

International State Responsibility: The Role of Italy in Outsourcing Migration Management to Libya

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Abstract

The 2007 Memorandum of Understanding between Italy and Libya entrusts the Libyan authorities with the authority to manage exit control to prevent refugees and migrants to cross the Mediterranean towards Europe. As the paper sought to establish, the Libyan authorities' implementation of these measures infringes not only refugees and migrants' right to leave but also their right to access to international protection. Besides, Italy, by eliminating any territorial or physical contact between refugees and migrants and the Italian authorities, obstructs jurisdiction under international human rights law. That being said, this dissertation attempts to demonstrate that Italy cannot divest itself from its liability. By venturing into responsibility in general international law, this article considers Italy's possible responsibility for aiding and assisting Libya in the unlawful containment of refugees and migrants in Libya.

Keywords: aiding and assisting, migration control, Libya, Italy, International State Responsibility, prohibition of torture and ill-treatment

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List of abbreviation

ASR	ILC Draft Article on State Responsibility
CAT	1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUBAM	EU's Border Assistance Mission
EUNAVFOR MED	European Union Naval Force Mediterranean
Frontex	European Border and Coast Guard Agency
GC	1951 Geneva Convention
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
IOM	International Organization for Migration
Libyan authorities	UN-backed Libyan Government of National Accord
MoU	Memorandum of Understanding
MSF	Médecins Sans Frontières
UNHCR	United Nations High Commissioner for Refugee
UDHR	Universal Declaration of Human Rights
OHCHR	United Nations Office of the High Commissioner for Human Rights
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNSMIL	United Nations Support Mission in Libya

I. INTRODUCTION

In the past, the European Union (hereinafter EU) and its Member States have conducted rescue operations to render assistance to migrants in distress at the Mediterranean Sea. The tension between the EU Member States' human rights obligation and their interest in reducing the arrival of refugees and migrants,¹ however, has led them to shift their approach progressively towards externalizing border control measures to transit countries outside of Europe.²

In order to reduce the number of people arriving in Europe, EU Member States have intensified their actions making use of violent push-back measures.³ However, in 2012 the European Court of Human Rights (hereinafter ECtHR) found in the *Hirsi Jamaa and Others v. Italy* judgment that Italy violates its obligation under the European Convention on Human Rights (hereinafter ECHR) and its Protocols by intercepting migrants at sea and forcibly returning them to Libya.⁴ In view of this decisive judgment, Italy and other EU Member States moved towards measures that would prevent the entry of refugees and migrants to Europe in the first place.⁵ By doing so, EU Member States expect to circumvent human rights bodies' jurisdiction and dilute their international responsibility. Among these measures, the EU Member States adopted agreements⁶ with and funding programs⁷ for third countries as to ensure that their authorities would be the primary actors intercepting migrants and bringing them back to the third countries' territory. One of the first chapters of this new era of cooperation in combating irregular migration and border control between EU Member States

¹ Note that notion 'refugees and migrants' will be used to refer to movements of people that may include, refugees, asylum seekers, irregular migrants, and other migrants.

² Amnesty International, 'Libya's Dark Web of Collusion: Abuses Against Europe-Bound Refugees and Migrants' (2017) MDE 19/7561/2017 9 <<https://www.amnesty.org/en/documents/document/?indexNumber=mde19%2f7561%2f2017&language=en>> accessed 5 July 2018.

³ Human Rights Watch, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (2009) <www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-and-asylum-seekers> accessed 20 June 2018.

⁴ *Hirsi Jamaa and Others v Italy* [2012] (Judgment) ECHR 27765/09 §§173-182.

⁵ Amnesty International (n 2) 45.

⁶ Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la grande Giamahiria araba libica popolare socialista 30 August 2008 <<http://www.perfar.eu/policies/treaty-friendship-partnership-and-cooperation-between-italian-republic-and-great-0>> accessed 5 July 2018; Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Great Socialist People's Libyan Arab Jamahiriya on Mutual Legal Assistance in Criminal Matters. (17 November 2008) <<http://www.perfar.eu/policies/treaty-friendship-partnership-and-cooperation-between-italian-republic-and-great-0>> accessed 5 July 2018.

⁷ European Commission, EU Trust Fund for Africa adopts €46 million programme to support integrated migration and border management in Libya (28 July 2017) <europa.eu/rapid/press-release_IP-17-2187_en.htm> accessed 25 June 2018.

and third countries is the bilateral Memorandum of Understanding (hereinafter MoU) concluded in 2017 between Italy and the UN-backed Libyan Government of National Accord (hereinafter Libyan authorities).⁸ This bilateral collaboration agreement raises particular concerns, because the risk that by externalizing border control measures refugees and migrants' rights will be infringed, is in Libya almost a certainty. Indeed, a high number of UN and NGO documents have continually reported the various human rights violations refugees and migrants are subjected to in Libya.⁹ Thus, the MoU raises pressing legal issues for refugees and migrants with respect to their human right to leave, whilst restricting their access to international protection, secured by the right to seek asylum and the principle of non-refoulement.

So far, the legal discussion has largely focused on the potential violations of primary rules of international law, including acts of torture or other ill-treatment committed by the Libyan authorities¹⁰ or the unlawfulness of Italy's 'push back' policy.¹¹ The issue of applicability of the secondary rules of international responsibility that provide for the consequences of the assistance to the commission of a wrongful act has attracted less attention.¹² But where human rights law courts are constrained because of a lack of a jurisdictional link between the State and affected individuals, the issue raises of whether there are other avenues to hold State responsible, *in casu* Italy, for the aid and assistance offered to third countries to prevent migrants to cross the Mediterranean Sea towards Europe.

This being said, the central question this study will attempt to address is whether Article 16 of the International Law Commission's Draft Articles on International State Responsibility (hereinafter ASR) offers an autonomous avenue for holding Italy responsible for the aid and

⁸ Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana (2 febbraio 2017) <www.governo.it/sites/governo.it/files/Libia.pdf> accessed 20 June 2018.

⁹ Amnesty International (n 2).

¹⁰ Human Rights Watch, 'World Report 2018: Events of 2017' (2018) <https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf> accessed 25 June 2018; UNSMIL and UNOHCHR, 'Overview of Violations of International Human Rights and Humanitarian Law During the Ongoing Violence in Libya' (2014) <https://www.ohchr.org/Documents/Countries/LY/OverviewViolationsLibya_UNSMIL_OHCHR_Sept04_en.pdf> accessed 3 July 2018.

¹¹ Human Rights Watch, (n 3); *Hirsi Jamaa and Others v Italy* (n 4).

¹² See: Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 *European Journal of International Law* 591; OHCHR, 'Report by Special Rapporteur on Torture' (2018) UN Doc A/HRC/37/50.

assistance it offers Libyan authorities in the implementation of the migration policies that aim to stem the migration flows towards Europe.

