UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

School of Advanced Legal Studies

Faculty of Law

(Human Rights Law)

Master's Dissertation

What does border externalization mean and what impact do the migration policies of the EU have on migrants' and refugees' human rights? What are the legal consequences for states that commit the human rights violations?

by
Isabella Winter

December 2020

Supervised by Dr Fatima Khan

24999 words

Contents

Copyright ©

Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in Human Rights Law by approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations

Signed by candidate

.....

Isabella Winter

Abstract

The EU is well-known for its policy of externalisation, that is, shifting the migration control away from its own borders (as a second, destination country) and towards third countries. This practice challenges human rights law. The thesis addresses the meaning and development of the border externalization. Furthermore, it explains how the migration policies are impacting migrants' and refugees' human rights. Finally, the thesis argues that states can be held responsible for the human rights violations happening due to the EU's policy of externalisation. Thus, overall, the thesis is concerned with the EU migration control and its member states and the human rights situation in Libya. The migration policies have changed in the past to new forms of *non-entrée* in which the border control is carried out by the authorities of the state of origin or transit. This is, because the early *non-entrée* practices were legally challenged, and did not protect European states from legal accountability. By funding the Libyan Coast Guards and entering agreements with a politically unstable country that also has a poor human right record, the EU and its member states are supporting the violations of migrants' and refugees' rights. These violations range from breaches of the right to life, the right to seek and enjoy asylum, the principle of *non-refoulment*, the right against torture and ill-treatment, the right to liberty, and the right to remedy. The violations are especially grave in migration-related detention in Libya where detainees experience inhuman living conditions and abuse. The thesis argues that the EU and its member states, particularly Italy due to the special cooperation between the Italian and Libyan authorities, are in breach of international as well as European law. The thesis concludes that state responsibility follows from Article 16, 17, and 47 ARSIWA are violated as well as Article 3 ECHR.

Abbreviation

UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
ECtHR	European Court of Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICCPR	International Covenant on Civil and Political Right
OAU	Organization of African Unity
OAU Convention	Convention Governing the Specific Aspects of Refugee Problems in Africa
EU	European Union
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
MoU	Memorandum of Understanding
ICJ	International Court of Justice
Refugee Convention	1951 Convention Relating to the Status of Refugees

I. CHAPTER 1: INTRODUCTION

(a) Policy of externalization of the European Union

This thesis aims to demonstrate that the policy of externalisation of the European Union (hereafter 'EU') is a challenge to human rights law. By externalizing its border control, especially through coalitions formed with Libya, the EU and its member states are contributing to human rights violations that are occurring in the country regularly. Therefore, the thesis refers to the meaning of border externalization in general, but also with special regard to the EU migration policies implemented in Libya. Furthermore, the thesis addresses the human rights violations happening to migrants and refugees in Libya. Central to this thesis is the contention that the migration management actions that result in human rights violations have legal consequences and that states can be held responsible for their contribution to these breaches in terms of international law.

Externalization is a well-known term used by many scholars, politicians, and the media, as a description of the policy adopted by states to facilitate the 'extension of border and migration controls' beyond a state's territory.[1] The goal of the externalization of migration controls is to prevent migrants and refugees from entering the destination state's territory. This is because by entering the state territory, they become subject to the state's jurisdiction; the state is then legally responsible for the individual. Protection claims of individuals who managed to arrive in the state are often made legally inadmissible. Generally, however, the destination states' aim is to avoid considering the protection claims of any individual at all.[2]

Extraterritorial state actions to control migration can include various state engagements, namely unilateral, bilateral, and multilateral agreements.[3] Private actors can also be enlisted.[4] The state actions can be direct and indirect. Part of direct state actions are policies of interdiction and prevention which are also called *non-entrée* policies.[5] The policies include the

[1] Inka Stock, Ayşen Üstübici & Susanne U. Schultz 'Externalization at work: responses to migration policies from the Global South' (2019) 7 *Comparative Migration Studies* 1.
[2] Bill Frelick, Ian M. Kysel & Jennifer Podkul 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 *Journal on Migration and Human Security* 193.
[3] Ibid.
[4] Ibid.
[5] Ibid.

'outsourcing of border controls to third countries, through visa procedures, readmission agreements, or border checks'.[6] Indirect mechanisms include 'provision of support for or assistance to security or migration management practices in and by third countries'.[7]

These migration control measures are re-packaged by governments to make them more acceptable to the general public. They seep into popular media as steps taken by government that are more humanitarian than self-serving and avoidant. States often justify border externalization publicly as 'either or both a security imperative and a life-saving humanitarian endeavour rather than simply as a strategy of migration containment and control'.[8] The reason for this deception is the socio-politically polarizing nature of the topic and the state's as well as the public's presumption that migrants are a risk to the state's security.[9] This is also embedded in the language used by politicians when talking to the public referring to migrants and refugees. Economic migrants are sometimes referred to as "illegal immigrants" to separate them from asylum seekers and recognized refugees.[10] This implies that 'economic migrants are all illegal' which generalizes the motives of all migrants and is nothing more than a lurid expression.[11] The United Nations (hereafter 'UN') General Assembly requested in 1975 that the UN organs use the term non-documented or irregular migrant to manifest the protection and defence of their rights.[12]

