[108]

Furthermore, it is laid down in the *Saadi* case and other case law from the ECtHR that it must be assessed whether detention was necessary to achieve the stated aim or if less severe measures would have been sufficient, *i.e.* proportional, as detention is justified

[103] See case law in the text below.
[104] ECtHR, *Vasileva v. Denmark*, (app. no. 52792/99), para. 37; ECtHR, *Nowicka v. Poland*, (app. no. 30218/96), Judgment, 3 December 2002, para. 61.
[105] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 67.
[106] *Ibid*., para. 69, with reference to ECtHR, *Čonka v. Belgium*, (app. no. 51564/99).
[107] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 69.
[108] ECtHR, *Winterwerp v. the Netherlands*, (app. no. 6301/73), para. 39; ECtHR, *Hutchison Reid v. the United Kingdom*, (app. no. 50272/99), Judgment, 20 February 2003, para. 49.

only as a last resort.[109] Moreover, the length of the detention is also relevant when examining whether the detention was arbitrary or proportional.[110]

In terms of detention with a view to deportation in Article 5(1)(f), the Court has stated that arbitrariness, including proportionality, is only in question when the detention continues for an unreasonable length of time and the deportation proceedings are not carried out with due diligence.[111] This also applies to detention with the purpose of preventing unauthorized entry into the country.[112]

2.3.3. Article 5(2): Notification of the reasons for arrest or detention

In addition to the evaluation of whether the restriction in question is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society, the person in question must also have been informed of the reasons for his arrest or detention in accordance with the safeguard in Article 5(2).

Article 5(2) provides that any person detained or arrested must "*be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him*." This article covers both detention and arrest, even though the article does not explicitly mention detention,[113] and it does not apply exclusively within the context of criminal proceedings.[114]

Under this article "*any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4*".[115] Whether the obligation to notify promptly is met and the content of the

[109] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 70; ECtHR, *Witold Litwa v. Poland*, (app. no. 26629/95), para. 78.
[110] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 74; ECtHR, *Nowicka v. Poland*, (app. no. 30218/96), para. 61.
[111] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 72; ECtHR, *A and Others v. the United Kingdom*, (app. no. 3455/05), para. 164.
[112] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 73.
[113] ECtHR, *Van der Leer v. the Netherlands*, (app. no. 11509/85), para. 28.
[114] Macovei, Monica. *The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights*, p. 46.
[115] ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, (app. no. 12244/86), Judgment, 30 August 1990, para. 40.

notification is sufficient have to be assessed in each case in light of its particular circumstances.[116] However, it is not sufficient to inform the detainee of the legal grounds without further details,[117] or for him to coincidentally hear of the reasons for his arrest or detention.[118] There are no requirements to the form of such notification.[119]

The notification of the reasons for arrest or detention may be less comprehensive if the individual is detained or arrested under Article 5(1)(f).[120] If the detainee is to be extradited, it is sufficient to inform him that he is wanted by the state to which he is being extradited.[121] Is the detainee to be deported, it is sufficient to inform him of the legal basis for it and the relevant facts regarding the lawfulness of his detention.[122] Nevertheless, individuals detained under Article 5(1)(f) must "*receive sufficient information so as to be able to apply to a court for the review of lawfulness provided for in Article 5 § 4*".[123] Thus, the notification under Article 5(2) is closely connected to Article 5(4).

2.3.4. Article 5(4): The right to judicial review

Article 5(4) of the ECHR provides that any person arrested or detained is "*entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*"

The right to judicial review enshrined in Article 5(4) has the purpose of assuring individuals arrested and detained the right to judicial supervision of the lawfulness of the

[116] ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, (app. no. 12244/86), para. 40; Reiterated by the Grand Chamber in ECtHR, *Murray v. the United Kingdom*, (app. no. 14310/88), Grand Chamber Judgment, 28 October 1994, para. 72.
[117] ECtHR, *Ireland v. the United Kingdom*, (app. no. 5310/71), Judgment, 1 January 1978, para. 198.
[118] ECtHR, *Van der Leer v. the Netherlands*, (app. no. 11509/85), paras. 30-31.
[119] EComHR, *X v. Federal Republic of Germany*, (app. no. 8098/77), Decision, 13 December 1978; ECtHR, *Kane v. Cyprus*, (app. no. 33655/06) Decision, 13 September 2011.
[120] ECtHR, *Bordovskiy v. Russia*, (app. no. 49491/99), Judgment, 8 February 2005, para. 56.
[121] As accepted by the Court in the case of ECtHR, *Bordovskiy v. Russia*, see paras. 56-59.
[122] EComHR, *Caprino v. the United Kingdom*, (app. no. 6871/75), Decision, 3 March 1978.
[123] ECtHR, *Shamayev and Others v. Georgia and Russia*, (app. no. 36378/02), Judgment, 12 April 2005, para. 427.

measure and the right to be released in case of lack of lawfulness.[124] The right to judicial review applies to all types of deprivation of liberty under Article 5(1).[125]

Article 5(4) states the right to a speedy judicial decision on the lawfulness of the detention,[126] as it is "*incumbent on the judicial authorities to make the necessary administrative arrangements to ensure that urgent matters are dealt with speedily and this is particularly necessary when the individual's personal liberty is at stake*".[127] The speediness of the review contains two aspects. Firstly, the legal review must be available shortly after the person is taken into detention,[128] and secondly, the proceedings must be carried out with due diligence.[129] Furthermore, the review must be practically effective.[130]

The judicial review must be carried out by a "*judge or other officer authorised by law to exercise judicial power*",[131] and the procedure must be of a judicial character.[132] However, the court does not need to be of the classic kind or part of the state's standard judicial machinery.[133] Nevertheless, the court reviewing the deprivation of liberty must be established by law,[134] independent, and impartial.[135] Furthermore, the court must ensure equality of arms and adversarial proceedings,[136] and it must be able to issue binding decisions.[137]

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[124] ECtHR, *De Wilde, Ooms and Versyp v. Belgium*, (app. no. 2832/66), Judgment, 18 June 1971, para. 76.
[125] Grabenwarter, Christoph. *European Convention on Human Rights – Commentary*, p. 92.
[126] ECtHR, *Baranowski v. Poland*, (app. no. 28358/95), para. 68.
[127] ECtHR, *S.T.S. v. the Netherlands*, (app. no. 277/05), Judgment, 7 June 2011, para. 48.
[128] Rainey, Bernadette, *et al. Jacobs, White, and Ovey: The European Convention on Human Rights*, p. 270.
[129] ECtHR, *Baranowski v. Poland*, (app. no. 28358/95), para. 73.
[130] *Ibid*., para. 76.
[131] ECtHR, *Brannigan and McBride v. the United Kingdom*, (app. no. 14553/89), Judgment, 26 May 1993, para. 58.
[132] *Ibid*.
[133] ECtHR, *Weeks v. the United Kingdom*, (app. no. 9787/82), para. 61.
[134] ECtHR, *Freimanis and Lidums v. Latvia*, (app. no. 73443/01), Judgment, 9 February 2006, para. 102. (available only in French); ECtHR, *Lavent v. Latvia*, (app. no. 58442/00), Judgment, 28 November 2002, para. 81. (available only in French).
[135] ECtHR, *Weeks v. the United Kingdom*, (app. no. 9787/82), para. 62; ECtHR, *De Wilde, Ooms and Versyp v. Belgium*, (app. no. 2832/66), para. 78; ECtHR, *Benjamin and Wilson v. the United Kingdom*, (app. no. 28212/95), Judgment, 26 September 2002, para. 33.
[136] ECtHR, *Schöps v. Germany*, (app. no. 25116/94), Judgment, 13 February 2001, para. 44.
[137] ECtHR, *Benjamin and Wilson v. the United Kingdom*, (app. no. 28212/95), para. 34.

If there is no effective and accessible remedy available to the detainee against arrest or detention, Article 5(4) is violated.[138]

A former detainee can have a legal interest in a review under Article 5(4) of the lawfulness of the detention after he has been released, for instance to determine a potential right to compensation under Article 5(5).[139] Does the detainee not have a legal interest under Article 5(4), the right to challenge the lawfulness of the detention is covered by the right to an effective remedy protected by Article 13 of the Convention.[140]

When Article 5(4) is viewed in the context of Article 5(1)(f), the legality of the detention should always be reviewed before the individual is deported or extradited.[141] Thus, deportation or extradition must be postponed. However, the scope of the review of the legality of detentions under Article 5(1)(f) is limited.[142]

2.4. Concluding remarks

Lithuania is a contracting state to both UNCLOS, the FAL Convention, and the ECHR, imposing several obligations on the state.

The flag state principle is enshrined in Article 91(1) of UNCLOS and in accordance with Article 92(1) of said convention, the flag state exercises exclusive jurisdiction over vessels flying its flag. It has a number of duties under UNCLOS, which are contained in Article 94 prescribing that the flag state shall exercise its jurisdiction in administrative, technical, and social matters.

The FAL Convention contains several standards and recommended practices for the flag state, including on the handling of stowaways. The twelve migrants were in fact stowaways and fulfilled the definition set forth in Section 1, subsection A of the Annex to the FAL Convention. The migrants hid on the ship without the shipowner, shipmaster

[138] ECtHR, *Georgia v. Russia*, (app. no. 13255/07), Grand Chamber Judgment, 3 July 2014, para. 188.
[139] ECtHR, *S.T.S. v. the Netherlands*, (app. no. 277/05), para. 61.
[140] Ktistakis, Yannis. *Protecting migrants under the European Convention on Human Rights and the European Social Charter*, p. 45.
[141] Macovei, Monica. *The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights*, p. 39.
[142] *Ibid*., p. 60.

or other responsible person knowing about or consenting to it, and they were not detected before departure.

Some safeguards for stowaways are set forward in the FAL Convention, Section 4 of the annex. Stowaways shall be treated in conformity with international protection principles and in accordance with humanitarian principles.[143] Furthermore, stowaways shall have access to food, accommodation, and medical attention as set forward in Section 4.4.2. Stowaway incidents must be resolved quickly, and situations where stowaways must stay on board indefinitely must be avoided as prescribed in Section 4.2. The flag state must prosecute stowaways under national legislation, as required under Section 4.3.3.1. and shall arrange for removal or repatriation of the stowaways in accordance with Section 4.13.1.

Article 5 of the ECHR protects the right to liberty and security. The purpose of this provision is to prevent arbitrary detention, and it applies to everyone within the state's jurisdiction. When determining whether an individual has been deprived of his liberty, the Court must take the context and circumstances surrounding the measure into account. This means that the type, duration, and effects of the detention are of relevance, as seen in the case of *Guzzardi v. Italy*. However, a restriction on the right to liberty and security is only permitted if it is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society. Nevertheless, the threshold is lower, if the detention is legitimized by Article 5(1)(f) with the purpose of preventing unauthorised entry or deporting or extraditing an individual.

Furthermore, Article 5 sets forward some safeguards in Article 5(2) and (4). Article 5(2) states that the detainee shall be informed of the reasons for his arrest and detention. In the case of *Fox, Campbell and Hartley v. the United Kingdom*, the Court stated that the individual should be told in a simple and non-technical language of the legal and factual grounds for his deprivation of liberty. Article 5(4) contains the right to judicial review of the lawfulness of the measure in question.

The law of the seas is relevant in the context of this thesis because the ECtHR also assesses other relevant international law when determining whether a state has breached

[143] FAL Convention, Annex, Section 4.1. and 4.4.1.

the human rights of an individual. The law of the seas is interconnected with the human rights in the situation involving *Kaunas Seaways* and puts forward a number of obligations which should be seen in the light of the human rights and vice versa. Taken together, the law of the seas and the human rights show whether Lithuania did what could be expected from a flag state in order to resolve the incident.