To approach the subject of this study properly, Chapter two elaborates, first of all, on the human rights context for refugees and migrants in Libya. It will then examine the nature and the scope of the MoU establishing the cooperation between Italy and the Libyan authorities in view of restricting the access of refugees and migrants to Europe. The text portrays the baseline of the Italian-Libyan migration policy, which will help to assess the degree of assistance Italy provides to Libya. Aware of the fact that the two countries have engaged in a plethora of agreements on migration policies that would offer a more conclusive portray of their cooperation, these will not be discussed here because not all agreements are made publicly available. Moreover, there is an important lack of information on the effective implementation of these accords. For example, while the MoU may entrust Libyan authorities with border control management, the implementation of the agreement in practice may, in fact, give rise to a more complex scenario, where Italian authorities are involved at varying degrees.

The third Chapter then addresses the direct legal implication Libya's exit control measures established by the MoU have on refugees and migrants' rights in Libya. This will determine the primary responsibility of Libya, necessary for the assessment in the subsequent Chapter.

Indeed, the fourth Chapter will address the derived responsibility Italy may incur for its aid and assistance to the Libyan authorities in the execution of these migration policies. While aware that the current lack of authority in Libya has led to a situation where various militias and non-State actors have taken over migration control activities, this research will confine itself to the Libyan authorities' implementation of the migration policies. In a similar way, it is absolutely worth noting that the cooperation between Italy and Libya is part of a broader EU migration containment strategy that involves numerous States, the EU as well as organizations such as the European Border and Coast Guard Agency (hereinafter Frontex). This contextual complexity due to the various actors involved in migration control activities raises additional questions with regard to the erosion of responsibility among them. However, these questions are beyond the scope of this study. Finally, the conclusion will sum up the findings.

By exploring alternative avenues to hold State responsible for their aid and assistance, the dissertation hopes to contribute to the more general understanding of the current drive towards outsourcing migration control activities to third States. It suggests that the legal analysis under

general international law of the Italy-Libya cooperation in migration control is pertinent for other situations in which refugees and migrants are encountered in comparable settings where third countries perform migration control management in cooperation with EU Member States outside their jurisdiction. For example, French, Italian, German and Spanish leaders have negotiated an action plan with Chad and Niger to stem the flow of migrants through Libya and across the Mediterranean.¹³ A similar objective is pursued in the *Joint Way Forward Declaration on Migration* between the EU and Afghanistan¹⁴ and affirmed in the *EU-Mali Joint Communiqué*.¹⁵ Hence, it could serve as a point of reference in similar cases for court and tribunals as well as for legal practitioners and policymakers.

In any event, other international law provisions than those ruling International State Responsibility may be relevant on the same fact such as assistance rules in international human rights law or individual criminal responsibility of governmental officials pursuing activities that amount to the adding and abetting of war crimes. These questions would need to be considered in parallel but are beyond the scope of this thesis.

¹³ Patrick Wintour and Kim Willsher, 'African and European Leaders Agree Action Plan on Migration Crisis' (*the Guardian*, 28 August 2017) <<http://www.theguardian.com/world/2017/aug/28/emmanuel-macron-hosts-summit-to-tackle-migration-crisis>> accessed 22 June 2018.

¹⁴ European Commission, 'Joint Way Forward on Migration Issues between Afghanistan and the EU' (*EEAS - European External Action Service*) <[https://eeas.europa.eu/generic-warning-system-taxonomy/404_en/11107/Joint Way Forward on migration issues between Afghanistan and the EU](https://eeas.europa.eu/generic-warning-system-taxonomy/404_en/11107/Joint_Way_Forward_on_migration_issues_between_Afghanistan_and_the_EU)> accessed 11 July 2018.

¹⁵ European Commission, 'Joint Communiqué on the High-Level Dialogue on Migration of 16 April 2016 in Côte d'Ivoire' (*EEAS - European External Action Service*) <[https://eeas.europa.eu/generic-warning-system-taxonomy/404_en/5178/Joint Communiqué on the High-Level Dialogue on Migration of 16 April 2016 in Côte d'Ivoire](https://eeas.europa.eu/generic-warning-system-taxonomy/404_en/5178/Joint_Communique_on_the_High-Level_Dialogue_on_Migration_of_16_April_2016_in_Cote_dIvoire)> accessed 11 July 2018.

II. THEORETICAL BACKGROUND

The following Chapter will first provide an initial overview of the situation in Libya and secondly discuss the content of the MoU cooperation agreement between Libya and Italy. This will form the basis for the ensuing analysis and discussion.

2.1 Human rights situation in Libya

In Libya, the dire situation of refugees and migrants has been extensively documented in recent years. Pursuant to the United Nations High Commissioner for Refugees (hereinafter UNHCR), over 50'000 refugees are registered in Libya,¹⁶ while others have suggested that the real number is much higher. Thousands of migrants continue to enter Libya to flee from war and violence or other situations of distress. Arriving in Libya, they are confronted with a reality remarkably different from their expectations.¹⁷

The terrible situation for migrants in Libya had already been highlighted in a joint report issued in 2014 by United Nations Support Mission in Libya (hereinafter UNSMIL) and the United Nations High Commission of Human Rights (hereinafter OHCHR).¹⁸ In response, the United Nations Security Council (hereinafter UNSC) condemned in Resolution 2144/2014 cases of torture, mistreatment, and deaths in detention centers in Libya.¹⁹ More recently, the United Nations Secretary General (hereinafter UNSG) claimed that he was horrified by the video footage CNN had published, showing sub-Saharan migrants being sold off as slaves in Libya.²⁰ The chief persecutor of the International Criminal Court (hereinafter ICC), Fatou Bensouda, has also expressed her deep concern with regard to the situation of migrants detained and exposed to allegedly serious and widespread abuses.²¹ UN Human Rights experts including the Special Rapporteur on the human rights of migrants, Felipe González Morales, and the Special Rapporteur on torture, Nils Melzer have continually expressed their serious concern

¹⁶UNHCR Libya operational update, 'UNHCR Flash Update' (2018) Situation Report/Updates <<https://data2.unhcr.org/en/documents/details/64649>> accessed 8 July 2018.

¹⁷Amnesty International (n 2) 22.

¹⁸ UNSMIL and UNOHCHR (n 10).

¹⁹ UNSC Res 2144 (14 March 2014) <[https://undocs.org/S/RES/2144\(2014\)](https://undocs.org/S/RES/2144(2014))> accessed 24 June 2018.

²⁰ Raja Razek and others, 'People for Sale: Where Lives Are Auctioned for \$400' (*CNN*) <<https://www.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>> accessed 13 July 2018; Richard Roth, 'UN Chief: Libya Slave Auctions May Be Crimes against Humanity' *CNN* (20 November 2017) <<https://edition.cnn.com/2017/11/20/africa/un-secretary-general-libya-slave-auctions/index.html>> accessed 23 June 2017.