To clarify the terminology used in the thesis, the three following terms can be helpful. First, the country of origin is the country of departure. The migrant or refugee who is leaving can be but does not necessarily have to be a national or citizen of that state. Secondly, the state of destination which is the state the migrant intends to go and lastly, the third countries or countries of transit which the migrant passes or intends to transit en route to the state of destination.[13]

[6] Stock, Üstübici & Schultz op cit note 1 at 2.
[7] Frelick, Kysel & Podkul op cit note 2 at 193.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] UN General Assembly Resolution No. A/RES/3449(XXX), 2433rd plenary meeting, 9 Dec 1975, available at *https://undocs.org/en/A/RES/3449(XXX)*, accessed on 30 November 2020.
[13] Frelick, Kysel & Podkul op cit note 2 at 193.

(b) Problem statement and objectives

The EU is well-known for its policy of externalisation, that is, shifting the migration control away from its own borders and towards third countries.[14] Politicians often talk about border externalization framing the matter in 'cost-efficiency terms'.[15] This means that externalization measures can be compared to 'outsourcing strategies in financial transactions, where costs are transferred to third parties in order to increase profit margins'.[16] By transferring the political, social and economic costs of migration to third parties which are, in general, not in close proximity to the country of final destination, it becomes especially evident that politicians in the EU aim to outsource their migration control.[17] Instead of referring to migrants in a positive manner, seeing migration as a chance for the sending and receiving state and their societies, they are often viewed as a burden by countries of destination.[18] The EU aim to avoid any obligation for migrants' well-being. Their goal is to transfer the responsibility to the authorities in countries of origin or transit.[19] Migration control through border externalization creates distance in an ethical and legal way. The EU has the attitude rather of "out of sight, out of mind" towards migrants and refugees.[20]

The EU's externalisation approach poses serious challenges to human rights law.[21] The externalisation policies have been implemented by the EU to reduce the number of asylum seekers. This makes states follow a two-pronged strategy: the first strategy is to 'push, prod, and sometimes pay a country of first arrival or a transit state to seek to curb the migration flow through its own enforcement measures'.[22] The other strategy is to create the construct of a "safe third country" or "first country of asylum". The country of first arrival or transit is then responsible for the protection of the refugee.[23] This saves the state of destination time and efforts to proceed with an asylum application. Another reason why states are following those

[14] Patrick Müller & Peter Slominski 'Breaking the legal link but not the law? The externalization of EU migration control through orchestration in the Central Mediterranean' 2020 *Journal of European Public Policy* 6.
[15] Stock, Üstübici & Schultz op cit note 1 at 2.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Violeta Moreno-Lax & Martin Lemberg-Pedersen 'Border-induced displacement: The ethical and legal implications of distance-creation through externalization' (2019) 56 *Questions of International Law* 5.
[21] Ibid.
[22] Frelick, Kysel & Podkul op cit note 2 at 195.
[23] Ibid.

strategies is due to the 'already existing huge body of human rights and refugee law established in various legal regimes such as public international law, EU law, and national constitutional law'.[24] Therefore, European states are interested in keeping refugees away from their territory because as soon as an irregular migrant or refugee arrives in the EU and claims asylum, the individual falls under the state's jurisdiction which results in a complex and long legal assessment of an independent court. Due to the court's independence, its decision cannot be controlled by national or international policy-makers.[25] States externalize their border control because they want to reduce the 'economic, political and social costs of "unwanted immigration" for receiving states'.[26] This shows the ambivalent behaviour towards migration because on the one hand, states are willing to commit to refugee law, on the other hand, however, they also want to avoid responsibilities following from this commitment.[27] Therefore, the objective of the thesis is to get a closer look at the migration policies of the EU and its member states uncovering what the author perceives as the real goal the states are aiming for, which is the deterrence of migrants and refugees. Many migrants and refugees aim towards Europe via the Mediterranean by boat which is one of the deadliest routes worldwide and many die at sea.[28] However, more than 50 percent of all individuals that disembarked from Libya are intercepted.[29] Many of them are detained and held in detention centres under inhuman conditions. They are often subjected to human traffickers, experience physical and sexual abuse, or death.[30] These human rights violations are occurring due to the externalization of migration control. Especially when considering the human rights violations in migration-related detention in Libya, it becomes evident how the violations of migrants' and refugees' rights are connected to the cooperation with Italy and the EU. Moreover, it will be shown that the European member states are potentially facing legal consequences when contributing to the human rights violations in Libya.

[24] Peter Slominski 'The Power of Legal Norms in the EU's External Border Control' (2013) 51 *International Migration* 44.
[25] Ibid.
[26] Stock, Üstübici & Schultz op cit note 1 at 2.
[27] Thomas Gammeltoft-Hansen & James C. Hathaway 'Non-refoulement in a world of cooperative deterrence' (2015) 53 *Columbia Journal of Transnational Law* 240.
[28] UNHCR & MMC '"On this journey, no one cares if you live or die" Abuse, protection, and justice along routes between East and West Africa and Africa's Mediterranean coast' July 2020 at 10.
[29] Ibid.
[30] Ibid.