This chapter has shown that Lithuania as a flag state was under several human rights obligations under Article 5. Whether the state honoured them will be addressed in chapter 5.

3. Extraterritorial application of human rights at sea

The incident on the Lithuanian vessel *Kaunas Seaways* took place in foreign territorial waters, namely outside Ukraine and Turkey, and particularly on the high seas. Therefore, the acts on board the vessel were carried out extraterritorially. It is thus of paramount importance whether the ECHR can be applied extraterritorially at seas.

Article 1 of the ECHR provides that "*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in* […] *this Convention*."

Jurisdiction is defined in public international law as a state's legal competence to make, apply, and enforce rules of conduct upon individuals.[144] Jurisdiction is not limited to the state's territory, but may be extended beyond state boundaries.[145]

The reference in Article 1 of the ECHR to "*within their jurisdiction*" indicates that the contracting states are not only obligated to secure Convention rights within their territories but also extraterritorially. The ECtHR has found that a state has extraterritorial jurisdiction in the sense of Article 1 of the ECHR in two situations; if the vessel in question is flying the flag of that state, or if the state exercises effective control over individuals or vessels.

3.1. *De jure* jurisdiction

According to the flag state principle found in Article 91(1) of UNCLOS, a ship has the nationality of the state whose flag it flies. In accordance with Article 92(1) of UNCLOS, the flag state exercises exclusive jurisdiction over vessels flying its flag.[146] This constitutes *de jure* jurisdiction.

The principle was first examined by the Permanent Court of International Justice (henceforth: the PCIJ) in *The Case of the S.S. "Lotus"* in 1927.[147] In this case, it was

[144] Evans, Malcolm D. *International Law*, p. 310; Shaw, Malcolm N. *International Law*, p. 645.
[145] Evans, Malcolm D. *International Law*, p. 310.
[146] Petrig, Anna. *Human Rights and Law Enforcement at Sea. Arrest, Detention and Transfer of Piracy Suspects*, p. 140.
[147] PCIJ, *The Case of the S.S. "Lotus"*, Judgment, 7 September 1927, Collection of Judgments, Series A, No. 10.

found that acts occurring "*on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.*"[148] The reasoning behind this principle was that a ship is part of the flag state's territory since the state exercises exclusive authority upon it.[149] Thus, the law in force in the flag state, including human rights obligations, applies on vessels flying the state's flag.

The flag state principle was later confirmed by the ECtHR in 2001 in the case of *Banković et al. v. Belgium et al*.[150] In this case, the Court initially stated that "*the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional*",[151] and that the only exception allowing the extraterritorial application of the ECHR was where a contracting state controlled a territory and its inhabitants effectively.[152]

Nevertheless, the Court confirmed the flag state principle by stating:

> "*Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities* […] *on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.*"[153]

This notion was repeated by the ECtHR in later case law on extraterritoriality.[154]

In the case of *Medvedyev and Others v. France,*[155] the flag state principle was confirmed,[156] but it was not elaborated on due to the fact that the flag state, Cambodia, having authorised France by diplomatic note to intercept, inspect, and take legal action

[148] PCIJ, *The Case of the S.S. "Lotus"*, p. 25.
[149] *Ibid*.
[150] ECtHR, *Banković et al. v. Belgium et al.,* (app. no. 52207/99), Grand Chamber Decision, 12 December 2001.
[151] *Ibid*., para. 71.
[152] *Ibid*.
[153] *Ibid*., para. 73.
[154] ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, (app. no. 61498/08), Decision, 30 June 2009, para. 85; ECtHR, *Medvedyev and Others v. France*, (app. no. 3394/03), para. 65; ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09), para. 75.
[155] ECtHR, *Medvedyev and Others v. France*, (app. no. 3394/03).
[156] *Ibid*., para. 83.

against the vessel involved.[157] In other case law from the ECtHR concerning the application of the ECHR at sea, the flag state principle has not been examined or even mentioned. In the cases of *Vassis and Others v. France*[158] and *Rigopoulos v. Spain*[159] dealing with suspicions of drug trafficking, the vessels were flying the Panamanian flag.[160] The Court derogated from the flag state principle in both cases as the operations were conducted in agreement with the Panamanian authorities in accordance with the procedure prescribed in Article 17(3) and (4) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[161] The flag state principle was therefore not examined in these cases. These cases will be further examined in chapter 3.2. on *de facto* jurisdiction.

However, the Court examined the flag state principle in depth when it delivered its judgement in the case of *Hirsi Jamaa and Others v. Italy.*[162] Twenty-four immigrants from Somalia and Eritrea left Libya on board three vessels with the purpose of reaching Italy.[163] South of Lampedusa, the vessels were intercepted by the Italian Revenue Police and the Coastguard,[164] and the passengers were transferred onto Italian military ships to be returned to Tripoli, Libya.[165] The immigrants were handed over to Libyan authorities as a consequence of a number of bilateral agreements concluded between Italy and Libya.[166]

The applicants claimed that Italy breached Article 3 of the ECHR, as they by being returned had been exposed to the risk of torture or inhuman or degrading treatment in Libya and their respective countries of origin.[167] Furthermore, the applicants claimed that

[157] ECtHR, *Medvedyev and Others v. France*, (app. no. 3394/03), para. 10.
[158] ECtHR, *Vassis and Others v. France*, (app. no. 62736/09), Judgment, 27 June 2013.
[159] ECtHR, *Rigopoulos v. Spain*, (app. no. 37388/97), Decision, 12 January 1999.
[160] ECtHR, *Vassis and Others v. France*, (app. no. 62736/09), para. 8; ECtHR, *Rigopoulos v. Spain*, (app. no. 37388/97), p. 1.
[161] UN Economic and Social Council (ECOSOC), *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 19 December 1988.
[162] ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09).
[163] *Ibid*., para. 9.
[164] *Ibid*., para. 10.
[165] *Ibid*., para. 11.
[166] *Ibid*., paras. 12-13.
[167] *Ibid*., para. 83.

there had been a breach of Article 4 of the Fourth Protocol, which prohibits collective expulsion.[168]

However, the Italian government claimed that the applicants had not been under Italian jurisdiction during the interception and return to Libya. The government acknowledged that the events took place on board the Italian vessels but "*denied that the Italian authorities had exercised "absolute and exclusive control" over the applicants.*"[169] Italy claimed that the interception had been a lawful rescue of people in distress under UNCLOS and that the state had acted in accordance with the agreements concluded between the two states by returning the immigrants to Libya.[170]

The Court's assessment of the jurisdiction issues began with the Court's emphasis on the exceptional character of extraterritorial jurisdiction.[171] Furthermore, the Court reiterated the passage from *Banković et al. v. Belgium et al*. in which the flag state principle had been confirmed.[172]

The Court continued by stating that the vessel fell under full Italian jurisdiction due to the flag state principle:

> "*The Court observes that, by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognise, in cases concerning acts carried out on board vessels flying a State's flag* […] *cases of extraterritorial exercise of the jurisdiction of that State* […] *Where there is control over another, this is de jure control exercised by the State in question over the individuals concerned*."[173]

In short, the Court found that Italy exercised *de jure* jurisdiction over the immigrants because the events took place on board Italian vessels flying the Italian flag. Therefore, Italy should have acted in accordance with the ECHR from the moment they intercepted the vessels.

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[168] ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09), para. 159.
[169] *Ibid*., para. 64.
[170] *Ibid*., para. 65.
[171] *Ibid*., para. 73.
[172] *Ibid*., para. 75, referring to ECtHR, *Banković et al. v. Belgium et al.,* (app. no. 52207/99), para. 73.
[173] ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09), para. 77.

The Court concluded that "*in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities."*[174] *De facto* jurisdiction regarding the case of *Hirsi Jamaa and Others v. Italy* will be addressed in chapter 3.2.

Consequently, *de jure* jurisdiction in relation to extraterritorial application of human rights at sea can be established in accordance with the flag state principle. Therefore, *de jure* jurisdiction of a contracting state to the ECHR is present when acts take place on a vessel registered in or flying the flag of that state.

3.2. *De facto* jurisdiction

In several cases from the ECtHR, Convention rights have been applied at sea when a contracting state was exercising effective control and authority over individuals or vessels. This constitutes the principle of *de facto* jurisdiction. It is relevant to note in this connection that within human rights law, extraterritorial jurisdiction is a question of fact and not of the legitimacy of the state's control.[175]

The first case to be brought before the ECtHR about extraterritorial application of the ECHR at sea was the case of *Rigopoulos v. Spain*. In this case, the Spanish customs police boarded and searched a ship on the high seas flying the Panamanian flag with Panama's consent under the suspicion of illicit drug trafficking.[176] The applicant, the captain of the Panamanian ship, who was a Greek citizen, was transferred to and detained on the customs police vessel under police supervision for 16 days before being brought before a judge.[177] The Court must implicitly have found that Spain had jurisdiction in the present dispute as the application was not declared inadmissible for lack of jurisdiction. The Court decided that Spain did not breach Article 5(3), and the rest of the case was found manifestly ill-founded.[178] However, the Court did not explain the foundation for

[174] ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09), para. 81.
[175] Langford, Malcolm, *et al. Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, p. 164f.
[176] ECtHR, *Rigopoulos v. Spain*, (app. no. 37388/97), p. 1.
[177] *Ibid*., pp. 1-2.
[178] *Ibid.*, pp. 6 and 10.

jurisdiction, but it must have been undisputed that the Spanish customs police exercised effective physical control over the applicant, since the Court decided on the merits. Therefore, Spain exercised *de facto* jurisdiction.

The ECtHR refrained from discussing jurisdiction in two other cases regarding Convention rights at sea, namely in 2001 in the case of *Xhavara et al. v. Italy and Albania*[179] and in 2009 in the case *Women on Waves and Others v. Portugal*.[180] In the latter, three non-governmental organisations, including the Dutch organisation Women on Waves, wished to host a meeting on board the Dutch organisation's ship *Borndiep* in a Portuguese port about reproductive rights and abortion. When Women on Waves approached Portuguese waters, a Portuguese minister forbade the vessel entrance by issuing a ministerial order.[181] Furthermore, the Portuguese Navy employed a vessel to physically prevent the *Borndiep* from sailing into Portuguese waters.[182] The Court must implicitly have found that the physical blocking was enough to establish *de facto* jurisdiction as it chose to decide on the merits and found that Portugal had violated Article 10 of the ECHR.[183]

In 2008 in one of the core judgments on extraterritorial application of the ECHR at sea, *Medvedyev and Others v. France*, the Court decided on the principle of effective control and authority. In this case, the *Winner*, a vessel registered in Cambodia, had attracted suspicion of illicit drug trafficking.[184] The Cambodian Minister of Foreign Affairs had authorised French authorities to intercept, inspect, and take legal action against the vessel by diplomatic note.[185] A French military vessel situated in Brest left for the mission with a French naval special forces team on board.[186] The *Winner* was located outside Cape Verde, where the French forces boarded and searched the vessel.[187] The vessel was towed to France by a French tug boat escorted by the military vessel, while the crew of the

[179] ECtHR, *Xhavara et al. v. Italy and Albania*, (app. no. 39473/98), Decision, 11 January 2001. (available only in French)
[180] ECtHR, *Women on Waves and Others v. Portugal*, (app. no. 31276/05), Judgment, 3 February 2009. (available only in French)
[181] *Ibid*., para. 8.
[182] *Ibid*., para. 9.
[183] *Ibid*., para. 44.
[184] ECtHR, *Medvedyev and Others v. France*, (app. no. 3394/03), para. 9.
[185] *Ibid*., para. 10.
[186] *Ibid.*, para. 12.
[187] *Ibid.*, para. 13.

