FACULTY OF LAW
Lund University

Malcolm Thulin

Italian Deterrence Policies

An examination of the State´s non-entrée policies in response to the migration crisis

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Supervisor: Daria Davitti

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Summary

The migration crisis of 2015 started when an unprecedented influx of irregular migrants arrived in the EU from the global south. The response from the countries of destination was increased securitization and policies aimed at deterring migrant crossings over the Mediterranean Sea and entering the EU, so called policies of non-entrée. Non-governmental organisations, formed for the purpose of operating search and rescue missions towards those in distress at sea, became subjects of deterrence policies.

The purpose of this thesis focuses on Italy and its deterrence policies, examining two specific Italian policies and their compatibility with international law: The first is the Italian State's refusal to allow disembarkation of rescued migrants at the country's ports, using the Aquarius incident as the example. The second is the Italian cooperation with Libya. For the purpose of facilitating a stop to migrant arrivals across the Mediterranean Sea, the Italian government has supplied Libya with materials to bolster Libya's migration control capabilities. This is done by Italy in an effort to effectively outsource its non-entrée policies and thus evade jurisdiction.

To achieve its purpose this thesis examines the following three areas of law: Maritime law, human rights law as well as jurisdiction alongside state responsibility.

The first conclusion of the thesis is that Italy is under no obligation to allow disembarkation of rescued migrants on its territory. Additionally, due to the sovereignty of its territorial waters, Italy is under no obligation to allow foreign flagged vessels to enter its ports. Therefore, Italy's policy of closing ports for NGOs seeking a port of disembarkation is in accordance with international law.

The second conclusion is that due to the security situation in Libya and the high risk of ill-treatment, the return of intercepted migrants to Libya is a breach of the prohibition of non-refoulement. The third conclusion is that Italy can be held responsible of the aid and assistance it provided to Libya, as the Libyan interception and return of migrants breaches the right to leave.

Preface

Many thanks to my supervisor Daria Davitti, for her great help.
Also, thanks to Bob Kahn and Vinton Gray Cerf, without whose work this thesis would have been significantly harder to research for.

Abbreviations

ASGI	Association for Juridical Studies on Immigration
ASR	Articles on Responsibility of States for Internationally Wrongful Acts
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	UN Human Rights Committee
GLAN	Global Legal Action Network
GNA	Government of National Accord
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commissions
IMO	International Maritime Organisation
LCG	Libyan Coast Guard
MOU	Memorandum of understanding
MRCC	Maritime Rescue Coordination Centre
NGO	Non-Governmental Organisation
MSF	Médecins Sans Frontières
MSC	Maritime Safety Committee
SAR	Search and Rescue
SOLAS	International Convention for the Safety of Life at Sea
SRR	Search and Rescue Region
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCLOS	United Nations Convention on the Law of the Sea

1 Introduction

1.1 Short presentation of subject

In 2015 the so-called refugee or migrant crisis began. A mass influx of refugees and migrants entered the European Union (EU) in an effort to escape war, persecution and poverty.[1] The vast majority travelled to Europe across the Mediterranean Sea, the body of water separating Europe with North Africa and the Middle East.[2] These voyages are undertaken in often unseaworthy vessels with the facilitation of human smugglers and traffickers, which has led to thousands of deaths over the past years.[3] At the moment of writing, the humanitarian crisis is still ongoing. Though both the number of arrivals as well as the death toll at sea has decreased quite significantly since the beginning of the 2015 migration 'crisis', well over a thousand people have lost their lives in 2018.[4] In response to the crisis, privately funded non-governmental organisations (NGOs) have carried out search and rescue operations in the Mediterranean Sea, for the purpose of preventing further loss of life.[5]

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[1] Souster, I., *The Mediterranean Migration Crisis*, 69 IBA Global Insight 16 (2015), pg.18. <https://www.westlaw.com/Document/I006b3212771211e598dc8b09b4f043e0/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0> (accessed 24-10-2018)); *Migrant crisis: Migration to Europe explained in seven charts*, BBC [website], 4 March 2016 <https://www.bbc.com/news/world-europe-34131911> (accessed 03-01-2019).

[2] *Migration and asylum,* European Parliament [website], <*http://www.europarl.europa.eu/thinktank/infographics/migration/public/index.html?page=intro*> (accessed 24-10-2018)

[3] Moreno-Lax, V., & Papastavridis, E., *'Tracing the bases of an integrated paradigm for maritime security and human rights at sea'* in Moreno-Lax, V., & Papastavridis, E., *"Boat Refugees" and Migrants at Sea: A comprehensive Approach*, Brill | Nijhoff (2016), pg. 6.

[4] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, I.C.L.Q., 2018, 67(2), 315-351, pg. 318-19. <https://www.westlaw.com/Document/IBDB4969046F911E8ABB29FA7BBB9B3D7/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0> (accessed 24-10-2018); *Mediterranean Situation*, UNCHR [website], <https://data2.unhcr.org/en/situations/mediterranean> (accessed 24-10-2018).

[5] Gombeer, K., & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, MarSafeLaw Journal, March 2018, ISSN 2464-9724, pg. 1-2.

In recent years, the response from some EU member States has veered towards attempts to prevent irregular migration across the Mediterranean.[6] In light of this policy shift, since 2017, several NGOs have faced difficulty in conducting search and rescue missions at sea,[7] especially due to specific policies aimed at reducing the number of irregular immigration arrivals in Italy, for instance by prohibiting access to ports and disembarkation of rescued migrants, and by providing support to the Libyan Coast Guard (LCG) to prevent crossings from Libya.[8]

From a legal point of view, the main question raised by this complex context of migration deterrence concerns the legality of such policies according to the relevant provisions enshrined in international law.

1.2 Purpose

The purpose of this thesis is to investigate whether the Italian policy of refusing NGOs access to the State's ports for the purpose of disembarkation of rescued migrants of deterring NGOs from carrying out search and rescue operations in the Mediterranean by refusing access to its ports, is compatible with international law.

Additionally, the thesis will address whether the practice of sending rescued migrants, directly or indirectly, back to the point of departure is in line with the international legal obligations vested upon EU member States. By the phrase 'directly or indirectly' it is meant either actively transporting the migrants or facilitating their transportation through methods such as co-operation with Libya.

<http://www.marsafelawjournal.org/wp-content/uploads/2018/06/MarSafeLaw-Journal_Issue-4_Gombeer-and-Fink.pdf> (accessed 24-10-2018).

[6] Moreno-Lax, V., & Papastavridis, E., *'Tracing the bases of an integrated paradigm for maritime security and human rights at sea',* pg. 3-4

[7] Gombeer, K., & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg.1-2.

[8] See Chapter 4.

Basically, is the responsibility of Italy engaged in international law for these interceptions and returns (also known as pushback and/or pullback operations[9]), even if they are not directly carried out by Italy?

1.3 Problem and delimitation

To fulfil its purpose, this thesis aims to answer the following research questions;

- Are the Italian attempts to deter search and rescue NGOs from operating in the Mediterranean in breach of international law?
- Is the interception and return of migrants to Libya in accordance with international law?
- Can Italy be held internationally responsible for the interception and return of migrants, even if Italy is not directly involved?

The primary focus of this thesis will be on Italy and its interaction with NGO rescue missions in the Mediterranean Sea.
While relevant, Libya will be dealt with because of the country's interaction with Italy on the matter. There is little to no possibility of holding Libya to account for any legal wrongdoing in comparison to Italy, as the former is a country in civil war and the latter is an EU member State and a member of the Council of Europe and as such subject to the jurisdiction of courts such as the European Court of Human Rights (ECtHR).

EU law itself will not be relevant as the main competence to regulate search and rescue operations, a not insignificant part of the thesis, lies with the individual member States themselves.

[9] Markard, N,. *The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries,* European Journal of International Law, Volume 27, Issue 3, 1 August 2016, 591-616. <https://academic.oup.com/ejil/article/27/3/591/2197244> (accessed 03-01-2019)

While there are regulations which contains provisions that are related to disembarkation, these provisions are only applicable to those operations carried out by the European Border and Coast Guard Agency (Frontex). Search and rescue (SAR) operations that involves private vessels such as NGOs, i.e. Aquarius, does not fall within the scope of EU competence.[10]

The thesis will be limited to events that has taken place from 2017 and onwards. This is due to the fact that the implementation of deterrence measures against SAR NGOs, which is the primary focus of the thesis, started in 2017.

1.4 Method

In researching and writing this thesis, a doctrinal approach will be used in the process, whereby applicable law will be examined in order to ascertain whether or not the Italian conduct is in line with its obligations in international law. Part of this process will entail considering existing case law, interpret the relevant treaties and applying them to the situation but also examining scholarly articles relevant to the question of State responsibility. The standpoint in this thesis is unbiased towards Italy. These is no personal interest or aim directed at proving whether or not Italy has breached any international law obligation. This thesis simply aims at investigating if Italian practice is compatible with international law.

[10] Cusumano, E., & Gombeer, K., (2018) In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers, Mediterranean Politics, Mediterranean Politics <https://doi.org/10.1080/13629395.2018.1532145> (accessed 03-01-2019); Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 323-324.

1.5 Material, sources and literature

The material used in this thesis will consist of academic journals, books and articles as well as primary sources of law such as treaties and case law. An examples of case law used in the thesis is the *Hirsi* case, which is highly relevant and is cited frequently as it deals with the interception and return of migrant vessels on the Mediterranean. Any source that provides legal information or arguments is from a legal professional or person that could be considered objectively knowledgeable on the subject referred to, example of cited authors is professor Hathaway and dr. Moreno-Lax. Non-legal sources will be used but only as sources for objective facts and not questions of legality.

All sources have been scrutinised to avoid using any sources that could be considered disreputable, unreliable or otherwise have a lack of credibility on the subject matter. Efforts have been made to avoid using information from authors that may be considered biased. Some information originates from NGO's, humanitarian organisations and EU organs, these actors can arguably be assumed to have an agenda of highlighting factors suiting their standpoint which is why available data will be examined, in order to confirm the reliability. For instance, this will be done by triangulate the data based on information from UN bodies, etc.

1.6 Outline

The main body of the thesis will be structured in three main parts. The first part is a background section, consisting of one chapter, aimed at explaining the migrant crisis in the Mediterranean Sea. This part provides the relevant context for the later sections.

The focus of the second part is on the applicable law of the problem. Here the maritime and human rights law relevant to the situation will be presented and described, for the purpose of establishing a satisfactory understanding of the applicable law. This section will also detail the law regarding jurisdiction and responsibility, in addition to an account of non-entrée policies.

The third part will be focused on the conduct of Italy, describing the facts of the deterrence policies of the Italian State. It could be said that there is two sub-parts, one focusing on deterrence aimed in a more direct way towards NGOs (closing ports to NGOs, with Aquarius as the example) and the second focusing on Italy's cooperation with Libya in deterring migrants from leaving.

