Does Italy accrue indirect state responsibility pursuant to Art. 16 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, for aiding and assisting Libya in the interception of irregular migrants in the Central Mediterranean Sea?
## Table of Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1.2</td>
<td>3</td>
</tr>
<tr>
<td>1.3</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>2.1</td>
<td>5</td>
</tr>
<tr>
<td>2.2</td>
<td>6</td>
</tr>
<tr>
<td>2.2.1</td>
<td>8</td>
</tr>
<tr>
<td>2.2.2</td>
<td>8</td>
</tr>
<tr>
<td>2.2.3</td>
<td>9</td>
</tr>
<tr>
<td>2.2.4</td>
<td>9</td>
</tr>
<tr>
<td>2.3</td>
<td>10</td>
</tr>
<tr>
<td>2.4</td>
<td>11</td>
</tr>
<tr>
<td>2.5</td>
<td>12</td>
</tr>
<tr>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>3.1</td>
<td>14</td>
</tr>
<tr>
<td>3.2</td>
<td>14</td>
</tr>
<tr>
<td>3.2.1</td>
<td>14</td>
</tr>
<tr>
<td>3.2.2</td>
<td>15</td>
</tr>
<tr>
<td>3.2.3</td>
<td>15</td>
</tr>
<tr>
<td>3.2.4</td>
<td>16</td>
</tr>
<tr>
<td>3.2.5</td>
<td>19</td>
</tr>
<tr>
<td>3.2.6</td>
<td>21</td>
</tr>
<tr>
<td>3.2.7</td>
<td>23</td>
</tr>
<tr>
<td>3.2.8</td>
<td>25</td>
</tr>
<tr>
<td>3.3</td>
<td>25</td>
</tr>
<tr>
<td>4</td>
<td>27</td>
</tr>
<tr>
<td>4.1</td>
<td>27</td>
</tr>
<tr>
<td>4.1.1</td>
<td>27</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Responsibility of States for Internationally Wrongful Acts</td>
<td>27</td>
</tr>
<tr>
<td>4.2 Was there a legal foundation for the 2009 push-backs?</td>
<td>29</td>
</tr>
<tr>
<td>4.2.1 SAR obligations</td>
<td>29</td>
</tr>
<tr>
<td>4.2.2 Protocol Against the Smuggling of Migrants by Land, Sea and Air</td>
<td>29</td>
</tr>
<tr>
<td>(Palermo Protocol)</td>
<td></td>
</tr>
<tr>
<td>4.3 State Responsibility – Italy. Interception at sea followed by</td>
<td>31</td>
</tr>
<tr>
<td>disembarkation in unsafe territories</td>
<td></td>
</tr>
<tr>
<td>4.3.1 Extraterritorial applicability of the principle of non-refoulement</td>
<td>31</td>
</tr>
<tr>
<td>4.4 Two types of state responsibility. Independent responsibility &amp;</td>
<td>32</td>
</tr>
<tr>
<td>Indirect responsibility</td>
<td></td>
</tr>
<tr>
<td>4.4.1 Independent responsibility</td>
<td>33</td>
</tr>
<tr>
<td>4.4.2 Indirect responsibility – Aiding and assisting</td>
<td>34</td>
</tr>
<tr>
<td>4.4.3 The Ras Jadir interception</td>
<td>38</td>
</tr>
<tr>
<td>4.6 Conclusion</td>
<td>40</td>
</tr>
<tr>
<td>5 Conclusion</td>
<td>42</td>
</tr>
<tr>
<td>Annex</td>
<td></td>
</tr>
<tr>
<td>Figure 1 - European Migrant Crisis 2015</td>
<td>45</td>
</tr>
<tr>
<td>Figure 2 - Malta Search and Rescue region</td>
<td>46</td>
</tr>
<tr>
<td>Bibliography</td>
<td>47</td>
</tr>
</tbody>
</table>
1. Introduction

In 2015 an increase in numbers of migrants traveling towards the European Union (EU) - , in search of protection and safety from persecution or escaping poverty became to be known as the European Migrant Crisis, alternatively also the European Refugee Crisis.1 During that time Europe experienced a steep rise in asylum requests. According to Eurostat, Syrians fleeing the civil war in their homelands were ranked the largest group of migrants arriving in Europe, followed by Kosovar and Afghan migrants.2 With increasing pressure along the southern external border of the EU the European migration policy became increasingly focused on deterrence.3 Though migration to the EU has always taken place the recent so-called crisis was meet with swift action at the EU level as well as national level. From Italy to Sweden and Germany to the Netherlands, the European countries began ruling the migrant situation with a striker hand.4 Immigration and asylum laws were toughened and impromptu migrant camps such as the notorious Jungle in Calais,5 France or the lesser known camp in down town Berlin,6 Germany closed down amid large scale protests.

In 2016, Greece was still struggling with the consequences of the economic crisis while every day the tide brought in more migrants and asylum seekers crossing the Mediterranean Sea. Many lost their lives or loved ones to a watery grave. Those that made it to safety were met by desolate conditions in reception camps across the Greek islands.7 The situation grew even more dire when several European member states (MS) decided to suspend the Schengen agreement and temporarily closed their borders,8 effectively creating a bottleneck situation in southern European countries with a high number of arrivals, which prevented the migrants from traveling on to other member states. In consequence a humanitarian9 and political10 crisis brewed up across the EU.

The refugee crisis of 2015 painfully showed the limits of Europe’s migration policies. Apart from the humanitarian crisis that enfolded along the Western Balkan and Central

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Mediterranean route, a threefold crisis of confidence, responsibility and solidarity shook the EU to the core.\textsuperscript{11}

Desperate to appease the growing populist sentiment within the population and their own ranks, governments across Europe and the EU collectively, increased their migration control efforts (and budgets)\textsuperscript{12} along the vast external border of the European Union\textsuperscript{13}. In September 2016 the European Border and Coast Guard Agency, colloquially referred to as Frontex, was established.\textsuperscript{14} The first out of three main operational priorities of the agency is to manage ‘migration more effectively,’ followed by the call to improve internal security within the EU and lastly the protection of the principle of free movement of people.\textsuperscript{15}

It can be said that crossing the external borders into the EU constituted the overall goal of the recent EU migration policy.\textsuperscript{16} The pursuit of this goal led to an arguably even more extreme policy development: The externalization of border control with the aim of stopping migratory flows from reaching the European external borders in the first place.\textsuperscript{17}

Bilateral migration agreements between Italy and Libya during the period of 2007-2009 resulted in the inhumane push-back practice. Migrants rescued at sea, by the Italian Navy were returned to Libya without being given the chance to make a request for asylum. The European Court of Human Rights, (ECtHR) deemed these actions a violation of Art. 3 and Art. 13 ECHR and Art. 4 Protocol 4 ECHR.\textsuperscript{18} In the ensuing period, academia discussed the matter of Italy’s state responsibility and civil society raised a storm of indignation. Today, in 2019, we are witnessing the effects of the new 2017 agreement. Instead of push-backs we are seeing pull-backs: Libyan forces, strengthened by Italian financial and physical support, are more capable than ever to patrol the seas. They prevent smugglers from moving their human cargo into Italian jurisdiction, drastically reducing the number of migrants arriving in Europe at the cost of returning a mixed migratory flow back to an unsafe third country, Libya.\textsuperscript{19}

Due to the novelty of the agreement, and the methods that resulted from it, no long-term assessment of the policy exits yet. First observations raise the moral as well as legal questions about Italy’s conduct. Though, - Italy is not itself returning migrants as it did in the past, they are facilitating a policy to the same effect. Without Italy’s support, Libya would not be capable nor enticed to retain the migrants.


\textsuperscript{16} Joannin, P. (n 11) para. 1

\textsuperscript{17} Ibid., para. 3.2

\textsuperscript{18} see chapter 3

\textsuperscript{19} Giuffré, (n 1)
This thesis attempts to assess if it is possible for Italy to accrue indirect state responsibly according to Art 16 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts based on the actions committed by Italy under the newly negotiated 2017 Italy-Libya Memorandum of Understanding (MoU) on topics of irregular migration and technical cooperation.

1.2 Outline
This thesis is organized into five chapters including the introduction. The introductory chapter familiarizes the reader with the objective of the article. It aims to impart on the reader the necessity and importance of the determination of state responsibility in the context of the externalization of migration control for future conduct. The second chapter explores the concept of the externalization of migration control and offers the reader working definitions for terms frequently used throughout the thesis. The third chapter contains the chronology of bilateral agreements on migration control and technical cooperation from 2000 to 2017 between Italy and Libya, including a brief annotation of the Hirsi and Others v Italy judgment by the ECtHR. The forth chapter assesses the question of Italy’s indirect state responsibility under Art. 16 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts. Finally chapter five closes with a summary of the topic and tentatively explores ideas for a way forward towards a more humane and rights-centred migration policy for the EU.

1.3 Methods and sources
This analysis of the various bilateral agreements on migration control between Italy and Libya as well as Italy’s indirect state responsibly under Art. 16 ILC Articles on Responsibility of States for Internationally Wrongful Acts draws on primary texts as well as academic texts. The bilateral Italy-Libya agreements and a MoU on migration are assessed based on primary sources where available. For those agreements that do not have an official English translation, I have drawn on the translation work by various research groups or think tanks. For reasons of transparency, civil society organizations make translations of specific bilateral agreements available to a wider public.

Documents issued by the EU, such as the Malta Declaration, are published on the respective EU Council websites and translated into official EU languages.

In chapter four I look at Italy’s state responsibility. The legal text of the International Law Commission on State Responsibility is readily available online and can be viewed via the UN online archive for legal documents. With regard to the ECtHR judgment in Hirsi and Others

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22 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001 (n 20)
v. Italy 2012, the full-text judgment can be accessed via the website of the European Court of Human Rights case-law database, HUDOC. The European Database of Asylum Law offers a detailed case summary and Dr. Maarten den Heijer, assistant professor at the University of Amsterdam has written an elaborate case annotation. I also look at recent scholarly interpretations of the case-law and its impact, much of which has been published on renown law blogs.

My meta search via refugee and migration law journals focused primarily on key words such as: EU migration policy; Migration control measures; Externalization of migration control/ border management; Italy-Libya Agreement, Malta Declaration; State responsibility; Non-refoulement; the right to seek asylum.