²¹ ICC Office of the Prosecutor, 'ICC Prosecutor, Fatou Bensouda, Condemns Recent Violence in Benghazi, Libya' (26 January 2018) <<https://www.icc-cpi.int/Pages/item.aspx?name=180126-otp-stat>> accessed 14 July 2018.

over a new European Migration policy on the Mediterranean Sea that “threatens life and breaches international standards by condemning people to face further human rights violations in Libya”.²²

According to the EU Border Assistance Mission’s (hereinafter EUBAM) Libya Initial Mapping Report of January 2017, about 4,000 refugees and migrants were detained in Libya at that time in condition where they were subject to “gross human rights violations and extreme abuse and mishandling of detainees, including sexual abuse, slavery, forced prostitution, torture and maltreatment”.²³ In 2017, Médecins Sans Frontières (hereinafter MSF) described the condition it discovered during visits of detention centres in and around Tripoli as inhumane.²⁴ Moreover, the International Organization for Migration (hereinafter IOM) estimated that 71% of refugees and migrants traveling to Europe through the Central Mediterranean route had been subjected to human trafficking and exploitation.²⁵ Human Rights Watch and Amnesty International have offered extensive documentation on the situation of refugees and migrants in Libya demonstrating that they continue to be subject to widespread human rights violations including torture, forced labor, slavery and sexual violence.²⁶ Besides, Libya has not ratified the 1951 Geneva Convention (hereinafter GC), does not have a national asylum system in place and the UNHCR activities are often impacted due to the lack of formalized presence in Libya.²⁷ In view of all this the IOM, the UNHCR, and the ECtHR, considered that the situation in Libya is such that the country can under no circumstances be regarded as a safe third country for refugees and migrants.²⁸

²² OHCHR, ‘EU “Trying to Move Border to Libya” Using Policy That Breaches Rights – UN Experts’ *News and Events* (Geneva, 17 August 2017) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21978&LangID=E>> accessed 25 June 2018.

²³ Council of the European Union, ‘EUBAM Libya Initial Mapping Report Executive Summary’ (2017) European External Action Service EEAS (2017) 0109 <<http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>> accessed 26 June 2018.

²⁴ Médecins Sans Frontières, ‘MSF Warns of Inhumane Detention Conditions in Libya as EU Discusses Migration’ (2017) <www.doctorswithoutborders.org/article/msf-warns-inhumane-detention-conditions-libya-eu-discusses-migration> accessed 27 June 2018.

²⁵ Eliza Galos and others, *Migrant Vulnerability to Human Trafficking and Exploitation Evidence from the Central and Eastern Mediterranean Migration Routes* (International Organization for Migration 2017) XV <<https://publications.iom.int/books/migrant-vulnerability-human-trafficking-and-exploitation-evidence-central-and-eastern>> accessed 7 July 2018.

²⁶ Amnesty International (n 2); Human Rights Watch, ‘Italy: Navy Support for Libya May Endanger Migrants’ (2017) <www.hrw.org/news/2017/08/02/italy-navy-support-libya-may-endanger-migrants> accessed 20 June 2018.

²⁷ Amnesty International (n 2) 7.

²⁸ UNSMIL and UNOHCHR (n 10); *Hirsi Jamaa and Others v Italy* (n 4) §§127-138.

2.2 The 2017 Memorandum of Understanding between Italy and Libya

There is a long track record of cooperation in the field of migration between Italy and Libya. During the 2000s, Italian Prime Minister Silvio Berlusconi concluded agreements with the Libyan Al-Gaddafi administration to reduce migration flows towards Europe.²⁹ However, this partnership was suspended in 2011 due to the decisive change in circumstances rendering Italy's migration policy no longer sustainable. It started with the outbreak of civil war in Libya that led to the fall of the Al-Gaddafi administration and it was followed by the *Hirsi Jamaa and Others v. Italy* judgment, in which the ECtHR found that Italy's interception of refugees and migrants at sea and forcibly returning them to Libya, constituted a violation of Italy's following obligations under the Convention and its Protocols: Firstly, a violation of Article 3 of the ECHR on a double count, namely a violation due to the risk to be subject to torture, inhumane and degrading treatment in Libya as well as because of the systematic shortcomings in Libya that have led to the expulsion of refugees and migrants to further countries without sufficient assessment of the risk that they will be exposed to torture or other ill-treatment in these countries (also known as 'chain-refoulement').³⁰ Secondly, Article 4 of Protocol no. 4 of the ECHR prohibiting collective expulsion.³¹ Thirdly, Article 13 ECHR guaranteeing domestic remedies for any alleged violation enshrined in the Convention.³²

For many years the European approach towards refugees and migrants prioritized their rescue. But, by 2016, EU Member States expressed an increasing reluctance to share responsibility for the reception and integration of refugees and migrants crossing the central Mediterranean from Libya to Italy. Their approach shifted progressively towards externalizing border control to transit countries outside of Europe.³³ It is in this context that the Italian Prime Minister Gentiloni concluded on 2 February 2017 a bilateral MoU with Fayeze al-Serraj, Head of the Libyan authorities "on cooperation in the development sector, to combat illegal immigration, human trafficking and contraband and on reinforcing the border security".³⁴ The MoU revitalized a full array of measures of the 2008 *Treaty of Friendship, Partnership and Cooperation* between Italy and the Al-Gaddafi administration, which had seemingly been

²⁹ Treaty of Friendship, Partnership and Cooperation, (n 6).

³⁰ *Hirsi Jamaa and Others v Italy* (n 4) §158.

³¹ *ibid* §186.

³² *ibid* §207.

³³ Amnesty International (n 2) 9.

³⁴ MoU, (n 8).

suspended during the Libyan civil war.³⁵ The old cooperation agreement already foresaw an important part of Italy's financial and technical support to Libya's containment of migrants. But, the new partnership agreement between Italy and Libya goes even further this time.

The MoU consists of a three-page-long document structured in a preamble followed by eight articles. The preamble reaffirms:

“the resolute determination to cooperate in identifying urgent solutions to the issue of clandestine migrants crossing Libya to reach Europe by sea, through the provision of temporary reception camps in Libya, under the exclusive control of the Libyan Ministry of Home Affairs, pending voluntary or forced return to the countries of origin.”³⁶

What is striking is that it only envisages two options, namely repatriation and voluntary return, both not providing an alternative to people in need of international protection.³⁷

Article 1 explicitly states that the parties' objective is to “commit to start cooperation initiatives [...] in order to stem the illegal migrants' fluxes [emphasis added] and face the consequences coming from them”.³⁸ To do so, Italy commits to offer to the Libyan authorities technical as well as training and financial support to combat irregular migration.

Italy accepts under Article 2 of the MoU, to fund the establishment of reception centers in Libya where refugees and migrants wait for their voluntary or forced return to their home countries. It also ensures that the Libyan personnel working in these centers will be provided with training, medicines and other means necessary to ensure the health needs of refugees and migrants detained in these centers. As well as that, Italy agrees to the establishment of a land border control system in southern Libya, to offer support to international organizations operating with refugees and migrants in Libya, and to invest in development programs in the region to contribute to the job creation.³⁹

Under Article 3 of the MoU the parties agree to the creation of a mixed committee to implement the MoU, Article 4 of the MoU concerns the financing, Article 5 emphasizes that

³⁵ Treaty of Friendship, Partnership and Cooperation, (n 6).

³⁶ MoU, Preamble (n 8).

³⁷ See : Anja Palm, ‘The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?’ [2017] EU Immigration and Asylum Law and Policy <<http://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>> accessed 25 June 2018; Médecins Sans Frontières (n 24).

³⁸ MoU, Article 1 (n 8).