Winner was confined to their quarters under military guard.[188] When the vessel reached Brest harbour, the crew was handed over to the police.[189] The applicants claimed that France had breached Article 5(1) and (3) of the ECHR by detaining them for thirteen days before bringing them before a judge.[190]

The Court found that the applicants were under French jurisdiction during the incident:

> "[T]*he Court considers that, as this was a case of France having exercised full and exclusive control over the Winner and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention*".[191]

Even though the *Winner* was registered in and flying the flag of Cambodia and consequently under *de jure* jurisdiction of this state,[192] the French military forces were exercising effective control and authority over the crew and vessel and thus brought them under *de facto* French jurisdiction.

Therefore, the ECtHR held France responsible for breaches of Article 5(1) and (3) of the ECHR.

The facts were very similar to those of the case of *Vassis and Others v. France*, but, presumably in light of previous case law, the Court did not address jurisdictional issues.

In the abovementioned case of *Hirsi Jamaa and Others v. Italy*, the Court found that Italy had both *de jure* and *de facto* jurisdiction. In terms of *de facto* jurisdiction, the immigrants were transferred onto Italian military vessels, as they were being returned to Libya.[193] The Court stated that:

> "*In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially*

[188] ECtHR, *Medvedyev and Others v. France*, (app. no. 3394/03), paras. 14-15.
[189] *Ibid*., para. 18.
[190] *Ibid*., paras. 38 and 46.
[191] *Ibid*., para. 67.
[192] *Ibid*., para. 83.
[193] ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09), para. 11.

must be determined with reference to the particular facts, for example full and exclusive control over […] *a ship*".[194]

The Court elaborated by stating that when state agents operate outside state territory and exercise control and authority over an individual, the state is obligated to secure the individual's human rights.[195] Therefore, in the *Hirsi Jamaa* case the Court found that, Italy had *de facto* jurisdiction over the migrants, as "*the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel.*"[196] Thus, the Court attached great importance to the fact that it was military vessels and personnel exercising effective control and authority over the immigrants and vessel.

The most recent cases from the ECtHR, in which Convention rights have been applied at sea, are *Ali Samatar and Others v. France*[197] and *Hassan and Others v. France*.[198] The applicants in these cases were nine pirates who had seized two French-flagged cruise ships and taken their crews hostage.[199] French military personnel arrested and detained the applicants on a French naval frigate,[200] before a French military aircraft transported them to France.[201] The applicants in the case of *Ali Samatar and Others v. France* had been detained for four days and twenty hours before they were taken to France,[202] whereas the applicants in the case of *Hassan and Others v. France* had been detained for six days and sixteen hours.[203] Presumably due to the French military's effective control and authority over the applicants, the issue of jurisdiction was never raised by the Court and France were therefore held accountable for violations of Article 5(1) and (3).[204]

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[194] ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09), para. 73.
[195] *Ibid*., para. 74.
[196] *Ibid*., para. 81.
[197] ECtHR, *Ali Samatar and Others v. France*, (app. no. 17110/10), Judgment, 4 December 2014. (available only in French)
[198] ECtHR, *Hassan and Others v. France*, (app. no. 46695/10), Judgment, 4 December 2014. (available only in French)
[199] Council of Europe, Information Note on the Court's case-law, No. 180, December 2014, pp. 7-8.
[200] ECtHR, Press Release,Ali Samatar and Others v. France and Hassan and Others v. France, 4 December 2014.
[201] Council of Europe, Information Note on the Court's case-law, No. 180, December 2014, p. 8.
[202] ECtHR, *Ali Samatar and Others v. France*, (app. no. 17110/10), para. 59.
[203] ECtHR, *Hassan and Others v. France*, (app. no. 46695/10), para. 104.
[204] ECtHR, *Ali Samatar and Others v. France*, (app. no. 17110/10), para. 59; ECtHR, *Hassan and Others v. France*, (app. no. 46695/10), paras. 72 and 104.

Thus, *de facto* jurisdiction in relation to extraterritorial application of human rights at sea can be established in accordance with the principle of effective control and authority; a conclusion derived from case law from the ECtHR. *De facto* jurisdiction of a contracting state to the ECHR is present when a military or other governmental vessel or personnel is exercising state control and authority over individuals by detaining crew or passengers or by forcing a vessel's route with physical power. The effective control and authority results in the fact that the *ratione loci* scope of the human rights contained in the ECHR also applies on the high seas.[205]

3.3. Jurisdiction in the *Kaunas Seaways* incident

3.3.1. *De jure* jurisdiction

The DFDS vessel *Kaunas Seaways* is flying the Lithuanian flag and is registered in the same state. Therefore, the nationality of the ship is Lithuanian in accordance with Article 91(1) of UNCLOS. There is a genuine link between the vessel and the flag state, and Lithuania must therefore exercise the duties laid down in Article 94 of UNCLOS.[206] Furthermore, *Kaunas Seaways* is subject to the exclusive jurisdiction of Lithuania on the high seas under Article 92(1) of UNCLOS.

Similarly to *The Case of the S.S. "Lotus"*, the vessel *Kaunas Seaways* was and still is under the flag state's jurisdiction, and accordingly Lithuanian law, including Lithuania's international human rights obligations, applied to the vessel at the time of the incident. This is underlined by Article 94, which requires that the flag state's domestic law applies to the vessel as a unit and thereby all persons on board, including stowaways.[207]

The Court's reasoning in the case of *Hirsi Jamaa and others v. Italy* suggest that acts carried out on board a vessel flying the Lithuanian flag constitute a case of extraterritorial

[205] Guiffré, Mariagiulia. *Watered-down Rights on the High Seas: Hirsi Jamaa and Others v. Italy (2012)*, The International and Comparative Law Quarterly, Vol. 61, no. 3 (2012), p. 731.
[206] See in this regard chapter 2.1. on UNCLOS.
[207] Proelss, Alexander. *United Nations Convention on the Law of the Sea – A Commentary*, p. 711. See also chapter 2.1. on UNCLOS.

exercise of Lithuanian jurisdiction. By gaining and keeping control of the twelve migrants, Lithuania exercised *de jure* control over them.[208]

Consequently, in accordance with the flag state principle Lithuania exercised *de jure* jurisdiction, during the detention of the twelve migrants on board *Kaunas Seaways*.

3.3.2. *De facto* jurisdiction

The twelve migrants were detained on board the vessel *Kaunas Seaways* in four locked cabins for approximately three months. The windows in the cabins were barred, the door handles removed, and the cabins were guarded.[209] Consequently, the migrants were effectively prevented from escaping the vessel, as they could not get out of the cabins. Their freedom was solely in the hands of the shipmaster, the crew, and the guards. These coercive measures were maintained during the migrants' stay on the vessel.

Detention and supervision were also seen in the cases *Rigopoulos v. Spain*, *Medvedyev and Others v. France*, *Ali Samatar and Others v. France* and *Hassan and Others v. France* and made up an important part of establishing effective control.

As the coercive measures, detention and supervision, used in the situation on *Kaunas Seaways* were comparable to the ones found in case law from the ECtHR, the shipmaster and crew were in effective control of the migrants. This is supported by the fact that the control over the individuals was continuous and uninterrupted, like it was described in the case of *Medvedyev and Others v. France,* para. 67. However, the time span was much longer than in any of the cases from the ECtHR. The length of the detention and the conditions under which the twelve migrants were detained on board *Kaunas Seaways* must constitute exceptional circumstances, which can justify recognition of extraterritorial jurisdiction as described in the case of *Hirsi Jamaa and Others v. Italy*, para. 73.

However, the important question is whether the exercise of effective control over the twelve migrants can be attributed to the Lithuanian state.

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[208] In accordance with the Court's reasoning in ECtHR, *Hirsi Jamaa and Others v. Italy,* (app. no. 27765/09), para. 77.

[209] See chapter 1.2. on factual background.

Kaunas Seaways is owned by a private shipping company, and its only obvious connections to Lithuania are its Lithuanian registration and flag.

Nevertheless, the shipmaster might be seen as a state representative with derived rights and responsibilities, as he is under some control of the flag state according to the law of the sea. Under Article 98 of UNCLOS, the state parties to the convention "*shall require the master of a ship flying its flag* […]" to render assistance. He has other obligations derived from the flag state under UNCLOS, see *e.g.* Article 211(3). Furthermore, Lithuania has several duties under Article 94 of UNCLOS affecting the master of the ship. The flag state, but also the shipmaster as the main authority of the vessel, shall ensure safety at sea and conformity with international regulations, procedures, and practices.[210] Many obligations are also imposed on the shipmaster in Section 4 of the FAL Convention. For instance, under Section 4.4.2., the flag state shall require the shipmaster to "*take appropriate measures to ensure the security, general health, welfare and safety of the stowaway*", and under Section 4.8., the flag state shall urge shipowners to instruct their shipmasters not to deviate from the planned route to disembark stowaways.

Thus, the flag state has the authority to instruct the shipmaster, and even though he cannot be seen as a typical state agent like military or other governmental personnel, the state nevertheless has the power to require that he acts in a certain way in a number of situations.

However, should the Court find that the shipmaster is not a state agent to any extent, Lithuania as a state must have been in effective control of the situation from the moment the shipmaster informed the flag state of the situation and thereby made it Lithuania's obligation to resolve it. It also follows from the FAL Convention, Section 4.13.1., that the flag state is responsible for the removal of the stowaway from the vessel. It being the flag state's responsibility is underlined by the fact that Lithuania claimed responsibility for the situation upon hearing of it, as the state tried to resolve it through diplomatic negotiations. That is to say, Lithuania was in effective control of the situation and tacitly accepted the detention of the migrants during the negotiations until ultimately resolving the situation through diplomatic agreement with the migrants' African home states.

[210] See UNCLOS, Article 94(3)-(5).

If the effective control cannot be attributed to Lithuania and jurisdiction not established, no state was in effective control in the present case, which would be factually false. Effective control must always be established when someone takes action, as Lithuania did in the present case.

3.3.3. Concluding remarks on jurisdiction in the *Kaunas Seaways* incident

Due to the flag state principle, it is undisputed that Lithuania had *de jure* jurisdiction in the incident involving *Kaunas Seaways*. However, it is arguable whether Lithuania had *de facto* jurisdiction based on the shipmaster's duties or on the state's effective control over the situation.

Having established *de jure* jurisdiction, the ECHR can be applied extraterritorially to the *Kaunas Seaways* incident.

Nevertheless, in legal literature on extraterritorial application of the ECHR, it is stated by several authors that *de jure* jurisdiction does not automatically satisfy "*the jurisdictional link required to render human rights law applicable extraterritorially*".[211] It is the exercise of factual effective control and authority by the state that is decisive when jurisdiction is to be established.[212]

However, other authors accept that *de jure* jurisdiction is sufficient for migrants to be under the protection of the ECHR.[213] This is supported by the ECtHR finding that:

> "*the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction*".[214]

[211] Geiss, Robert and Petrig, Anna. *Piracy and Armed Robbery at Sea. The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, p. 105.
[212] *Ibid*., p. 105; Duttwiler, Michael. *Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights*, p. 144; Milanovic, Marko. *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, p. 435.
[213] Hartmann, Jacques and Papanicolopulu, Irini. *Are Human Rights Hurting Migrants at Sea?*
[214] ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09), para. 178, with reference to ECtHR, *Medvedyev and Others v. France*, (app. no. 3394/03), para. 81.