Following the three main parts is the analysis. Here the law will be applied to the conduct in order to analyse the compatibility of Italy's conduct with its obligations in international law. Furthermore, the rules of jurisdiction and State responsibility will be analysed to determine whether the Italian cooperation with Libya is a successful way to avoid jurisdiction and therefore responsibility for non-entrée policies.

The result of the analysis will then be presented in the conclusion.

2 The Mediterranean “crisis”

2.1 Explaining irregular migrant

First of all, it’s worth explaining the use of the term irregular migrant. For a future asylum-seeker, there is no option for a regulated entry into the EU, as EU law does not allow for it.[11] The entry for migrants attempting to reach the EU is therefore almost always irregular, due to lack of documentation and/or through the use of unauthorised border crossing points. As a result, the figures for border crossings are mixed between possible future asylum-seekers and irregular migrants.[12]

With both groups intermingled during their travels, terminology can be a bit bothersome. For the purpose of this research, when the flow of refugees and irregular migrants as a whole are referred to, they will be referred to as “migrants”.

2.1.1 The refugee “crisis”

The refugee “crisis” started in 2015, when more than a million refugees and migrants entered the European continent.[13] The use of the term “crisis” has been criticized as a way of depicting the large migration movement as an emergency, with the migrants themselves seen as a security threat, thus warranting more exceptional measures as a response from the EU States. An emergency demands swift and decisive action and the continued use of the term becomes a useful tool for EU States to deal with the issue of irregular

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[11] *Migration and asylum,* European Parliament [website]; this subject will be further elaborated on in 2.1.7.
[12] Ibid.
[13] *Migrant crisis: Migration to Europe explained in seven charts*, BBC [website].

migration.[14] In the context of mass influx generated during this period, EU member states struggled to cope with an increase in the number of arrivals. During the year of 2015, it is estimated that over one million migrants arrived by sea, compared to less than 35 000 by land.[15] Worth noting is that these figures only accounts for those that were detected and is substantially larger than the numbers in 2014 which amounted to 280 000 arrivals both by an and sea. During 2015 the main EU destination country was Greece, as people attempted to reach the EU using small wooden boats or rubber vessels to traverse the relative short distance of the Aegean Sea between Turkey and the Greek islands.[16]

The main identified causes for the movement of migrants into Europe from the global south are the devastating effects of poverty, under-development, armed conflicts along with power vacuums left in countries where dictators have been ousted in ineffective international intervention and human rights violations in the country of origin.[17]

The routes across the Mediterranean are divided into the Eastern, Central and Western Mediterranean routes, with the respective final destinations of Greece, Italy and Spain. As stated, the majority of irregular migrants came to Greece during 2015, with over 885 000 people reaching the EU through the Eastern Mediterranean route, compared to just under 154 000 using the Central Mediterranean route and just over seven thousand using the Western route.[18]

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[14] Davitti, D., *Biopolitical Borders and the State of Exception in the European Migration 'Crisis'*, Forthcoming, European Journal of International Law, 1 April 2017, pg. 14-15. <https://ssrn.com/abstract=3229131> (accessed 05-01-2019).
[15] *Migrant crisis: Migration to Europe explained in seven charts*, BBC [website].
[16] Ibid.
[17] Souster, I., *The Mediterranean Migration Crisis*, 69 IBA Global Insight 16 (2015), pg. 18.
[18] *Migration and asylum*, European Parliament [website].

2.2 Deaths and trafficking

The Central Mediterranean route, with Libya as the main departure point, is the most active and dangerous route at the moment of writing. It accounted for the largest number of migrants crossing the sea into Europe in March 2018[19]. Whilst arrivals in Europe decreased significantly in 2017, migrants still attempt to reach the EU, putting themselves at grave risk whilst doing so. It is estimated that in 2017 alone 2 800 migrants perished or went missing in the central Mediterranean Sea.[20] Additionally, it is estimated that an even greater number of people died before even attempting to cross the Mediterranean, due to the dangers faced on the routes through the desert and in Libya.[21]

During the onset of the refugee crisis in 2015, over a million migrants arrived in Europe, with over 3100 dead or missing in the Mediterranean Sea.[22] The following year, the number of migrant arrivals decreased to 356 000, however, the number of missing or dead increased to over 5000. This was a significant proportion of the total number of migrant deaths worldwide during the same period, 7 763.[23]

The reduced numbers of arrivals can be linked back to the EU-Turkey deal concluded in March 2016, which led to reduced crossings from Turkey to the Greek islands. Additional cooperation between Italy and the LCG, combined with anti-smuggling operations in the Central Mediterranean reduced the numbers further.[24]

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[19] *Central Mediterranean Route Situation*, UNCHR [website], March 2018, pg. 4. <http://www.unhcr.org/partners/donors/5aa78775c/unhcr-2018-central-mediterranean-route-situation-supplementary-appeal-january.html?query=mediterranean> (accessed 24-10-2018).
[20] Ibid.
[21] Ibid.
[22] *Mediterranean Situation*, UNCHR [website].
[23] Ghezelbash, Moreno-Lax, Klein and Opeskin, *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 318.
[24] Ibid. pg. 319.

The number of arrivals in Greece have therefore decreased significantly since the peak of the crisis in 2015. The country saw a total number of 856 723 arrivals by sea in 2015 compared to only 173 450 in 2016 and 29 718 in 2017.[25]

In 2017 the numbers reduced further to an estimate of 172 301 arrivals by sea and a further decreased number of casualties, 3139. By early October 2018, the number of arrivals has lowered further to just over 86 000 with 1 772 dead or missing.[26]

While the Central Mediterranean route has not seen the majority of traffic, it has witnessed the highest number of casualties. Out of the over 5000 dead or missing in 2016, making it the deadliest year so far, over 4500 occurred during the crossing to Italy.

Sea Arrivals	2014	2015	2016	2017	2018 early oct
Total[27]	216 054	1 015 078	362 753	172 301	86 010
Greece[28]	41 038	856 723	173 450	29 718	24 345
Italy[29]	170 100	153 842	181 436	119 369	21 191
Spain[30]	4 632	5 283	8 162	22 103	40 209

[25] *Mediterranean Situation: Greece*, UNCHR [website]. <https://data2.unhcr.org/en/situations/mediterranean/location/5179> (accessed 24-10-2018).
[26] *Mediterranean Situation*, UNCHR [website].
[27] Ibid.
[28] *Mediterranean Situation: Greece*, UNCHR [website].
[29] *Mediterranean Situation: Italy*, UNCHR [website]. <https://data2.unhcr.org/en/situations/mediterranean/location/5205> (accessed 24-10-2018).
[30] *Mediterranean Situation: Spain*, UNCHR [website]. <https://data2.unhcr.org/en/situations/mediterranean/location/5226> (accessed 24-10-2018).

Dead or Missing	2014	2015	2016	2017	2018
Total	3 638	3 771	5 096	3 139	
Greece	405	799	441	51	
Italy	3 093	2 913	4 578	2 873	
Spain	40	59	77	212	

2.2.1 NGOs' Search and Rescue Activities in the Mediterranean

In response to the high death toll of migrants attempting to cross the Mediterranean Sea in order to reach the EU, privately funded search and rescue operations have been carried out by NGOs. These operations mainly consist of search and rescue activities, that is to say patrolling, rescuing persons in distress and disembarking them in a place of safety. The focus of these operations is on first response to emergencies, not necessarily transporting the migrants to a place of safety but instead mitigating the danger by providing aid until larger ships can take the migrants aboard for transport.[31]

The first operation was launched in 2014 by Migrant Offshore Aid Station, which was followed by Sea-Watch and Médecins Sans Frontières (MSF) in 2015 with several additional NGOs becoming active in 2016.[32] However, the NGO rescue activities, recorded as accounting for half of all rescues at one point, has been perceived to constitute a form of "pull factor", effectively encouraging migrant smugglers and human traffickers,[33] a perception that has been criticised for being inaccurate.[34]

[31] Gombeer, K., & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg. 1-2.
[32] Ibid.
[33] Ghezelbash, Moreno-Lax, Klein and Opeskin, *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 347.
[34] Ibid. pg. 350.

Due to pressure and confrontations with authorities, NGO activities declined substantially in 2017.[35] MSF halted its rescue activities in the Mediterranean Sea in early December 2018, citing problems with European authorities as one of the reasons for its decision.[36]

2.2.2 Trafficking

Criminal networks have exploited the 'crisis' and developed sophisticated systems of human trafficking and migrant smuggling by sea.[37] These "transnational mafias" employ ruthless methods of coercion on migrants and use unseaworthy vessels through perilous routes in their transport of migrants, endangering human lives. These groups pose a challenge to maritime safety, migration management and law enforcement, leading to a will from states to foil these smuggling and trafficking businesses.[38] Smuggling and trafficking, often the only available options for migrants, involve serious violations of human rights, and migrants have been known to face death at the hands of their traffickers and smugglers by being dumped at sea. An estimated cost, by Italian investigators, for transport from West Africa or the Horn of Africa to the Libyan coast is 5 000 USD, with an additional 1000 -1 500 USD for the voyage across the Mediterranean.[39]

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[35] Gombeer, K., & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg. 1-2.

[36] *Aquarius forced to end operations as Europe condemns people to drown*, Médecins sans frontiers [website], 6 December 2018. <https://www.msf.org/aquarius-forced-end-operations-europe-condemns-people-drown> (accessed 03-01-2019); Taylor, L., *Migrant rescue ship Aquarius to end operations*, Reuters, 6 December 2018, <https://www.reuters.com/article/us-europe-migrants-italy-aquarius/migrant-rescue-ship-aquarius-to-end-operations-idUSKBN1O52HZ> (accessed 03-01-2019).

[37] Moreno-Lax, V., & Papastavridis, E., *'Tracing the bases of an integrated paradigm for maritime security and human rights at sea'* in Moreno-Lax, V., & Papastavridis, E., *"Boat Refugees" and Migrants at Sea: A comprehensive Approach*, pg. 6.

[38] Ibid.

[39] Souster, I., *The Mediterranean Migration Crisis*, pg. 19-20.

2.3 Securitisation of migration

The prevailing response from the countries of destination have been focused on the fight against illegal immigration and the prevention of irregular maritime movements.[40] While maritime migration, people crossing the oceans searching for protection or opportunities, is not a new phenomenon, the States opinion towards these migrants have changed over the last decades. Instead of international protection and solidarity, indifference and pro-active forms of pre-emption are prevalent amongst EU member states.[41]

The process in which authorities identify threats to the States, society or similar objects, existence and thereafter enact measures to deal with the assumed threat, is called securitization.[42] The arrival of boat migrants is considered a threat. Potential reasons for the perceived threat are the unknown background of individual, the perception of migrants as potential or existing terrorists or criminals or simply perceived in a broader sense as jeopardising the destination states lifestyles, economy or culture.[43]

[40] Moreno-Lax, V., & Papastavridis, E., *'Tracing the bases of an integrated paradigm for maritime security and human rights at sea',* pg. 4.
[41] Ibid, pg.3.
[42] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 317.
[43] Ibid.