³⁹ *ibid*, Article 2.

the MoU is to be interpreted and applied in respect of international law and international human rights obligations the two parties are bound to, and Article 6-8 address technical matters, such as dispute settlements, procedural amendments and the period of the agreement. Overall, the MoU is phrased rather in general terms, offering the parties a broad margin of maneuver in the implementation of the migration control activities and its funding. It is also worth noting that the text of the MoU offers no precise delimitation of the personal scope nor a distinction between nationals, third State nationals, asylum seekers and irregular migrants.

For the effective implementation of the MoU, Italy attempted to ensure that the Libyan authorities are the primary actor to intercept migrants at sea and to bring them back to Libya. Thus, the Italian government - backed by other EU governments and institutions - decided to adopt a 'code of conduct' that restricts the work of NGOs conducting rescue operations at sea.⁴⁰ Financially, Italy together with the EU announced on the 28 November the support of 285 million euros to reinforce the capacities of the Libyan migration authorities.⁴¹

The MoU is only a first chapter of a new era of cooperation in combating irregular migration and border control between EU Member States and third countries, as it shifts the focus to the Central Mediterranean route. The text was endorsed by the EU in the Malta Declaration⁴² and a significant financial support channeled through the EU Trust Fund for Africa.⁴³ Thus, the MoU should be read within the broader EU containment strategy, supporting increasing bilateral cooperation between EU Member States and third countries in order to prevent arrivals in Europe.⁴⁴

To resume, this section has attempted to offer a brief overview of the current situation for refugees and migrants in Libya and to expose the content of the core document determining the cooperation between Libya and Italy on migration control policies. Depicting the main element of the Italy-Libya cooperation is necessary for the analysis of International State Responsibility under the ASR. It enables an assessment of the degree of assistance Italy

⁴⁰ Ministero dell'Interno Codice di condotta per le ONG impegnate nel salvataggio dei migranti in mare (7 August 2017) <<http://www.interno.gov.it/it/servizi-line/documenti/codice-condotta-ong-impegnate-nel-salvataggio-dei-migranti-mare>> accessed 15 June 2018.

⁴¹ Nikolaj Nielsen, 'EU and Italy Put aside €285m to Boost Libyan Coast Guard' *euobserver* (Brussels, 29 November 2017) <<https://euobserver.com/migration/140067>> accessed 20 July 2018.

⁴² European Council, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route (3 February 2017) <www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/#> accessed 25 June 2018.

⁴³ European Commission, (n 7).

⁴⁴ Wintour and Willsher (n 13).

provides to Libya. The following Chapter will examine the direct legal implications the implementation of the migration policies established by the MoU have on refugees and migrants' human rights in Libya. This will be relevant to determine subsequently the International State Responsibility Italy may incur for its aid and assistance to the Libyan authorities infringing refugees and migrants' human rights when implementing these policies.

III. DEPARTURE PREVENTION: LEGAL IMPLICATIONS

Italy's cooperation with the Libyan authorities is frequently portrayed as a humanitarian response to the so-called 'migration/refugee crisis' and as serving an absolutely noble goal, namely saving lives, preventing migrants from taking the dangerous journey, or the dismantling of traffickers and smugglers' network.⁴⁵ Framed this way, the compatibility of the above-discussed cooperation agreement with international human rights and refugee law is often taken for granted.

Despite this humanitarian discourse that tries to deviate the attention from the primary goal, the MoU and the reported practices of its implementation demonstrates how Italy, in fact, collaborates with the Libyan authorities to prevent departures and halt arrivals in Europe.⁴⁶ The MoU is one of several examples of how EU Member States displace the border management closer to the point of departure and eliminate any territorial or physical contact between refugees and migrants and the Italian authorities that would trigger Human Right Courts' jurisdiction. Indeed, Italy requests Libya to conduct pre-emptive rescues, exit prevention, pre-removal detention within or repatriation from Libya in exchange for development aid and other benefits.⁴⁷ By doing so, Italy does not engage its own border authorities and successfully circumvents the refoulement responsibility the ECtHR had established.⁴⁸ It obviously follows that these practices transform pre-entry control into exit prevention that denies refugees and migrants the exercise of their right to leave, the pre-condition for individuals to exercise their right to seek asylum and to be protected from refoulement.⁴⁹ Thus, it is worth recalling the basic content as well as the intertwined relationship of these key protections for individuals contained by outsourced migration control measures. This will be followed by a brief discussion on the alleged primary obligations' infringement of Libya when implementing the migration policies established by the MoU.

⁴⁵ MoU, (n 8).

⁴⁶ Human Rights Watch (n 26); Human Rights Watch, (n 3); Amnesty International (n 2).

⁴⁷ MoU, (n 8).

⁴⁸ *Hirsi Jamaa and Others v Italy* (n 4).

⁴⁹ See: Markard (n 12); Violeta Moreno-Lax and Mariagiulia Giuffr , 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' (Social Science Research Network 2017) ID 3009331 <<https://papers.ssrn.com/abstract=3009331>> accessed 30 July 2018.

3.1 Normative context

The right to leave as provided under Article 12 (2) of the International Covenant on Civil and Political Rights (hereinafter ICCPR)⁵⁰ belongs to citizens and aliens alike irrespective of the legality of their entry and presence.⁵¹ In contrast to the principle of non-refoulement under the 1984 UN Convention against Torture (hereinafter CAT),⁵² the right to leave is not absolute and may be subject to lawful derogation pursuant to Article 4 ICCPR. Article 12(3) ICCPR permits restrictions in accordance with the law and necessary for the purpose of protecting national security, public order, public health and the morals or the rights and freedoms of others. Moreover, any restriction must be proportionate (not generally),⁵³ cannot be discriminatory and has to be consistent with other rights of the Convention.⁵⁴ The Human Rights Committee (hereinafter HRC) emphasizes in General Comment no. 27 that any restriction “must not impair the essence of the right”.⁵⁵ Neither the ECtHR jurisprudence nor the ICCPR General Comment no. 27 suggests that an interference could be justified by the protection of the laws and interests of the destination State.⁵⁶ Even under the law of the sea, restrictions would be permissible only in very limited cases, and even under these circumstances, human rights guarantees continue to apply.⁵⁷ Thus, any generalized practice preventing departures on land or by sea would constitute an intrusion with the right to leave.⁵⁸

The confines of the right to leave ensue from the fact that there is no complementary right of entry in international law. The international legal system has left entry regulations in the power of the destination State.⁵⁹ However, the States’ power to control their border is considerably restricted by the right to seek asylum and in particular the principle of non-refoulement.⁶⁰

⁵⁰ Italy (1978) and Libya (1970) have ratified the ICCPR.

⁵¹ UN Human Rights Committee ‘General Comment 27’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (2 November 1999) CCPR/C/21/Rev.1/Add.9 §4.

⁵² Italy (1989) and Libya (1989) have ratified the CAT.

⁵³ UN Human Rights Committee (n 51) §14.

⁵⁴ *ibid* §18.

⁵⁵ *ibid* §13.

⁵⁶ See: Markard (n 12) 606.

⁵⁷ *Hirsi Jamaa and Others v Italy* (n 4) 78. For an analysis of the law of the sea in the current migration context see: Markard (n 12).