Furthermore, it has been conveyed in legal literature that the Court, without expressly recognizing so, is moving towards a more extensive understanding of the term 'jurisdiction'.[215] This is derived from the fact that the Court has reiterated a certain phrasing in the same manner as the quote above in a number of cases, namely "*that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory*".[216] This is also important in order to avoid "*double standards in the field of safeguarding human rights and ensuring that a State* [is] *not authorised to commit acts outside its territory which would never be accepted within that territory*."[217] Thus, extraterritorial application can arise from the prohibition of circumventing the Convention rights.[218]

The ECtHR has not explicitly stated in its case law that a state should possess both *de jure* and *de facto* jurisdiction to hold a state responsible for breaches of the ECHR, and the Court has yet to be presented to a case on the extraterritorial application of the Convention at sea where only *de jure* jurisdiction is present. Nevertheless, according to the dynamic and teleological interpretation of the Convention as a living instrument by the Court,[219] it cannot be denied, especially in the light of the quotes above, that the Court might find that *de jure* jurisdiction is sufficient in the incident involving *Kaunas Seaways* under these particular circumstances. All the more so because human rights law has been seen as sufficiently flexible to cope with different exceptional issues that may arise when human rights obligations are adapted to extraterritorial circumstances.[220]

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[215] Langford, Malcolm, *et al. Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, p. 177.

[216] ECtHR, *Issa and Others v. Turkey*, (app. no. 31821/96), Judgment, 16 November 2004, para. 71; ECtHR, *Andreou v. Turkey* (App. no. 45653/99), Decision, 3 June 2008; ECtHR, *Solomou and Others v. Turkey*, (app. no. 36832/97), Judgment, 24 June 2008, § 45; ECtHR, *Isaak v. Turkey*, (app. no. 44587/98), Decision, 28 September 2006.

[217] ECtHR, *Hirsi Jamaa and Others v. Italy*, (app. no. 27765/09), para. 69.

[218] Weinzierl, Ruth and Lisson, Ursula. *Border Management and Human Rights. A study of EU Law and the Law of the Sea,* p. 64.

[219] ECtHR, *Banković et al. v. Belgium et al.,* (app. no. 52207/99), para. 64; ECtHR, *Tyrer v. the United Kingdom*, (app. no. 5856/72), Judgment, 25 April 1978, para. 31; ECtHR, *Soering v. the United Kingdom*, (app. no. 14038/88), Judgment, 7 July 1989, para. 102; ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 55.

[220] Langford, Malcolm, *et al. Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, p. 181.

The legal effects of Lithuania possessing only either *de jure* or *de facto* jurisdiction or both will be examined below in chapter 4 and 5.

4. The state's positive obligation under the ECHR

As the *Kaunas Seaways* incident fell within Lithuania's jurisdiction as prescribed in Article 1 of the ECHR, it is relevant to examine whether Lithuania can be held responsible for potential breaches of Article 5 of the Convention committed by private individuals.

Under Article 1 of the ECHR, the state parties are required to 'secure' the rights and freedoms expressed in the Convention to everyone within their jurisdiction. Through interpretation of this and other articles in the Convention, both negative and positive obligations have been deduced.[221]

The negative obligation of a right under the Convention can be defined as an obligation for the state to abstain from interference in the exercise of a right.[222] Under Article 5 of the ECHR, the negative obligation has the effect that the state must refrain from arbitrary detention.

A positive obligation under the ECHR requires the state to take action and actively 'protect' or 'fulfil' rights under the Convention.[223] A positive obligation is characterized by demanding that the national authorities take all necessary steps or reasonable and appropriate measures to safeguard a right.[224]

Almost all of the Convention rights impose both a negative and a positive obligation on the state parties.[225] However, the Court has a case-by-case approach to whether the right in question contains a positive obligation, and any general theory on this subject has therefore not been developed.[226] Nevertheless, the Court has often stated that "*the Convention is intended to guarantee rights that are not theoretical or illusory, but*

[221] Harris, David, *et al. Law of the European Convention on Human Rights*, p. 21.
[222] *Ibid*.
[223] Brems, Eva and Gerards, Janneke. *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, p. 162; Harris, David, *et al. Law of the European Convention on Human Rights*, p. 22.
[224] ECtHR, *Hokkanen v. Finland*, (app. no. 19823/92), Judgment, 23 September 1994, para. 58; ECtHR, *López Ostra* v. Spain, (app. no. 16798/90), Judgment, 9 December 1994, para. 51.
[225] Mowbray, Alastair. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, p. 224.
[226] ECtHR, *Plattform "Ärzte Für das Leben" v. Austria*, (app. no. 10126/82), Judgment, 21 June 1988, para. 31.

practical and effective […] [A] *purely negative conception would not be compatible with the purpose of* […] *the Convention in general."*[227]

The positive obligation under the ECHR is either based on "*the need to guarantee the 'effective' protection of a Convention right or on Article 1 ECHR, which requires states to 'secure' the enjoyment of the Convention rights to everyone within their jurisdiction*."[228] Thus, the state breaches its positive obligation under the Convention if it fails to take all reasonable measures to protect individuals against violations by other private parties within its jurisdiction,[229] for instance by not rendering unlawful the acts of private persons infringing them.[230]

4.1. The scope of a state's positive obligation under the ECHR

The scope of a state's positive obligation under the ECHR was examined by the ECtHR in its judgment in the case of *Ilaşcu and Others v. Moldova and Russia*.[231] In this case, Moldova had lost effective control over a part of its territory, Transdniestria, which had become occupied by a separatist regime, the 'Moldovan Republic of Transdniestria'. The Court found that even though the area was governed by a separatist regime and Moldova did not exercise *de facto* control over it, the territory did not cease to fall under Moldovan jurisdiction in the sense of Article 1 of the ECHR.[232] As the state exercised no effective control over the area, the Court specified that the alleged breach of Convention rights should be assessed in the light of the state's positive obligation.[233] The Court found that the state had "*a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in*

[227] ECtHR, *Ouranio Toxo and Others v. Greece*, (app. no. 74989/01), Judgment, 20 October 2005, para. 37; ECtHR, *Artico v. Italy*, (app. no. 6694/74), Judgment, 13 May 1980, para. 33; ECtHR, *United Communist Party of Turkey and Others v. Turkey*, (app. no. 19392/92), Judgment, 30 January 1998, para. 33.
[228] Brems, Eva and Gerards, Janneke. *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, p. 162.
[229] Augenstein, Daniel. *State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights*, para. 31.
[230] Harris, David, *et al. Law of the European Convention on Human Rights*, pp. 23-24.
[231] ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (app. no. 48787/99), Grand Chamber Judgment, 8 July 2004.
[232] *Ibid*., para. 333.
[233] *Ibid*., para. 335.

accordance with international law to secure to the applicants the rights guaranteed by the Convention."[234] Moldova was held responsible as "*the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention*".[235] Consequently, a contracting party to the ECHR has a duty to take all appropriate legal and diplomatic steps to continue to guarantee Convention rights, even when lacking *de facto* jurisdiction.

The *Ilaşcu* case proves that extraterritorial obligations, in particular the positive ones, and the state's responsibility should be seen in the context of the state's ability to solve the situation.[236] Thus, there is a connection between the state's options and the state's responsibility.

The Court reiterated the principle of the state's positive obligation in the absence of effective control in the case of *Treska v. Albania and Italy*[237] and in the case of *Manoilescu and Dobrescu v. Romania and Russia*.[238]

In the case of *Treska v. Albania and Italy,* two Albanian nationals claimed that Italy had breached Article 1 of the First Protocol of the ECHR when Italy purchased their property from the Albanian government, which had confiscated it without compensation. By applying the reasoning from the *Ilaşcu* case, the Court found that Italy had "*a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to applicants the rights guaranteed by the Convention*".[239] In the Court's assessment of jurisdiction, it was examined what the Italian state could have done in the particular situation. This implies that states may be obliged to act on extraterritorial human rights violations if they can, and state parties to the Convention can therefore also

[234] ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (app. no. 48787/99), para. 331.
[235] *Ibid*., para. 318.
[236] Boie, Hans N. A. and Torp, Kristian. *Extraterritorial Human Rights Obligations - Human Rights Due Diligence and Home States Duty to Protect against TNC's*, p. 95.
[237] ECtHR, *Treska v. Albania and Italy*, (app. no. 26937/04), Decision, 29 July 2006.
[238] ECtHR, *Manoilescu and Dobrescu v. Romania and Russia*, (app. no. 60861/00), Decision, 3 March 2005.
[239] ECtHR, *Treska v. Albania and Italy*, (app. no. 26937/04), p. 12.

be held responsible if they refrain from acting.[240] Nevertheless, the *Treska* case was ultimately deemed inadmissible, as the Italian authorities did not have the capacity to take part in Albanian court proceedings.[241]

In the case of *Manoilescu and Dobrescu v. Romania and Russia*, a similar issue was raised. Two Romanian nationals had received an administrative decision regarding restitution for property assigned to the USSR,[242] which had vested its embassy in Romania in it.[243] The applicants complained under Article 6(1) and Article 1 of the First Protocol of the ECHR that they were unable to obtain a court order requiring the authorities to execute the decision regarding their entitlement over the property.[244] The Romanian courts noted that such an order would violate Russian diplomatic immunity, causing the applicants to argue that the Russian government had interfered with their rights.[245] In this case, the Court reiterated the principle from the *Ilaşcu* case on the state's positive obligation.[246] However, the Court found that Russia's responsibility could not be engaged under Article 1 of the ECHR in relation to the state's positive obligation because the state could not be required to intervene in court proceedings before the Romanian courts or consent to any measures of constraint.[247]

In legal literature, the Court's reiteration of the *Ilaşcu* principle on the state's positive obligation in the *Treska* case and the *Manoilescu and Dobrescu* case has been interpreted as a general positive obligation for the contracting states to always do their best to secure human rights, also extraterritorially.[248] This is derived from the state's capability to positively affect the human rights situation of an individual.[249] This is in line with the

[240] Boie, Hans N. A. and Torp, Kristian. *Extraterritorial Human Rights Obligations - Human Rights Due Diligence and Home States Duty to Protect against TNC's*, p. 98.
[241] ECtHR, *Treska v. Albania and Italy*, (app. no. 26937/04), pp. 13-14.
[242] ECtHR, *Manoilescu and Dobrescu v. Romania and Russia*, (app. no. 60861/00), paras. 1, 11 and 17.
[243] *Ibid*., para. 15.
[244] *Ibid*., para. 50.
[245] *Ibid*., para. 99.
[246] *Ibid*., para. 101.
[247] *Ibid*., para. 107.
[248] Boie, Hans N. A. and Torp, Kristian. *Extraterritorial Human Rights Obligations - Human Rights Due Diligence and Home States Duty to Protect against TNC's*, p. 98; Langford, Malcolm, *et al. Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, p. 188.
[249] Langford, Malcolm, *et al. Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, p. 189.

argument that as long as there is "*a sufficiently tangible link between the extraterritorial act of a Convention State and the individual right bearer residing outside the State's territory, the State is under a positive obligation to take the necessary steps within its power and in accordance with international law to protect Convention rights against violations by private parties*".[250]

Three principles regarding the states' positive obligation can be derived from case law from the ECtHR:

> *"- States must secure the individual's legal status, rights and privileges under domestic law necessary for an effective enjoyment of Convention rights*
>
> *- States must ensure an effective protection of Convention rights in the sphere of relations between private parties*
>
> *- The acquiescence of State authorities into acts of private parties that violate Convention rights can engage the State's responsibility under the Convention."*[251]

Positive obligations require due diligence, and a positive obligation can therefore only arise if the state was or ought to be aware of a possible breach of the right.[252] This is supported by the case of *Öneryildiz v. Turkey*,[253] where the Turkish authorities knew or ought to have known the risk of explosion stemming from a rubbish tip, and therefore Turkey was in a position to take the preventive operational measures necessary and sufficient to protect the inhabitants from such an explosion.[254] The same precondition for a positive obligation to arise was used in the case of *Fadeyeva v. Russia*.[255] In this case, Russian authorities were in a position to evaluate and prevent the pollution hazards of a steel plant, as it had earlier been owned by the state, as well as been subjected to a number of operating conditions and administrative penalties after its privatization.[256] Thus, there