In regard to the recent 2017 Italy-Libya agreement my search yielded very little outcome in terms of academic papers. I portray the impact of the policy by exploring documentations, position papers and investigations by think tanks, NGO’s and others concerned with the issue of state responsibility and the protection of the right to seek asylum. Lastly, I include quotes of politicians and experts made in the context of either the Refugee Crisis or with regard to EU externalisation efforts in Libya and the Mediterranean Sea. The quotes are drawn from news articles and (law)blogs published online by news agencies or non-governmental organisations.
2. Externalization of border control and mixed migratory flows

2.1 Introduction

Externalization of migration control has become the primary migration control method utilized by the EU in an effort to stem the influx of migrants and asylum seekers approaching or crossing the external borders into the EU.\(^\text{23}\) The member states have a whole body of bilateral agreements on readmission with countries of origin or countries of transit, many of which have been endorsed by the EU.\(^\text{24}\) In the diplomatic realm, non-legally binding MoU put on record mutual assurances to accept the return of those illegally apprehended within the EU, while agreements on technical and police cooperation pave the way for joint maritime and land border patrols.\(^\text{25}\) Their aim is to seal the EU’s external borders and to prevent migrants from crossing into the EU irregularly. This strategy results in readmissions without factual arrival in any of the 28 EU member states.\(^\text{26}\)

Depending on the point of view, such agreements might be considered a highly effective migration policy or detrimental to the protection of those among the migrants seeking international protection.\(^\text{27}\) Effectively, the EU’s external borders have been moved as far south as, for instance, Mali, Nigeria or Libya.\(^\text{28}\)

A steep decline in the number of arrivals might seem like the ultimate proof that the EU immigration policy is a success. Talking to the press in Brussels, Estonia’s Interior Minister Andres Anvelt said:

‘If we look at the flows of migrants across the Mediterranean a few months ago and now, the decrease in illegal migration has been big in numbers...We’ll have a discussion about how to have this success story going on.’\(^\text{29}\)

Very much along similar lines, Thomas de Maiziere, Germany’s Interior Minister said:

‘I am happy that the numbers of people sent across the Mediterranean by the smugglers to Italy has really fallen in the last two months ...These developments need to be carried on. We really need to work to ensure that many people simply do not make the trip across the desert to Libya. The neighbourhood policy with Africa is very important for a sustainable

\(^{23}\) Giuffré, (n 1)


\(^{25}\) Joannin, P. (n 11) para. 2.3


\(^{28}\) Joannin, P (n 11) para. 1.3

decline in migrants coming to Italy. \(^{30}\) What those numbers do not tell us, however, is how many people seeking protection from persecution were stopped on their flight from danger either in a third country or on the high seas \(^{31}\), and subsequently returned to an unsafe place where they are at risk of ill-treatment, slavery, rape or exploitation. \(^{32}\)

### 2.2 Mixed migratory flows

The dangers of externalization of migration control lie in the practice of banning mixed migratory flows from approaching the external EU borders and thereby preventing those in search of protection from requesting refuge. \(^{33}\) But what, exactly, are mixed migratory flows and why do they require special attention and protection?

Ekaterina V. Kiseleva, \(^{34}\), associate law professor at the University of Russia, and Egor E. Markin, post-graduate at the University of Russia, composed an interesting article on the history of the concept of mixed migration. They reach as far back as the post WWII era and illustrate the origins for the 1951 Refugee Convention (RC), the first legal separation of migrant groups and refugees. Those displaced by conflict and persecution were grouped together under the RC. Until today the convention is an authoritative legal document regulating the international refugee regime. Kiseleva and Markin describe migration, or human mobility, as they also call it, as part of human nature. \(^{35}\) Similar to other scholars, such as Dr. Nicholas van Hear in the next section, Kiseleva and Markin explain that different groups of humans move for different reasons constituting distinct categories of migrants, e.g. students, asylum seekers, economic migrants or victims of human trafficking, just to name a few. The term mixed migration has come to be understood to include all types of migration reaching from complex population movements to singular individuals seeking safety or an escape from poverty. \(^{36}\)

The origins of the term can be traced back to the 2007 UNHCR launch of a new campaign, which first mentioned the concept of mixed migration. \(^{37}\) The former ‘asylum-migration nexus’ had come under fire and was replaced. Jeff Crisp, research associate at the Refugee Studies Centre at University of Oxford, explains that the asylum-migration nexus had increasingly acquired a negative connotation in the Global North. On the one hand the

\(^{30}\) Ibid.
\(^{31}\) Art 86, United Nations Convention on the Laws of the Sea, ‘The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.’; UN General Assembly, Convention on the Law of the Sea, 10 December 1982. Retrieved from [https://www.refworld.org/docid/3dd8fd1b4.html](https://www.refworld.org/docid/3dd8fd1b4.html) [accessed 12 February 2019]
\(^{32}\) Frelick, B., Kysel, I. M., & Podkul, J. (n 3), p.197
\(^{33}\) Giuffrè, (n 1)
\(^{35}\) Ibid. (376)
\(^{36}\) Ibid. (376)
\(^{37}\) Ibid. (377)
concept had become to be understood as migrants predominately heading towards the Global North versus those on the other hand that thought the nexus mainly concerned itself with the problems of the Global North.\textsuperscript{38}

Under the heading of the ‘Dialogue on Protection Challenges’,\textsuperscript{39} the UNHCR introduced the concept of mixed migration as the organization’s primary theme of the new core strategy, along with a ‘10 Point Plan of Action’. Kiseleva and Markin write that the UNHCR proclaimed that new patterns of movement called for a new approach to new challenges. They argue, that giving an old problem a new name will not necessarily contribute to meeting current challenges.\textsuperscript{40}

Over the course of the next decade the term grows in prevalence. In 2009 the International Organization for Migration (IOM) defined mixed migration as ‘complex population movements including refugees, asylum seekers, economic migrants and other migrants’. The IOM then soon declared mixed migration the ‘Area for Strategic Interaction’.\textsuperscript{41} Kiseleva and Markin raise an interesting point when they put mixed migration in the context of sustainable development: they believe sustainability will be one of the main future challenges mixed migration will have to face. In 2015 the UN General Assembly passed Res. No 71/1 – the 2030 Agenda for Sustainability. The document highlights the positive contributions mixed migration is expected to have on growth and sustainable development.\textsuperscript{42}

Dr. Nicholas van Hear, Senior Researcher and Deputy Director at the Centre on Migration Policy and Society (COMPAS) at the University of Oxford explains in an interview with Rob McNeil for the Migration Observatory, that the term mixed migration or mixed migratory flows is relatively new and began to appear in the policy world around the year 2000.\textsuperscript{43} According to van Hear the term can and must be understood in two different ways:
Firstly, the term encompasses the mixed, varying and motivating factors migrants might experience prior to leaving their country of origin or residence. They might fear for their life, or have their economic livelihood undermined due to violence and therefore seek economic betterment. Many migrants have been found to migrate for a combination of factors.
Furthermore, research has shown that oftentimes countries of origin are undergoing socio-economic unrest, possibly resulting in violent conflict.

Secondly, mixed migratory flows must also be understood in the sense that different categories of migrants travel in the same streams. Economic migrants, asylum seekers, victims of human trafficking, unaccompanied minors etc. travel the same routes and might make use of the same brokers to arrange travel. They may eventually wind up in the same

\textsuperscript{40} Kiseleva, E. Markin, E. (n 34) 378
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid., (378-379)
communities en route and in countries of destination.

National governments and international organizations are faced with the challenge to set up adequate policy regimes that cater effectively to all categories within mixed migratory flows. So far few positives have been achieved in this field, Dr van Hear laments. This is mainly attributable to the fact that governments tend to view migrants as one sole category, when in fact the flows consist of a variety of migrants with different (protection) needs.

More often than not, the public debate on migration makes indifferent use of the terms migrant and refugee. Yet, for the sake of analytical clarity, it is undoubtedly of importance to clarify the meaning and establish an unbiased working definition of the terms that will be used in this thesis.

2.2.1 Definition - Migrant
The International Organization for Migration defines migrant as follows:

‘... any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of
(1) the person’s legal status;
(2) whether the movement is voluntary or involuntary;
(3) what the causes for the movement are; or
(4) what the length of the stay is’

In other words any one of us who has ever travelled (abroad) for work or leisure, irrespective of the mode of transport, duration of stay and legality of entrance to the country of destination, has for that amount of time been a migrant!

2.2.2. Definition - Refugee
In order to be a refugee as defined by Art. 1A(2) of the 1951 Convention relating to the Status of Refugees, commonly referred to as the Refugee Convention (RC), the person seeking protection from persecution must fulfil following criteria:

‘As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term ‘the country of nationality’ shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid

reason based on well-founded fear, he has not availed himself of the protection of one of the
countries of which he is a national. 45

Being a refugee is a declaratory status a person gains when a country of destination or of
refuge determines, based on the individual’s circumstances, that the person is in fact in need
of international protection. The distinction between a migrant and a refugee matters because
a refugee will have access to a set of rights and protection. 46 While a refugee is always a
migrant, a migrant is not always a refugee.

2.2.3. Definition - Asylum Seeker
Asylum seeker, - is another term that is frequently mentioned by the media and refers to a
person who has left her or his habitual place of residence due for fear of persecution and is
seeking international protection in another country but has not yet been successfully
determined to be a refugee. 47

2.2.4. Definition - Economic Migrant
The so-called economic migrant is defined as

‘a person who travels from one country or area to another in order to improve their standard
of living’ 48.

In the popular imagination economic migrants are young adult males. In reality they are also
women and minors. 49 They have left their homeland for the unknown with the hope to create
a better life for themselves and their dependants.

Economic migrants from developing countries will usually not qualify for refugee status. As
mentioned above, only once recognized in need for international protection, the person is
considered lawfully present in the country, which will automatically infuse her with a set of
rights and obligations. The irregular migrants not in need of protection do not receive any
such rights. This is because in order to be a refugee the person has to establish that he has ‘a
well-founded fear of persecution for reasons of race, nationality, religion, political opinion
or membership to a particular social group’ 50. This means if a person has no legal residence
status he will be undocumented and in many cases unprotected - in other words an irregular
migrant.

46 Palm, A. (2017). The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all
libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/ [accessed 12
February 2019]
48 economic migrant | Definition of economic migrant in English by Oxford Dictionaries. Retrieved from
lights.pdf [accessed 12 February 2019]
50 UN General Assembly, Convention Relating to the Status of Refugees, (n 45) 137
In sum, migratory flows are per definition mixed flows consisting of people with a variety of reasons and motivating factors to migrate to another country. The reasons for departure from their homes are numerous. While some are seeking safety from harm and conflict, others seek to be reunited with family members. Others again, embark on a journey into the unknown with hopes to escape poverty or a chronical lack of opportunities in their homelands. In some occasions the reasons for migration might also change once the person is on the way, depending on changing circumstances in their country of origin. Such changes could be the overturn of the political regime or the implementation of a provision particularly harmful to the person.

The IOM stated that, mixed migratory flows are an accurate reflection of the diversity of migration itself. The term mixed migration has been firmly established within the contemporary migration dialog among policy makers, academics and international organizations. This thesis employs the term according to the prevailing meaning of the concept and as described above, free of criticism or bias.

2.3 Principle of non-refoulement

Every person has the right to seek and enjoy asylum and to cross international borders illegally in the pursuit of international protection, if necessary. The state obligation of non-refoulement weighs heavily as an additional layer of protection for refugees and asylum seekers. Article 33 RC delimits the principle of non-refoulement as follows:

1. No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The principle of non-refoulement has also been recognized as customary international law by the UN High Commissioner for Human Rights and thus has to be respected by all countries worldwide, irrespective of their signatory status to the RC.