(c) Significance of the topic

Three humanitarian organizations formulated a complaint to the European Court of Auditors concerning the mismanagement of EU funds in February 2020.[31] They addressed the human rights violations in Libya which are funded by the EU. The authors are demanding that the EU 'condition[s] its funding of Italian-Libyan cooperation on ensuring Libyan actors respect human rights and international law'.[32] Furthermore, the complaint contains that the EU has knowledge about the violations of international law that occur in Libya. Therefore, with funding the foreseeable breaches the EU is 'at high risk of legal liability'.[33]

The EU funds that the complainants are referring to is the EU Emergency Trust Fund for Africa (hereafter 'EUTFA'). Italy is the second largest contributor to the fund.[34] The project "Support to Integrated border and migration management in Libya" supported the Libyan border control through Italy and is funded by the EUTFA.[35] One of the main objectives of the projects is to 'improve the human rights situation for migrants, including through ensuring that the Libyan authorities targeted by this action comply with human rights standards'.[36] This stands, however, in contrast with the situation in Libya as was pointed out by several institutions.[37] Italy initiated the partnership between the EU and Libya. The complainants show that the EU and its member states complicitally violated European law as a consequence of the cooperation between Italy and Libya.[38] Moreover, Italy also partnered with Libya without the EU being involved.[39] Due to Italy's geographical location and its extensive sea borders facing the Mediterranean, it is one of the countries of migrants' first arrival (when choosing the

[31] GLAN, ASGI and ARCI 'Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' Programme' available at *https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2020-04/GLAN%20ASGI%20ARCI%20ECA%20Libya%20complaint%20%26%20expert%20opinion%20EMBARGO ED.pdf*, accessed on 30 November 2020.
[32] Ibid at 2.
[33] Ibid at 4.
[34] Germany is the leading contributor with 41%, Italy with 27%; Andrea Terlizzi 'Border Management and Migration Controls in Italy' June 2019 Research report at 34 available at *http://uu.diva-portal.org/smash/get/diva2:1320888/FULLTEXT01.pdf*, accessed on 30 November 2020.
[35] European Commission, EUTF, Support to Integrated border and migration management in Libya- first phase, 27 July 2017 available at *https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-first-phase_en*, accessed on 30 November 2020.
[36] Ibid.
[37] For instance, the Office of the High Commissioner for Human Rights, UN Support Mission in Libya 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' 20 December 2018 available at *https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf*, accessed on 30 November 2020.
[38] GLAN, etc. complaint op cit note 31 at 2.
[39] The involvement of Italy will be outlined in the next section.

Mediterranean route). Due to the cooperation with the Libyan Coast Guard (hereafter 'LCG') the numbers of sea arrivals dropped dramatically; from almost 200 000 arrivals in 2016 to less than 28 000 in 2020.[40] It is suggested that the lower numbers are a result of the agreement with the LCG that are handling the pushbacks and, as a consequence, are preventing migrants coming to the Italian territory. In 2012, the European Court of Human Rights (hereafter 'ECtHR') ruled in *Hirsi* that these practices are unlawful.[41] Nevertheless, the cooperation between the countries continued. In general, Italy has been cooperating with numerous African countries for three decades.[42] Because of Italy's continuing involvement in border externalization, the thesis is focusing on the topic.

(d) The European involvement in Libya

To start with, the Italian government signed a Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders (hereafter 'MoU') with the Libyan Government of National Accord in 2017. In the beginning of 2020, the MoU was renewed automatically. The MoU is actually not the first cooperation between Libya and Italy concerning the curbing of migratory flows.[43] The Treaty of Friendship, Partnership, and Cooperation was agreed upon prior, but was suspended in 2012 as a result of the de-stabilization of the Libyan government and the outbreak of civil war.[44] The *Hirsi* decision of the ECtHR was another reason for the suspension because the Court ruled that Italy violated the principle of *non-refoulement* and the prohibition of collective expulsions.[45]

The MoU includes 8 Articles.[46] The language used is broad and in parts legally imprecise. Nevertheless, it does not include a precise list of projects that are supported with

[40] In 2019, there were only 11.471 sea arrivals registered; UNHCR, Operational Portal Refugee Situations, Sea arrivals, available at *http://data2.unhcr.org/en/situations/mediterranean/location/5205*, accessed on 30 November 2020.
[41] *Hirsi Jamaa and other v Italy*, Application no. 27765/09, European Court of Human Rights, 23 February 2012.
[42] Terlizzi op cit note 34 at 34.
[43] Anja Palm 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?' *EU Immigration and Asylum Law and Policy* 2 October 2017, available at: *https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/*, accessed on 30 November 2020.
[44] Ibid.
[45] Ibid; *Hirsi* supra note 41 at para 158 (violation of Article 3 ECHR) and 186 (breach of Article 4 of Protocol No. 4 of the ECHR).
[46] English version of the Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders

the agreement, nor does it address the exact amount or origin of the funding.[47] Articles 1 and 2 address the obligations and the support that is given to stem the illegal migration flow.[48] The term "illegal migrant" is used throughout the MoU and shows how the policy makers categorize individuals. Referring to them as "illegal" clarifies how the MoU aims to create a negative perception and implies that they do not have the right to enter the EU.[49] Although the MoU has two objectives[50], it is the securitization of Libya's borders that is clearly the main goal of the agreement.[51]

The EU's involvement in Libya was also determined by the Malta Declaration in February 2017. Objectives of the Declaration are, for instance, the stabilization of Libya as well as provision of 'training, equipment and support to the Libyan national coast guard'.[52] The financial support of the EU included the mobilization of an additional 200 million euros for Northern Africa prioritizing migration-related projects in Libya.[53] The EU expects Libya to regulate and reduce the number of asylum-seekers coming to Europe.