[250] Augenstein, Daniel. *State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights*, para. 82.
[251] *Ibid*., para. 34.
[252] Brems, Eva and Gerards, Janneke. *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, p. 169.
[253] ECtHR, *Öneryildiz v. Tyrkey*, (app. no. 48939/99), Grand Chamber Judgment, 30 November 2004.
[254] *Ibid*., para. 101.
[255] ECtHR, *Fadeyeva v. Russia*, (app. no. 55723/00), Judgment, 9 June 2005.
[256] *Ibid*., para. 90.

was a "*sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation*".[257]

The scope of the state's positive obligation is influenced by the margin of appreciation. This means that "*regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual* […] *The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources*."[258] These considerations have been set forward in several cases before the Court.[259] The margin of appreciation involves a choice of means, and the state in question can therefore fulfil its positive obligation in various ways.[260] However, the positive obligation must not impose an impossible or disproportionate burden on the state.[261]

4.2. The positive obligation under Article 5 of the ECHR

Based on the wording of Article 5(1), it only protects against negative interferences from the state and does not contain a positive obligation to actively secure the right of the individual. The fact that Article 5(2)-(5) contain specific positive obligations have been interpreted as excluding "*a broader – "inherent" – positive obligation*".[262]

Nevertheless, in recent case law, the state's positive obligation under Article 5 of the ECHR have been derived from Article 5(1), first sentence.[263] It obligates "*the State not only to refrain from active infringements of the rights in question, but also to take*

[257] ECtHR, *Fadeyeva v. Russia*, (app. no. 55723/00), para. 92.
[258] ECtHR, *Appleby and Others v. the United Kingdom*, (app. no. 44306/98), Judgment, 6 May 2003, para. 40.
[259] ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (app. no. 48787/99), para. 332; ECtHR, *Rees v. the United Kingdom*, (app. no. 9532/81), Judgment, 17 October 1986, para. 37; ECtHR, *Özgur Gundem*, (app. no. 23144/93), Judgment, 16 March 2000, para. 43; ECtHR, *Jahn and Others v. Germany*, (app. no. 46720/99), Grand Chamber Judgment, 30 June 2005, para. 93.
[260] ECtHR, *Fadeyeva v. Russia*, (app. no. 55723/00), para. 96.
[261] ECtHR, *Appleby and Others v. the United Kingdom*, (app. no. 44306/98), para 40; ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (app. no. 48787/99), para. 332; ECtHR, *Osman v. the United Kingdom*, (app. no. 23452/94), Grand Chamber Judgment, 28 October 1998, para. 116.
[262] Campbell, Angus I. L. *Positive Obligations under the ECHR: Deprivation of Liberty by Private Actors*, p. 402.
[263] Grabenwarter, Christoph. *European Convention on Human Rights – Commentary*, p. 97.

appropriate steps to provide protection against an unlawful interference with those rights to everyone within its jurisdiction".[264]

The existence of a positive obligation under Article 5 was tried by the EComHR in one of its early cases, *X v. Ireland*.[265] The Commission found that Article 5(1) did not contain a positive obligation for the state to provide a citizen with special police protection for an indefinite period of time.

The ECtHR evaded the question of the positive obligation under Article 5(1) in the case of *Nielsen v. Denmark*,[266] where a minor was hospitalised in a psychiatric ward at his mother's request, as the Court found that it did not amount to deprivation of liberty.[267] Likewise, the Court refrained from discussing the positive obligation in the case of *Koniarska v. the United Kingdom*,[268] which dealt with secure accommodation in a private youth centre for a young girl convicted of several criminal offences.

In other case law, the Court has examined the positive obligation under Article 5(1) more thoroughly. In 1999 in the case of *Riera Blume and Others v. Spain*,[269] the applicants, suspected members of a sect, were arrested and transferred to an investigating court.[270] A judge ordered their release and instructed the police to hand over the applicants to their families in order for them to recover their psychological balance.[271] The applicants were placed in individual rooms at a hotel by their families, and they were 'deprogrammed' by a psychologist and a psychiatrist from a Spanish association against sects.[272] In this case, the authorities had played an active role in the deprivation of liberty of the applicants even though the loss of liberty was carried out by family members and the association.[273] The ECtHR found that the national authorities had acquiesced to the deprivation of liberty when they transferred the applicants to their family members and the association without

[264] ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, (app. no. 39630/09), Grand Chamber Judgment, 13 December 2012, para. 239.
[265] EComHR, *X v. Ireland*, (app. no. 6040/73), Decision, 20 July 1973.
[266] ECtHR, *Nielsen v. Denmark*, (app. no. 10929/84).
[267] *Ibid*., para. 73.
[268] ECtHR, *Koniarska v. the United Kingdom*, (app. no. 33670), Decision, 12 October 2000.
[269] ECtHR, *Riera Blume v. Spain*, (app. no. 37680/97), Judgment, 14 October 1999.
[270] *Ibid*., para. 13.
[271] *Ibid*., para. 13.
[272] *Ibid*., para. 14.
[273] *Ibid*., para. 35.

their consent, and therefore the ultimate responsibility was imposed on the Spanish authorities.[274]

The same reasoning was used in the case of *Rantsev v. Cyprus and Russia*,[275] where a Russian victim of human trafficking was handed over to her traffickers by the Cypriot police after which she was deprived of her liberty.[276] The Court noted that the national authorities of Cyprus had acquiesced to the deprivation of liberty as they were aware of the problem with human trafficking.[277]

In the case of *Medova v. Russia*,[278] the Court stated that "*there are no reasons to consider the scope of the State's positive obligation under Article 5 of the Convention to protect* […] *from arbitrary deprivation of liberty to be different from that under Article 2 of the Convention to protect his life*".[279] Hence, Russia breached its positive obligation under Article 5 when Russian authorities did not put an end to the concerned applicant's arbitrary detention, even though they had every means of doing so.[280]

Lastly, in the case of *El-Masri v. the former Yugoslav Republic of Macedonia*,[281] the Macedonian authorities violated their positive obligation under Article 5 by actively enabling detention of the applicant in Afghanistan as they handed him over to the CIA, even though they were or ought to have been aware of the risk of detention.[282]

The common feature in these four cases where a positive obligation under Article 5 was established is that the national authorities were involved to some extent and that they knew or ought to have known the risk of deprivation of liberty.

[274] ECtHR, *Riera Blume v. Spain*, (app. no. 37680/97), paras. 33 and 35.
[275] ECtHR, *Rantsev v. Cyprus and Russia*, (app. no. 25965/04), Judgment, 7 January 2010.
[276] *Ibid*., para. 320.
[277] *Ibid*., para. 321.
[278] ECtHR, *Medova v. Russia*, (app. no. 25385/04), Judgment, 15 January 2009.
[279] *Ibid*., para. 123.
[280] *Ibid*., para. 124.
[281] ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, (39630/09).
[282] *Ibid*., para. 239.

4.2.1. *Storck v. Germany*[283]

The case of *Storck v. Germany* is a core judgment on the positive obligation under Article 5. The case concerned a German girl's repeated stays in hospitals and psychiatric institutions.[284] At the age of 18, she was confined to a private psychiatric clinic at her father's request after serious conflicts between her and her parents.[285] The applicant was not incapacitated and did not grant her consent to the placement, which had not been authorised by a court order either.[286] During her stay at the clinic, she tried to escape but was brought back by the German police.[287]

The ECtHR found that the applicant had been deprived of her liberty as per Article 5(1).[288]

According to Germany's positive obligation under Article 5(1), the applicant claimed that Germany had failed to protect her against deprivation of liberty by private persons.[289] This was supported by the fact that she had not been in a position to secure help from the outside and that the law did not offer her adequate protection against such a deprivation.[290] The government contested this, as multiple control mechanisms were in place and the law from the government's point of view was adequate to prevent deprivation of liberty of other persons.[291]

Regarding Germany's positive obligation under Article 5(1), the Court began by stating that Article 1 of the ECHR requires the state "*to take appropriate steps to provide protection against an interference with those rights either by State agents or by private parties*."[292] Furthermore, the Court noted that:

> "*Article 5 § 1, first sentence, of the Convention must* […] *be construed as laying down a positive obligation on the State to protect the liberty of its citizens. Any conclusion to the effect that this was not the case would not only be inconsistent with the Court's case-law, notably under Articles 2, 3 and 8 of the Convention, it would also leave a sizeable gap in*

[283] ECtHR, *Storck v. Germany*, (app. no. 61603/00).
[284] *Ibid*., paras. 13-14, 17-18 and 19-21.
[285] *Ibid*., para. 14.
[286] *Ibid*., para. 15.
[287] *Ibid*., para. 15.
[288] *Ibid*., para. 78.
[289] *Ibid*., para. 83.
[290] *Ibid*., para. 83.
[291] *Ibid*., para. 84.
[292] *Ibid*., para. 101.

> *the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The state is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge*".[293] (emphasis added)

Germany should therefore have exercised control and supervision over the private clinic in order to evaluate the lawfulness of the applicant's detention.[294] Especially the vulnerability of the applicant led the Court to emphasize the need for effective protection against deprivation of liberty.[295]

The lack of control of the lawfulness was illustrated by the police having to return the applicant to the clinic by force. The involvement of public authorities in her stay at the clinic did not provoke a review of the lawfulness of her detention.[296]

Consequently, since the authorities were aware of her stay at the clinic and her vulnerable state, Germany breached its positive obligation under Article 5(1) to protect the liberty of its citizens.[297]

The Court refrained from using a fair balance test in the case and abstained from discussing whether there were any justificatory grounds for the detention or whether the positive obligation placed an impossible or disproportionate burden on the authorities.[298] Yet, this procedure has been used in other cases regarding positive obligations.[299] However, it has been suggested that it was not relevant in the case, as there was a clear breach of the right to liberty and a lack of any community interest in the applicant's confinement.[300]

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[293] ECtHR, *Storck v. Germany*, (app. no. 61603/00), para. 102.
[294] *Ibid*., para. 104.
[295] *Ibid*., para. 105.
[296] *Ibid*., para. 106.
[297] *Ibid*., para. 108.
[298] Campbell, Angus I. L. *Positive Obligations under the ECHR: Deprivation of Liberty by Private Actors*, p. 406.
[299] ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (app. no. 48787/99), para. 332; ECtHR, *Ösgur Gündem v. Turkey*, (app. no. 23144/93, para. 43.
[300] Campbell, Angus I. L. *Positive Obligations under the ECHR: Deprivation of Liberty by Private Actors*, p. 406.

4.3. Concluding remarks

As Lithuania at least exercised *de jure* jurisdiction in the *Kaunas Seaways* incident, the dispute can be settled like in the *Ilaşcu* case, namely in light of the state's positive obligation under the Convention.[301] In the *Ilaşcu* case, para. 331, the state was obligated under Article 1 of the Convention to take any diplomatic, economic, judicial, or other measure in its power to secure the rights contained in the Convention. In this connection, the acquiescence or connivance of the authorities to the acts of private individuals within its jurisdiction was of significant importance for the invocation of state responsibility.[302] It is relevant to examine Lithuania's options in the present case to solve the situation and to examine whether Lithuania was able to positively affect the human rights situation of the twelve migrants.

From the examination of the positive obligation, it can be derived that there is a general positive obligation for the state parties to the ECHR to do their best to secure human rights, also extraterritorially. However, this is only an obligation if the state knows of the potential violation of the Convention. Furthermore, regarding the positive obligation there is a margin of appreciation which requires the state to strike a fair balance between the general community interest and the interest of the individual. Similarly, the positive obligation must not impose a disproportionate or impossible burden on the state.[303]

Regarding the positive obligation specifically attached to Article 5 of the ECHR, it is required from the state not to acquiesce to or play an active role in the deprivation of liberty by private persons, as it was seen in the cases of *Riera Blume v. Spain*, *Rantsev v. Cyprus and Russia* and *El-Masri v. the former Yugoslav Republic of Macedonia*. Furthermore, the case of *Medova v. Russia* sets forth that a state must put an end to an arbitrary deprivation of liberty if it is capable of doing so.