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51 Joannin, P. (n 11) para. 1.3
55 Ibid., Art. 31(1)
56 Ibid., Art. 33
International refugee law as well as international human rights law and the UN Convention on the Law of the Sea furthermore provide rules and obligations for all seafarers. Those rescued at sea have the right to be disembarked at a ‘place of safety’ where the ‘rescue operations are considered to terminate’ under the condition that the place is able to provide the necessary infrastructure to secure ‘basic human needs’.58

**2.4 Externalization of border control. Italy and Libya Partnership Agreement**

In February 2017 Italy signed a MoU with Libya in Rome, which was subsequently endorsed by the EU Council at the EU Malta Summit, in the Malta Declaration in Valletta 3 February 2017.59

Content and objective of the agreement are the control of migratory flows and regional development. Fully aware that the situation for migrants in Libya is far from adequate and does not meet international standards, the EU nevertheless endorsed the agreement and gave Italy free reign.60

An unnamed senior EU diplomat candidly explained:

‘It is hard to know exactly what is going on in Libya. We have increasingly entrusted Italy with doing the job there, we give them money. There would never be any proof of EU money going directly to some armed group somewhere. Some of the methods may seem controversial. But there is also preventing loss of life at sea and political stability in Italy to consider. We shouldn’t be too judgmental.’61

The previous Italy-Libya agreements, which were signed precisely ten years ago, resulted in the inhumane practice of push-backs in 2009. Migrants rescued at sea, - by the Italian Navy were returned to Libya without given the chance to make a request for asylum. The European Court of Human Rights deemed this method a violation of Art. 3 and Art. 13 ECHR and Art. 4 Protocol No 4 ECHR. Academia discussed the matter of Italy’s state responsibility and civil society raised a storm of indignation.

Today, in 2018, we are witnessing the effects of the new 2017 agreement. Instead of push-backs we are observing pull-backs. Libyan forces, strengthened by Italian financial and physical support are more capable than ever to patrol the seas. They prevent smugglers from moving their human cargo into Italian jurisdiction or the Maltese Search and Rescue (SAR)

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61 Baczynska, G. (n 29)
region, drastically reducing the number of migrants arriving in Europe at the cost of returning a mixed migratory flow back to Libya, an unsafe third country.

2.5 Conclusion
Externalization of border control becomes problematic when there is no differentiation of the migratory flows and the external partner in charge of the implementation of EU measures, fails to safeguard the protection of migrants and asylum seekers.

European MS ought to assess the necessity of international protection for asylum seekers who made a request for protection once within the territory of a MS. At the same time the MSs are investing billions in form of foreign aid in return for assistance in the externalization of their borders to countries as far away as Niger, Sudan, Mali, Nigeria and Libya and thereby effectively aiming at preventing migrants or more precisely asylum seekers from accessing the international protection procedure in the EU.

States are under the obligation to screen and assess claims made for asylum. This is especially necessary where mixed migratory flows are concerned. Unfortunately, it appears that especially countries/regions (i.e. EU) with a very developed and efficient protection procedure are the most likely to bar asylum seekers or migrants from entering and thus requesting international protection. In consequence, this means that asylum seekers are met with a lack of access to the asylum procedure and find themselves in a precarious legal status in the country of first arrival or transit, most likely lacking adequate reception conditions.

The heterogeneity of migratory flows negatively affected the solidarity among member states and in consequence undermined the harmonization of European asylum law. Other factors contributing to this lack of solidarity were the absence of a common foreign policy and the prevailing reluctance of certain member states to adhere to the principle of subsidiarity.

These new policies were either described as an inhumane sealing off of the entirety of the EU external border for migrants or a necessary new type of border management. Wherever one stands on these debates, they seem to be the only short-term solution in light of the political stalemate under which they were formulated.

In the following chapters this thesis seeks to assess the indirect state responsibility of Italy under Art 16 ILC Articles on Responsibility of States for Internationally Wrongful Acts such as the violation of the principle of non-refoulement. The next chapter gives a chronological overview of the 2007/2009 and 2017 agreements and will briefly elaborate on the objective

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65. Joannin, P. (n 11) para. 3.1
66. Ibid.
and content of each agreement respectively. The chapter will also include a short annotation of the Hirisi and Others vs Italy ECtHR judgment.
3. Chronology of Agreements between Italy and Libya relating to (irregular) migration

3.1 Introduction
This chapter will focus on the 2007 Protocol, 2009 Additional Protocol (2007/2009 Agreements), the 2008 Friendship and Partnership Agreement and the 2017 MoU. These agreements are the backdrop to understanding and analysing the legal environment that gave rise to the push-back operations in 2009. Following the fall of General Gaddafi in 2011 and the ensuing civil war, as well as the 2012 Hirsi judgment issued by the ECtHR, the existing agreements between Italy and Libya were suspended for the time being. It was not until February 2017 that Libya and Italy returned to the negotiating table and signed the 2017 MoU.

3.2 Chronology of migration agreements between Italy and Libya
Mid-December 2000 Italy and Libya commence their bilateral cooperation and agreed to assist each other in combatting terrorism, illegal trafficking of drugs and human beings, organized crime and most importantly to this thesis, irregular immigration. The agreement entered into force two years later in 2002, after the Italian Parliament ratified the document.

3.2.1 2007 Protocol for Technical and Police Cooperation
On 29 December 2007 the Agreement for Technical and Police Cooperation is signed (2007 Agreement). Objective of the agreement is the joint patrolling of the northern coast and ports of Libya. For this purpose, Italy agrees in Art. 2, to ‘temporarily’ (emphasis added) make six patrolling vessels available to Libya for ‘joint’ (emphasis added) patrolling operations. Additionally, the Italian Parliament procured six million Euro for the realization of the agreement. A close read of the preamble of the 2007 agreement suggests that the purpose of the agreement is to undermine irregular migration to Europe via Libya. The latter agreement from 2009 is expected to see to the realization of Europe’s vision by means of received technical cooperation. The agreement entered into force two years later, in 2009, after the Friendship and

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68 see chapter 3.2.5


Partnership Agreement\textsuperscript{74} (Treaty of Benghazi / Partnership Agreement) was signed on 30 August 2008.

\textbf{3.2.2 2008 Treaty of Benghazi}

The Treaty of Benghazi (Partnership Agreement) had been negotiated over the course of almost ten years, The document had diverse input from a number of Italian governments, but it was Berlusconi’s administration that finalized the process.\textsuperscript{75} During the signing ceremony the Italian Prime Minster Berlusconi returned cultural objects that, Italy had appropriated during its colonial reign in Libya.\textsuperscript{76}

The main objective of the Partnership Agreement was the reconciliation of the colonial past between Italy and Libya. The treaty was written in Arabic and Italian and constitutes a bilateral agreement that gives due respect to the African Union and European Union, respectively. The treaty is organised into three sections, starting with general principles.\textsuperscript{77} The parties make assurances to respect norms and principles of international customary law. The mid-section deals with the cessation of the dispute between Italy and Libya. Finally the agreement closes with a forward looking statement on ending the history of dispute and entering a new era of partnership between the parties.\textsuperscript{78}

Center piece of the Treaty of Benghazi is a 5 billion Euro commitment from Italy, paid to Libya in 250 million Euro instalments over the course of 20 years, as specified in Art. 3 and Art. 4 of the treaty. The long-term investment sought to improve and expand Libyan infrastructure, including, for instance, the construction of a highway connecting the north African countries Libya, Tunisia and Egypt.\textsuperscript{79}

\textbf{3.2.3 2009 Additional Protocol}

The 2009 Additional Protocol (2009 Agreement) defines the mechanism of the joint operation performed by mixed crews, Italian and Libyan forces jointly operating the same vessels. The six previously loaned vessels are transferred to Libyan authorities, flying the Libyan flag. The signal to Libya was that it should take a more proactive, autonomous stance in the fight against irregular migration.\textsuperscript{80}

Article19 renews enforcement efforts and commitments made under previous agreements and puts into effect the agreements signed in 2007. The signatories agree to design and implement regional and bilateral effective measures to prevent the departure of migrants from countries

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\textsuperscript{74} Trattato di Amicizia, Partenariato, e Cooperazione (Bengazi, 30, August 2008). Retrieved from http://www.camera.it/_dati/leg16/lavori/schedela/apritelecomando_wai.asp?codice=16pdf0017390 [accessed 12 February 2019]; see also Ronzitti, N. (n 76) 127 see also Biondi, P. (n 71) 166
\textsuperscript{75} Biondi, P. (n 71) 166
\textsuperscript{77} Ronzitti, N. (n 76) 127
\textsuperscript{78} Ibid.
\textsuperscript{79} Sarrar, S. (n 73)
\textsuperscript{80} Giuffré, M. (n 69) 703
\end{flushright}
of origin. The Partnership Agreement revives the previously established commitment in the fight against irregular migration.\textsuperscript{81} A satellite detection system for land and sea border surveillance is to be established and financed by Italy and the EU.\textsuperscript{82}

3.2.4 Comments

Ronzitti\textsuperscript{83} deems the planned satellite detection system a flagrant human rights violation.\textsuperscript{84} He emphasises the importance of Art. 6 Add. Protocol, which in turn refers to Art. 14 UN Declaration of Human Rights (UNDHR). Ronzitti proceeds to explain that the purpose of Art. 6 Add. Protocol is to provide both parties with the right to call upon the UNDHR and UN Charter, despite the non-binding character of the declaration.\textsuperscript{85} Biondi, refers to Emanuela Paoletti and Prof. Dr. Sven Biscop from the Royal Institute for International Relations in Brussels, when he explains that Libyan diplomacy was not inclined towards written agreements and preferred the spoken word. Italy respected Libya’s wishes mainly as it appeared advisable to abide by Libya’s demands on this matter in order to achieve consensus. Therefore, documentation of the early re-admission agreements between Italy and Libya is lacking, as the latter refused written agreements, presumably to retain a degree of discretion in the matter.\textsuperscript{86}

The European Parliament, together with an alliance of non-governmental organisations requested more transparency from Italy concerning the bilateral agreements with Libya. The issue was brought to the European Commission with the demand to sanction Italy for ‘silent agreements’ made with Libya. However, the demand was not met. The European Commission stated such measures would exceed the authority held by the Commission.\textsuperscript{87} The Commission stated that it neither has the authority nor the jurisdiction to impose such sanctions. Early agreements remained unpublished, yet henceforth agreements concluded between the two countries were made publicly available. This change might possibly be due to the loss of public support that Italy suffered throughout this debate.\textsuperscript{88} Biondi\textsuperscript{89} further argues the collective of measures fostered by the 2007/2009 agreements are the soil out of which the push-back operations arose.\textsuperscript{90}

Giuffrè\textsuperscript{91} points out that none of the publicly available protocols explicitly mention a modus operandi for push-backs. The documents make no definitive mentioning of how to deal with interceptions of migrants at sea conducted by Italy or Libya in international waters or Italian

\textsuperscript{81} Ibid., (701)
\textsuperscript{83} Ronzitti, Natalino - Emeritus Professor at LUISS University Rome (Italy)
\textsuperscript{84} Ronzitti, N. (n 76) 130, 132
\textsuperscript{85} Ibid., (129)
\textsuperscript{86} Giuffré, M (n 69) 704
\textsuperscript{88} Biondi, P. (n 71) 165
\textsuperscript{89} Biondi, Paolo - PhD candidate at the University of London (UK) and Head of Protection with UNHCR in Malta
\textsuperscript{90} Biondi, P. (n 71) 167
\textsuperscript{91} Dr Giuffrè, Mariagiulia - senior lecturer at Edge Hill University (UK)
waters. She suggests that a plethora of unpublished communication between Libyan and Italian (border) authorities were decisively involved in creating the modus operandi for pushbacks. Giuffré criticises that neither of the agreements mention ratione personae. The documents make no distinction between nationals and third country nationals, nor between asylum seekers and irregular migrants.