The MoU was the European attempt to solve the so-called "migration crisis".[54] With regard to the extension of the MoU, the Commissioner for Human Rights called

> on the Italian government to urgently suspend the co-operation activities in place with the Libyan Coast Guard that impact, directly or indirectly, on the return of persons intercepted at sea to Libya until clear guarantees of human rights compliance are in place right before the renewal[55]

This was not the first call from the Commissioner who already had highlighted several times that the agreement between the two countries is causing serious human rights violations to

between the State of Libya and the Italian Republic available at *http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf*, accessed on 30 November 2020.
[47] Palm op cit note 43.
[48] MoU supra note 46 at Article 1 A).
[49] Palm op cit note 43.
[50] The second objective is the stabilization and general support of the country (Palm op cit note 43)
[51] Ibid.
[52] Council of the European Union, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017 available at *https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/*, accessed on 30 November 2020.
[53] Ibid para 7.
[54] Jean-Pierre Gauci 'Back to Old Tricks? Italian Responsibility for Returning People to Libya' 6 June 2017 EJIL: Talk! Blog of the European Journal of International Law available at *https://www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/*, accessed on 30 November 2020.
[55] Commissioner for Human Rights (hereafter 'HRC'), Statement 31 January 2020 available at *https://www.coe.int/en/web/commissioner/-/ommissioner-calls-on-the-italian-government-to-suspend-the-co-operation-activities-in-place-with-the-libyan-coast-guard-that-impact-on-the-return-of-p*, accessed on 30 November 2020.

migrants and asylum seekers who are increasingly returned to Libya by the LCG.[56] The Commissioner's criticism was published in her Recommendation of June 2019[57] and in her observation submitted to the ECtHR in connection with the case of *S.S. and others v. Italy* in November 2019.[58] She says

> it is shameful that we turn a blind eye to them. This tragedy has gone on for too long now, and European countries have contributed to it. It is urgent that Italy, the EU and all its member states take action to put an end to it[59]

(e) Research question

The thesis is going to address the following questions: What does border externalization mean and what impact do the migration policies have on migrants' and refugees' human rights? What are the legal consequences for states that commit the human rights violations?

The research question is split in three sections. First, the meaning of border externalization with regard to the European border policies is outlined. The next part addresses the human right violations that occur due to the migration policies of the EU. In particular, the thesis focusses on the human rights situation in Libya. Finally, the state responsibility of the EU member states, and particularly that of Italy, is addressed.

(f) Literature review

Many scholars have written about the externalization of migration controls and concluded with a definition of the term. Frelick, Kysel and Podkul, for instance, describe the externalization of border control as 'extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdiction or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims'.[60] The meaning is commonly agreed on, although the particular wording changes from

[56] Ibid.
[57] Human Rights Committee 'Bridging the protection gap for refugees and migrants in the Mediterranean' June 2019 available at *https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87,* accessed on 30 November 2020.
[58] Human Rights Committee, Third party intervention by the Council of Europe Commissioner for Human Rights, CommDH(2019)29 available at *https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-app/168098dd4d,* accessed on 30 November 2020.
[59] HRC op cit note 55.
[60] Frelick, Kysel, and Podkul op cit note 2 at 193.

scholar to scholar.[61] Gammeltoft-Hansen and Hathaway describe the development of migration policies, dividing them into traditional *non-entrée* practices and cooperation-based *non-entrée*. States changed their approaches because they aim to avoid legal responsibility. Therefore, the next generation of *non-entrée* is mostly set in the country of origin or transit, away from the jurisdiction of the destination state.[62]

Moreno-Lax and Giuffré's work examines 'new and different forms of "contactless" control of cross-border migration'.[63] The authors analyse the violation of the principle of *non-refoulment* as well as the right to leave due to contactless migration control. Their scope of violated rights is limited even though other rights are being violated too. Therefore, this thesis has expanded the list of impacted human rights by using Amnesty International's report (hereafter 'Amnesty').[64] The reports of human rights' organizations are valuable sources of information because, due to their interaction with migrants in refugee camps and detention centres, they have insightful information regarding the human rights' situations in countries of interest. Most scholars address the human rights situation in Libya briefly. However, to understand the scope of the human rights violations, it is necessary to show the conditions under which migrants and refugees have to live. The UN report on the human rights situation in Libya was a helpful source for addressing the violations and abuses against migrants and refugees and how the border externalization measures contribute to those violations.[65] One of the main findings is that the funding of the LCG by the EU and its member states impacts the human rights of migrants and refugees negatively because, as a result of the cooperation, the intercepted individuals are detained under inhumane conditions.