3 Applicable Law

3.1 Maritime law

In the context of the migration "crisis" in the Mediterranean, there are three major maritime legal regimes that are applicable. These are the International Convention on Maritime Search and Rescue (SAR Convention[44]), the International Convention for the Safety of Life at Sea (SOLAS[45]) and the United Nations Convention on the Law of the Sea (UNCLOS[46]).[47]

3.1.1 SAR Convention

As the name suggest, this convention specifically deals with SAR, it has 107 State parties including all but three EU member States (Austria, Slovakia and the Czech Republic).[48] State parties are required to "participate in the development of search and rescue services" as well as to establish a search and rescue region (SRR) with other States.[49] As a result of these obligations, multiple SRRs have been established on the world's oceans, effectively dividing the seas into zones with the adjoining coastal States being assigned as responsible. The size of these zones varies. Australia's SRR, for instance, encompasses 53 000 000 km^2, which amounts to one-tenth of the world's surface, while the relatively smaller Mediterranean Sea is shared between coastal States.[50]

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[44] International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 119 (SAR Convention).
[45] International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention).
[46] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).
[47] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 317-318.
[48] Ibid.
[49] SAR convention, Annex, para 2.1.1 and 2.1.4.
[50] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 321.

A key obligation of the convention is that State parties must make sure that persons in distress at sea are given assistance, regardless of said persons nationality, status or "the circumstance in which that person is found"[51]. The SAR convention define distress as

> "A situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance"[52]

In order to facilitate the efficient coordination of distress incidents within their respective SRRs, an obligation under the SAR convention, coastal States are required to establish facilities for that very purpose. Usually, coastal States give coordination competence to State authorities, primarily a Maritime Rescue Coordination Centre (MRCC).[53]

The instructions given by MRCC are usually requests for vessels to travel to a source of distress and provide assistance. Instructions given to vessels by the MRCC (or any other national authority) are considered mere requests for cooperation, provided that the vessel in question is outside of the coastal States territorial sea, and as such not legally binding. This would serve as a reminder for the foreign vessel to comply with its flag States domestic law. Should the foreign vessel not cooperate, the coastal State has no recourse to enforce its instructions, but it can inform the flag State of the vessel's conduct as typically captains are obliged to offer assistance to any persons in distress under the domestic laws of the vessels flag State.[54]

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[51] Ibid. pg. 322.; SAR convention, Annex, para 2.1.10.
[52] SAR convention, Annex, para 1.3.13.
[53] Gombeer, K. & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg. 15.
[54] Ibid. pg. 17.

Some nations have given their MRCC the competence to issue legally binding SAR instructions. This however is only possible inside the territorial waters of the coastal State, as States have full sovereignty over foreign vessels within this territory but all vessels on the high seas are under the exclusive jurisdiction of their respective flag States.[55] Coastal States only gain responsibilities from the SAR regime, they do not gain any additional grounds or rights of jurisdiction over the seas[56], which means that coastal States cannot give legally binding orders to vessels outside its jurisdiction[57] with support from the SAR legal regime.

After its revisions in 1998, the SAR Convention now offers definitions of the terms “search” and “rescue”.[58] The definition of search being an operation meant to “locate persons in distress” while rescue being an operation meant to retrieve persons. Additionally, rescue also entails providing for initial needs, medical or otherwise, and “deliver them to a place of safety”.[59] A definition of “a place of safety”, however, is not provided in the Convention.[60]

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[55] Ibid. pg. 16.
[56] Ibid.
[57] The rules regarding jurisdiction will be detailed in section 3.3.
[58] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 322.
[59] SAR convention, Annex, para 1.3.1 and 1.3.2.
[60] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, Pg. 322.; SAR convention, Annex, 1.3.

Additionally, coastal States are obliged to ensure that coordination and cooperation follows a rescue in their SRR, in order to facilitate the disembarkation of the rescued persons at a place of safety. The Convention does not specify, however, how to determine which specific port should be the port of disembarkation, since it only provides that the coastal State in whose SRR the rescue operation took place shall take the lead in procuring such a port.[61]

As a final relevant point, the SAR Convention also stipulates the right to enter coastal States, as entry into the territorial waters should be authorised if the sole purpose of the entry is search and rescue.[62]

3.1.2 SOLAS

Among other things, the SOLAS Convention requires its State parties to regulate the activities of any and all ships that fly its flag, wherever they may sail, as well as facilitate rescue of any person found in distress, distance or maritime zone notwithstanding, around its coast.[63]

The Guidelines on the Treatment of Persons Rescued at Sea (IMO guidelines[64]) released by the International Maritime Organisation (IMO) in 2004 amended the SOLAS Convention[65]. Amongst the changes was a clarification of the captain's duty to assist persons in distress. The duty now applies to the rescued person "regardless of the nationality or status of such

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[61] Gombeer, K., & Fink, M., *The Aquarius incident: navigating the turbulent waters of international law*, Ejil: Talk, 14 June 2018 <https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/> (accessed 03-01-2019).
[62] Gombeer, K. & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg. 9.; SAR convention, Annex, para 3.1.2.
[63] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 321.
[64] IMO, "Guidelines on the Treatment of Persons Rescued at Sea' (20 May 2014) Res MSC.167 (78), Annex 34. <http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf> (accessed 09-01-2019) (IMO Guidelines)
[65] IMO Guidelines, para 2.3.

persons or the circumstances in which they are found".[66] These particular guidelines were adopted at the same session of the Maritime Safety Committee (MSC) as the amendments to both SOLAS and the SAR Conventions. The development of the guidelines was based on the amendments made.[67] This is why the captain's duty is similar to some of the duties enshrined in the SAR convention.

Additionally, captains are required to treat the people they rescue with as much humanity as possible, considering the ships' capabilities and limitations. On the subject of disembarkation, the amendments added that State parties are obliged to cooperate in order to ensure that, with minimum deviation from the ships intended voyage, the captain will be relieved of their obligation to assist. As in the SAR convention, it is the States in whose SRR the vessel in distress is located, that are given the primary responsibility to make sure that the rescued persons disembark at a place of safety. It has been argued by commentators that if there are no options for safe disembarkation elsewhere, it is the State who organised the SAR operation that is obliged to allow disembarkation on its territory. The issue of where to disembark, however, remains contentious.[68]

There are several interesting additions in the IMO guidelines.
The guidelines define a place of safety as the place in which the rescue operation is considered to end. This is a place where basic human needs of the rescued person can be met, e.g. a place in which access to food, shelter and medical treatment can be provided. This place can temporarily be a location at sea, until the rescued persons can be disembarked. While this location at sea can be the rescue vessel itself, the guidelines State that while

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[66] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 322.
[67] IMO Guidelines, para 2.3.
[68] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 322.

rescued persons can be considered no longer in immediate danger, the assisting ship should not be considered a place of safety based on that fact alone.[69] Furthermore, a place of disembarkation should not be a place where there is a possibility for the rescued persons to face a well-founded fear of persecution. [70]

When a MRCC[71] is contacted despite not being the centre responsible for the SRR where the incident takes place, it shall "begin efforts to transfer the case" to the responsible MRCC. The second MRCC should immediately accept responsibility for the coordination of the rescue, since the responsibilities relating to the rescue primarily fall on the government in charge of said SRR. However, until the second MRCC accepts responsibility, it is the MRCC that was first contacted that retains responsibility to coordinate the rescue operation.[72]

Furthermore, the government and responsible MRCC should "make every effort" to keep the amount of time the rescued persons spend on the assisting ship to a minimum.[73] The State also has to expedite the arrangements for disembarkation from the assisting ship, while noting that in some cases the coordination can cause unavoidable delays.[74]

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[69] Ibid. pg. 323.
[70] Ibid.
[71] The IMO guidelines refer to rescue co-ordination centre (RCC) rather than MRCC, omitting the "maritime" as a MRCC is a RCC that only operates in maritime SAR activities otherwise the terms are used in an interchangeable way. For the sake of simplicity and relevance to the subject, I have continued to use MRCC.
[72] IMO guidelines, para 6.7.
[73] IMO guidelines, para 6.8.
[74] IMO guidelines, para 6.9.

3.1.3 UNCLOS

All EU member States are party to the UNCLOS Convention.[75]
Article 98 of the Convention details the duty to render assistance.[76] Under the first paragraph of the article, there is an obligation upon flag States to require a captain to "render assistance to any person found at sea in danger of being lost" and, if informed of a need for assistance, "proceed with all possible speed to the rescue of persons in distress, in so far as such action may reasonably be expected of him".[77] The duty to assist is not an absolute duty, the captain is not required to assist if doing so would endanger his ship, crew or passengers.[78] Furthermore, the provision of assistance is an obligation only is so far as it can be reasonably expected of him.[79] It is worth noting that the duty to assist is in any case considered to be binding in customary international law, thus binding States which are not party to UNCLOS and similar treaties.[80] An interesting point is that it is irrelevant if the individuals in need of rescue have contributed to their peril themselves, e.g. by using non-seaworthy vessels. This fact does not free anyone of their duty to assist.[81]

The second paragraph of article 98 UNCLOS requires coastal State to organise SAR services and capabilities as well as, when required, to enter into regional arrangements for this purpose.[82]

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[75] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 317-318.
[76] Art 98, UNCLOS.
[77] Art 98 (1), UNCLOS.
[78] Ibid.
[79] Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, pg. 320.
[80] Gombeer, K. & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg. 3.; Komp, L., *The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas* in Violeta Morena-Lax and Efthymios Papastavridis, *"Boat Refugees" and Migrants at Sea: A comprehensive Approach"*, Brill | Nijhoff, 2016, pg. 235.
[81] Ibid. pg. 245.
[82] Art 98.2, UNCLOS

According to article 3 and 4 UNCLOS, coastal States have the right to establish a territorial sea which can span up to 12 nautical miles from the coast.[83] It is worth noting that both Italy and Libya have used this right.[84] Within these waters, the coastal State in question has full sovereignty.[85] The exclusive sovereignty also includes the ports located in the territorial waters. There are no obligations to allow any foreign-flagged vessels access to the State's waters and ports, with the exceptions of cases of force majeure, distress or if it is required in bilateral or multilateral treaties.
When it comes to the ports, States are entitled to both regulate and deny access for foreign-flagged vessels, unless these vessels are in distress. Then the State cannot deny access.[86]