Though it might appear at first sight that Italy bears the brunt of the burden, the financing is more complex at a closer look. Despite historical disputes, Italy and Libya have maintained an intricate multi-million Euro relationship in the gas and oil industry. Improved relations between the two countries secures Italy’s access to Africa’s largest oil holding nation and fourth biggest oil producing site on the African continent.

In February 2011 Italy unilaterally suspended the Treaty of Benghazi due to the violent uprisings of the 17 February Revolution and General Gaddafi’s death shortly after. On 15 December 2011 the Partnership Agreement was revived again. A new National Transitional Council (NTC) is established, based both in Benghazi and Italy. The MoU reiterates the content under equal terms as previously negotiated under the Gaddafi regime, including the 2007 and 2009 technical protocols on the fight against irregular migrants and their subsequent repatriation to countries of transit or origin.

Biondi argues that the effects of the ratified Treaty of Benghazi were the ‘legislation’ used to violate basic human rights of migrants. A bilateral agreement shall not supersede international human and refugee rights obligations. Particularly, not when the refoulement to an unsafe third country is the consequence. The human rights situation for intercepted or irregular migrants in Libya’s detention camps is known to be deplorable. Reports such as the 2009 Human Rights Watch analysis of Libyan reception camps speak of systematic maltreatment and overall lacking in basic sanitation facilities, violence and limitless detention without official charges.

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92 Giuffré, M. (n 69), 710-711 see also S. Trevisanut, „Immigrazione Clendestina Via Mare e Cooperazione fra Italia e Libia dal Punto di Vista del Diritto Del Diritto“ (2009)3 Diritri Umani e Diritto Internazionale; p. 609
93 Giuffré, M. (n 69) 704-705
94 Ibid., (703)
95 Biondi, P. (n 71) 165/ 167
100 Giuffré, M. (n 69) 701
101 Biondi, P. (n 71) 166
102 Asiedu, M. (n 13)
In 2010, Stefano Manservisi, Director General for Migration at the European Commission, expressed himself in favour of the bilateral agreements between Italy and Libya. He assured that the legality of the agreements existed because of their conformity with EU law and that Libya - despite not being party to the 1951 RC had refugee rights obligations under regional conventions.104

Libya is not party to the 1951 RC,105 yet party to a number of regional conventions to the same effect, such as the 1982 African Charter on Human and People’s Rights,106 the Organization of African Unity (OAU)107 and the 1969 African Refugee Convention (ARC)108. The latter Convention relies heavily on the 1951 RC as ‘the basis and universal instrument relating to the status of refugee’.109

At this point Biondi poignantly questions the veracity of the legal system. Though the Italy - Libya agreements seemingly adhere to EU law does this compliance make the results that the agreements generate automatically lawful?110 An interesting question, which raises legal, moral and philosophical concerns.
3.2.5 Hirsi Jamaa v Italy – European Court of Human Rights 23 February 2012, Application 27765/09

Facts of the case
In 2009 the Guardia di Finanza intercepted three migrant boats carrying approximately two hundred migrants attempting to reach Italy via the Mediterranean Sea with point of departure being Libya. At the time of interception, the boats had entered the Maltese SAR region. The migrants were transferred from their boats to Italian military vessels and were unknowingly brought back to Tripoli/ Libya where they were handed over to Libyan authorities against their explicit will.

The applicants in the case were eleven Somali and thirteen Eritrean nationals. They stated that the Italian authorities confiscated their belongings including identification documents, yet made no efforts to identify the intercepted migrants prior to handing them over to Libyan authorities. They claimed to have been misled by Italian authorities, which supposedly communicated to them that they would be transferred to Italian soil. Two of the applicants passed away under unclear circumstances after arrival in Libya. Other migrants of the same group received confirmation of their refugee status by the UNHCR in Libya. The application with the European Court of Human Rights in Strasbourg was lodged three weeks after their interception.

According to a public statement made on 7 May 2009 by Roberto Maroni, Italian Minister of Interior, the push-back operations were the proclaimed aim of the bilateral agreements between Italy and Libya, which had entered into force as per February 2009.

During the period of 6 May - 6 November 2009, nine maritime interventions were performed by Italian vessels. The operations took place under the auspice of the Ministry of Interior. More precisely the Central Directorate for Immigration and Border Police and the Department of Public Security. The vessels were under the control of the Guardia Costiera.

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112 Tax and Customs Police

113 Ibid., (para. 9-13)

114 Ibid., (para. 15)

115 Ibid., (para. 16)


117 Italian Coast Guard
Marina Militare and the Guardia di Finanza. The UNHCR submission in the case of Hirsi Jaama stipulates that during that time vessels operated by Italian forces returned 834 persons to Libya. The report identifies two singular occasions in which Italian forces were ‘unilaterally responsible’ for push-back operations to Libya. In these two instances, the migrants rescued at sea were kept unaware of their impending return to Libya. Witness statements claim that the migrants were forcefully disembarked once they had returned to Libyan shores. There they were subsequently handed over to the Libyan authorities. Other documented cases involved Italian authorities transfer migrants onto Libyan patrol boats jointly operated by Libyan and Italian forces.

Despite Italy’s forceful denial that the migrants were at any time under Italian authority during the search and rescue operation, the Court makes a crucial point by declaring that the migrants had come under de jure and de facto control of Italy when they were taken aboard the Italian navy vessels. According to Italy, the migrants were not at risk of ‘treatment allegedly in contravention of the Convention’ and thus no breach of article 3 ECHR occurred. Furthermore, Italy stipulated that Libya was a safe third country that had ratified not just the International Covenant on Civil and Political Rights (ICCPR) but also the Convention against Torture (CAT). Also, in a bilateral agreement between Italy and Libya the latter country made explicit guarantees to uphold the values of the Universal Declaration of Human Rights and of the United Nations Charter.

Taking reference from various reports of non-governmental organizations and other international agencies on the dire situation of irregular migrants in Libya, the Court stressed that Italy ‘knew or should have known that, as irregular migrants, [the applicants] would be exposed in Libya to treatment in breach of the Convention’. According to the Court, Italy’s theoretical assumption that Libya was a safe third country did not suffice. Italy ought to have known that ‘the existence of domestic laws and the ratification of international treaties do not in themselves ensure adequate protection against the risk of ill-treatment’. Enforced return to a country where the risk of ill-treatment is ‘sufficiently real and probable’ shall give rise to a violation of Art 3 ECHR, where the returning authorities knew or ought to have known of the risk for the applicant.

118 Italian Navy
119 Italian Tax and Customs Police
121 Ibid.
122 Ibid., (para 2.2.5) see also Giuffré, M. (n 69) 697
123 Ibid., (para 2.2.5-2.2.6)
124 ECtHR - Hirsi Jamaa and Others v Italy (n 111) para. 65
125 Ibid., (para. 81)
126 Ibid., (para. 92)
127 Ibid., (para. 97-98)
128 Ibid., (para. 131)
129 Ibid., (para. 128)
130 Ibid., (para. 136)
Additionally, the Court deemed the risk of arbitrary repatriation to Somalia or Eritrea, the country of origin of the applicants, within the realm of Art 3 ECHR and thus booked a twofold violation of the article. In this respect the Court was not predominantly concerned with whether repartitions took de facto place with the lack of guarantee that the applicants were not at risk of repatriation.\(^{131}\)

On account of the violation of the prohibition of collective expulsion under Art. 4 of Protocol No 4, the Court established a violation of said article based on Italy’s apparent lack of effort to either identify the migrants and/or to determine their individual situation.\(^{132}\)

Lastly, the Court stated ‘the applicants were deprived of any remedy which would have enabled them to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No.4’.\(^{133}\) The Court disagreed with Italy’s position, - that the applicants had not exhausted domestic remedies.

Italy claims the applicants had recourse to bring criminal proceedings before an Italian court against the accountable military authorities. Supposedly, this could have even been done from Libya. Nevertheless, leaving the question of the practicability of such a suggestion aside, the Court argued that the suggested criminal proceedings in Italian courts would not have been of use to prevent the impending refoulement the applicants were at risk upon return to Libya. With no access to an effective remedy with suspensive effect, the applicants had in fact no remedy available to them, so the Court, it thereby invoked the applicability of Article 13\(^{134}\) ECHR.

### 3.2.6 Comments

Professor Marie Bénédicte Dembour, from University of Sussex (UK) emphasizes the importance of the judgement. She argues that the Hirsi judgement reached by the Grand Chamber of the ECtHR questions the validity of bi-/multilateral agreements made by European member states with third countries in the context of irregular migration. She raises concerns about the status quo of the European migration policy, saying that in light of such conduct as seen by Italy in Hirsi, Europe ought to revise its migration policy. With regard to the court invoking Art. 13 ECHR, Professor Dembour highlights that by doing so the court has put into question the legality of the totality of push-backs. She compares the effect the Hirsi judgment will have on EU migration policy and Frontex operations, with the suspensive implications M.S.S. v Belgium and Greece had on Dublin II proceedings, particularly because the Hirsi judgment was reached unanimously by the Grand Chamber of the ECtHR.\(^{135}\)

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\(^{131}\) Ibid., (para. 148)

\(^{132}\) Ibid., (para. 185)

\(^{133}\) Ibid., (para. 205)

\(^{134}\) Ibid., (para. 206)

Biondi considers the Hirsi judgement a landmark case for the court’s decision to expand the ECHR to the high seas.\textsuperscript{136}

Events taking place on the high seas had so far been considered to be outside the ‘immediate state’s territorial jurisdiction’. However, post-Hirsi states can no longer engage in push-backs in the fight against irregular migration. Migrants intercepted on the high seas shall not be returned to places where they are at risk of facing inhuman or degrading treatment.