Anna Liguori focuses on the cooperation between Italy and Libya and the implementation of pullbacks which is a migration control policy that developed after the *Hirsi*

[61] Besides that, Alejandro Del Valle-Gálvez, for instance, differentiates between externalization and extraterritorialization. The latter stands for the border control activities by destination states outside their territory whereas the former means the 'management and control of migration flows): Alejandro Del Valle-Gálvez 'Refugee crisis and migrations at the gates of Europe: Deterritoriality, extraterritoriality and externalization of border controls' (2019) 7 *Paix et sécurité internationals/ Journal of International Law and International Relations* at 118.
[62] Gammeltoft-Hansen & Hathaway op cit note 27 at 248.
[63] Violeta Moreno-Lax & Mariagiulia Giuffré 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibilty" for Forced Migration Flows' in: S. Juss (ed) Research Handbook on International Refugee Law (Edward Elgar, forthcoming) (2017) at 19.
[64] Amnesty International '*The Human Rights Risks of External Migration Policies*' (2017) available at *https://www.refworld.org/pdfid/593fecfe4.pdf*, accessed on 30 November 2020.
[65] UN Support Mission Libya op cit note 37.

judgement. She outlines the human rights violations in Libya as well as the responsibility that Italy might face[66]. Gammeltoft-Hansen and Hathaway argue that more than one can be held liable for a violation of human rights in the notion of shared jurisdiction which helps to hold states responsible for the newly established forms of *non-entrée*.[67] Moreover, they are discussing the state responsibility that follows from Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter 'ARSIWA').[68] An aiding and assisting state can therefore be held accountable even if the state does not exercise jurisdiction. The strength of the article lies within the ability of the authors to outline the general concepts and how the new *non-entrée* methods can be challenged, by pointing out various ways states can be held accountable. Furthermore, the scholars point out that the state responsibility occurring from having jurisdiction and shared responsibility are more developed in comparison to the duty to not aid or assist. However, a state can theoretically be held responsible under Article 16 ARSIWA. Therefore, the immunity regarding legal consequences that states believe themselves to have – when they are not exercising jurisdiction – is removed.[69] They show the 'schizophrenic attitude towards international refugee law' of many developed states because they only want the benefits, whilst avoiding any commitment.[70]

Gammeltoft-Hansen and Hathaway outline the topic broadly, whereas other scholars focus on the responsibility of the EU and Italy, in particular that concerning the cooperation with Libya. Moreno-Lax and Giuffré show the state responsibility based on the EU-Libya cooperation agreement. Their research results in EU member states' and especially Italy's responsibility for complicity (Article 16 ARSIWA), direction and control (Article 17 ARSIWA) and the independent responsibility for the states own acts and omissions. The independent responsibility occurs from the European Convention of Human Rights (hereafter 'ECHR'). Liguori is also investigating whether Italy is violating Article 16 ARSIWA as well as Article 3 of the ECHR.

However, there are also other provisions that can be violated. Certainly, the mentioned norms are the ones most likely to be in breach, but other authors extended the possibility for

[66] Anna Liguori 'Migration Law and the Externalization of Border Controls European State Responsibility' Routledge (2019).
[67] Gammeltoft-Hansen & Hathaway op cit note 27 at 276.
[68] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001
[69] Gammeltoft-Hansen & Hathaway op cit note 27 at 282.
[70] Ibid at 282-3.

state responsibility. Giuseppe Pascale, for instance, includes Article 41 ARSIWA. He emphasizes that EU member states can also be held responsible for maintaining the situation in Libya which goes beyond what other scholars addressed.[71] The thesis contributes to the debate of state responsibility and extends the range of the possible provisions that can be violated.

Important case law, especially the *Hirsi* case, is outlined to point out the arguments of the ECtHR that lead to a change of *non-entrée* measures.[72] The case that is before the ECtHR is *S.S. and others v Italy* and shows that the newly implemented migration policies after the *Hirsi* decision are also challenged now.[73] This suggests that Gammeltoft-Hansen and Hathaway were right with their presumption that even the new generation *non-entrée* measures result in state responsibility.[74]

(g) Methodology

The research objectives of the thesis on the one hand to address the meaning of externalization of border control in a European context. On the other hand, the thesis points out the impact on the human rights of the migration policies, with special regard to the situation in Libya. Besides that, the thesis focusses on state responsibility occurring from the ARSIWA and ECHR exploring whether the EU and its member states, and mainly Italy, can be held responsible for the human rights violations that happen under their watch. In general, the thesis opts for a combination of legal theory and practice. The main goal of the thesis is to show that states are not able to avoid responsibility by creating more advanced migration control policies.[75] In the beginning, the thesis shows the theoretical background of the term "externalization of border control" and how it can be implemented. Additionally, the thesis outlines the practical impact that the migration policies have on the individuals who come in direct contact with the measures. This is achieved by using the descriptive research method.

Due to the ongoing conflict in Libya as well as the COVID-19 outbreak at the beginning of the year, it was not possible to access information in the country itself. Unfortunately, the

[71] Giuseppe Pascale 'Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?' (2019) 56 *Questions of International Law.*
[72] *Hirsi* supra note 41.
[73] *S.S. and others v* Italy, Application no. 21660/18, European Court of Human Rights.
[74] Gammeltoft-Hansen & Hathaway op cit note 27 at 282.
[75] Ibid at 248, they summed up that 'the classic tools of *non-entrée* no longer provide developed states with an effective and legal means to avoid their obligations under refugee law'.

pandemic also made it impossible to interview refugees who stayed in Libya but are now residing in South Africa. Nevertheless, the reports by Amnesty as well as Human Rights Watch (hereafter 'HRW'), and other humanitarian organisations portray the human rights' situation of migrants and refugees in detail. Due to their research in Libya and the interviews with people who experienced the human rights violations, their reports are relevant sources.