There are more exceptions to the rule of State sovereignty inside its territorial waters. The State has the right to take the steps necessary in order to prevent passage within these waters, provided that the passage in question is not deemed innocent.[87] The regime of innocent passage is governed by article 17 through 32 of UNCLOS. According to this principle, a foreign-flagged vessel has the right to access a coastal State's territorial sea, provided that they merely pass through it, not stay within it and do so in an innocent fashion. Passing in this context entails a crossing of the territorial sea in an expeditious and continuous manner.[88] In the *Nicaragua* case the International Court of Justice (ICJ) said that the right of innocent passage as seen in UNCLOS is a codification of customary international law.[89] So

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[83] Gombeer, K. & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg. 9.
[84] Ibid.
[85] Ibid.; Art 2(1) UNCLOS.
[86] Churchill R. R. & Lowe A. V., *The Law of the Sea*, Manchester University Press, (1999) pg.63 cited in Papastavridis, E., *The Aquarius incident and the law of the sea: is Italy in violation of the relevant Rules?*, Ejil:Talk, 27 June 2018, <https://www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/> (accessed 24-10-2018).
[87] Art 25 (1) UNCLOS.
[88] Gombeer, K. & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg.10.
[89] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27

while Italy is a party to UNCLOS[90] and Libya is not, both are bound to comply with it. Of note is that States have no right to unilaterally restrict the navigation of foreign vessels in another coastal States' territorial sea.[91]

The vessel is allowed to stop, provided it is for the purpose of ordinary navigation or if the stop is necessary because of force majeure, distress or the vessel providing assistance to another vessel, persons or aircraft in distress.[92] In the context of NGOs entering the territorial sea if it is necessary for the purpose of SAR, the vessel can enter and traverse freely. However, the NGO cannot circle around or hover inside the territorial waters waiting for an incident of distress to occur. For the passage to be considered innocent the entry, stop and/or passage through the territorial waters must be for the purpose of responding to a situation of distress.[93]

The requisite for a passage to be innocent is that it is not "prejudicial to the peace, good order or security of the coastal State".[94] In the second paragraph of article 19, there is an exhaustive list of activities which would render a passage prejudicial to these domestic interests. One of these is loading or unloading of any person contrary to the immigration laws and regulations of the coastal State.[95]

June 1986, para 214. <https://www.refworld.org/cases,ICJ,4023a44d2.html> (accessed 9-01-2019) (Nicaragua).

[90] Gombeer, K. & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg.14.

[91] Ibid.

[92] Art 18 (2) UNCLOS

[93] Gombeer, K. & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea,* pg. 10.

[94] Art 19 (1) UNCLOS

[95] Art 19 (2) and Art 19 (2)(g) UNCLOS

The freedom of navigation on the high seas is set out in article 87 UNCLOS.[96] The principle is simple: when vessels are outside of a coastal State's territorial sea, i.e. on the high seas or within a State's exclusive economic zone, they are solely subject to the jurisdiction of their flag State. No other State than the flag State can restrict the voyage on the high seas.[97]

The coastal State can, however, declare a so-called contiguous zone of up to 24 nautical miles from its baseline. In this zone, the State can take measures for the purpose of preventing infringement upon certain domestic laws and regulations such as immigration. This is the last point in which a State can potentially interfere with the navigation of a foreign-flagged vessels, whilst remaining within the boundaries of what is permissible in international law.[98]

3.2 Human rights law

3.2.1 Non-refoulement

The principle of non-refoulement can be found enshrined in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT[99]), article 3 European Convention of Human Rights (ECHR[100]),[101] as well as article 7 of the International Covenant on Civil and Political Rights (ICCPR).[102]

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[96] Papastavridis, E., *The Aquarius incident and the law of the sea: is Italy in violation of the relevant Rules?*
[97] Gombeer, K., & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg. 14.
[98] Papastavridis, E., *The Aquarius incident and the law of the sea: is Italy in violation of the relevant Rules?*
[99] Art 3, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (UNCAT).
[100] Art 3, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. (ECHR).
[101] Gauci, J., *Back to Old Tricks? Italian Responsibility for Returning People to Libya*, Ejil:Talk, 6 June 2017, <https://www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/> (accessed 24-10-2018).
[102] Art 7, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, 999 UNTS 171 (ICCPR).

The principle is regarded as an established principle of customary law[103] with participation in a convention or similar agreement which contain the principle of non-refoulement is near universal.[104] While Libya is not party to the ECHR, it is party to both ICCPR and UNCAT. Italy, however, is party to all three.[105] The principle can be considered the primary obligation for States when dealing with refugees and other persons entitled to international protection, both internationally and domestically.[106]

The vice-president of the European Commission offered a succinct definition of non-refoulement in a legal opinion to the 2012 *Hirsi* case:

> "The principle of non-refoulement, as interpreted by the [ECtHR], essentially means that States must refrain from returning a person (directly or indirectly) to a place where he or she could face a real risk of being subjected to torture or to inhuman or degrading treatment."[107]

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[103] Lauterpacht, E. and Bethlehem, D., *'The Scope and Content of the Principle of Non-refoulement: Opinion,* UN High Commissioner for Refugees (UNHCR), para 216. <https://www.unhcr.org/protection/globalconsult/3b33574d1/scope-content-principle-non-refoulement-opinion.html> (accessed 08-01-19).
[104] Ibid. para 209-210 and Annex 1.
[105] Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, 31 March 2017). S. Juss (ed.), Research Handbook on International Refugee Law (Edward Elgar, Forthcoming). pg. 21. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009331>, (accessed 05-01-2019); The Office of the High Commissioner for Human Rights, *Status of ratification: Interactive dashboard* [website] <http://indicators.ohchr.org/> (accessed 07-01-2019).
[106] Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, pg.11.
[107] Para 34, Hirsi Jamaa and Others v. Italy, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, <https://www.refworld.org/cases,ECHR,4f4507942.html> (accessed 28-12-2018) (Hirsi)

Other definition adds additional elements in the form of "cruel" treatment or "punishment" such as the UN Human Rights Committee (HRC)[108]:

> "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement"[109]

This is a relatively broad definition of non-refoulement, similarly broad definitions are also reflected in several conventions, including art 3 ECHR and article 7 ICCPR.[110] A broader definition to the principle appears to be the more prevalent one, with the notable exception of art 7 UNCAT which restricts itself only to torture, with customary status in international law.[111]

Worth noting is that while article 3 ECHR does not explicitly reference non-refoulement, the article is interpreted as including the principle.[112] An example of this in case law can be found in *T.I. v. United Kingdom*. The ECtHR stated that article 3 ECHR (containing a prohibition against torture and inhuman and degrading treatment) read together with article 1 ECHR (which obligates contracting States to secure the rights and freedoms of individuals within its jurisdiction), also imposes an obligation to "expel a person to a country where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to treatment contrary to Article 3."[113]

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[108] Lauterpacht, E. and Bethlehem, D., *'The Scope and Content of the Principle of Non-refoulement: Opinion,* para 241.
[109] UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para 9.
<https://www.refworld.org/docid/453883fb0.html> (accessed 31-12-2018)
[110] Lauterpacht, E. and Bethlehem, D., *'The Scope and Content of the Principle of Non-refoulement: Opinion*, para 221-222.
[111] Ibid. para 223 and 228-229.
[112] Lauterpacht, E. and Bethlehem, D., *'The Scope and Content of the Principle of Non-refoulement: Opinion*, para 204.
[113] T.I. v. The United Kingdom, Application no. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000, pg. 14, (T.I. v. United Kingdom).
<https://www.refworld.org/cases,ECHR,3ae6b6dfc.html> (accessed 31-12-2018)

A similar interpretation was made in relation to article 7 ICCPR by the HRC. Not only are actions such as torture prohibited, the State must also prevent these actions as well as not expose individuals to them by e.g. refoulement.[114]

The ECtHR stated in the *Hirsi* case (referring to art 3 ECHR) that when ascertaining the risk of ill-treatment, it is the foreseeable consequences that will be examined, in light of the personal circumstances of the removed person and the domestic circumstances of the receiving country. When doing so, the Court places importance on the information of independent human rights organisations such as Amnesty International or governmental sources.[115]

Additionally, whether or not a risk exists should be evaluated with reference to facts which the State had or ought to have had knowledge of, at the relevant time.[116] In *Hirsi*, the Court found that the situation in Libya at the time was "well-known and easy to verify on the basis of multiple sources" and stated that Italian authorities "knew or should have known" that the migrants given over to the Libyan authorities would be unprotected upon arrival in Libya and be subject to treatment in breach of the ECHR.[117] Thus Italy was found in breach of Article 3 under the principle of non-refoulement.[118]

3.2.2 Right to leave

The right to leave can be found in article 2(2) of Protocol 4 ECHR and article 12(2) of the ICCPR, succinctly expressed as "everyone shall be free to leave any country, including his own".[119] Unlike the freedom of

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[114] Lauterpacht, E. and Bethlehem, D., *'The Scope and Content of the Principle of Non-refoulement: Opinion*, para 207.
[115] Para 117–118, *Hirsi*.
[116] Para 121, Hirsi.
[117] Para 131, Hirsi.
[118] Para 137, Hirsi.
[119] Art 2, protocol 4, ECHR; Art 12(2) ICCPR.

movement within the territory of a State expressed in the same article, the right to leave has a universal scope, applicable to everyone regardless if they reside within the territory legally or not: the legal status of the person within the territory he/she is trying to leave, is therefore irrelevant.[120]

The right to leave is not an absolute though, as both articles express the possibility to restrict the right through law for the purpose of protecting certain interests such as national security, public order or rights and freedoms of others.[121] These restrictions, however, must be necessary, proportionate and based on clear legal grounds.[122] Additionally, the laws must be proportional in each individual case, pursue a legitimate objective and be as minimally intrusive as possible.[123]

An example of this can be found in the *Stamose* case from the ECtHR, where Bulgaria was found to be in violation of article 2 of protocol 4. This was due to an automatic travel ban imposed on an individual for breaking another State's immigration law. The travel ban came into effect automatically without there being any individual examination of the persons situation. The legislation which the ban was based on, appeared to have been prompted by a Bulgarian will to "allay fears" of European States of illegal emigration from Bulgaria in the past.[124] The Court said it could not find the automatic prohibition on travel beyond the country proportionate for a single breach of migration law in a single country, a "blanket and indiscriminate measure".[125] Furthermore, while the Court opened for the

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[120] Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, pg. 13; see also art 2(1) and 2(2) Protocol 5, ECHR and art 12(1), 12(2) ICCPR.
[121] Ibid.
[122] UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12, para 16, (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, <https://www.refworld.org/docid/45139c394.html> (accessed 28-11-2018)
[123] Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, pg. 14.
[124] Stamose v. Bulgaria, Application no.29713/05, Council of Europe: European Court of Human Rights, Nov. 2012, paras 34 and 36. <http://hudoc.echr.coe.int/eng?i=001-115160> (accessed 28-01-2019) (Stamose)
[125] Ibid. paras 33 and 34.

possibility of a similar travel ban to be justified in certain "compelling situations", it stated it did not consider that "the automatic imposition of such a measure without any regard to the individual circumstances of the person concerned may be characterised as necessary in a democratic society."[126]

As a general rule, States are to respect and ensure the human rights of the individuals within their jurisdiction and are responsible for any conduct which breaches the rights.[127] Therefore it would be prudent to explain the relevant rules of jurisdiction.