⁵⁸ UN Human Rights Committee (n 51) §16.

⁵⁹ See: Markard (n 12) 595.

⁶⁰ Kay Hailbonner, ‘Comments on the Right to Leave, Return and Remain’ in Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff Publishers 1996) 114; Markard (n 12) 595.

The right to seek asylum, which is first found under Article 14 of the Universal Declaration of Human Rights (hereinafter UDHR), does not provide individuals a right to asylum but foresees that States have at least a duty not to obstruct the access to an asylum procedure.⁶¹ Even though the right to seek asylum has never been incorporated in a *strictu sensu* legal binding instrument, many argue that it constitutes a norm of customary international law.⁶²

It is with the adoption of Article 31 and 33 of the GC that the State's power to control their border has been significantly limited.⁶³ Article 31 GC provides that refugees may not be penalized for their unlawful entry and Article 33 GC offers the cornerstone of international refugee protection, prohibiting the return of a refugee "where his life or freedom would be threatened".⁶⁴ Article 3 of the CAT extends the *refoulement* protection even further to anyone who is at risk of torture, inhuman or degrading treatment. In contrast to international refugee law, under international human rights law the customary protection from *refoulement* is absolute and non-derogable.⁶⁵ Besides, the principle of non-*refoulement* as a corollary of the prohibition of torture enjoys the peremptory status, and thus sets aside national laws as well as contradicting international obligations.⁶⁶

Under both, international human rights law and refugee law, the evaluation of whether the country of return is safe is a *condition sine qua non* of the principle of non-*refoulement*.⁶⁷ The ECtHR has set rather clear conditions States must assess in order to return refugees and migrants to a third country. This includes a verification of the country of return's compliance with international law, migrants' access to procedure evaluating their personal circumstances,

⁶¹ Hailbonner (n 60) 114.

⁶² See: William Thomas Worster, 'The Contemporary International Law Status of the Right to Receive Asylum' (2014) 26 International Journal of Refugee Law 477; Kay Hailbonner and Jana Gogolin, 'Asylum, Territorial' [2013] Max Planck Encyclopedia of Public International Law [MPEPIL] <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e757>> accessed 25 June 2018.

⁶³ Hailbonner (n 60) 114.

⁶⁴ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

⁶⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987) 1465 UNTS 85 (CAT); UN Committee Against Torture, 'General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22' (9 February 2018) CAT/C/GC/4 § 9-10.

⁶⁶ UN Committee Against Torture (n 65) §25; UN ILC Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001) General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10) Art. 41(2).

⁶⁷ UN Committee Against Torture (n 65) §11.

and a fair and effective decision-making process offering the possibility to appeal any decision.⁶⁸ Besides, the ECtHR has ruled out any policy of automatically returning migrants – such as so-called ‘fast track’ screenings’ - even to countries that can generally be regarded as safe.⁶⁹ Similarly, when States are confronted with a mass influx of refugees and migrants, they have no absolute discretion in their action. In fact, States have a duty not only under international human rights law and refugee law but also under the law of the sea, to carry individuals rescued at sea to places of safety.⁷⁰

In practice, for a person to be able to seek asylum or to have access to protection against refoulement it must cross an international border and get to another country.⁷¹ Following a good faith interpretation of the principle of non-refoulement supported by the ECtHR,⁷² this principle amounts to a *de facto* duty of States not to obstruct their right to leave and to admit refugees and migrants, being the only means to avoid their exposure to be subject to torture and ill-treatment.⁷³

This being said, this section has attempted to establish the intertwined relationship between the right to leave, the right to seek asylum and the protection from refoulement, demonstrating that the right to leave a country is the precondition for the enjoyment of international protection. It will now turn to the discussion on the impact Libya’s exit control measures – agreed upon in the MoU – have on these rights.

3.2 Migration control measures: Libya’s primary responsibility

Actions by Libya under the respective deals with Italy compromise the right to leave. It is not because measures of migration control are violations of the right to leave *per se* but they have to comply with the exhaustive grounds of restriction provided by Article 12 (3) ICCPR. It is doubtful that preventing individuals to leave a country in order to please a foreign country can comply with any permissible grounds of restriction of the right to leave.⁷⁴ Besides, considering the general character of the measures taken to prevent migrants and refugees to

⁶⁸ *ibid* §13.

⁶⁹ *Hirsi Jamaa and Others v Italy* (n 4) §185.

⁷⁰ International Convention on Maritime Search and Rescue (SAR) (1979) 1405 UNTS 97 modified by Resolution MSC.155(78) (20 May 2004) (SAR), Annex 1.3.2; MSC Resolution 167(78) on Guidelines on the Treatment of Persons Rescued at Sea (MSC Guidelines) (20 May 2004) MSC 78/26/Add.2, Annex 34 §6.12.

⁷¹ Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Springer 1987) 50.

⁷² *MSS v Belgium and Greece* [2011] (Judgment) ECHR 30696/09; *Hirsi Jamaa and Others v Italy* (n 4) §179.

⁷³ James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005).

⁷⁴ Markard (n 12) 599; Hailbonner (n 60) 111.

leave, these can hardly meet the principle of necessity and proportionality. Indeed, under no circumstances can security interests offer alternatives for individual assessment, and even less so the interests of the State of destination.

Besides, the intertwined relationship between the right to leave and the right to seek asylum discussed above means that a violation of the former will indirectly entail a denial of the latter too.⁷⁵ Libya has never established an asylum procedure nor adopted a national legal framework in this regard. Those refugees and migrants crossing the Mediterranean Sea in order to apply for asylum in Europe are denied their right to do so when intercepted by Libyan authorities trained and equipped by Italy. The combined right to leave in order to seek asylum must, therefore, be accounted in the context under scrutiny.

Moreover, the measures are problematic with the principle of non-refoulement for two reasons. First, migrants in Libya are not only at risk of being subject to torture, inhumane and degrading treatment, but the systematic shortcomings in Libya have reportedly also led to the ‘chain-refoulement’.⁷⁶ Such conduct may amount to a violation of the customary principle of non-refoulement, which also enjoys the peremptory status as a corollary to the prohibition of torture.⁷⁷

Secondly, as discussed above, this principle ensures to those who escape torture or ill-treatment or to those who be deported to the country they first fled a limited ‘right to enter’ another State’s territory.⁷⁸ This being said, Libya’s border control measures preventing migrants to leave in order to protect Italy’s migration laws, results in a clear denial of access to international protection.

It is also worth noting that the MoU arguably defeats the object and purpose of the principle of non-refoulement, which is “to ensure that States refrain from conduct or arrangement which they know, or ought to know in the circumstances, would subject or expose migrants to acts or risks of torture or ill-treatment by perpetrators beyond their jurisdiction and control”.⁷⁹ Indeed, the MoU concluded between Libya and Italy introduces migration policies that point towards

⁷⁵ Hannum (n 71) 50.

⁷⁶ *MSS v. Belgium and Greece* (n 72) §§357-359.

⁷⁷ OHCHR (n 12) §39.