The last part of the thesis, concerning the state responsibility, follows a doctrinal legal research methodology by pointing out the law, the commentary as well as existing case law. This part analyses whether the ARSIWA or the ECHR are violated by the state actors. After addressing the legal theory, the close focuses on making the connection to the case Italy/Libya.

Many countries implement external border controls and have agreements with third countries to prevent migrants from entering their state territory. This thesis, however, is limited to the European migration policies. In particular, the cooperation between the EU (especially Italy) and Libya is portrayed. The thesis is also limited to the data that was available and accessible online given the UCT law library being closed due to the pandemic.

(h) Chapter synopsis

The thesis contains 4 chapters. The following chapter focuses on the meaning of the term "border externalization" and outlines the different terminology used by scholars. Moreover, Chapter 2 points out the development of the migration measures, which vary from measures taken in the country of destination, to measures implemented in the country of transit or origin. Next, Chapter 3 discusses the impact of the border externalization measures on the human rights of migrants and refugees. Beginning with a brief outline of the Libyan political and legal system – which also explains how the violation of migrants' and refugees' rights in the country are able to occur – the violated human rights are addressed in detail. In addition, the human rights situation in migration-related detention in Libya is pointed out and shows the various abuses that migrants and refugees experience. Chapter 4 concerns the state responsibility of the EU and its member states occurring from the ARSIWA as well as Article 3 of the ECHR. This chapter also includes the relevant case law of the ECtHR, referring to migrants' and refugees' rights which is the *Hirsi* case and the pending case of S.*S. and others v Italy.* The final chapter concludes that the externalization policies, adopted by the EU and Italy in particular, lead to

gross human rights violations and demonstrates that state responsibility in terms of international law is undermined.

II. CHAPTER 2: WHAT DOES EXTERNALIZATION MEAN?

Many terms describe the externalization of border control. Depending on the scholar or the context in which migration policies are referenced, the terms vary. This chapter addresses the meaning of border externalization. Due to the extensive vocabulary used in this context, the chapter first explains the terminology. Secondly, the chapter portrays the development of the migration measures which are categorized into old and new generation measures. Both measures – old and new generation – comprise various migration control activities. Whereas some of the measures are used frequently by states, some of the migration policies, especially those belonging to the "old generation" were legally challenged in the past and are, consequently, not in the migration control repertoire of states anymore.

(a) Terminology

The following terms are used to describe the phenomenon of politics of *non-entrée*: border displacement, the delegation or remote control of migration, off-shore asylum, policing at a distance, and those that can be summed up in the term of *non-entrée*.[76] Nevertheless, the list is not definite and can be extended by adding the following terms: outsourcing, externalization, offshoring or extra-territorialisation of migration management; external migration governance; remote migration policing; de-territorialization of border control; politics of extraterritorial processing; neo-refoulment[77]; or limes imperii.[78] What can be said is that the terms externalization or extra-territorialization of borders and their control can be used synonymously.[79]

[76] Del Valle-Gálvez op cit note 61 at 146.
[77] Hyndman and Mountz are referring to "neo-refoulment" as 'a geographically based strategy of preventing the possibility of asylum through a new form of forced return'. In particular, the return of refugees and other migrants 'to transit countries or regions of origin before they reach the sovereign territory in which they could make a claim'. See Jennifer Hyndman & Alison Mountz 'Another Brick in the Wall? Neo-Refoulement and the Internalization of Asylum by Australia and Europe, Government and Opposition' (2008) 43 *Government and Opposition* 249-250.
[78] Maria Nagore Casas 'The Instruments of Pre-Border Control in the EU: A New Source of Vulnerability for Asylum Seekers?' (2019) 7 *Paix et sécurité internationals/ Journal of International Law and International Relations* 164.
[79] Del Valle-Gálvez op cit 61 at 146.

What the terms have in common is what they refer to, which is 'various types of interception measures used by States against asylum-seekers and refugees, measures which are usually developed by the wealthiest states, notably the United States, Australia, Canada and EU Member States'.[80] Del Valle Gálvez refers to the set of situations that are performed at the state's entry points, such as the border checkpoints as "deterritorialization of migration control" because the mentioned migration prevention activities are taking place somewhere else, but not the EU ground.[81] He uses that term because in his view the term is 'more neutral than those mentioned above, as it evokes the positioning of certain border control and migration policy functions outside the territory, to be carried out by third states or by the state itself'.[82] Additionally, he outlines that 'the de-territoriality option hypothetically makes it possible to encompass the situations of both the externalization and extra-territoriality of border control functions'.[83]

(b) Old generation border externalization measures

The following part outlines the development of different measures that were used by European states and other countries that implement migration policies addressing the issue of border externalization – beginning with the "old generation" measures, followed by the "new generation" of border externalization measures.