Francesco Messineo, lecturer at Kent Law School Canterbury (UK) draws similar conclusions as Biondi and Dembour. However, unlike other scholars, he highlights the court’s approach to establish extra-territoriality by making reference to the Italian Navigation Code. According to the code, Italian navy vessels flying the Italian flag are legally ‘Italian territory’. This circumstance was particularly beneficial in arguing for additional breaches of the Convention committed by Italy on the collective expulsion of aliens. Article 4, Protocol No. 4 prohibits the collective expulsion of aliens from the territory of contracting parties to the ECHR. In para. 178 the court argues in favour of interpreting the Convention as a whole, which means the territorial requirements of Art 4. Protocol No.4 must also be expanded to the high seas in order to avoid a ‘discrepancy between scope of application’. Messineo applauds the court’s decision to move towards ‘the closing of gaps of protection’.\textsuperscript{137}

The most prevalent conclusion of the Hirsi judgement is that states are bound by their international obligations under international refugee and human rights law when exercising de jure and de facto control beyond their territory. The judgment explicitly counteracts migration control measures resulting in collective expulsions of aliens. The ECtHR thereby openly criticizes EU migration policies, otherwise endorsed by national governments and EU legislative bodies. The court takes a clear stand on the prohibition of refoulement and prescribes that states returning applicants are duty bound to have a forward-looking perspective of possible ill-treatment the applicants might encounter if returned to their country of origin or transit. The extra-territorial application of the ECHR is established by the de jure and de fact control of the returning EU member state.

In Hirsi, the Italian responsibility could be neatly established as the applicants were taken aboard the Italian navy vessel, flying the Italian flag in international waters. The immediate effect of the judgement was Italy’s cessation of push-backs. It remains debatable in how far this judgement results in a dampening of the preparedness of EU member states to assist migrants on the high seas. Their inference will likely establish jurisdiction and hence activate their human rights obligations to offer protection to those that seek it. Sadly, the words of Galina Cornelisse, associate professor at Vrije Universiteit Amsterdam, are all too true ‘in a situation in which one’s presence on national territory automatically leads to entitlement to fundamental right, the sovereign state may wish to keep

\textsuperscript{136} Biondi, P. (n 71) 169

people outside its territory in order not to have to accord them these fundamental right’. 138

3.2.7 2017 Memorandum of Understanding on the Cooperation in the Development Sector, to Combat Illegal Immigration, Human Trafficking and Contraband and on Reinforcing the Border Security between the Italian Republic and the National Reconciliation Government of Libya State (2017 Agreement)

In 2017 Libya is an unstable country at best, but has also been considered a failed state by more pessimistic commentators.139 Currently, the country features three main political actors or governments trying to control the country. The UN backed Government of Accord - GNA, is based in Tripoli and headed by Prime Minister al Sarraj. Also based in Tripoli, yet without control over any government institutions, is the Government of National Salvation under the authority of Prime Minister Khalifa Ghwell. There are also authorities based in Tobruk and Bayda which are aligned with the prominent Khalifa Haftar, head of the Libyan National Army140.

The 2017 Italy-Libya Agreement141 was negotiated at the EU Malta Summit and subsequently endorsed by the EU Council in the Malta Declaration in Valletta 3 February 2017. The MoU was signed on 2 February 2017, in Rome by the Italian Prime Minister Paolo Gentiloni and Fayez al-Serraj142, the Prime Minister associated with the UN backed Government of Accord – GNA.143

The main content and objectives of the 2017 MoU is to curtail the migratory flows from Libya via the Mediterranean Sea to Europe, specifically Italy. The agreement also seeks to enhance the bilateral development cooperation, to eradicate criminal networks of human trafficking, fuel smuggling and to reinforce border security along the southern land border of Libya as well as the sea border across the Mediterranean Sea.

The document consists of three pages. A preamble and the operative section consisting of eight articles and a statement confirming the validity of three years pursuant to Art 8. Article 1 resuscitates previous cooperation on security and irregular migration, key commitments of the Italy-Libya partnership. Previous agreements between Italy and Libya

143 Aamann, P. (n 59) para 6(i)
were temporarily suspended following the fall of General Gaddafi in 2011 and the 2012 Hirsi judgment issued by the ECtHR. Italy agrees to finance regional development programs as well as to provide financial support, capacity building and technical assistance to Libya to combat irregular migration.\textsuperscript{145}

Article 2 specifies points made in Art 1. Italy agrees to support the completion and modernization of the border control system on the southern Libyan border as well as upgrading and maintaining reception centers \textit{in compliance with relevant provisions} and providing adequate health care services for the detainees.

Article 3 establishes a mixed Italian-Libyan committee tasked to oversee the implementation of the MoU. Article 4 deals with the financing, which will be borne by Italy and European Union funds. Article 5 references the need to adhere to international obligations and applicable human rights treaties. The articles 6-8 cover technical aspects such as the dispute settlement and amendment procedure and as mentioned earlier the three year duration of the MoU.

Primary objective of the MoU and other related agreements is to limit the number of departures from Libya to Europe by securitizing the borders.\textsuperscript{146} A careful reading of the MoU might suggest push-backs at the southern border as well as interception of departing migrants at sea by the Libyan coast guard with subsequent placement in reception camps.\textsuperscript{147} Under the framework of the bilateral agreements on migration control and technical cooperation, Libya agrees to the readmission of migrants intercepted on the high seas or within Libya, en route to Europe.\textsuperscript{148}

Interestingly, the MoU frequently makes use of the term \textit{clandestine/illegal migrants}. The terminology does not account for the reality that a mixed migratory flow, such as the one coming from Libya, will include individuals with a variety of legal statuses. Referring to the heterogenous mass of migrants as \textit{illegal/ clandestine migrants} could be read as a connotation towards a seclusive immigration policy on parts of the EU.\textsuperscript{149}

The so-called \textit{temporary reception centers} are under the exclusive control of the department for combatting illegal immigration under authority of the Libyan Ministry of Interior and tasked to host the intercepted migrants\textsuperscript{150} awaiting repatriation or voluntary return to the country of origin\textsuperscript{151}. According to Art. 4 of the MoU, the centers will be financed by Italian

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\textsuperscript{144} Aljazeera.com. (2018). The Death of Gaddafi. (n 67)
\textsuperscript{145} Giuffré, (n 1)
\textsuperscript{147} Palm, A. (n 46)
\textsuperscript{148} Giuffré, (n 1)
\textsuperscript{149} Giuffré, (n 1) see also Palm, A. (n 46)
\textsuperscript{151} Palm, A. (n 46)
funds, yet no mention is made of a minimum human rights standards within the reception centers nor are there any provisions in the MoU that would permit the involvement of supervisory third parties such as international organizations, NGO’s or lawyers.\(^{152}\)

3.2.8 Comments

Anja Palm, researcher at the Isituto Affari Internazionali in Rome (Italy), criticizes the generic language of the document and its lack of tangible and intelligible details of actual projects.\(^{153}\) She laments the lackadaisical mentioning of international (human rights) obligations under Art. 5 and points out that in light of Libya’s human rights record and overall unstable and volatile current situation, Art. 5 cannot be considered sufficient to safeguards migrants and asylum seekers from irreversible harm. Palm suggests that it appears that the true intention of Italy and also the EU is to remove the issue of migration and border control as far away from the public eye as possible and out of reach of European human rights and immigration lawyers.\(^{154}\)

As mentioned earlier, Libya does not provide for a national asylum system. When possible the UNHCR steps in and covers basic needs of refugees and attempts a status determination process.\(^{155}\) The latest Human Rights Watch report on the situation of irregular migrants in Libya\(^{156}\) does not see an improvement of the situation.

3.3 Conclusion

As this chapter has shown, the bilateral migration agreements between Italy and Libya have the nature of diplomatic assurances rather than hard law contracts. Italy has repeatedly been criticised for not making the full extent of agreements publicly available. Much of the details of the cooperation between the two countries appears to be based on ad-hoc verbal communication, leaving no paper trail and, - undermining transparency. This is even more so the case since the 2017 agreement post-Hirsi.

None of the bilateral agreements uses the term push-back nor is there any descriptive allusion to the method to be found in the documents. However, a teleological interpretation of the agreements will conclude that the objective of the cooperation is to undermine any further arrival of irregular migrants in Europe via Libya. This objective shall be attained by patrolling the Libyan coast and high seas between Libya and Italy, intercepting irregular boat migrants which shall then be returned to Libyan territories.

It remains to be argued that the nebulous nature of the agreements is maintained in order to avoid legal responsibility on either side of the Mediterranean Sea. While Italy was actively

\(^{152}\) Ibid.

\(^{153}\) Ibid.

\(^{154}\) Ibid.

\(^{155}\) Abeer Etefa, J. (n 105)

\(^{156}\) No Escape from Hell | EU Policies Contribute to Abuse of Migrants in Libya. (2019). Retrieved from https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya?fbclid=IwAR3sIEQvcsGUgK-DsQ6FUQk8f7H30op2tvd_EXg5-ks9j7s-1N50XRhjDAQ [accessed 12 February 2019]
involved in the interception of migrants at sea under the 2007/2009 agreements, the 2017 agreement sees Italy taking the back seat, leaving the interceptions to Libya. This is the direct result of the Hirsi judgment. The ECtHR decided that when Italy took intercepted migrants aboard their navy vessels on the high seas, the migrants were thus brought under Italian de facto and de jure control. Italy’s lack to establish the identity and possible needs for international protection of the persons concerned and their subsequent return to Libyan territories substituted a violation of international obligations Italy held under the ECHR. For the first time the ECtHR ruled on a case concerning interception of migrants on the high seas. The landmark judgment gave rise to an extraterritorial application of ECHR obligations onto the high seas. In light of the Hirsi judgement, Italy is determined to avoid any direct interaction with intercepted migrants, risking exercising de facto or de jure control and thus opening the possibility for irregular migrants to seek protection with Italy.
4. Italy’s state responsibility

4.1. Introduction
Intercepting boats carrying migrants on the high seas or in national waters and transferring the migrants to a third country is not a policy explicitly spelled out in the Technical Cooperation Agreements or Partnership Agreement between Italy and Libya. Yet, it is the consequential result of Italy’s policy in the fight against irregular migration via the central Mediterranean Sea. 157

The following chapter looks at the concept of state responsibility for internationally wrongful acts as defined by the International Law Commission (ILC) Draft Articles on Responsibility by States for Internationally Wrongful Acts. Special attention will be paid to Italy’s responsibility, though, of course Libya was equally involved and responsible during the 2009 push-backs and ongoing pull-backs under the 2017 MoU.

In light of the previous chapters this following section, seeks to answer the question if it is possible to accrue indirect state responsibly for internationally wrongful acts committed by Italy under the newly negotiated 2017 Italy-Libya Memorandum of Understanding on topics of irregular migration and technical cooperation.