⁷⁸ Guy S Goodwin-Gill, ‘The Right to Leave, Return and Remain’ in Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff Publishers 1996) 99; Markard (n 12) 603.

⁷⁹ OHCHR (n 12) §44.

a deliberate erosion of good faith compliance by Libya and Italy with the cornerstone protection from torture and ill-treatment. Besides, the peremptory nature of the provision could set aside a bilateral agreement such as the MoU, disregarding the fact that the policy is portrayed as a humanitarian one.⁸⁰ But, this discussion suggesting also a direct responsibility of Italy would require a more in-depth analysis and is beyond the scope of this study focusing primarily on Italy's divert responsibility.

To resume, the Libyan operations designed to prevent refugees and migrants leaving the Libyan territory in order to reach Italy's jurisdiction is by their very nature infringing migrants right to leave and to seek asylum. Furthermore, repatriation measures of refugees and migrants from Libya to third countries without sufficient assessment of the risk that they will be exposed to torture and ill-treatment are irreconcilable with the absolute principle of non-refoulement, a core component of the prohibition of torture and ill-treatment under the CAT, the ICCPR and customary international law.

International human rights treaties create obligations to refrain from contributing to human rights violations. However, the most important treaties in this regard have deliberately imposed a clear territorial and personal limitation, in which States may be held liable for their aid and assistance to countries committing human rights abuses.⁸¹ The current state of the law poses an insurmountable obstacle to extend the human rights treaties to cases where no 'effective control' over the territory or the person can be established. The following Chapter will, therefore, examine other possible avenues under general international law under which States may be held liable for the aid and assistance they offer to States committing human rights violations. In particular, when international human rights fail to offer remedies because of the absence of a jurisdictional link between the assisting State and the affected individual.

⁸⁰ Vienna Convention on the Law of Treaties (adopted on 23 May 1969 and entered into force on 27 January 1980) 1155 UNTS 331 (VCLT) Art. 53.

⁸¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 2(1); UN Human Rights Committee 'General Comment 35' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (16 December 2014) CCPR/C/GC/35 §64; *Al-Skeini and others v the United Kingdom* [2011] (Judgment) ECtHR 55721/07; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] (Advisory Opinion) International Court of Justice (ICJ); *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] (Judgment) International Court of Justice (ICJ); *Öcalan v Turkey* [2003] (Judgement) ECHR 46221/99.

IV. INTERNATIONAL STATE RESPONSIBILITY WHEN OUTSOURCING MIGRATION MANAGEMENT

Under general international law, States may be found responsible either directly or indirectly. To establish direct International State Responsibility, it must be verified that the conduct (i) is attributable to the State and (ii) constitutes a breach of an international obligation of the State.⁸² The attribution of the conduct can be verified either through the direct attribution of the conduct to the State⁸³ or through the assessment of the ‘effective control’ of the State over third State authorities or non-State actors.⁸⁴ Following this, Italy would be directly responsible if it decides to transfer migrants within its territory back to Libya, where they are at risk of being subject to torture, inhuman and degrading treatment⁸⁵, or if it intercepts vessels carrying migrants on high seas and diverts them back to Libya.⁸⁶ It could also be found directly responsible for its own conduct if it can be demonstrated that Libyan authorities were following Italy’s instruction and were under its exclusive direction and control when returning migrants back to Libya.⁸⁷

However, training programs, financial assistance, and capacity-building offered to Libyan authorities to prevent migrants to cross the Mediterranean Sea towards Europe is insufficient to satisfy the ‘effective control’ test.⁸⁸ The following section argues that by eliminating any territorial or physical contact between refugees and migrants and the Italian authorities, Italy cannot dilute its responsibility, but may still incur indirect responsibility for aid and assistance it provides Libyan authorities under general international law.

4.1 International responsibility for aid and assistance to Libyan authorities

Article 16 ASR regulates derived responsibility for aiding and assisting another State in the commission of an internationally wrongful act. Two conditions must be satisfied in this regard.

⁸² UN ILC (n 66) Art. 2.

⁸³ *ibid* Chapter II.

⁸⁴ *ibid* Art. 8; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (n 79).

⁸⁵ See: *Soering v The United Kingdom* [1989] (Judgment) ECHR 14038/88.

⁸⁶ See: *Hirsi Jamaa and Others v Italy* (n 4).

⁸⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (n 62) §§86, 109, 115; *Application of the Convention on the prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] (Judgment) ICJ Rep 43 §404; UN ILC (n 45) UN ILC (n 45), Art. 8 establishes attribution of a private person or a group to a State where it is "in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

⁸⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (n 84) §§86, 109, 115; *Application of the Convention on the prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 87) §404.

First, the assisting States does so “with knowledge of the circumstances of the internationally wrongful act”. Secondly, the conduct of the assisted States “would be internationally wrongful if committed by [the assisting] State”.

Initially, Article 16 ASR was seen as a measure of progressive development on the part of the International Law Commission (hereinafter ILC).⁸⁹ However, the International Court of Justice (hereinafter ICJ) in the *Bosnian Genocide case* in 2007 held that Article 16 ASR had by the time acquired customary international law status.⁹⁰

It is also important to note that Article 16 ASR cannot be equated to the responsibility for the commission of the internationally wrongful act itself nor to attribution, or joint responsibility.⁹¹ Instead, Article 16 ASR establishes derived responsibility, independent of the wrong committed by the assisted State. Applied to the Italy-Libya cooperation on migration policies, the responsibility of Italy arises simply from the fact that Italy facilitated the wrongful acts discussed in the previous Chapter, and not for the commission of these acts themselves.⁹²

With regard to the nature of the support, Article 16 ASR is far-reaching, including all kinds of aid and assistance. The degree of support does not need to be essential to the commission of the internationally wrongful act. It is sufficient that the aid and assistance contributed significantly to the commission of the wrongful act.⁹³ Besides, the ILC specifies that the internationally wrongful act need not be committed against another State but may be committed against “a particular group of States, a subject of international law other than a State, or the international community as a whole”.⁹⁴ Following this, the provision covers Italy’s funding of detention centers, offer of training and other capacity-building activities to Libyan border security forces. Indeed, without the Italian aid and assistance, Libyan authorities would not have the institutional nor material capacity to prevent refugees and migrants to exit territorial waters and to hold them in detention facilities.

⁸⁹ James Crawford, *State Responsibility: The General Part* (Cambridge Univ Press 2014) 408. Note also that The UN General Assembly took note of the Draft Articles in Resolution A/RES/56/83 of 12 December 2001.

⁹⁰ *Application of the Convention on the prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 87) §417.

⁹¹ UN ILC, *Commentary of the International Law Commission on Article 16 of the Draft Article on State Responsibility*, vol II (Yearbook of the International Law Commission 1975) 66 §1.

⁹² UN ILC (n 66) Art. 16 §6 and §10; Vaughan Lowe, ‘Responsibility for the Conduct of Other States’ [2002] *Kokusaiho Gaiko Zassi* 11.

⁹³ UN ILC, *Commentary of the International Law Commission on Article 16 of the Draft Article on State Responsibility* (n 91) 66 §5.