The case of *Storck v. Germany* puts forward an important positive obligation under Article 5 for the states to take measures that effectively protect vulnerable persons from deprivation of liberty.[304] This includes reasonable steps to prevent deprivation of liberty

[301] ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (app. no. 48787/99), para. 335.
[302] *Ibid*., para. 318.
[303] ECtHR, *Appleby and Others v. the United Kingdom*, (app. no. 44306/98), para. 40.
[304] ECtHR, *Storck v. Germany*, (app. no. 61603/00), para. 102.

which the authorities knew or ought to have known about.[305] Therefore, in the *Storck* case, Germany should have controlled and supervised the detention to examine its lawfulness.

Consequently, it can be concluded that Lithuania in the present case was under several positive obligations under the ECHR and Article 5. Whether Lithuania honoured these obligations will be examined below in chapter 5.3.

[305] ECtHR, *Storck v. Germany*, (app. no. 61603/00), para. 102.

5. Application of the results to the *Kaunas Seaways* incident - Violation of Article 5 of the ECHR

It remains uncertain how the ECtHR will view the question of Lithuania's jurisdiction over the twelve migrants in the present case.

If the Court follows the argumentation in chapter 3, it will conclude that Lithuania had *de jure* jurisdiction based on the flag state principle. If the Court does not establish *de facto* jurisdiction as well, the present case must be solved as the case of *Ilaşcu and Others v. Moldova and Russia* was, namely in light of Lithuania's positive obligation under the Convention as presented in chapter 4.

However, should the Court find some sort of *de facto* jurisdiction in the present case based on the argumentation in chapter 3, the Court must also examine a potential breach of Lithuania's negative obligations as described in chapter 2.

It will therefore be up to the Court to ascertain whether Lithuania's responsibility is engaged based on its duty to refrain from a wrongful interference, *i.e.* the state's negative obligations, or on its duty to take any diplomatic, economic, judicial, or other measures that are in its power to take to secure the human rights, *i.e.* the state's positive obligation, or both.

In the following it is assumed that Lithuania had both *de jure* and *de facto* jurisdiction, and thus Lithuania's negative as well as positive obligations in the *Kaunas Seaways* incident will be examined.

In this chapter, the information on the migrants' stay on board *Kaunas Seaways*, as described in chapter 1.2., will be compared to the legal framework presented in chapter 2, namely Lithuania's negative and explicit positive obligations under Article 5, and the scope of Lithuania's positive obligation 'inherent' in Article 5 and the Convention examined in chapter 4.

However, this chapter is characterized by a lack of precise information on the migrants' stay on board the vessel, and it can therefore be difficult to provide definitive answers regarding Lithuania's potential breaches of its obligations.

5.1. Lithuania's negative obligation

When examining whether a state breached its negative obligation, the Court uses a clear, bifurcated approach.[306] Firstly, the Court examines whether there has been an infringement of a protected interest under the Convention. Secondly, it examines whether this infringement is justified by being legal, legitimate, and proportional.

This thesis will employ the model when examining Lithuania's potential breach of its negative obligations under Article 5(1).

5.1.1. Infringement of a protected interest under the Convention

Whether there was an infringement of Article 5(1) depends on the degree and the intensity of the measure in issue,[307] as set forward in chapter 2.3.1.1 It is therefore relevant to examine the circumstances surrounding the measure in the present case, such as the type, duration, effects, and manner of implementation.[308]

The twelve migrants were locked inside four cabins on board *Kaunas Seaways*.[309] In the cabins, the windows were barred, the door handles removed, and the cabins were guarded. These measures can approximately be compared to confinement in a cell. The migrants' stay in the cabins lasted for three months.

When physical detention under Article 5(1) is examined, the element of coercion is indicative.[310] In the *Kaunas Seaways* incident, there was an element of coercion as the migrants were effectively prevented from escaping the vessel and thus could not remove themselves from the sphere of application of the measure.[311] In the event that the twelve migrants got out of the cabins, they could not get off the vessel or secure help from the outside due to its continued sailing in the Black Sea.

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[306] Brems, Eva and Gerards, Janneke. *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, p. 165.
[307] ECtHR, *Guzzardi v. Italy*, (app. no. 7367/76), para. 93; ECtHR, *Stanev v. Bulgaria*, (app. no. 36760/06), para. 115.
[308] Circumstances set forward in the case of ECtHR, *Guzzardi v. Italy*, (app. no. 7367/76), para. 92 and ECtHR, *Engel v. the Netherlands*, (app. no. 5370/71), para. 59.
[309] See chapter 1.2. on factual background.
[310] ECtHR, *Gillan and Quinton v. the United Kingdom*, (app. no. 4158/05), para. 57.
[311] See also the case of ECtHR, *Amuur v. France*, (app. no. 19776/92), paras. 46-48.

The twelve migrants were confined to a restricted space for a significant length of time, and the measure in question therefore fulfilled the objective element under Article 5(1).

Consequently, holding the twelve migrants locked in the four cabins under these circumstances did indeed contain a deprivation of liberty. Therefore, Article 5(1) is applicable to the present case.

5.1.2. Prescribed by law

It is a task for the Lithuanian authorities to ensure compliance with the state's obligations under Article 5(1) of the ECHR, but as described under chapter 2.3.2.1., the ECtHR must exercise a certain power of review.[312]

The detention of migrants is regulated by the Lithuanian Law on the Legal Status of Aliens.[313] Article 113 reads as follows:

> "***Article 113. Grounds for Detention of an Alien***
> *An alien may be detained on the following grounds:*
> *1) in order to prevent the alien from entering the Republic of Lithuania without a permit;*
> *2) if the alien has unlawfully entered or stays in the Republic of Lithuania, except when he has lodged an application for asylum in the Republic of Lithuania;*
> *3) when it is attempted to return the alien who has been refused entry into the Republic of Lithuania to the country from which he arrived;* […]" (emphasis added)

Thus, there is a national legal basis for the deprivation of liberty of aliens in Lithuania. This legal basis is clear and accessible,[314] by stating that the alien risks detention if he is unlawfully in the state. Therefore, the Lithuanian legal basis fulfils the principle of legal certainty.

Lithuania may argue that the twelve migrants were detained on board *Kaunas Seaways* in order to prevent them from entering Lithuania under Article 113(1) of the Law on the

[312] ECtHR, *Benham v. the United Kingdom*, (app. no. 19380/92), para. 41; ECtHR, *Winterwerp v. the Netherlands*, (app. no. 6301/73), para. 46.
[313] Law on the Legal Status of Aliens (*įstatymas dėl užsieniečių teisinės padėties*), 29 April 2004, No. IX-2206, Vilnius.
[314] Requirements set forth in the cases of ECtHR, *Baranowski v. Poland*, (app. no. 28358/95), para. 52 and ECtHR, *Medvedyev and Others v. France*, (app. no. 3394/03), para. 80.

Legal Status of Aliens or to return them to the country from which they came, either Turkey or Ukraine, since they did not have the right to enter into Lithuania, under Article 113(3).

Consequently, the detention of the twelve migrants was prescribed by law under Article 5(1) of the Convention.

5.1.3. Legitimate aim

A deprivation of liberty is only permitted if it falls within one of the grounds listed in Article 5(1)(a)-(f). The burden of proof lies on Lithuania as to whether the deprivation of liberty falls within one of these grounds and whether it was applicable in the specific situation.[315]

As described in chapter 2.3.2.2., the relevant ground in the *Kaunas Seaways* incident is Article 5(1)(f), as it dealt with twelve migrants trying to enter another state and Lithuania trying to return them to Ukraine, Turkey, or their home states.

Lithuania's sovereign right as a state to control the liberty of aliens and thus their entry into and residence in its territory is undisputed.[316] Nevertheless, this right must be exercised in accordance with Article 5. It is therefore relevant to examine whether the twelve migrants on board *Kaunas Seaways* were in fact detained with one of the purposes of Article 5(1)(f), namely 1) preventing the persons from entering Lithuania unauthorised, 2) deporting the migrants to their home states, or 3) extraditing them.

Kaunas Seaways continued its sailing in the Black Sea between Ukraine and Turkey for three months after discovering the stowaways.[317] During this time, the stowaways were detained and diplomatic negotiations took place with the purpose of figuring out which state was willing to receive the undocumented migrants. Turkey and Ukraine refused, which is why it was pursued to get Algeria and Morocco, the migrants' home states, to accept them. The twelve migrants wished to go to Romania, and it was therefore never an

[315] As put forward by Macovei, Monica. *The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights*, p. 8.
[316] As set forward in the cases of ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 64 and ECtHR, *Amuur v. France*, (app. no. 19776/92), para. 41.
[317] See chapter 1.2. on factual background.

issue that the migrants should cross Lithuanian borders. At least it does not follow from any of the official statements or news articles that the migrants wanted to go to Lithuania. That this was never an actual option for the migrants is underlined by the fact that the vessel sailed in an area far from Lithuania, namely the Black Sea. Hence, it was never a real risk that the migrants should enter Lithuanian territory.

The first purpose under Article 5(1)(f) to prevent the persons from entering into Lithuania was therefore not relevant in the present case.

It does not follow from the ECHR or the Court's case law that Lithuania can invoke this part of Article 5(1)(f) on behalf of Romania, which is also a member state to the Convention, due to the fact that the migrants initially wished to go there. In this relation it is important to remember that the list of grounds for deprivation of liberty in Article 5(1) is exhaustive and must be interpreted narrowly.[318]

Regarding the second purpose under Article 5(1)(f), namely that action is being taken with a view to deporting the migrants to their home states, it is relevant to note it is a requirement that the deportation proceedings were in progress during the detention in order to fall within this part of the article.[319] In the present case, the Lithuanian authorities had not issued any deportation orders.[320] This might be caused by the migrants never entering Lithuania, leaving their cases unexamined by Lithuanian authorities. Furthermore, it does not follow from the facts that Lithuanian authorities had been present on board the vessel in order to determine whether the migrants should be deported. In this case it was merely a diplomatic process to find a state which wanted to receive the migrants. It was rather coincidental that the receiving states were their home states, as the receiving state could just as well have been Turkey or Ukraine, seeing the negotiations with these states continued until an agreement was reached with Algeria and Morocco. Deportation was therefore not the purpose of the detention.

[318] ECtHR, *Lexa v. Slovakia*, (app. no. 54344/00), para. 119; ECtHR, *Čonka v. Belgium*, (app. no. 51564/99), para. 42.
[319] ECtHR, *A and Others v. the United Kingdom*, (app. no. 3455/05), para. 164.
[320] This is the regular procedure, before migrants can be deported. See namely ECtHR, *Čonka v. Belgium*, (app. no. 51564/99); ECtHR, *M.A. v. Cyprus*, (app. no. 41872/10), Judgment, 23 July 2013; ECtHR, *Andric v. Sweden*, (app. no. 45917/99), Decision, 23 February 1999.

The third purpose under Article 5(1)(f), to take action with the aim of extraditing the migrants, is only relevant if a state requested the extradition of one or more of the migrants from Lithuania, if the migrants were suspected of or convicted for crimes committed on the territory of the former state.[321] This has not been an issue in the present case, and thus extradition was not the purpose of the detention.

As the purpose of the detention of the twelve migrants does not fall within the grounds mentioned in Article 5(1)(f), there is a violation of the state's obligations under Article 5.