4.1.1 Origins of the International Law Commission & Articles on Responsibility of States for Internationally Wrongful Acts
In 1947, the UN General Assembly (UNGA) established the ILC under the mandate of Art 13 (1)(a) of the Charter of the United Nations. 158 The objective of the ILC was defined to ‘initiate studies and make recommendations for the purpose of (…) encouraging the progressive development of international law and its codification’. 159

In 1956, the ILC commissioned Special Rappater García Amador with the work on state responsibility. Over the next 40 years a number of Special Rappateurs added to Amador’s initial work. 160 In 2001, the ILC adopted the Articles on Responsibility of States for Internationally Wrongful Acts. The same year the UNGA acknowledged the ILC report containing the Articles during its fifty-six session. 161

Governments were invited to submit written comments on the Articles, including as they

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157 UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy (n 120) para. 2.2.1

158 Charter of the United Nations Article 13. (1)The General Assembly shall initiate studies and make recommendations for the purpose of:(a) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; (b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.(2)The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.


pertain to state practice. The Secretary-General put out a request to international courts and tribunals to advise on their usage of the Articles. By 2013, the Secretary-General could report on 210 instances that international courts and tribunals had made reference to the Articles in their judgments and decisions.\(^{162}\)

In 2016, a working group chaired by Patrick Luna, concluded that delegations reported to value the ILC Articles as ‘useful and authoritative statement of the rules on states’\(^{163}\).

The ILC’s decision not to adopt a Convention on the Articles has been endorsed by the UNGA in Res. 56/83 in 2001 and subsequently in Res. 59/35 in 2006.\(^{164}\)

In his article on ILC Articles in international law and customary law Dr. Fernando Bordin from the University of Cambridge refers to Prof. Dr Nils Jansen from the University of Münster, when he states that non-legislative codifications such as the ILC Articles have gained authoritative status despite not being ratified into hard law. This is because the international community has grown to accept the Articles as opinion juris. According to Bordin, the international courts and tribunals employ the ILC Articles on state responsibility as ‘a subsidiary means for the determination of rules of law’.\(^{165}\) Bordin argues that the appeal of the ‘non-legislative codification’ goes back to the uncertainty of the international legal system. He views the ‘structural deficiencies’ and lack of ‘certainty and determinacy’ as pivotal factor for the Articles to have gained such authority in the international legal system.\(^{166}\) The Articles are considered opinion juris thus have no binding-effect, but as Kazimir Menzel from the Friedrich-Schiller University Jena said, they are widely considered to ‘identify structural principles’\(^{167}\).

Finally, Bordin uses the example of the International Centre for Settlement of Investment Disputes (ICSID). The award in Archer Daniels Midlands Company and Tate & Lyle Ingredients America, Inc v Mexico refers in para. 116 directly to the ILC Articles and confirms the status of customary law:\(^{168}\)

‘The Tribunal acknowledges the fact that the ILC Articles are the product of over five decades of ILC work. They represent in part the ‘progressive development’ of international law – pursuant to its UN mandate – and represent to a larger extent a restatement of

\(^{163}\) Responsibility of States for internationally wrongful acts - Seventy-first session - Sixth Committee (Legal) - UN General Assembly (n 161)
\(^{164}\) Crawford, J. (n 160) para.64
\(^{165}\) Bordin, (n 162) 537
\(^{166}\) Ibid., (567)
customary international law regarding secondary principles of state responsibility (...).

4.2. Was there a legal foundation for the 2009 push-backs?
In response to the Council of Europe Committee on the Prevention of Torture, Italy presented in July 2009, a twofold justification for push-backs. The method was considered a necessary SAR operation and migration control measure under the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Palermo Protocol).

4.2.1 SAR obligations
Under the International Convention for Safety at Sea (SOLAS), the state responsible for delivering the rescued person to a ‘place of safety’ is the state responsible for SAR operations in this specific area. The International Maritime Organisation (IMO) issued guidelines on the treatment of rescued persons, according to which:

‘the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum seekers and refugees recovered at sea’.

Numerous, readily available reports confirm that Libya cannot be considered a ‘place of safety’. The country neither has the capacity nor the legal framework to adequately deal with mixed migrant flows.

By justifying the 2009 push-backs as SAR operations Italy seeks to redeem its SAR obligations under the SOLAS. However, these obligations incur the delivery of the rescued individuals to a ‘place of safety’. Clearly, delivering the migrants to Libya does not meet these standards. Hence, the SAR justification has to be disregarded.

4.2.2 Protocol Against the Smuggling of Migrants by Land, Sea and Air (Palermo Protocol)
The second justification put forward by Italy in defence of the push-back operations is based on their obligations under the Palermo Protocol.

In 2000, under the auspice of the United Nations Office on Drugs and Crime (UNODC) the UN Convention against Transnational Organized Crime was augmented by three additional

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170 Rm.coe.int. (2010). Response of the Italian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Italy. [online]. Retrieved from https://rm.coe.int/1680697275 [accessed 12 February 2019]
172 International Maritime Organization (IMO), Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea, (n 58) para 6.17.
173 UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy (n 120) para 5.1
Protocols:
1. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
2. Protocol against the Smuggling of Migrant’s by Land, Sea and Air
3. Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition


Italy made reference to Art 8(7) of the Palermo Protocol which reads as follows:

‘A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State party shall take appropriate measures in accordance with relevant domestic and international law.’

Art 8(1) permits the state party to solicit the assistance of another state in the matter, however, Giuffré points out that there is no provision in the Protocol that would suggest the return of the intercepted vessel to the port or country of embarkation. 176 Rather, Art. 16 requires state parties to intercept vessels carrying smuggled migrants, to conduct themselves with close attention to their international obligations and to adhere to the principle of non-refoulement

‘...consistent with its obligations under international law, all appropriate measures, including necessary legislation, to preserve and protect the rights of person who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.’

Guiffré argues this obligation extends to the duty to ensure de facto and de jure compliance with said principles when third countries assist the state party in order to preclude internationally wrongful acts. 177

In Art. 18 the Palermo Protocol provides for the return of intercepted and/or smuggled migrants back to their country of origin or permanent residence, yet no mention is made of

176 Giuffré, M. (n 69) 709
177 Ibid.
returning smuggled migrants to a country of transit. Migrants intercepted on the high seas between Europe and Libya are not Libyan nationals and should thus not be returned to Libya under the Palermo Protocol against the Smuggling of Migrants. Similar to Italy’s first justification, the second attempt made to justify push-backs under the Palermo Protocol is equally misguided.

4.3 State responsibility – Italy. Interception at sea followed by disembarkation in unsafe territories

The main question raised in this context is whether it is possible to attribute direct or indirect responsibility to Italy under international law for cooperating with third countries in the fight against irregular migration.

Marko Milanovic, Professor for public international law at the Nottingham University argues that under international human rights law a violation of the principle of non-refoulement will inevitably give rise to state responsibility if the state exercised jurisdiction over the situation in question. The overall aim ought to be to establish possible state responsibility in case of perpetrated violations.

4.3.1 Extraterritorial applicability of the principle of non-refoulement

This thesis’ scope is limited to the specific situation of push/ pull-backs at sea. Which responsibilities are activated when the principle of non-refoulement is breached i.e. when intercepted mixed migrant flows are returned to territories where they need to fear for their life, face detention and/or are directly or indirectly at risk of being returned to their country of origin?

The principle of non-refoulement as laid down by Art. 33 of the 1951 RC has widely been accepted to have transformed into international customary law. The prohibition of refoulement is a consecutive development of the prohibition of torture, cruel inhuman and degrading treatment, or punishment. The International Covenant on Civil and Political Rights (ICCPR) as well as the Convention against Torture (CAT) both include the prohibition of torture. Each of these legislations have been ratified by Italy and Libya respectively.

According to Nils Coleman and other scholars, the word refouler ought to be understood as ‘to drive back, repel, or re-conduct, which does not presuppose a presence in-country’. He

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178 M. Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8 HRLR 411, p.417
179 UN High Commissioner for Refugees (UNHCR), The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, (n 57) para. 3.
argues in favour of an extraterritorial applicability of Art. 33 (1) in the sense that intercepting and/or rejecting migrants at maritime or land borders falls within the scope of *refouler.*

In General Comment No 31, the Human Rights Committee comes to a similar conclusion concerning the extraterritorial application of the principle of non-refoulement when it states, in para. 12:

‘…not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm…either in the country to which removal is to be effected or in any country to which the person may subsequently be removed’.

The Committee against Torture deals with extraterritorial applicability of the principle of non-refoulement in General Comment No 2 para. 7:

‘…includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party’.

The ECtHR made mention of the applicable treaties in cases of extradition where the defendant was at risk of facing torture or degrading treatment if returned to his/her country of origin. It was, however, in the Hirsi case in 2012 that the ECtHR applied the principle of non-refoulement for the first time to migrants intercepted on the high seas and forcefully returned to Libya. The Hirsi judgment is discussed in more detail in chapter 3.2.3.

**4.4 Two types of responsibility. Independent responsibility & Indirect responsibility**

There are two types of responsibility a EU state could accrue should it be engaged in measures of migration control aimed at irregular migrants, in cooperation with a third country. Independent responsibility as defined under Art. 2 and Art. 4 of the ILC Articles on state responsibility and indirect responsibility pursuant to Art. 16 ILC Articles.

The following section will look at each type of responsibility individually and apply the requirements to the 2007/2009 and 2017(- ongoing) conduct of Italy in the context of migration control in the Mediterranean in collaboration with Libyan forces.

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187 ECtHR - Hirsi Jamaa and Others v. Italy, Application (n 111)
4.4.1 Independent responsibility
Art. 2 Elements of an internationally wrongful act of a State - ILC Draft Articles:\textsuperscript{188}

‘There is an internationally wrongful act of a State when conduct consisting of an action or mission (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.’

Art. 4 Conduct of organs of a State:

‘1. The conduct of any State organs shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.’

Even though a joint border control might physically take place within the territorial waters of a third country a EU MS could nevertheless be considered independently responsible. This is, if it is irrevocably possible to ascertain that the breach of an international obligation has been committed by state organs of either state respectively. In case of intercepting and returning mixed migrant flows, the violation of the principle of non-refoulement would be considered the violation of an international obligation as the previous section showed.

Maritime operations conducted under the 2007/2009 agreements by Italian authorities in the Mediterranean Sea resulted in interceptions and indiscriminate return of mixed migrant groups. The ECtHR determined that Italy had effective control and hence independent responsibility. On two separate occasions dated 6 May and 30 August 2009 intercepted migrants were taken aboard Italian navy vessels and disembarked in Libya to national authorities. The identifiable internationally wrongful act was disembarkation of persons to situations of known inhuman treatment and exposing said persons to direct or indirect refoulement to countries of origin.

However, under the newly negotiated 2017 Agreement the situation plays out differently. Maritime migration control operations are conducted and performed by Libyan authorities, whereas Italy’s involvement is more passive in terms of facilitating the Libyan maritime operations technically and financially. Giuffré explains that theoretically, Libya is independently responsible when entering Italian territorial waters or the Maltese SAR region while conducting maritime migration control operations against irregular migrants. In this scenario, Malta, as well, responsibility for the internationally wrongful act of not assisting people in distress to reach a place of safety.\textsuperscript{189} Yet, this aspect of the operation is

\textsuperscript{188} International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 20)
\textsuperscript{189} Giuffré, M. (n 69) 723-724
unfortunately not within the scope of his thesis, the focus shall be upon Italian (mis-) conduct.