⁹⁴ UN ILC Report of the International Law Commission on the work of its Thirtieth session (8 May-28 July 1978) General Assembly, Official Records, Thirty-third Session, Supplement No. 10 (A/33/10) 105 §22.

Nonetheless, the scope of International State Responsibility for aid and assistance under Article 16 ASR is also restricted in three essential ways.

For instance, responsibility under Article 16 ASR is limited by the condition that the internationally wrongful act must be opposable to both the assisted and assisting State.

Libya is not a party to the GC or to the ECHR. However, both Libya and Italy have ratified the CAT, the ICCPR, and are bound by customary international law. The categories of internationally wrongful acts that are relevant to the migration control operations conducted by Libyan authorities include, the rights to leave, the prohibition of arbitrary detention, the right to seek asylum, the right to have access to due process proceeding, and principle of non-refoulement under human rights law all of which are prohibited norms of international law opposable to Libya and Italy.

The second limitation is that the assisting State must have ‘knowledge’ of the circumstances making the conduct of the assisted State internationally wrongful. The ILC Commentary explains that a State may presume that the aid will not be used to violate international law.⁹⁵ The acceptable standard of proof in the particular circumstances of the case would be objective or constructive ‘knowledge’, meaning direct ‘knowledge’ or at least what can be expected from the exercise of reasonable care or diligence.⁹⁶

Italy is not in the position to argue that it had no ‘knowledge’ of the dire human rights’ situation in Libya. As discussed above, numerous reliable sources have regularly reported the systematic human rights violations refugees and migrants are subjected to, including violation of their right to leave, right to seek asylum, protection of refoulement, and prohibition of torture and other inhuman or degrading treatment. Besides the disturbing circumstances, Libya is not bound by the GC, does not recognize the refugee status, does not have a national asylum system in place and UNHCR activities are often impacted by the lack of its formal recognition. The ECtHR in the *Hirsi Jamaa* judgment found that Libya is not a safe place, not only due to the reported human rights situation but also because it did not offer any guarantee of protection from refoulement.⁹⁷ Despite all this, Italy continues to fund detention centers, offer training

⁹⁵ UN ILC, *Commentary of the International Law Commission on Article 16 of the Draft Article on State Responsibility* (n 91) 66 §4.

⁹⁶ *ibid.*

⁹⁷ *Hirsi Jamaa and Others v Italy* (n 4) §§126-128.

and other capacity-building activities to Libyan border security forces. Hence, presenting its aid and assistance program as a life-saving mechanism for migrants serves no excuse, when the Italian authorities are in full ‘knowledge’ of the human rights violations migrants will be exposed to in Libya.

The final limitation and related to the former is that “the aid or assistance must be given with a view to facilitating the commission of that act”.⁹⁸ This is certainly the most controversial issue, resulting from a clear tension between the text in Article 16 ASR and the ILC Commentary. While the former refers exclusively to the notion of ‘knowledge’, the latter refers to the ‘intent’. Thus, the central question here remains whether ‘intent’ and ‘knowledge’ must both be established or whether one of the two elements would suffice.

The following sections will explore the current debate on this question and submit that, at least in the circumstances of a serious violation of peremptory norms, a lower threshold than the one of ‘intent’ should prevail.

4.1.1 Mens rea under Article 16 ASR

As a matter of positive law, the precise standard of the *mens rea* required to establish the responsibility of an assisting State is not settled yet. Among scholars, some favor Crawford’s support for the ILC Commentary’s prescription of wrongful ‘intent’, arguing that a broader standard would discourage States to participate in forms of international cooperation.⁹⁹ Others support the lower standard of ‘knowledge’. For example, Jackson finds that any interpretation should take the letter of the text as the starting point and views the argument that the threshold of ‘intent’ would endanger international cooperation unconvincing. He believes that the standard of ‘knowledge’ would instead require States to make sure that their aid is used lawfully and thus promotes the twin objectives of compliance and cooperation.¹⁰⁰ Commentators have also criticised the very high threshold of ‘intent’ because it enables States to evade responsibility for human rights abuses – although fully aware of the commission of the abuses - simply because they did not intend such result.¹⁰¹ Indeed, the intention to aid and

⁹⁸ UN ILC, *Commentary of the International Law Commission on Article 16 of the Draft Article on State Responsibility* (n 91) 66 §5.

⁹⁹ Georg Nolte and Helmut Philipp Aust, ‘Equivocal Helpers: Complicit States, Mixed Messages and International Law’ (2009) 58 *The International and Comparative Law Quarterly* 1, 15.

¹⁰⁰ Miles Jackson, ‘Introduction’, *Complicity in International Law* (Oxford University Press 2015).

¹⁰¹ Kate Nahapetian, ‘Confronting State Complicity in International Law’ (2002) 7 *UCLA Journal of International Law and Foreign Affairs* 99, 110; Moreno-Lax and Giuffré (n 49) 20.

assist human rights violations is often not clearly expressed, since the principal intention of States is rather to further their national or economic interests irrespective of the violations they may facilitate. In view of this, many agree that the requirement of ‘intent’ should not eviscerate the object and purpose of Article 16 ASR by allowing States from “do[ing] by another state what it cannot do by itself”¹⁰² without infringing international law.¹⁰³ This is especially true in situations where the internationally wrongful act is manifestly being committed. Accordingly, where Libya is supported by Italy and it is obvious that Libya is systematically violating a central component of the peremptory prohibition of torture, Italy should not be allowed to hide behind the position that they did not wish to support the commission of the wrongful acts. In some cases, therefore, a rebuttable presumption of ‘intent’ should be sufficient to incur responsibility for the aid and assistance to international wrongful act.¹⁰⁴ This suggestion is supported by Article 41 ASR and primary rule, in the case at hand the principle of non-refoulement under human rights law.

4.1.2 Mens rea under the primary rules and the ASR serious breach regime

Article 41 (2) provides for a separate duty of non-assistance for certain violations of international law because of their gravity. According to the Article 40 (2) ASR, this is the case for serious breaches meaning “violations of obligations arising under peremptory norms of general international law”, involving a gross and systematic failure by the responsible State to fulfill the obligations. As has been explained, today it is widely accepted that the prohibition of torture has acquired the status of a peremptory norm in the international normative system.¹⁰⁵

From a serious breach under Article 40 (2) ASR follows the third States’ duty not to offer aid or assistance that would maintain the situation resulting from the serious breach provided under Article 41 ASR. In contrast to the obligation under Article 16 ASR requiring a nexus between the assistance and the internationally wrongful act, where peremptory norms are concerned it is sufficient to demonstrate that Italy’s aid and assistance have contributed to maintain the situation resulting from a serious breach. Moreover, the threshold of the *mens rea* under Article 41 ASR is less restrictive than under Article 16 ASR since, in the case of aid and

¹⁰² UN ILC, *Commentary of the International Law Commission on Article 16 of the Draft Article on State Responsibility* (n 91) 66 §6.

¹⁰³ John Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’ (1987) 57 *British Yearbook of International Law* 77.

¹⁰⁴ Nahapetian (n 101) 111.