3.3 Jurisdiction

In the context of human rights, jurisdiction can be interpreted as a responsibility leading to certain legal obligations for the State. Jurisdiction can also be construed as an "all or nothing" concept, meaning that unless the threshold of jurisdiction is met, human rights will not apply to the situation.[128] What that means is essentially that for human rights to be applicable in a circumstance, the State in question must have jurisdiction over the individuals concerned. When international judicial bodies (e.g. the ECtHR) determines whether or not a State, in the human rights context, has incurred jurisdiction they rely on the control exercised by the State in question. There are two circumstances from which jurisdiction can be derived from, and those are when the State has control over a territory and when it has control over individuals.[129]

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[126] Stamose, para 36.
[127] ECHR art 1, ICCPR art 2(1); Lauterpacht, E. and Bethlehem, D., *'The Scope and Content of the Principle of Non-refoulement: Opinion*, para 63.
[128] Altwicker, T., *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, European Journal of International Law, Volume 29, Issue 2, 23 July 2018, 581-606, pg. 588. <https://doi.org/10.1093/ejil/chy004> (accessed 05-01-19)
[129] Ibid. pg. 596 and 588.

3.3.1 Jurisdiction from territorial control

The ECtHR mentioned in the *Al-Skeini* case that jurisdiction (referring to article 1 ECHR) is “primarily territorial” and limited to a State’s own territory, where the State is presumed to exercise jurisdiction throughout.[130] There are exceptions though.

In the *Loizidou* case, and echoed in *Al-Skeini*, the ECtHR stated that a States has jurisdiction over a territory outside its national boundaries if it exercises effective control over it.[131] What constitutes effective control has been given a wide interpretation in ECtHR case law.[132] The term “effective overall control” has been used, which does not entail a detailed manner of control.[133] In the *Kyriacou* case, Turkish jurisdiction in Northern Cyprus (an area which it effectively controlled) was said not to be limited to the actions of its own State agents but extended to the actions of the local administration as well. Of note is that the local administration in Northern Cyprus had survived due to Turkish military and support.[134] The control does not have to be military though, it may be enough for a controlling State to have significant political, financial or economic influence on foreign territory. Similarly to *Kyriacou*, in the *Ilaşcu* case Russia was deemed to have jurisdiction over the acts of the Transdniestrian administration due to the military, financial, economic and political support it provided the

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[130] Al-Skeini and Others v. United Kingdom, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, para 131 and 138. <https://www.refworld.org/cases,ECHR,4e2545502.html> (accessed 28-01-2019) (Al-Skeini)

[131] Al-Skeini, para 138; Loizidou v. Turkey (Preliminary Objections), Application no. 15318/89, Council of Europe: European Court of Human Rights, 23 March 1995, para 62. <https://www.refworld.org/cases,ECHR,402a07c94.html> (accessed 28-01-2019) (Loizidou)

[132] Loizidou, para 56.; Kyriacou Tsiakkourmas and Others v. Turkey, Application no. 13320/02, Council of Europe: European Court of Human Rights, 2 June 2015, para 150. <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Kyriacou%20Tsiakkourmas%20and%20Others%20v.%20Turkey%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-155000%22]}> (accessed 28-01-2019) (Kyriacou)

[133] Altwicker, T., *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, pg. 589.

[134] Kyriacou, para 150.

separatist region.[135] The ECtHR stated that Russia held decisive influence if not effective authority over the local administration, which existed by virtue of the Russian support.[136] Such effective control over a territory, lawfully or unlawfully acquired, obligates the controlling State to guarantee the rights of the territory's inhabitants.[137] Indeed, in *Al-Skeini*, the Court stated:

> "The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights."[138]

If a State exercises control over a territory in a way similar to its control over its own sovereign territory, the State in question has human rights obligations towards the inhabitants.[139]

3.3.2 Jurisdiction from control over persons

As stated previously, jurisdiction primarily is territorial. However, a State can have jurisdiction over an individual beyond its borders, provided the State is exercising control over said individual.[140]

The HRC, in relation to the context of the ICCPR, stated that if a person is within the power or effective control of a State party, said person is under the State's jurisdiction. If an individual is under the jurisdiction of a State as

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[135] Ilaşcu and Others v. Moldova and Russia, Application no. 48787/99, Council of Europe: European Court of Human Rights, 8 July 2004, para 392-394. <https://www.refworld.org/cases,ECHR,414d9df64.html> (accessed 28-01-2019) (Ilaşcu)
[136] Ibid. para 392.
[137] Loizidou, para 138
[138] Al-Skeini, para 138
[139] Milanovic, M., *Extraterritoriality and Human Rights: Prospects and challenges* in Gammeltoft-Hansen, T., & Vedsted-Hansen, J., *Human Rights and the Dark side of Globalisation*, [Kindle book], Routledge 2017, section 2.2.2.
[140] Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence*, (2014), Law & Economics Working Papers, pg. 28. <https://repository.law.umich.edu/law_econ_current/106/> (accessed 05-01-19).

a result of this control, said State is obligated to "respect and ensure the rights" of the individual. [141] It is not necessary for the individual in question to be within the home territory of the State, that is to say jurisdiction is not only limited to territorial jurisdiction.[142]

The ECtHR has in the past put the focus on the *de facto* exercise of control over an individual, when determining jurisdiction.[143] The ECtHR said in *Issa and Others v. Turkey*, that a State can be held accountable for the violation of individuals located on foreign territory, if State's agents operated there and had authority and control of the individuals. The court stated that the accountability of similar situations was motivated by the fact that a State party should not be allowed to perpetrate human rights violations abroad if it cannot perpetrate them at home.[144]

The same was stated in *Al-Skeini*, where the Court concluded that if State agents exercised "control and authority over an individual", the individual is under the State's jurisdiction and the State is to secure the individual's human rights and freedoms.[145] The Court thus defined jurisdiction as "state control and authority over an individual", with the caveat that the activities of the state agents, in this case soldiers engaged in security operations, were an exercise of public powers that would in normal cases be exercised by a sovereign government.[146]

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[141] UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 10, <https://www.refworld.org/docid/478b26ae2.html> (accessed 22-12-2018)
[142] Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence*, pg. 31.
[143] Ibid. pg. 36.
[144] Issa and Others v. Turkey, Application no. 31821/96, Council of Europe: European Court of Human Rights, 16 November 2004, para 71. <https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-67460%22]}> (accessed 05-01-19) (Issa).
[145] Al-Skeini para 137.
[146] Milanovic, M., *Extraterritoriality and Human Rights: Prospects and challenges* in Gammeltoft-Hansen, T., & Vedsted-Hansen, J., *Human Rights and the Dark side of Globalisation*, section 2.3.3.; Al-Skeini para 149-150.

In *Al-Skeini,* the ECtHR interpreted the jurisdiction through control over persons in a narrower fashion as compared to territorial control, limiting it to circumstances in which the state agent has to be exercising control over the individual while physically present in the foreign territory.[147]

In the past, individuals have been found to be under a State's jurisdiction when inside embassies, consulates or onboard vessels flying the flag of the relevant States[148]. Along the same vein, a State can hold jurisdiction over individuals should they be held in detention centres, military bases or similarly closed facilities abroad that are controlled by the State.[149] ECtHR have stated that in cases where an official agent has operated outside State territory, in a way that brought an individual under the control and thus jurisdiction of the State, the jurisdiction does not solely come from the fact that the control is exercised in buildings or ships where the individuals in question are held. The important factor in such cases is the exercise of physical power and control,[150] which can lead to jurisdiction by itself.[151] Even indirect control can lead to jurisdiction, in cases such as blockades or forcibly escorting vessels on the high seas.[152]

[147] Altwicker, T., *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, pg. 589 (referencing Al-Skeini para 134-137).
[148] Medvedyev and Others v. France, Application no.3394/03, Council of Europe: European Court of Human Rights, 29 March 2010, para 65. (https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-97979%22]}) (accessed 22-12-2018); Bankovic and Others v. Belgium and Others. European Court of Human Rights. Application no. 52207/99. 12 120 December 2001, para 73. (http://www.rulac.org/assets/downloads/ECtHR_Bankovic_Admissibility.pdf) (accessed 22-12-2018).
[149] Al-Saadoon and Mufdhi v. United Kingdom, Application no. 61498/08, Council of Europe: European Court of Human Rights, 30 June 2009, para 86-88. <https://www.refworld.org/cases,ECHR,4a5360060.html> (accessed 22-12-2018); Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence,* pg. 35.
[150] Al-Skeini, para 136.
[151] Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence*, pg. 36.
[152] Ibid. pg. 40.

In *Hirsi*, the Italian navy took migrants found at sea and delivered them to the Libyan authorities. The Court found that the migrants had been in the "continuous and exclusive *de jure* and *de facto* control" of the Italian forces between the moment they boarded the Italian ships to the point where they were handed over to the Libyans, therefore leading to Italy having jurisdiction over the migrants.[153] The Court found that handing the migrants over to the Libyan authorities constituted an act in breach of the principle of non-refoulement, as sending the migrants back to Libya exposed them to risk of ill-treatment contrary to Article 3 ECHR.[154]

3.4 Avoiding jurisdiction

3.4.1 Non-entrée

Non-entrée is a term that describes the efforts of powerful States (in this case, the EU states) to hinder migrants from ever reaching their jurisdiction where they would be entitled to human rights protection from the States, e.g. non-refoulement.[155] Simply put, stop the migrants from coming into the jurisdiction where they will become the responsibility of the State.

Non-entrée has been described as the opposite of non-refoulement. Instead of working towards not turning away migrants it works towards ensuring that no migrant will be allowed to arrive.[156]

[153] Hirsi, para 81-82.
[154] Hirsi, para 135-138; Giuffré, M., *Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations* in Morena-Lax, V., & Papastavridis, E., *"Boat Refugees" and Migrants at Sea: A comprehensive Approach*, (2016), Brill | Nijhoff, pg. 262.
[155] Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence*, pg. 11.
[156] Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence,* pg. 6.

There are different forms of non-entrée, but the general rule is to erect a form of barrier towards migration flows. Example of a relatively simple one is making airlines and other transportation companies have visa checks before departure into State territory. Another example in the realm of airlines is the establishment of international zones, e.g. in airports, where the territorial State has declared that some or all legal obligations do not apply.[157]

Migrants normally rely on organised smuggling and similar methods when entering the EU. This causes the traditional non-entrée methods, such as requirement for visas, to be less effective[158] as the migrant does not pass a passport control when being smuggled into a country.