Giuffré points out that if Italy would permit Libya to conduct migration control measures within the Italian contiguous zone,\textsuperscript{190} Italy would equally be considered responsible for wrongful acts, though the physical interception would be performed by Libyan forces\textsuperscript{191}. This point is interesting, yet moot since Italy appears to have not clearly defined its contiguous zone.\textsuperscript{192} Nevertheless, the point serves well to illustrate the breath and varieties of independent responsibilities for maritime migration control operations.

4.4.2 Indirect responsibility - Aiding and assisting
The legal foundation for establishing indirect responsibility by means of aiding and assisting is found in Art. 16 ILC Articles:

‘A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with the knowledge of the circumstances of the internationally wrongful act and (b) the act would be internationally wrongful if committed by that State.’

Article 16 ILC Articles concerns itself with states that voluntarily provide assistance or aid to another state in support of measures executed by the latter that consequently lead to internationally wrongful acts. Such assistance or aid may include financial support, technical assistance, procurement of infrastructure or political will.

Primary responsibility is placed with the acting state whereas the aiding state is considered to merely have a supportive effect. The chapeau to Art 16 makes explicit reference to ‘by the latter’, thereby drawing a distinguishing line between aiding and assisting on the one hand and collaborators on the other. The assisting state shall only be considered responsible in relation to the extent the given aid ‘caused or contributed to the internationally wrongful act’.

Importantly, with regard to the Italy and Libya agreements, if the internationally wrongful act would have occurred even without aid or assistance of another state, the assisting state will not be obliged to compensate for the wrongful act.

The scope of Art. 16 is qualified by three requirements:

a) the aiding or assisting state is knowledgeable about the violation of international obligations committed by the other state and

b) the aid or assistance must be given with the purpose to support the wrongful conduct and


\textsuperscript{191} Giuffré, M. (n 69) 723-724

must be proven to have been used to this end and
c) the act must be wrongful irrespective of which state executed the wrongful act.193

The possible ratione materiae covered by Art. 16 is highly diverse and can reach from financial assistance to actionable intelligence, technical and/or political aid. The late Bernhard Graefrath, professor for international law at the Humboldt University in Berlin, wrote in regard to Art 16 ILC Articles ‘assistance must be given with the intention to support the commission of the wrongful act’.194 As Graefrath explains further, a narrow interpretation of intent is useful and even necessary in establishing complicity. This requires that one has to establish that the aid or assistance was given with the purpose to facilitate the receiving state to conduct the wrongful act. The proof of the intent must be established beyond doubt, the causal link has to be identified. The threshold for intent must be set high and defined narrowly in order to avoid unjustified state responsibility for wrongful acts inferred from a weak causal link. A simple example for such inference might be helpful at this point: if state A supplies state B with fertilizer for an agricultural project but state B uses the fertilizer to build bombs to be used on a local minority, state A is not responsible for the wrongful act. If, on the other hand, state A has prior knowledge of state B’s intentions, and knows that the fertilizer will be used to realise the bombs, the case for indirect responsibility could be made.

The causal link between assistance and intent must be strong in order to invoke state responsibility under Art 16 ILC Articles. Could Italy’s conduct under the 2017 agreement fall within the realm of Art. 16 ILC Articles? The following section will attempt to assess Italy’s indirect responsibility for the financial and technical aid supplied to Libya on the basis of the 2017 Technical and Cooperation Agreement signed in Malta in 2017.

As the previous chapters have illustrated, from the very beginning of the bilateral cooperation in the fight against irregular migration, Italy’s intent was to prevent irregular migrants traveling via Libya to Europe from entering the EU territory, particularly into Italian jurisdiction. Italy sought out Libya’s assistance in stopping and returning the migrants intercepted at sea. Numerous agreements were signed to that effect and public statements were made in support of the agreements. Not just did Libya assist in stopping irregular migrants, readmission agreements between Italy and Libya were put in place. In effect this meant that third country nationals were extradited to an unsafe transit country.

The Human Rights Watch report on Libya, dated 21 January 2019195 describes the situation in the detention centers as cruel and inhuman, detainees are subject to degrading treatment. Libyan authorities are responsible for the situation in the detention centers. The report criticizes the Libyan authorities for not undertaking any efforts to identify the perpetrators of those crimes. Libya’s lack of accountability for the grave violation of human and refugee

195 No Escape from Hell (n 156)
rights gives rise to severe concerns. For years Italy and the EU have been made aware of the deplorable situation of irregular migrants in Libyan detention centers.\textsuperscript{196}

The Italian government has provided millions of Euro in aid and technical equipment to Libyan authorities and pledged 5 billion Euro over the course of the next twenty years to Libya. Purpose of the assistance is to build and train a stronger Libyan coast guard with the explicit mandate to intercept irregular migrants in international waters between Libya and Italy and to return them to Libya (i.e. performing pull-backs). Italy plays a pivotal role in enabling Libya to increase its capacity to intercept migrants at sea.

Over the course of the last ten years Italy has entered several agreements concerned with irregular migration with Libya. The last one was signed as recent as February 2017. In it, Italy commits itself to supplying Libya with funding, equipment, knowledge transfer and intelligence and surveillance assistance. Parts of the funds are given with the purpose of improving conditions in reception camps. But as reports, - such as the January 2019 Human Rights Watch report reveal, - little, if any, improvement has so far taken place.

Italy has seized effective control over the Libyan Coast guard by means of bilateral agreements, dictating the policies on the one hand and on the other hand advancing significant capacity building and development of infrastructure to Libya. Since the Hirsi judgement, Italy is fully aware that direct involvement with the interceptions and returns will result in state responsibility on part of Italy. By means of the 2017 bilateral agreement, Italy has created circumstances under which interceptions are factually performed solely by the Libyan coast guard.

In sum, the first requirement of Art. 16 ILC Articles is the establishment of intent or the mental element. Italy knew or could have have reasonably been expected to know at the time, that migrants intercepted by the Libyan coast guard will be returned to Libya. Likewise, Italy is aware that the migrants crossing the Mediterranean travel in mixed flows. Thus, asylum seekers among the migrants face the risk of onwards repartition to countries of origin, giving rise to violations of the principle of non-refoulement. A collection of detailed reports of the untenable circumstances in Libyan detention camps was repeatedly brought to the attention of Italy.\textsuperscript{197} Nevertheless, Italy continued unabatedly to support Libya. After the Hirsi judgment put an end to Italy’s push-backs, the new 2017 agreement redefines the same practice in different words, though meticulous attention is paid to ensuring that Italian authorities are not participating in the actual act of refoulement. Purpose and objective of the assistance is to advance Libya’s ability to perform effective interceptions.

The causal link between aid and wrongful act must be prevalent and strong. Italy’s aid and

\textsuperscript{196} UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy, (n 120) para 3.3 see also Stemming the Flow (n 109) see also No Escape from Hell (n 156)

assistance given to Libya is not unlawful as such. Yet, knowingly exposing asylum seekers to chain-refoulement is a wrongful act. It is a grave violation irrespective by which country the wrongful act was committed. Libya might not be party to the 1951 RC but the principle of non-refoulement has become part of customary international law and is thus applicable to all nations. Other than that, Libya will incur the obligation to protect the principle of non-refoulement from the Convention against Torture, the International Covenant on Civil and Political Rights along with regional treaties such as the African Charter on Human and People’s Rights and the 1969 African Refugee Convention. Italy is bound by the European Charter on Human Rights to protect the principle of non-refoulement as well as the CAT and ICCPR.

Taken together and viewed in the context of restrictive EU immigration policies it appears likely that Italy’s conduct will incur indirect state responsibility under Art. 16 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts. Though the ILC Articles have a non-binding character, the Articles are widely considered an authoritative source for international customary law. In the event of a judgment in the case against Italy before the ECtHR, the court might choose to turn to the ILC Articles and commentaries for inspiration. The ECtHR must continuously strive to incorporate developing general principles and standards of general international law in its judgments and thereby into European law.

Paolo Biondi remarks that the current Italian conduct i.e., to contribute to contribute to refoulement while not directly engaging with intercepted migrants - ‘confuses the issue of state responsibility’. The method ‘contactless’ interception, as he calls it, has no precedent. Italy coordinates as well as physically and financially supports Libyan forces, yet the interception is solely performed by Libya. Biondi argues, that despite the lack of physical involvement, Italy ought to be held internationally responsible to a certain degree. Though the physical contact or interaction is usually considered the pivotal element in the determination of the exercise of authority, he argues that Italy’s ‘contactless’ activities could be viewed as de facto forms of the exercise of authority. Where a state exercises de facto control, international human rights and refugee rights must be respected and international obligations upheld. Consequently, Italy ought to cease aiding and assisting Libyan authorities since by doing, so Italy knowingly facilitates the conduct of internationally wrongful acts. Prior to the technical cooperation agreements with Italy, Libya neither had the means nor the political will to apprehend large numbers of irregular migrants. However, the technical support and financial incentives made available by Italy to Libya -, linked to capturing migrants before they cross the European external borders - have changed the situation drastically. Biondi believes that Italian state responsibility comes into play because of ‘foreseeable negative consequences of supplying technical support or equipment’. The causal link exists despite having taken place outside Italy’s direct jurisdiction.

Biondi makes references to two recent incidents in order to illustrate his point: on 10 May 2017, the Maritime Rescue Coordination Centre (MRCC) located in Rome contacted the Libyan coast guard and advised them on the location of migrant vessels on the high seas to be
intercepted. The MRCC directed the Libyan coast guard to assume ‘on-scene command’ of the situation. The intercepted migrants were hence returned by Libyan authorities to Libya despite the presence of the German charity SeaWatch offering assistance to the migrant boats. A different, yet similar interaction took place on 31 October 2017, when the Italian warship A Doria directed the Libyan coast guard to the location of a migrant boat within its direct vicinity. The migrants were taken aboard the Libyan vessel once they arrived on the scene. The A. Doria remained within sight but did not offer physical assistance to the migrant boats.

The first incident cannot be deemed a true push-back by Italy, however the MRCC has the authority to determine where intercepted migrants are taken. This as well as the latter incident are examples of ‘contactless’ interventions by Italy to the effect of knowingly returning intercepted migrants to unacceptable conditions in Libya. Biondi uses these examples to illustrate, that though the conduct might not fall within the ‘classical definition’ of non-refoulement the negative result is foreseeable and to have the same effect as an act of refoulement. Where the facilitated actions lead to internationally wrongful acts Italy ought to be obliged to avoid said actions.198

4.4.3 The Ras Jadir interception

On 6 November 2017 a Libyan coast guard vessel intercepted a boat of migrants on the high seas. The encounter was well documented by the crew of the nearby rescue vessel of the German SAR charity SeaWatch. Based on video and audio recordings of ten cameras, witness statements, radio transmissions and tracking data the interception could be forensically reconstructed.