Even though the grounds in subparagraph a-f must be interpreted narrowly, the ECtHR has adopted a pragmatic approach if the measure cannot be contained in any of the grounds mentioned. In a number of cases, the Court has instead found that there was not a deprivation of liberty if the measure was reasonable due to the public and the individual's own interest,[322] but could not be contained in Article 5(1)(a)-(f). This has happened under exceptional circumstances and if the measure was necessary to prevent serious injury or damage.[323]

However, the aim of the measure, for instance to prevent serious injury or damage or another public interest, cannot be included in the determination of whether there has been a deprivation of liberty. This is only relevant during the examination of the justification of the measure.[324]

Consequently, in the present case there is a clear deprivation of liberty which does not fall within any of the grounds in Article 5(1)(a)-(f).

[321] Shaw, Malcolm N. *International Law*, p. 686.
[322] ECtHR, *H.M. v. Switzerland*, (app. no. 39187/98); ECtHR, *Austin v. the United Kingdom*, (app. no. 39692/09); ECtHR, *Gahramanov v. Azerbaijan*, (app. no. 26291/06), Decision, 15 October 2013.
[323] ECtHR, *Austin v. the United Kingdom*, (app. no. 39692/09), para. 68
[324] *Ibid*., para. 58; Joint Dissenting Opinion of Judges Tulkens, Spielmann and Garlicki in ECtHR, *Austin v. the United Kingdom*, (app. no. 39692/09), para. 4; Dissenting Opinion of Judge Loucaides in ECtHR, *H.M. v. Switzerland*, (app. no. 39187/98).

5.1.4. Necessary in a democratic society (absence of arbitrariness)

For the very reason that the deprivation of liberty of the twelve migrants on board *Kaunas Seaways* did not fall within any of the grounds in Article 5(1)(a)-(f), the measure was arbitrary, and Lithuania breached Article 5(1).

Nevertheless, should the Court find that the measure falls within Article 5(1)(f), it must be examined whether the deprivation of liberty was an arbitrary measure.

As stated in chapter 2.3.2.3, the case of *Saadi v. the United Kingdom* has laid down several criteria regarding arbitrariness.

Firstly, detention must be the last resort as it is an exceptional measure, meaning detention must be necessary in order to achieve the purpose.[325] In the present case, the migrants were detained on board the vessel because they were violent, tried to set the ferry on fire, and threatened to commit suicide by jumping overboard.[326] Detention can therefore be seen as a necessary measure, due to it being the only way to secure the safety of the migrants, the passengers, and the crew at sea, as the migrants were not allowed to be disembarked.

Secondly, there must be a proper relationship between the ground for detention and the place and conditions of detention, which should be appropriate.[327] It is acceptable that the migrants initially were detained on board the vessel in the cabins after posing a risk to themselves, the passengers, and the crew. However, it is questionable whether it is acceptable that they continued to be detained on board the vessel for three months; also while there was no clear solution to the situation. The twelve migrants were detained in four cabins, why they must have been three in each. A cabin is not designed for people to be locked inside them constantly for three months, and they can therefore not be deemed suitable for such a long detention due to the lack of space, especially when shared by three persons. Furthermore, the personnel on board the vessel was not qualified to handle the migrants, which they ought to have been as the migrants stayed on board the vessel for such a prolonged time.[328] Consequently, the conditions under which the migrants were

[325] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 70.
[326] See chapter 1.2. on factual background.
[327] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 69.
[328] Ktistakis, Yannis. *Protecting migrants under the European Convention on Human Rights and the European Social Charter*, p. 34.

placed were not appropriate, and it must therefore be considered whether the migrants should have been transferred to another facility or a reception centre until their situation was resolved.

Nevertheless, it was positive that the migrants were given food, clothes and medical assistance, and that it was made sure that they could contact their families.[329]

Thirdly, under the requirement of absence of arbitrariness, the detention must not have continued for an unreasonable length of time for the purpose pursued.[330] This entails that when detention has the purpose of preventing unauthorised entry or deporting or extraditing the migrants, the proceedings must be prosecuted with due diligence.[331] Three months of detention of the twelve migrants pending entry or deportation under inappropriate conditions must be considered too long in light of the cases of *Kanagaratnam and Others v. Belgium* and *Suso Musa v. Malta*.[332] The Lithuanian authorities cannot be seen as having prosecuted the proceedings with such due diligence. This is underlined by the obligation set forth in the standard in Section 4.2. of the FAL Convention stating that the state parties must resolve stowaway cases expeditiously and secure an early return or repatriation of stowaways.

Consequently, the detention of the twelve migrants on board *Kaunas Seaways* was arbitrary under Article 5(1), causing Lithuania to breach its obligations under the Convention.

5.2. The explicit positive obligations in Article 5

In addition to the negative obligation in Article 5(1), the provision contains explicit positive obligations on the right to be notified of the reasons for an arrest or detention and the right to judicial review as these are expressed in Article 5(2) and (4) respectively.

[329] See chapter 1.2. on factual background.
[330] ECtHR, *Saadi v. the United Kingdom*, (app. no. 13229/03), para. 74.
[331] *Ibid*., paras. 72-73.
[332] See ECtHR, *Kanagaratnam and Others v. Belgium*, (app. no. 15297/09), paras. 94-95; ECtHR, *Suso Musa v. Malta*, (app. no. 42337/12), paras. 102-103.

In the following, it will be examined whether Lithuania honoured these obligations in the *Kaunas Seaways* incident.

5.2.1. Article 5(2): Notification of the reasons for arrest or detention

Everyone, including migrants,[333] has the right to be promptly informed of the reasons for their arrest or detention in a language which the individual understands under Article 5(2). Thus, the twelve migrants detained on board *Kaunas Seaways* were also covered by this safeguard.

Irrespective of whether the migrants were covered by Article 5(1)(f) or not, they should have received sufficient information to apply to a court to challenge the lawfulness of the detention provided for in Article 5(4).[334]

There is a lack of information regarding the fulfilment of this safeguard in the present case, as it cannot be said how the shipmaster and the crew communicated with the twelve migrants.

The official languages in the migrants' home states Morocco and Algeria are Arabic and Berber, and the second language is French.[335] It cannot be said whether the migrants spoke English. The shipmaster was of East European descent and spoke English. It is therefore unknown whether the shipmaster and the crew on the vessel were able to inform the African migrants why they were detained in a language they understood.

The migrants might have been aware of the factual grounds for the detention, namely their illegal entry onto the vessel, but cannot necessarily be expected to have been told the legal grounds, which is a requirement.[336] Since the authorities from the United Nations were invited on board the vessel to question the migrants, they might have informed the

[333] Ktistakis, Yannis. *Protecting migrants under the European Convention on Human Rights and the European Social Charter*, p. 30.
[334] ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, (app. no. 12244/86), para. 40; Regarding Article 5(1)(f), see the case of ECtHR, *Shamayev and Others v. Georgia and Russia*, (app. no. 36378/02), para. 427.
[335] CIA. The World Factbook: Algeria; CIA. The World Factbook: Morocco.
[336] See ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, (app. no. 12244/86), para. 40.

migrants why they were detained and their prospects. However, as it has not been possible to establish a time lime, it cannot be determined whether this happened promptly.

In order for Lithuania not to be in violation of Article 5(2), ECtHR has put forward that the state in question must make submissions during the case before the Court as to whether the detainee had been informed of the grounds for the detention and provide evidence therefore.[337] If Lithuania fails to do this, the Court can choose to decide in favour of the applicants.

Consequently, due to a lack of information on the communication between the shipmaster, crew and migrants on board *Kaunas Seaways*, it cannot be concluded whether Article 5(2) was breached by Lithuania.

5.2.2. Article 5(4): The right to judicial review

Under Article 5(4), the twelve migrants had the right to judicial review of the lawfulness of their detention by a court. This review should have been carried out by a judge or another officer authorised by law to exercise judicial power.[338]

Judicial review should have been available to the migrants shortly after they were taken into detention. However, such review was not an option for the migrants in the present case, as they continued to stay at sea where they were not in a position to apply for judicial review at court if necessary with legal assistance. Their case could therefore not be assessed by a judge or another legal officer. The shipmaster of the vessel cannot be regarded as such a legal officer as judicial power is not vested in him and as he does not represent an organ able of issuing binding legal decisions.[339]

Furthermore, if the migrants were covered by Article 5(1)(f), the lawfulness should have been reviewed before they were returned to their home states.[340]

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[337] See ECtHR, *Abdolkhani and Karimnia v. Turkey*, (app. no. 30471/08), Judgment, 22 September 2009, para. 138.
[338] ECtHR, *Brannigan and McBride v. the United Kingdom*, (app. no. 14553/89), para. 58.
[339] This criterion was set forth in the case of ECtHR, *Benjamin and Wilson v. the United Kingdom*, (app. no. 28212/95), para. 34.
[340] Macovei, Monica. *The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights*, p. 39.

Consequently, as there was no effective and accessible remedy available to the migrants against the detention on board *Kaunas Seaways*, Article 5(4) has been violated.[341]

Even though the migrants have now been released, they might still have a legal interest in a judicial review under Article 5(4),[342] with the intent of determining a potential right to compensation under Article 5(5). If the Court should consider that the migrants do not have a legal interest under Article 5(4), the right to challenge the lawfulness of the detention is covered by the right to an effective remedy protected by Article 13 of the Convention.[343]

5.3. Lithuania's positive obligations 'inherent' in the Convention and Article 5 of the ECHR

When the ECtHR examines a state's positive obligation, it tends to merge the bifurcated model described in chapter 5.2.[344] Additionally, the Court sometimes does not separate the negative and positive obligations but simply examine whether a fair balance has been struck between the public and private interests at stake.[345] However, it has gained some support that the examination of positive obligations must happen in accordance with the same model as the negative obligations.[346] However, this model has not previously been used consistently by the Court.

[341] As seen in the case of ECtHR, *Georgia v. Russia*, (app. no. 13255/07), paras. 182-188.
[342] As seen in the case of ECtHR, *S.T.S v. the Netherlands*, (app. no. 277/05).
[343] Ktistakis, Yannis. *Protecting migrants under the European Convention on Human Rights and the European Social Charter*, p. 45.
[344] See among others ECtHR, *Hatton v. the United Kingdom*, (app. no. 36022/97), Grand Chamber Judgment, 8 July 2003, para. 98; ECtHR, *Rees v. the United Kingdom*, (app. no. 9532/81), para. 37; ECtHR, *Christine Goodwin v. the United Kingdom*, (app. no. 28957/95), Grand Chamber Judgment, 11 July 2002, para. 72; ECtHR, *Stjerna v. Finland*, (app. no. 18131/91), Judgment, 25 November 1994, para. 38.
[345] ECtHR, *Dickson v. the United Kingdom*, (app. no. 44362/04), Grand Chamber Judgment, 4 December 2007, para. 71; ECtHR, *Powell and Rayner v. the United Kingdom*, (app. no. 9310/81), Judgment, 21 February 1990, para. 41.
[346] See concurring opinion of Judge Wildhaber in the case of ECtHR, *Stjerna v. Finland*, (app. no. 18131/91); Brems, Eva and Gerards, Janneke. *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, p. 134-136, p. 181; Gerards, Janneke. *The Prism of Fundamental Rights*, p. 194-195.

Therefore, in the following, it will firstly be examined whether Lithuania took the diplomatic, economic, judicial, or other measures in its power to secure the migrants' rights under the Convention. Secondly, it will be examined whether Lithuania acquiesced to the deprivation of liberty carried out by private persons. Lastly, it will be examined whether there has been struck a fair balance between the competing public and private interests in accordance with Lithuania's margin of appreciation.