3.4.2 Cooperative deterrence

"Cooperative deterrence" is the term used to describe the form of non-entrée based on international cooperation which States have used as a newer form of deterrent. This form of deterrence towards migrant arrival occurs under the jurisdiction as well as in the territory of the migrant's home State or State of transit.[159] The incentives for the States of transit for handling immigration control on behalf of others, can be trade agreements, help with visa facilitation or direct financial incentive. An example of financial incentive is when Spain in 2003 provided Morocco with aid and debt relief, in exchange for Moroccan border control efforts.[160]

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[157] Ibid. pg. 12; Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows,* pg.2.

[158] Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence,* pg. 14.

[159] Ibid. pg. 17 and 9

[160] Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows,* pg. 20-21.

By cooperating with third countries to outsource the executive part of the migrant management, the non-entrée policies have the goal of avoiding direct or indirect physical contact between the migrants and authorities of the intended destination States, in a bid to evade a jurisdictional link and responsibility for the migrants.[161]

As opposed to the quite clear liability of non-refoulement should the destination States handle the deterrence themselves, within their own borders or under their respective jurisdiction, this form of contactless migration control can seem more risk-free from a legal perspective.[162] It has been assumed by some States that this approach to non-entrée is compatible with human rights law. It is not the EU countries themselves that are performing any of the containment after all, but it's the partner States that do. There is no direct contact between the EU countries and the migrants, who are stopped on their way. The appeal of this approach is that it is seen as a way to take deterrent action against irregular migration without actually incurring legal liability, thereby not breaching the principle of non-refoulement without having to de facto comply with it.[163]

If a State has managed to avoid jurisdictional link to a wrongful act by acting through a proxy, there is a possibility outside of jurisdiction to hold States to account.

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[161]Ibid. pg. 4.
[162] Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence*, pg. 17.
[163] Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, pg.10 and 7.

3.5 Responsibility

For an EU country to incur responsibility for an internationally wrongful act, there are three situations: through actions attributable directly to them, through direction and control of a third country's actions and in situations of complicity.[164]

On State responsibility we look towards the International Law Commissions (ILC) and the Articles on Responsibility of States for Internationally Wrongful Acts (ASR). Despite not being formally binding, the articles found therein enjoys wide support as opinion juris as well as State practice.[165]

The definition of an internationally wrongful act, given in article 2 of the ASR, is an act or omission that both is attributable to the State under international law and constitutes a breach of an international obligation by the State.[166] An act is attributable to the State if the act in question is made by an organ of the State, State organs being all the "individual or collective entities which make up the organisation of the State and act on its behalf".[167]

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[164] Art 16, ASR; Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, pg. 19.

[165] Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence*, pg. 54.; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, 43. para 420. <https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf> (accessed 28-01-2019) (Bosnian genocide)

[166] Art 2, ASR.

[167] Art 4 ASR; Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, International Law Commission, 2001, Art 4, commentary para 1. <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> (accessed 05-01-2019). (

3.5.1 Aid and assistance

Responsibility derived from aid and assisting can be found in article 16 of the ASR. Simply put, a State can be held internationally responsible for assisting another State in the execution of an internationally wrongful act. Worth noting is that the State is only responsible to the extent that its own actions contributed to the wrongful act in question.[168] Case law from the ICJ have expressed that the rule found in art 16 is part of customary international law.[169]

However, the scope of the responsibility of the assisting State is limited in the article. There are a series of requirements for article 16 to be applicable to a situation. First, the State providing assistance or aid must, based on the relevant circumstances, have awareness of the fact that the conduct of the assisted State is internationally wrongful. Second: whatever aid or assistance given must be given with the motivation of enabling the facilitation of the wrongful act and must achieve the intended result. Finally, the completed act has to be wrongful for the assisting State, if it had been the perpetrating State.[170]

It is worth pointing out that the responsibility under article 16 is responsibility for assisting the State that committed the wrongful act. An assisting State cannot be held responsible for perpetrating the internationally wrongful act in of itself but can be held responsible for facilitating the wrongful act.[171]

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[168] Art 16, ASR; Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, pg. 19.
[169] Bosnian genocide case, para 420.
[170] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, art 16, para 3.
[171] ILC commentaries, Article 16 para 1 and 10. and Moynihan, H. (2018). Moynihan, H., *Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission´s Articles on State Responsibility*, International and Comparative Law Quarterly, 67(2), 455-471, 19 December 2017, pg. 457.
<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/aiding-and-assisting-the-mental-element-under-article-16-of-the-

In caselaw, the ICJ has made clear that for aiding, the assisting State should have knowledge of the fact that there is a serious risk of wrongful acts, but despite this still offer assistance to the perpetrating State.[172] Court speaks of that the assisting State has to have knowledge of the intent of the assisted State. Some commentators have argued that to meet the criteria of knowledge of the act, it is not sufficient that the assisting State "should have known". In the *Bosnian genocide* case, the ICJ stated that it was necessary for the assisting State to have "at least" knowledge, which can be interpreted as the minimum of the knowledge requirement, being having actual knowledge.[173]

Article 16 does not impose any duty to make enquiries, meaning that there is no explicit obligation to seek information in order to make sure that the act which the assisting State is facilitating is a wrongful one.[174] In the ILC commentaries, it was noted that States that provide assistance or aid usually do not assume that there is a risk for unlawful use of the aid provided by the receiving State. Should the assisting State be unaware of the intended (and unlawful) use of the aid it provided, it cannot bear responsibility for the act.[175] However, if there is evidence of potential wrongdoing by the assisted State and the assisting State deliberately avoid knowledge of the fact to remain wilfully blind to any international wrongdoing, it should be of sufficient to meet the criteria.[176] To meet the knowledge criteria, the assisting State needs to have actual knowledge of, or wilful blindness, to the fact that the assistance or aid given will be utilised in a unlawful manner by the assisted State.[177]

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international-law-commissions-articles-on-state-responsibility/F867C734B10EDFFFE75440B13411C41E> (accessed 03-01-2019).

[172] Genocide, para 420-421; Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, pg. 21.

[173] Moynihan, H., *Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission´s Articles on State Responsibility*, pg. 461.

[174] Ibid. pg. 463.

[175] ILC commentaries, article 16 para 4.

[176] Moynihan, H., *Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission´s Articles on State Responsibility*, pg. 461-463.

[177] Ibid. para 462.

For the assisting State to be held responsible for aid or assistance through article 16, it needs to have given the aid or assistance with the intention of facilitating the wrongful act and the act must have been committed. There needs to be a clear link between the assistance and the wrongful conduct.[178] The assistance does not have to be an essential contribution but the assistance has to contribute in a significant way in the performance of the act.[179] Additionally, the assistance given cannot be in the form of moral support or a show of approval, it has to be an actual form of aid or assistance.[180] However, there is no need for the use of force, e.g. merely providing necessary material aid to a State's human rights abuses would be enough.[181]

The articles do not offer a definition of the terms aid or assistance, which has been interpreted by commentators as given a wide scope covering e.g. financial assistance, political or legal aid, training and treaties to help facilitate the completion of the wrongful act.[182] The ILC commentaries does provide a couple examples of aid or assistance which can be summarised as: should a State give another State access to its airfields for the purpose of facilitating the launching of aerial attacks on a third State but the attacks are unlawful (e.g. an act of aggression), it could constitute assisting a wrongful act in article 16.[183]

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[178] ILC commentaries, Article 16 para 5.
[179] ILC commentaries, article 16 para 5.; Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence*, pg. 55-56.
[180] Moynihan, H., *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, para 20. < https://www.chathamhouse.org/publication/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism > (visited on 03-01-2019)
[181] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Art 16 par 9.
[182] Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, pg. 20; Moynihan, H., *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, para 19.
[183] Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, art 16 par 8.; Moynihan, H. (2016), *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, para 19.

It is worth noting however, that while there is literature and commentary on the subject of article 16, there is a lack of case law. This has caused concern as the framework of State responsibility has been described as not as clear as it should be.[184]

The final requirement for responsibility, found in article 16 (b), is that the internationally wrongful act in question would also have been unlawful had it been carried out by the assisting State. If the prohibition of the act is based on a treaty obligation that only the perpetrating State is bound by, the assisting State cannot be held responsible. However, if the treaty obligation is in fact customary law, both States will be bound by it and responsibility for assistance can follow.[185]

The commentaries to art 16 state that the assisting State cannot aid the assisted State to breach "an obligation by which both States are bound; a State cannot do by another what it cannot do by itself".[186] Additionally, the comment concludes with a statement that for the assisting State to have responsibility of the act, the act would have "constituted a breach of its own international obligations."[187] Additionally, it has been argued by commentators that the if the obligation is shared between the assisting and assisted States, it is irrelevant if the respective obligations come from different formal sources.[188]

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[184] Moynihan, H., *Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission´s Articles on State Responsibility*, pg. 456.
[185] Moynihan, H. (2016), *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, para 28-29.
[186] ILC commentaries, article 16 para 6.
[187] ILC commentaries, article 16 para 6.
[188] Crawford, J., *Collective or ancillary responsibility. In State Responsibility: The General Part* (Cambridge Studies in International and Comparative Law, pp. 323-456). Cambridge: Cambridge University Press, section 12.2.4.; Hathaway, J., & Gammeltoft-Hansen, T., *Non-refoulement in a World of Cooperative Deterrence*, pg. 59.

4 Italys deterrence policies

4.1 Aquarius

The ship Aquarius is a rescue ship operated by the German NGO SOS Méditerranée alongside MSF.[189] In June 2018 the Aquarius participated in rescue operations carried out by NGOs and the Italian navy and rescued 629 migrants between the 9th and 10th of June, on the central Mediterranean whilst flying the flag of Gibraltar. The operations were coordinated by the Italian MRCC. On its way to Italy, Italian authorities ordered the Aquarius to stop and informed the ship that it would be refused access to the country's ports and that any disembarkation of the rescued migrants on Italian territory was prohibited. This was to be Italy's new policy for NGO vessels that rescued migrants in the Mediterranean according to the Italian interior minister Matteo Salvini.[190]

By the summer of 2018, in fact, the Italian coalition government had taken a hard-line stance on immigration, led mainly by Mr Salvini, who also serves as the leader for the right-wing Northern League party. One of his main claims is that it is unfair that EU frontline nations, such as Italy, bear the majority of the burden of the migrants' influx.[191]

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[189] Vandoorne, S. & Said-Moorhouse, L., *Migrant ship Aquarius reveals a fractured Europe*, CNN, 14 June 2018, <https://edition.cnn.com/2018/06/13/europe/migrant-ship-intl/index.html> (accessed 24-10-2018).
[190] Gombeer, K., & Fink, M., *The Aquarius incident: navigating the turbulent waters of international law.*
[191] *Aquarius in Valencia: Spain welcomes migrants from disputed ship*, BBC, 17 June 2018, <https://www.bbc.com/news/world-44510002> (accessed 24-10-2018).