The following is a summary of the events as they occurred on 6 November 2017 in the Central Mediterranean Sea:199 The migrants placed a distress call to the Italian coast guard requesting assistance. The German SeaWatch vessel was contacted and directed to the location of the migrant boat. By the time the SeaWatch approached the location, the Libyan coast guard had reached the migrant boat and taken over control of the rescue operation. The Libyan coast guard was operating the vessel by the name Ras Jadir. According to information obtained by a group of researchers at the Forensic Oceanography200 the Ras Jadir had undergone repairs by Italy and was transferred back to Libya in May 2017. More than half of the Libyan crew was trained by the EU anti-smuggling unit under EUNAVFOR MED Operation Sophia.201

Despite European training the Libyan rescue operation was ill-fated. Mistakes made during the approach escalated the tense situation even further. Twenty migrants drowned during the interception. Some had already drowned before the Libyan or German vessels arrived on the scene, others drowned due to Libyan misconduct, others again returned to the water after they were taken aboard the Libyan vessel attempting to reach the SeaWatch. Those remaining aboard the Ras Jadir were beaten by Libyan forces.

Meanwhile, the SeaWatch was physically prevented by the Libyan coast guard from approaching the scene despite repeated offers to assist. Supposedly, various ships flying European flags were within reach but did not approach the interception. In total the Libyan coast guard took forty-seven migrants aboard and returned them to Libya. Seventeen of those forty-seven have now filed an application at the European Court of Human Rights against Italy.202

The application was filed by the Global Legal Action Network and the Association for Juridical Studies on Immigration, with support of the Yale Law School’s Lowenstein International Human Rights Clinic and the Italian non-profit ARCI.203 As Charles Heller, researcher and filmmaker with Forensic Oceanography and the group of lawyers of the seventeen applicants, expressed during a press conference ‘Libya has operated as Italy’s proxy’ in performing interceptions and returns. At the time of writing Italy had not responded to the allegations yet.

In this context Nils Melzer, UN Special Rapporteur on Torture stated:

‘…any participation, encouragement or assistance provided … would be irreconcilable with the good faith interpretation and performance of the prohibition of torture and ill-treatment, including the principle of non-refoulement’204

In regards to irregular migrants having been intercepted on the high seas and subsequently exposed to the risk of ill-treatment or inhuman conditions, Melzer explicitly stated:

‘If European countries are paying Libya to deliberately prevent migrants from reaching the safety of European jurisdiction, we’re talking about complicity in crimes against humanity because these people are knowingly being sent back to camps governed by rape, torture and murder’.205

202 Heller, C., Pezzani, L., Mann, I., Moreno-Lax, V., Weizman, E., & Adams, T. (n 199)
4.5 Conclusion

In chapter three the detailed analysis of the 2007-2009 Agreements has shown that the agreements are not the legal basis for push-backs. The collection of MoU, technical protocols and especially in-official understandings between both countries created the legal and political environment in which the push-backs took place. Under the 2017 MoU Libya is the sole facilitator of interceptions and solitarily performs pull-backs when the Libyan coast guard returns intercepted migrants back to Libya. Though, Italy is not itself returning migrants as in the past, they are facilitating a policy to the same effect. Without Italy’s support, Libya would neither be capable nor enticed to intercept and retain this magnitude of irregular migrants.

This thesis questions the possibility to incur indirect state responsibility for Italy under Art. 16 ILC Articles for aiding and assisting Libya in the conduct of the internationally wrongful act of exposing mixed migratory flows to the risk refoulement.

This chapter first analyzed the nature of the ILC Articles on Responsibility of States for Internationally Wrongful Acts and then proceeded to define the requirements of Art. 16. Based on commentaries and scholarly interpretation three requirements could be identified which need to be fulfilled in order to satisfy Art 16 ILC. The mental element of the assisting state must be established. A strong causal link between intent and wrongful conduct is required - the aiding state must be knowledgeable about the violation committed by the assisted state. The aid must be given with the intent to facilitate the wrongful act. Lastly the act must be wrongful irrespective of which states committed it. When Italy’s conduct was tested against the requirements of Art. 16 ILC Articles it was possible to satisfy all three requirements and hence incur Italy’s indirect responsibility for aiding and assisting Libya to commit an internationally wrongful act by violating the customary law principle of non-refoulement.

Due to the novelty of the 2017 agreement and the thereof resulting conduct, no long-term assessment of the policy exits yet. However, migrants intercepted by the Ras Jadir late 2017 have recently lodged an application with the European Court of Human Rights against Italy. At the time of writing it was not possible to gain access to the application but the group of lawyers representing the seventeen migrants have made it known that the application is directed against Italy for assisting Libya in the performance of pull-backs.
5. Conclusion

The aim of this thesis was to assess Italy’s indirect state responsibility pursuant to Art. 16 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts. Unlike direct state responsibility under Art. 2 and Art. 4 of the ILC Articles, Art. 16 infers indirect state responsibility for aiding and abetting another state in the conduct of an internationally wrongful act.

In February 2017 the Italian government renegotiated the cooperation agreement with Libya during the EU Malta Summit. The European Council subsequently endorsed the agreement in the Malta declaration. The joint maritime operations involving Italian and Libyan coast guard forces were to cease. Instead, Italy committed 5 billion Euro to regional and technical development of Libyan infrastructure, in exchange for Libya’s commitment to patrol the Central Mediterranean Sea between the two countries and to intercept and return irregular migrants to Libya. Parts of the funds are dedicated to improve and maintain detention centers across Libya and also to improve the performance of the Libyan coast guard. In other words, Italy has outsourced migration control at its external EU border to a country known for its flagrant human rights abuses.

Not just is Italy paying Libya billions for their assistance in stemming the continuous flow of irregular migrants traveling across the Central Mediterranean Sea, they also externalised ‘the human rights abuses to Libyan actors’ as Charles Heller from the Forensic Oceanography put it. The newly negotiated 2017 MoU between Italy and Libya has the explicit objective to perform pull-backs of intercepted irregular migrants to Libya, a place of known insecurity. With no effective recourse to international protection measures the return of a mixed migratory flow will inevitably result in violations of the principle of non-refoulement.

In 2012, the ECtHR deemed the human rights protection in Libya insufficient for irregular migrants, when it ruled on the Hirsi v Italy case. The court decided that when Italy took intercepted migrants aboard their navy vessels on the high seas, the migrants were thus brought under Italian de facto and de jure control. Italy’s lack to establish the identity and possible needs for international protection of the persons concerned, and their subsequent return to Libyan territories, substituted a violation of international obligations Italy held under the ECHR. For the first time the ECtHR ruled on a case concerning interception of migrants on the high seas. The landmark judgment gave rise to an extraterritorial application of ECHR obligations onto the high seas.

Seven years later in 2019, the human rights situation for irregular migrants has not improved, sadly one my claim that it has become even more dire. Those responsible for drafting the

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207 Forensic Oceanography (n 200)
2017 Italy–Libya MoU, created a policy aimed at stemming the arrival of irregular migrants on Italian shores, without Italy’s physical intervention. The policy was carefully drafted to place acute attention on the separation of operational duties. Libya alone will conduct the maritime operations and returns, thus placing the conduct well out of reach of the ECHR and ensuing responsibilities for Italy.

I strongly agree with Charles Heller’s statement that Libya is in fact acting under the direction and supervision of Italy in the conduct of the pull-backs. Therefore, I argue in chapter four, that Italy’s aid and assistance given to Libya, in the fight against irregular migration across the Central Mediterranean Sea, fulfils the three requirements of indirect state responsibility as per Art 16 ILC Articles.

Firstly, the mental element is given. Italy knew or could have reasonably been expected to know at the time, that migrants intercepted by the Libyan coast guard will be returned to Libya and exposed to harmful treatment and the risk of refoulement. Secondly, the causal link between aid and wrongful act must be prevalent and strong. Purpose of the 2017 MoU is to facilitate Libya to reduce the number of irregular migrants across the Central Mediterranean Sea, by means of interception and returns. Lastly, the aided act must be wrongful irrespective of which state perpetrated it. The prohibition of refoulement, is widely recognized as an essential international customary law obligation and is thus universally applicable. Hence, I argue that Italy could accrue indirect state responsibility under Art. 16 ILC Articles, for aiding and assisting Libya in performing the internationally wrongful act of refoulement.

Though the ILC Articles have a non-biding character, they carry significant advisory weight for international courts and tribunals. It is desirable that the European Court of Human Rights will seek inspiration from the ILC Articles, should the pending case of the seventeen intercepted migrants, from November 2017, proceed. In this case the ECHR would have the power to seal a legal gap left by the Hirsi case. When the ECHR ruled in Hirsi that Italy’s physical involvement in the push-back gave rise to the violation of the ECHR, Italy reacted by devising a ‘contactless’ interception policy as described above. On this matter Sara Prestianni, spokeswoman at the ACRI said:

‘This application is essential for demonstrating the political and legal responsibility of the Italian government for ongoing systematic violations of human rights law, both at sea and in the hellish conditions to which migrants are returned to Libya.’

Talya Lockmann-Fine, member of the Yale Law School’s Lowenstein International Human Rights Clinic added:

‘International law must not be misinterpreted to permit countries to subcontract their human rights violations and avoid all accountability.’

208 GLAN Law (n 203)
If such migration control methods as Italy is currently employing in Libya, go uncontested it will not be possible to hold European countries accountable for internationally wrongful acts committed by third party actors not bound by European standards protecting European external borders with (monetary) assistance of European states. Maintaining a policy of externalized border control at the detriment of the protection of human and refugee rights, will inevitably result in Europe’s loss of ‘credibility and legitimacy as normative power’.\footnote{Joannin, P.(n 11) para. 3.2}

Assessing the legal grounds for external processing centres has to become the next step. If asylum seekers, in need of international protection, were able to access the refugee determination process within their region, this might prevent irregular migrants from attempting the perilous journey with human smugglers. On the one hand, the lucrative, yet criminal business network of the smugglers would be disrupted, and on the other hand, asylum seekers would be less likely to end up in a Libyan detention centres with their fundamental rights violated.

Externalization of migration control along European external borders can only be considered a migration management approach if externalization includes externalization of protection as well. Mixed migratory flows call for a differentiation in treatment and processing.
Annex

Figure 1 – Eurostat Dataset/ Frontex

European Migrant Crisis 2015

Top Countries of Origin

- Syria
- Vietnam
- Afghanistan
- Algeria
- Russia
- Serbia
- Pakistan
- Ukraine
- Nigeria
- Somalia
- Ireland
- Morocco
- unknown
- India
- Bangladesh
- Russian Federation
- Croatia and Herzegovina
- Senegal

Number of Refugees

- 25,000
- 50,000
- 100,000
- Asylum applicants per 10,000 inhabitants in the destination country
- Asylum applications between 1 January and 30 June 2015

Migratory Routes

- 10,000
- 25,000
- 50,000
- 100,000
- Illegal border crossings between 1 January and 30 June 2015

Other important entry points for European migrants were Albania and Greece, but these are not shown in the diagram because they do not meet the criteria set for the analysis.

Number of asylum applicants per month

- 2008
- 2009
- 2010
- 2011
- 2012
- 2013
- 2014
- 2015

Data extraction date: 13 Sept. 2015

Questions:
- Asylum applications
- Migration dataset
- Migration routes
- Frontex Migration Routes Map
- Population data
Figure 2 Malta Search and Rescue region
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