The approaches taken by states to prevent migrants or refugees from coming to their territory have developed over time. Traditionally, the *non-entrée* practices focused on the point of departure and aimed to stop migrants from crossing borders in the first place. Therefore, the favoured migration control measures were visa controls and carrier sanctions. The latter measure fined transporting companies or individuals who transported people who did not have the required valid visa.[84] The goal of those *non-entrée* approaches was to prevent migrants from claiming protection within the jurisdiction of the country of destination, by denying them the right to travel.[85] It is easy, though, for individuals to overcome this burden. Especially when they are leaving for a neighbouring country with large sea or land borders.[86]

[80] Ibid.
[81] Ibid at 147.
[82] Ibid at 147-8.
[83] Ibid.
[84] Gammeltoft-Hansen & Hathaway op cit note 27 at 245.
[85] Ibid.
[86] For instance, Mexico/USA or Syria/Turkey.

Furthermore, states established "international zones" which were designed to be legally free areas on the states' territory, especially in airports, where states claim that their jurisdiction does not apply.[87] Nevertheless, various courts decided that international zones fall under the jurisdiction of a country. The ECtHR, for instance, decided in *Amuur v. France*[88] that while being held in an airport's transit zone, the individuals must be given access to legal or social assistance.[89] Nevertheless, states are allowed to confine individuals 'in order to enable States to prevent unlawful immigration while respecting their international obligations' when the outlined requirements are fulfilled.[90] Moreover, the Court in the *Amuur* case concluded that 'by holding the applicants in the international airport of Paris, they became subject to French law'.[91] A South African case which dealt with the matter is *Abdi and Another v Minister of Home Affairs and Others.*[92] In this case, the Supreme Court of Appeal held that the Inadmissible Facility in the airport falls under the South African jurisdiction because it forms part of the South African national territory.[93] The Court concluded that 'potential asylum seekers and refugees held in that facility are entitled to the assistance of the Department's officials and need to show no more than that they are persons who might qualify as refugees or asylum seekers'.[94] The existent case law narrowed down the possibilities for states to implement measures that are not breaching international or national law.

In addition, the third form of *non-entrée* is the deterrence on the high seas. On the high seas, international law is applicable.[95] States are violating international law if they do not assist refugees and migrants on the high seas. This was already decided in the *Sale v Haitian Center Council*[96] case in 1993. In this case, the US Supreme Court held that refugees cannot be returned to their country of origin when they are rescued on the high seas because the principle of *non-refoulment* applies only to individuals that are physically present within a country's territory.[97] The Supreme Court referred to the *travaux préparatoires* of the 1951 Refugee

[87] Ibid.
[88] *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996.
[89] Ibid at 45.
[90] Ibid at 43.
[91] Ibid at 52.
[92] *Abdi and Another v Minister of Home Affairs and Others* 2011 3 SA 37 (SCA).
[93] Ibid at 28.
[94] Ibid.
[95] Gammeltoft-Hansen & Hathaway op cit note 27 at 245.
[96] *Sale v Haitian Centers Council* 1993 (509) U.S. 155.
[97] Ibid at 247.

Convention to justify its decision. To sum up, by implementing external border control on the high seas, the practicing states are part of a process which violates international law.

The traditional forms of *non-entrée* have been legally and practically challenged in the past, as was partly shown above. The visa controls and carrier sanctions might have worked out well for a while but are not reliable forms to deter someone from crossing territorial borders. This applies increasingly as human smugglers develop more advanced operational techniques, due to high demand (despite the risks involved for those smuggled). The high demand has led to the commercialization of human smuggling throughout the last couple of years. On the one hand, because refugees rely heavily on human smugglers to cross borders and, on the other hand, because of the high number of prospective customers. The financial incentive is very tempting for human smugglers. This has led to the invention of more sophisticated methods on production of fraudulent passports, visas, etc. which are harder to detect as false.[98] Other ways of securing the operations is by 'bribing border officials and regularly adapting travel routes to exploit new opportunities for entry'.[99] This development is seen as a never ending cat and mouse game to keep up with the smuggler networks. Given the financial incentive to these networks that human smuggling brings with it, the border control has to reinvent their responses extraordinarily often.[100]

(c) New approaches towards border externalization

States aim to avoid their legal obligations under refugee law. The migration tools that were previously outlined do not protect states anymore from their liability which is why states have created new forms of *non-entrée* practices. International cooperation's were founded where the individuals are deterred in the territory, or under the jurisdiction, of the country of origin or transit.[101] European states use third countries as gatekeepers in exchange for economic, political, or other support. Third countries are mostly the countries of origin or transit. The EU 'believe[s] that they can insulate themselves from liability for refugee deterrence by having such action take place under the sovereign authority of another country'.[102] They assume that such actions are free from legal risks.[103] This is a reason why the geography of border activities

[98] Ibid at 246.
[99] Ibid.
[100] Ibid.
[101] Gammeltoft-Hansen & Hathaway op cit note 27 at 248.
[102] Ibid at 249.
[103] Ibid.

has changed; international law says that states are liable for violating the principle of *non-refoulement* when they are acting within their own jurisdiction or at the state's borders.[104]