Malta also refused Aquarius access, leaving the ship floating in the Mediterranean for an additional 24 hours. On Monday the 11th of June, the Spanish Prime Minister Pedro Sánchez announced that Spain could facilitate disembarkation for all migrants.[192]

The trip to Spain would entail a voyage of additional 700 nautical miles (almost 1 300km), so the Italian coast guard and navy shared most of the migrants between them to facilitate a safe journey.[193] Aquarius docked in a Spanish port a week later on Sunday 17th of June.[194]

4.2 Cooperation with Libya

4.2.1 Memorandum of understanding

In February 2017, a memorandum of understanding (MOU) was signed between Italy and the Libyan Government of National Accord (GNA), on "cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic".[195]

The purpose of the MOU is to support the coast guard of the UN-backed government, so that GNA can manage its borders. In the spirit of this, Italy has committed to provide support in the form of money, equipment and

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[192] Gombeer, K., & Fink, M., *The Aquarius incident: navigating the turbulent waters of international law.*

[193] Binnie, I., *Aquarius migrant rescue ship arrives in Spain*, Reuters, 17-06-2018, <https://www.reuters.com/article/us-europe-migrants-italy-spain-aquarius/aquarius-migrant-rescue-ship-arrives-in-spain-idUSKBN1JD07S> (accessed 24-10-2018).

[194] Papastavridis, E., *The Aquarius incident and the law of the sea: is Italy in violation of the relevant Rules?*

[195] *Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic* [English version], <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> (accessed 07-01-2019). (MOU English version)

training.[196] The end-goal of this assistance is to enable the Libyan state to conduct rescue and retrieval operations on an autonomous basis.[197]

Among the various commitments found in the MOU, Italy accepted to provide funds for reception centres[198] and provide "technical and technologic" support to the Libyan institutions handling the border security, i.e. the LCG.[199] Worth noting is that in the deal there is mention of that the MOU should be interpreted and applied in respect of human rights agreements and international obligations of the two parties.[200]

Under the agreement, Italy and the EU have provided support in the form of vessels, financial support and training to the LCG. Additionally, Italy have in the past deployed Italian war ships to the territorial waters of Libya in support of the LCG. [201] In 2017, the Italian government supplied the LCG with four vessels and a plan to donate an additional 12 patrol vessels was approved by the Italian parliament in august this year.[202] During 2017 it is estimated that the LCG intercepted and returned over 80 000 people off the Libyan coast. Furthermore, it has been reported in the past that NGOs ability to provide SAR services in the area have been limited due to the activities of the LCG.[203]

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[196] Euronews, *Italy-Libya sign agreement to curb flow of migrants to Europe*, Euronews, 2 February 2017. <https://www.euronews.com/2017/02/02/italy-libya-sign-agreement-to-curb-flow-of-migrants-to-europe> (accessed 08-01-2018).
[197] Moreno-Lax, V., & Giuffré, M., *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, pg. 8.
[198] MOU English version, article 2.
[199] MOU English version, article 1.
[200] Ibis. Article 5,
[201] Gombeer, K., & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea*, pg. 8.
[202] Ghiglione, D., *Italy donates 12 more vessels to Libya to stem migration*, Financial Times, 7 August 2018. <https://www.ft.com/content/391ed012-9a28-11e8-9702-5946bae86e6d> (accessed 07-01-2019).
[203] Gombeer, K., & Fink, M., *Non-Governmental Organisations and Search and Rescue at Sea,* pg. 8.

Libya has in the past come into conflict with NGOs, reportedly threatening vessels not complying with orders and actively banning them from entering territorial seas as well as its declared rescue zone.[204] An example is the confrontation between the LCG and the NGO Sea Watch in 2017.[205] This incident is the basis of an application against Italy with the ECtHR by the Global Legal Action Network (GLAN) and the Association for Juridical Studies on Immigration (ASGI), for its cooperation with Libya on the Mediterranean Sea.[206]

4.2.2 The situation in Libya

Since the Libyan leader Muammar al-Gaddafi was overthrown in 2011, the country has been the scene of internal conflict and a political impasse that has yet to be solved. As of right now, there are two major ruling powers in Libya, one based in western Tripoli while the other is based in eastern cities of Tobruk and Al-Bayda. The UN-backed GNA, the internationally recognised government of Libya, has its seat in Tripoli.[207]

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[204] MAREX, *Libya Excludes NGO Vessels from "Rescue Zone"*, The Maritime Executive, 11 August 2017. <https://www.maritime-executive.com/article/libya-excludes-ngo-vessels-from-rescue-zone> (accessed 28-12-2018); Cullen, S. Veselinovic, M. & Smith-Spark, L., *NGOs halt migrant rescue operations, citing Libya 'threat'*, CNN, 13 August 2017. <https://edition.cnn.com/2017/08/13/europe/mediterranean-libya-migrant-rescues-suspended/index.html> (accessed 28-12-2018); Riegert, B., *Libya takes over from Italy on rescuing shipwrecked migrants*, Deutsche Welle, 5 July 2018. <https://www.dw.com/en/libya-takes-over-from-italy-on-rescuing-shipwrecked-migrants/a-44546754> (accessed 28-12-2018).

[205] MARE CLAUSUM: The Sea Watch vs Libyan Coast Guard Case, Forensic Architecture. <https://www.forensic-architecture.org/case/sea-watch/#toggle-id-3> (accessed 28-12-2018).

[206] *Legal action against Italy over its coordination of Libyan Coast Guard pull-backs resulting in migrant deaths and abuse.*, GLAN, 8 May 2018. <https://www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse> (accessed 08-01-2018).

[207] UN High Commissioner for Refugees (UNHCR), UNHCR Position on Returns to Libya - Update II, September 2018, <https://www.refworld.org/docid/5b8d02314.html> (accessed 10-12-2018), pg. 2.

The security situation in the country is reported to be characterised by lawlessness, kidnappings for criminal and political reasons in addition to sporadic fighting between various armed groups. In the political vacuum that has developed, the most powerful players are the armed groups, who are divided across regional, ideological, ethnic and tribal lines, with varying and changing loyalties and interests. Of those groups aligned with the GNA, there is reportedly no effective command or oversight from the government itself.[208] All parties continuously perpetrate human rights violations with impunity, some of the more common ones are reportedly arbitrary detention, rape, unlawful killings and enforced disappearances.[209] Reportedly, the trafficking of human beings is prevalent in the nation as well.[210]

Libyan domestic legislation criminalises the irregular movement across national borders, including entry, exit as well as stay. Examples could be a migrant traveling through the territory without proper documentation. Regardless of status, every non-Libyan citizen, including refugees and asylum seekers, are subject to these immigration laws. The penalty for such law violations is an “undefined” prison sentence coupled with hard labour with deportation after sentence is completed. An alternative for the prison sentence is a fine amounting to approximately 723 USD.[211]

After a migrant is intercepted at sea by the LCG, the individual is directly transferred to government run detention centres, in which he or she is held for an indefinite amount of time with evacuation, repatriation or resettlement to a third country being the only possibility for release. In September 2018, the UNCHR estimated that over 8 000 individuals were held in government-run detention centres, a number that does not include the number of people held in unofficial detention centres run by criminal

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[208] Ibid. pg. 4 and 3.
[209] Ibid. pg. 5.
[210] Office of the Prosecutor, Statement of ICC Prosecutor to the UNSC on the Situation in Libya, International Criminal Court, 9 May 2017, para 27. <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib> (accessed 08-01-2018).
[211] UNHCR, *UNHCR Position on Returns to Libya - Update II*, pg. 10.

networks or armed factions. Reportedly, the condition in the detention centres are “nightmarish” and “cruel, inhuman and degrading conditions” with individuals regardless of their age, sex or refugee status face a high risk of being subject to ill-treatment such as torture.[212]

Due to the security situation in Libya, coupled with the risks faced by migrants and similar non-nationals, the UNCHR has stated that it does not consider Libya to be a safe place in the context of disembarkation following SAR activities.[213]

[212] Ibid. pg. 12.
[213] Ibid. pg. 22.

5 Analysis

Are the Italian attempts to deter search and rescue NGOs from operating in the Mediterranean in breach of international law?

First the deterrence policy of refusing port access will be analysed, to examine whether or not Italy breached its obligations in international law when it refused port access to Aquarius.

Aquarius

The Aquarius rescued migrants in an operation that was coordinated by the Italian MRCC but was ordered to stop and informed that it would not be allowed to disembark the rescued migrants in an Italian port as per a non-entrée policy by the Italian government. This led to the Aquarius being stranded at sea in limbo before Spain allowed them to dock in a Spanish port.

According to the SOLAS convention, in a distress situation it is the MRCC belonging to the relevant SRR that is responsible for coordinating the SAR operation. Should the appropriate MRCC be unavailable to take over the responsibility, the responsibility falls on the MRCC first contacted. Italy was the one coordinating the SAR operation, this is very clear. According to the IMO guidelines, the government and responsible MRCC should make every effort to expedite the arrangements for disembarkation at a place of safety and get the rescued persons off the assisting ship as soon as possible. Furthermore, it is the MRCC responsible for the SAR operation in question, that is to take point in finding a place of safety. A place of safety can temporarily be at sea, but it is not a permanent solution. A place of safety is a territory where basic human needs of the rescued person can be satisfied, and the rescue operation can be said to have ended.

In the case of Aquarius, the Italian MRCC was responsible for the SAR operation. While Italy had to organise the search for finding a port to disembark, there are no regulations in neither SOLAS nor SAR as to which port. Neither are there any obligation to allow disembarkation in Italy if no other State would accept disembarkation. Some commentators have argued that if the responsible State cannot find any viable foreign ports, the responsible State should be the place of disembarkation. However, this line of argument is contentious and not an established principle.

Italy did not have to offer an Italian port as a place of disembarkation for the rescued migrants aboard the Aquarius, however, did the State have the power to deny port entry to Aquarius?

According to articles 3 and 4 UNCLOS, the coastal State enjoys full sovereignty over its territorial waters, which also includes the ports. The State has no obligation to allow foreign flagged vessels to access its territorial waters or the ports within. However, there are certain exceptions, including if the vessel in question is in distress. If that is the case, the State cannot deny entry to its ports.

This brings us to the question if Aquarius was in distress or not. According to the SAR convention Aquarius would have to have been in a situation where there is a threat of grave and imminent danger and would require immediate assistance. I would argue that this was not the case. While the SAR operations was not completed yet, it concludes upon disembarkation, the imminent threat to the rescued passengers ended when rescued from their vessels by the Aquarius. The ship was in need of a place of safety to disembark its passengers but was in no apparent danger. In conclusion, Italy was under no maritime obligation to offer access to a port for the purpose of disembarkation, nor was it prohibited from refuse port access.