¹⁰⁵ OHCHR (n 12) §39.

assistance to acts that breach peremptory norms of international law, there is no need to demonstrate ‘knowledge’ or ‘intent’. According to the ILC Commentary, such a view is motivated by the fact that “it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State”.¹⁰⁶ *A contrario*, this indicates that the level of certainty about the commission of the primary wrongful act is a determinant factor for the application of Article 16 ASR.¹⁰⁷

Another argument in support of a lower standard of the mental element under Article 16 ASR, ensues from the *mens rea* under the primary rule of non-refoulement as a component of the prohibition of torture. Under the non-refoulement obligation under human rights law, the threshold to engage responsibility for complicity is considered to be sufficient where there are “substantial grounds” to believe that the individual concerned would be in danger of being subject to torture or other ill-treatment.¹⁰⁸ A stricter interpretation of the mental element would defeat the object and purpose of non-refoulement under the human rights law and is irreconcilable with a good faith interpretation of the principle.¹⁰⁹

All these factors strengthen the above proposal to presume ‘intent’ or to accept a considerably lower threshold than the one of ‘intent’ at least where serious violations of peremptory norms are concerned.

4.2 Italy’s *mens rea*

The *mens rea* under Article 16 ASR is unclear to begin with. Nevertheless, the above section has attempted to demonstrate the need to favor a lower threshold than ‘intent’ at least where the wrongful act consists of a serious violation of a peremptory norm. Following this line of reasoning, the assessment of Italy’s mental element to incur indirect State Responsibility under Article 16 ASR will depend on whether the wrongful conduct of Libya under scrutiny consists of a serious violation of a peremptory norm or not. The following will, therefore, discuss the mental element to establish Italy’s responsibility to assist Libya first, with regard to the violation of the right to leave and secondly, the violation of the principle of non-refoulement

¹⁰⁶ UN ILC, *Commentary of the International Law Commission on Article 16 of the Draft Article on State Responsibility* (n 91) 66 §11.

¹⁰⁷ Nolte and Aust (n 99) 16.

¹⁰⁸ UN Committee Against Torture (n 65) §§12-13.

¹⁰⁹ Vienna Convention on the Law of Treaties (n 80) Art. 31.

as the core component of the peremptory prohibition of torture under the CAT, the ICCPR and customary international law.

However difficult it is to prove in practice that the State offered aid and assistance “with a view to facilitate the commission of the wrongful act”,¹¹⁰ for the purpose of our discussion, there is arguably enough evidence to demonstrate that Italy had a level of the *mens rea* that meets the demanding threshold of ‘intent’ under Article 16 ASR. The MoU text seems to be clear. Italy delivers assistance to Libya for the explicit purpose of, “*stem[ing] the illegal migrants’ fluxes* [emphasis added] and face the consequences coming from them”.¹¹¹ The intention to infringe the refugees and migrants’ right to leave Libya, furthermore, materializes from the ECtHR findings, public statements of Italian authorities and the continuation of their conduct despite the huge variety of documentation that exists on the situation in Libya.¹¹² Following this, Italy’s aid and assistance to Libya in migration prevention policies arguably attain even the higher threshold of ‘intent’ sufficient to engage indirect State Responsibility under Article 16 ASR.

In the case at hand, the wrongful conduct of Libya may additionally entail a serious violation of the peremptory prohibition of torture. In fact, numerous reports by NGOs and international bodies denounced the Libyan practice criminalizing every person entering Libya by illegal means, and described their frequent expulsion to third countries, where they are in danger of being subject to torture, inhuman and degrading treatment. Hence, Libya’s expulsion practices following a pattern that can be described as systematic are in breach of the intrinsic component of the peremptory prohibition torture, namely the protection from refoulement under human rights law. Ultimately, and following the discussion above, Italy’s ‘intent’ should be presumed in such circumstances. Accepting the contrary would amount to allowing Italy to let Libya do the unpleasant work on their behalf, in the attempt to deny any responsibility.

In view of the foregoing, even by eliminating any territorial or physical contact between refugees and migrants and the Italian authorities, Italy cannot divest itself from both its human rights obligations and its International State Responsibility at the same time. As a matter of

¹¹⁰ UN ILC, *Commentary of the International Law Commission on Article 16 of the Draft Article on State Responsibility* (n 91) 66 §5.

¹¹¹ MoU, (n 8) Preamble.

¹¹² *Hirsi Jamaa and Others v Italy* (n 4) §181.

fact, Italy may still incur indirect State Responsibility for aid and assistance it provides Libyan authorities, pursuant to Article 16 ASR.

V. CONCLUSION

Italy's cooperation with the Libyan authorities is frequently portrayed as a humanitarian response to the so-called 'migration/refugee crisis' and as serving an absolutely noble goal, namely saving lives, preventing migrants from taking the dangerous journey, or dismantling of traffickers and smugglers network.¹¹³ The dissertation sought to demonstrate that the bilateral cooperation agreement between Libya and Italy, however, is first and foremost designed to curtail migratory flows to Europe by entirely outsourcing migration management to Libya. The MoU entrusts Libyan authorities with the responsibility of patrol and return operations, carried out in Libyan territorial as well as international waters. Refugees and migrants intercepted at sea or along the roads are retained in Libya or send back to third countries, where well-founded evidence exists to presume that they will be subject to torture and ill-treatment.¹¹⁴ As Chapter three has demonstrated, migration control measures implemented by the Libyan authorities supported by Italy not only infringe refugees and migrants' right to leave but also their right to access to international protection.

International human rights treaties create obligations to refrain from contributing to the violation of human rights. But, the current stage of the law poses an insurmountable obstacle to extend the human rights treaties to cases where no 'effective control' over the territory or the person can be established.¹¹⁵ Hence, where jurisdiction obstructs access to legal remedies under international human rights law, general international law offers additional avenues under which States may engage responsibility. This paper attempts to demonstrate that by eliminating any territorial or physical contact between refugees and migrants and the Italian authorities, Italy cannot divest itself from both, its human rights obligations and its International State Responsibility at the same time. In fact, as Chapter four has displayed, Italy may still incur indirect State Responsibility for the aid and assistance it offers Libyan authorities, pursuant to Article 16 ASR.

In this respect, despite the fact that the paper has argued that the high threshold of 'intent' under Article 16 ASR can be considered met in the case at hand, it suggests that the threshold

¹¹³ MoU, (n 8).

¹¹⁴ *ibid.*

¹¹⁵ International Covenant on Civil and Political Rights (n 78) Art. 2(1); UN Human Rights Committee (n 78) §64; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 78); *ase Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (n 78); *Al-Skeini and others v. the United Kingdom* (n 78); *Öcalan v Turkey* (n 78).

needs to be readjusted. The reason is that a very high threshold the *mens rea* under Article 16 ASR enables States to evade negative and positive duties enshrined in their obligation to protect from refoulement and to respect the right to leave simply because they did not intend such result.¹¹⁶

In light of the current trend towards an increasing practice of outsourcing migration management to third countries, this dissertation wishes to conclude by insisting on the importance to discuss avenues to find State responsible for the aid and assistance they offer to third States. Not only in order to prevent States from evading their human rights obligations, but also in order to ensure effective remedies to individuals whose human rights have been violated.

¹¹⁶ Nahapetian (n 101) 110.

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