Before examining these three points, it must be underlined that Lithuania was aware of the deprivation of liberty that took place on board *Kaunas Seaways* and hereby in a position to take action, making possible the questioning of Lithuania's positive obligation.[347]

Regarding the first point, the positive obligation under the Convention in general, it must be determined as in the case of *Ilaşcu and Others v. Moldova and Russia* whether Lithuania took the diplomatic, economic, judicial, or other measures in its power to protect the migrants' rights under the Convention,[348] including the migrants' right to freedom and security under Article 5 of the ECHR. It is clear from the facts that Lithuania took the diplomatic measures in its powers to solve the case. There have been extensive diplomatic negotiations with Turkey, Ukraine, Algeria, and Morocco to make an agreement with one of these states to receive the migrants.[349] Regarding the judicial measures, Lithuania can furthermore argue that it is criminalised under Article 146 of the Lithuanian Criminal Code to deprive others of their liberty.[350]

In light of the cases *Ilaşcu and Others v. Moldova and Russia*, *Treska v. Albania and Italy* and *Manoilescu and Dobrescu v. Romania and Russia*, it must be examined which concrete options or measures Lithuania could have resorted to in resolving the situation. Lithuania could easily have solved the case by removing the migrants from the vessel and placing them in a reception centre for migrants in Lithuania until a solution was found. This would likely have given the migrants better conditions and improved their legal

[347] As in the cases of ECtHR, *Öneryildiz v. Tyrkey*, (app. no. 48939/99), para. 101, and ECtHR, *Fadeyeva v. Russia*, (app. no. 55723/00), para. 92.
[348] Criteria set forward in ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (app. no. 48787/99), para. 331.
[349] See chapter 1.2. on factual background.
[350] See Article 146 on Unlawful Deprivation of Liberty in the Criminal Code of the Republic of Lithuania, 26 September 2000, No. VIII-1968.

protection, seeing they probably would have had access to judicial control of their detention. Consequently, Lithuania's responsibility under Article 1 of the ECHR is engaged due to its positive obligation in the present case.

Regarding the second point, the state's positive obligation under Article 5, it must be determined whether Lithuania's involvement in the present case included acquiescence or connivance to the deprivation of liberty. Lithuania was involved to some extent in the deprivation of liberty of the twelve migrants, as the state knew of the detention without taking any steps towards ending it while the negotiations with other states took place. This must amount to an acquiescence to the detention and its extensive length.[351]

Furthermore, as established in the case of *Medova v. Russia*, a state must end the deprivation of liberty if it has the means to do so,[352] or as in the case of *Storck v. Germany*, a state must take reasonable steps to prevent an existing deprivation of liberty.[353] In the *Kaunas Seaways* incident, Lithuania could have ended the detention by private persons without any hardship by transferring the migrants to a reception centre. Therefore, Lithuania's responsibility for its positive obligation under Article 5 of the Convention is also engaged.

Regarding Lithuania's margin of appreciation, the state must strike a fair balance between the general interest of the community and the interest of the individual.[354] This includes having regard to choices being made in terms of priorities and resources.[355]

In this situation, Lithuania can argue against the solution involving the transfer of the migrants to a reception centre, as the general interest is to protect the Lithuanian community against unregulated migration. Furthermore, it is a relevant consideration that migrants should not get easy access into Europe simply because they are unwanted

[351] As established in the cases of ECtHR, *Riera Blume and Others v. Spain*, (app. no. 37680/97), para. 35 and ECtHR, *Rantsev v. Cyprus and Russia*, (app. no. 25965/04), para. 321.
[352] ECtHR, *Medova v. Russia*, (app. no. 25385/04), para. 124.
[353] ECtHR, *Storck v. Germany*, (app. no. 61603/00), para. 102.
[354] ECtHR, *Appleby and Others v. the United Kingdom*, (app. no. 44306/98), para. 40; ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (app. no. 48787/99), para. 332; ECtHR, *Rees v. the United Kingdom*, (app. no. 9532/81), para. 37.
[355] ECtHR, *Appleby and Others v. the United Kingdom*, (app. no. 44306/98), para. 40; ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (app. no. 48787/99), para. 332.

stowaways. The general interest is supported by it being a sovereign state's prerogative to control migration into the state.

On the other hand, the interest of the individual is that rights under the Convention should not become illusory for migrants, as they have the same rights as anyone else as long as they are within a contracting state's jurisdiction. Furthermore, the migrants on board *Kaunas Seaways* were in a precarious situation, and the vulnerability of the migrants called for of a solution on Lithuanian soil.

It does not seem like the Lithuanian authorities have tried to balance the general interest of the community against the one of the migrants.

Lithuania is a wealthy and well-functioning European state, and there are no particular considerations of priorities and resources to make to ensure a fair balance. Lithuania does not receive many migrants or refugees,[356] and therefore the burden put on Lithuania to transfer the twelve migrants to a reception centre does not seem disproportionate or impossible.[357] That the transfer of the migrants is a burden Lithuania must accept is underlined by the fact that the state under Section 4.2. of the FAL Convention is obligated to take all appropriate measures in order to avoid situations where stowaways must stay on board vessels indefinitely.

Consequently, Lithuania has breached its positive obligations under the Convention and under Article 5.

5.4. Concluding remarks

In light of the above, if the Court concludes that Lithuania had *de facto* jurisdiction over *Kaunas Seaways,* the state breached its negative obligation under Article 5(1) of the Convention as the measure taken to control the situation, namely the deprivation of liberty of the twelve migrants, cannot be contained in any of the grounds specified in Article

[356] Global Detention Project, Country Profile, Lithuania, Demographic and immigration-related statistics.
[357] Requirements set forth in the cases ECtHR, *Appleby and Others v. the United Kingdom*, (app. no. 44306/98), para. 40 and ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (app. no. 48787/99), para. 332.

5(1)(a)-(f). Even if the measure could be considered as falling within Article 5(1)(f), it was arbitrary due to the place, conditions, and the length of the detention.

Regarding Article 5(2), the right to be notified of the reasons for the arrest or detention, it cannot be concluded whether this obligation was breached by Lithuania due to the lack of information on the communication on board the vessel between the shipmaster, crew, and migrants. However, Article 5(4) was breached by Lithuania seeing there was no effective and accessible remedy available to the migrants as the vessel continued its sailing in the Black Sea.

Additionally, Lithuania, which had *de jure* jurisdiction over the vessel in accordance with the flag state principle, breached its positive obligations under Article 5 and the Convention in general. Lithuania was aware that the twelve migrants were detained on board *Kaunas Seaways* but did not take any steps towards ending the deprivation of liberty despite having the option as well as the obligation to do so. Thus, Lithuania acquiesced to the violation of Article 5 of the ECHR committed by private persons. Furthermore, it does not appear from the facts of the case that Lithuania struck a fair balance between the general interest of the Lithuanian community and the migrants' interests.

6. Conclusion

The purpose of this thesis was to examine whether the flag state Lithuania can be held responsible for potential breaches of Article 5 of the ECHR committed on board the privately-owned vessel *Kaunas Seaways.*

UNCLOS and the FAL Convention set forth several obligations for the flag state. Article 91 of UNCLOS states that a vessel is jurisdictionally connected with its flag state, and Article 92 of said convention confirms the flag state's exclusive jurisdiction over vessels flying its flag. Under Article 94 of UNCLOS, the flag state has several duties, *e.g.* it is obligated to exercise effective jurisdiction and control over the vessel and apply its domestic law to the vessel, crew, and both legal and illegal passengers. Stowaways are therefore also covered by these regulations.

The FAL Convention contains several safeguards for stowaways which must be respected by the flag state, shipowner, and shipmaster. Under this convention, stowaways must be treated in accordance with international protection principles and humanitarian principles embodied in international instruments as well as be returned or repatriated quickly.

Stowaways, if they are under a contracting state's jurisdiction, are protected by the ECHR. Therefore, stowaways are covered by the right to liberty and security enshrined in Article 5 of the Convention, and any infringement of this right must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society, which includes absence of arbitrariness. The right to freedom and security also entails the right to be notified of the reasons for an arrest or detention and the right to judicial review as these are contained in Article 5(2) and (4) respectively.

The ECHR therefore takes over when the regulations contained in UNCLOS and the FAL Convention become insufficient.

The analysis of several judgments from the ECtHR substantiates how the ECHR applies extraterritorially at sea if the state in question has jurisdiction in the sense of Article 1 of the Convention. Extraterritorial jurisdiction under Article 1 manifests in two situations; if the state has *de jure* jurisdiction in accordance with the flag state principle, or if the state has *de facto* jurisdiction by exercising effective control and authority over individuals or vessels.

In the *Kaunas Seaways* incident, Lithuania had *de jure* jurisdiction because the vessel was flying the Lithuanian flag. Therefore, Lithuanian law and the state's obligations under the ECHR applied to the vessel and the stowaways were thus covered by it.

Regarding the *de facto* jurisdiction in the incident, the shipmaster, crew, and guards on board *Kaunas Seaways* exercised effective control over the stowaways. This control can be attributed to the Lithuanian state if the shipmaster acted as a state agent, as the flag state was in a position to require him to act in a certain way. Should the shipmaster not be considered a state agent, Lithuania as a state must have been in effective control of the situation on board the vessel when it claimed responsibility for the situation upon hearing of it by trying to resolve it.

Should the Court find that the state had *de facto* jurisdiction, it can be held responsible for its negative obligations under the ECHR. Lithuania had undisputedly *de jure* jurisdiction in the *Kaunas Seaways* incident, and the state's responsibility for its positive obligations under the Convention can thus be engaged.

Almost all of the articles in the ECHR contain both a negative and a positive obligation. The positive one is especially relevant if the state in question lacks effective control. Not only the articles contain a positive obligation, the Convention itself does too. The latter is derived from Article 1 and requires the state to take the diplomatic, economic, judicial, or any other measure in its power to secure the Convention rights against violations by private persons. Under this obligation, it is relevant to examine the state's possibility of solving the situation.

From Article 5(1), a positive obligation derives as well. It stipulates that state authorities must provide effective protection to vulnerable individuals, including taking reasonable steps to prevent deprivation of liberty. Therefore, the state must establish control and supervision mechanisms that ensure the review of the lawfulness of any deprivation of liberty.

Positive obligations under the Convention and Article 5(1) only apply if the state knew or ought to have known of the potential breach of the Convention right. The scope of these obligations is affected by the margin of appreciation.

The analysis of whether Lithuania breached its obligations in relation to the *Kaunas Seaways* incident shows that if the Court should find that the state had *de facto* jurisdiction, it breached its negative obligations under Article 5(1). The incident entailed a deprivation of liberty of the twelve migrants which indubitably was prescribed by law but did not fall within any of the grounds in Article 5(1)(a)-(f). Furthermore, the detention was an arbitrary measure because of its inappropriate setting, poor detention conditions, and excessive length.

Regarding the explicit positive obligations contained in Article 5 it cannot be concluded whether Lithuania breached the safeguard in Article 5(2) because it is unknown how the shipmaster, crew, and migrants communicated and thus if it was possible to inform the migrants of the reasons for their detention. Nevertheless, it can be concluded that Lithuania breached Article 5(4) as there was no effective and accessible remedy available to the migrants for them to get the lawfulness of their detention reviewed.

Lithuania, having *de jure* jurisdiction, breached its positive obligations 'inherent' in the Convention and Article 5(1). Lithuania was aware of the twelve migrants' deprivation of liberty but cannot be considered as having taken any measure in its power to secure the migrants' human rights, including their right to freedom and security under Article 5. The state could easily have removed the migrants from *Kaunas Seaways* and placed them in a reception centre in Lithuania until a solution was found. Instead Lithuania acquiesced to the detention committed by private persons by not ending it sooner.

Consequently, Lithuania was complicit in human rights violations committed extraterritorially aboard *Kaunas Seaways* and can therefore be held accountable for these breaches.

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