International human rights law does not play a part in this discussion of Aquarius as there was no Italian jurisdiction over the vessel. Aquarius

(sailing under a Gibraltarian flag) or the migrants onboard were never in an Italian controlled territory nor were they under the effective control of Italian State agents like in *Hirsi*. The order to stop before entering Italian territorial waters was without legal effect, as the Italian State had no authority over Aquarius beyond the territorial waters. The Italian coast guard did assist Aquarius on its way to Spain, even taking migrants aboard its own vessels. I would argue though, since this was done for the purpose of helping the Aquarius on its way towards Spain, a destination set by the ship itself, the Italian state did not exercise any effective physical influence over the movement of the vessels and its passenger.

Is the interception and return of migrants to Libya in accordance with international law?

There are two important principles at play when answering the second question; non-refoulement and the right to leave.

Non-refoulement is relevant when other States, such as Italy, directly return migrants to Libya after interception while the right to leave is relevant when it is Libya itself that intercepts and returns migrants to its territory.

Non-refoulement

The principle of non-refoulement can be found in art 3 UNCAT, art 3 ECHR (through interpretation by the ECtHR) and art 7 ICCPR (through interpretation by the HRC). Both Italy and Libya are party to both UNCAT and ICCPR, however, since the principle is established in customary law, it would have been binding to both regardless.

The principle is an obligation not to expel an individual to a State where, as said in *T.I v. United Kingdom*, there is a substantial risk that this individual will face a real risk of being subjected to treatment contrary to article 3 ECHR, meaning being subjected to torture or to inhuman or degrading treatment. This is a broader interpretation than the one in UNCAT, however it is thought to have customary status in international law.

For a State to have human rights obligation, e.g. prohibition of non-refoulement, towards a migrant, said migrant must be in the jurisdiction of the State in question. In the context of interception and returns of migrants at sea by EU States, taking the migrants off their vessels and deliver them back to Libya, the jurisdiction is primarily acquired through control over the migrants. This was the case in *Hirsi*, when Italy transported migrants found at sea and handed them over to Libyan authorities.

According to ICCPR, if the individual is within the power or effective control of the State agents, regardless in what territory they happen to be in, the State has jurisdiction. Stopping migrants (perhaps as a result of an interception or as a result of the duty to assist) on their journey to EU and effectively turning them around (either by escort or by taking them aboard and directly transporting them) the State definitely exercises enough effective de facto control over the migrants.

When determining the risk of ill treatment, *Hirsi* clarified the test as foreseeable consequences, in light of personal circumstances and domestic situation. In that particular case, there was such a risk and Italy "knew or should have known" of the risk of ill treatment, due to the poor security situation in Libya at the time, which was well known and easy to verify. This was in 2012 though, before the ousting of Gaddafi. Unfortunately, the situation has not improved. According to the UNCHR, the nation is currently embroiled in a civil war, with all parties of the conflict reportedly committing human rights violations with impunity. In addition to the poor security situation in general, all irregular migration in and out of the nation is prohibited and the intercepted migrants are held in detention centres in appalling conditions for an indefinite time. In these centres there is reportedly a high risk of ill treatment.

With that in mind, coupled with the fact that UNCHR has expressed that Libya is not a safe place for disembarkation of migrants following a SAR activity: if an EU State such as Italy were to return an intercepted migrant to Libya today, it would amount to a breach of non-refoulement.

The reasoning behind the earlier statement that non-refoulement is not relevant in the context of Libya being the State that intercepts and returns migrants is simply that I doubt the principle applies to Libya here. I interpret the principle as only being applicable to scenarios where a State expels an individual within its jurisdiction to another State, where the individual faces risk of inhuman treatment. When LCG intercepts migrant vessels and bring them back to Libya, they do not expel the migrants to another State. Libyan authorities are bringing people back, effectively hindering them from leaving. Which brings us to the next principle:

Right to leave

According to the principle, found in article 2(2) of Protocol 4 ECHR and article 12 (2) ICCPR, everyone is free to leave any country, even the home country. This is applicable to everyone, regardless if they reside in the territory legally or not, making the legal status of the person within the territory he or she is trying to leave irrelevant.

This right can however be restricted through law, but said restrictions must be necessary, proportionate and based on clear legal grounds. It is important that it is proportionate in its use in each individual case as well. In *Stamose*, the Bulgarian travel ban was deemed a breach of the right to leave, due to it being an indiscriminate blanket measure without an examination of the individual circumstance of the person involved. The ECtHR found the ban not to be proportionate nor necessary in a democratic society. It did open for the possibility that such a travel ban could be justified in certain compelling situations though.

Libya is currently attempting, with support from the EU and Italy, to stop irregular migration from its territory to the other side of the Mediterranean Sea. Irregular migration out of the nation is prohibited by law, the LCG patrols the sea in an attempt to intercept and return any migrant attempting the voyage and if intercepted, the migrants are put into detention centres directly upon return. There is no apparent review or examination period between return and detention, which last an indeterminable time.

Applying the motivation behind the *Stamose* verdict to the Libya prohibition and stop of irregular exit, I would consider it highly unproportionate and indiscriminate as there is no apparent individual examination of circumstances in each individual case and definitely in breach of the right to leave.

Can Italy be held internationally responsible for the interception and return of migrants, even if Italy is not directly involved?

Jurisdiction

As previously stated, should Italy attempt to return intercepted migrants to Libya, it would be a breach of non-refoulement. But Italy does not return intercepted migrants to Libya today, it would appear that the State has learned from the lesson in *Hirsi* and has adapted its approach accordingly. Instead of intercepting and return the migrants themselves, the Italian government has signed the MOU with the GNA. Through this deal, Italy has supplied the Libyan government with money, equipment, training and vessels for the LCG. This is done in order for the Libyans to bolster its capabilities for migration control, rescue operations at sea and most importantly return the rescued or intercepted migrants back to Libya.

With this policy of cooperative deterrence, a contactless approach to non-entrée is designed to avoid jurisdiction. Italy gets to have the cake and eat it too. The State receives the benefit of a non-refoulement approach, i.e. hindering irregular migration across the Mediterranean, without actually

breaching the prohibition. Italy has no jurisdiction over Libya's migration control, it does not control the territory on which the actions of interception, return or detention of the migrants occur. Additionally, Italy does not have any State agents (to my knowledge) in Libya that are exercising effective control over migrants.

Though Italy is giving Libya support, said support is for the purpose of migration control. The ECtHR set a high threshold for jurisdiction through control over the local administration in *Kyriacou* and *Ilaşcu.* In both these cases, the Turkish and Russian governments held significant authority and control over the local administrations, basically sustaining their continued existence through their respective support. While the Italian support seems to be of great significance to the effective migration control in Libya, I do not believe the Italian State to have such a high degree of control over the GNA administration for the threshold for jurisdiction to be met.

Responsibility

While Italy has seemingly protected itself from running afoul of the non-refoulement principle by avoiding jurisdiction, the contactless form of migration control is not watertight. Through article 16 ASR, an internationally customary rule, a State can be held responsible for assisting another State in perpetrating an internationally wrongful act. An internationally wrongful act is an act, or omission, that is attributable to the State performing it under international law and which breaches an international obligation of said State.

As previously mentioned, Libya has breached the right to leave, an obligation through ICCPR. This act attributable to Libya, since it was performed by the LCG, which should constitute a State organ of the GNA as it is an executive part of the administration and acts on the behalf of the State in an official capacity.

The assistance provided by Italy to Libya is the support given through the MOU, e.g. financial support for detention centres and training and vessels for the LCG.

There are a series of requirements in order for Italy to be held responsible for an internationally wrongful act perpetrated by Libya.

Italy would have had to have been aware of the fact that the conduct of the assisted State is internationally wrongful.
Italy must have had some form of knowledge that by stopping migrants from leaving the territory, the was a risk of the GNA violating the right to leave. It is not sufficient to claim that Italy "should have known", there has to be a degree of knowledge or wilful blindness. I find it hard to believe that the Italian government did not at the very least suspect there was a risk that the same conduct that they themselves were criticised for in *Hirsi* could constitute a breach of an international obligation, simply because the act was made by Libya. If Italy did not have knowledge of the risk, then I argue that the State was wilfully blind to it, which is enough. As a result, I believe that the knowledge requirement for State responsibility is fulfilled.

The aid or assistance given by Italy to Libya must have been given with the intent of facilitating the act in question and must have actually done so.
To reiterate, the act in question is the hindering of irregular migration from Libya by returning migrants intercepted or rescued at sea Libya. Italy aided the GNA and the LCG for this very purpose, to build up the State's capability for migration control and subsequently lower the irregular migration over the Mediterranean into Europe.

The aid has to be an actual contribution, not essential but a significant one. The ILC commentaries did provide an example of access to airfields in order to facilitate aerial attacks. I would argue that the aid given was of great significance, especially the donation of vessels used by the LCG in its activities. If an airfield is considered significant enough aid in the

facilitating of an air raid, then the donation of a vessel in the facilitation of operations at sea is even more so. To compare it to the airfield example, Italy's aid is less a case of offering the access to an airfield to another State's warplanes and more a case of donating the warplanes themselves. I argue that the aid given by Italy to Libya is significant enough and helped facilitate the wrongful act, thereby fulfilling the requirement.

The wrongful act must have been wrongful had it been perpetrated by Italy.
The act in question needs to be wrongful for both parties.
The right to leave can be found in both ICCPR and ECHR, both of which Italy is bound by. Had Italy in a similar fashion put an indiscriminate blanket ban on the exit of irregular migrants from its territory and had used its own coast guard to execute the ban, it would have breached the right to leave, an international obligation Italy is bound by. I believe the act would have constituted a wrongful act if Libya and Italy had traded places, fulfilling the final requirement for responsibility through article 16 ASR.

Therefore, Italy can be held responsible for its assistance of Libya's violation of the right to leave.

6 Conclusion

Are the Italian attempts to deter search and rescue NGOs from operating in the Mediterranean in breach of international law?
No.
While Italy was responsible for the coordination of the Aquarius SAR operation and thus was to take point in finding a point of disembarkation, Italy was under no international obligation to disembark the rescued migrants on its territory nor was it in breach of any when refusing the Aquarius access to its ports.

Is the interception and return of migrants to Libya in accordance with international law?
No.
For an EU State, returning intercepted migrants to Libya would constitute a breach of the prohibition of non-refoulement as Libya is a State in which the returned migrants would face a significant risk of ill-treatment. For Libya, returning intercepted migrants does not constitute a breach of non-refoulement but it does constitute a violation of the migrants right to leave.

Can Italy be held internationally responsible for the interception and return of migrants, even if Italy is not directly involved?
Yes.
While Italy cannot be held to account for direct conduct towards migrants, Italy can be held responsible for provided aid and assistance to Libya for the interception and return of migrants, as the act is a violation of the right to leave and constitutes an internationally wrongful act.

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