Deals with European states started as 'bilateral and ad hoc arrangements' but developed into more sophisticated arrangements. Now, the externalization actions are often part of the mainstream migration and asylum policies of developed states.[105] Cooperation-based *non-entrée* actions come in various forms, from 'simple diplomatic agreements to full-scale joint operations to effect migration control'.[106] Hathaway and Gammeltoft-Hansen have observed several variants that states implement- individually or jointly. These seven variants can be seen as new migration-control approaches and are outlined in the following:[107]

(i) Diplomatic relations

States form diplomatic relations with each other for various reasons. In the case of migration control, states of origin or transit are often forced into their willingness to assist in deterring outward migration, as otherwise, states of destination would withhold development assistance. Other variables are 'trade agreements, visa facilitation, and labour immigration quotas'.[108] The EU member states have been 'especially active in promoting this approach, seeking to negotiate agreements with key Mediterranean and Eastern European states to combat "irregular" migration, including by the establishment or intensification of exit controls'.[109] Entering diplomatic relations is often the starting point of external migration control. Regarding the Italy/Libya relations, the two countries have been diplomatically involved for more than two decades. The Treaty of Friendship, Partnership and Cooperation between Italy and Libya of 2008 was the final product of year-long negotiations and was preceding the MoU. The treaty also contained provisions concerning the regulations of illegal immigrations which had already raised serious human rights' concerns.[110]

[104] Ibid.
[105] Ibid at 250.
[106] Ibid.
[107] Ibid.
[108] Ibid at 251.
[109] Ibid.
[110] Natalino Ronzitti 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' (2009) 1 *Bulletin of Italian Politics* 132.

(ii) Direct financial incentives

In exchange for executing tasks that prevent migrants from coming to Europe, the EU provides direct financial support for countries of origin or transit. European states pledge deals, especially with Northern African countries, in which those countries agree to protect the sea borders and take back refugees and other migrants which they have intercepted on their patrols.

(iii) Indirect financial incentives

States not only support countries of origin or transit financially but give them the tools to undertake the migration control responsibilities. Such tools could be 'equipment, machinery, and training'.[111] For instance, Libya was given 'border control equipment, including radars, night vision goggles, and patrol boats' by Italy. Other security companies, which were funded by the EU, equipped states with document scanners and thermo imaging facilities that were helpful to the border control authorities.[112]

The 'financial and technical support to less institutionally-developed states, with a view to enabling them to play their part within the international migration management system' is also known as "capacity-building".[113] Capacity-building involves a variety of different actions such as

> funding for awareness-raising campaigns by civil society organizations, technical assistance to third State governments in the drafting of new legislation or the implementation of administrative reforms, and the provision of funds, training, and equipment intended to strengthen their law enforcement authorities' capacity to "contain" irregular migrants transiting through their territory[114]

The first three measures can be understood as "externalization of border control" because authorities of the EU member states are neither physically present on the territory of the supported state nor do they exercise any migration control activity directly.[115] The countries of origin or transit have only agreements with countries of destination. For instance, the third states have agreements with the EU or with the EU member states to carry out border control and migration activities such as the 'surveillance of their borders, detention, and return of

[111] Ibid at 252.
[112] Ibid.
[113] Francesco Bosso 'Cooperation-based Non-entrée- What prospects for legal accountability?' (2016) 6 *IFHV Working Paper/ Ruhr-Universität Bochum* 4.
[114] Ibid.
[115] Del Valle-Gálvez op cit note 61 at 149.

migrants, regularization processes and residence permits for migrants'.[116] Therefore, Del Valle-Gálvez suggests to 'classify externalization of migration control activities as generic migration flow management or control activities, because they have components, activities, and purposes that are not strictly those of controlling the entry of foreigners into the territory through border control at checkpoints or borders'.[117]

Especially with regard to the (in)direct financial incentives, destination states are compensating other countries to avoid their own legal responsibility occurring by migrants entering their state territory and consequently falling under their jurisdiction. By funding the border control activities in the countries of origin or transit, destination states are dictating how to manage the migratory flows. The decision-making of a third country is directly influenced by the destination state's expectations towards a certain result. Therefore, it is questionable how freely states of origin or transit can be in their behaviour towards migrants and refugees.

(iv) Deployment of immigration officials in the country of origin or transit

In comparison with the measures presented above, the following ones include the direct participation of authorities. One of these measures is the deployment of immigration officials of the destination country to work with authorities in the country of origin or transit. Official authorities work, for instance, at airports or other arrival points.[118] These activities must be, however, carried out in a way that the sovereignty of the state where the immigration officials are deployed is not minimized. Nevertheless, their support is 'often decisive for decisions regarding onward travel'.[119]

(v) Joint enforcement

Furthermore, a program of joint or shared enforcement may be established between the destination country and partner states of origin and/or transit. An example of such joint operations is having non-European immigration officers 'on board vessels engaged in

[116] Ibid.
[117] Ibid.
[118] Gammeltoft-Hansen & Hathaway op cit note 27 at 253.
[119] Ibid.

interception of outbound migrants from the territorial waters'.[120] Those activities are called "ship-rider agreements". The third country officials are called ship-riders and exercise jurisdiction over the intercepted individuals which moves the liability away from the European member states.[121] In that scenario, it seems as if it can be difficult to determine which state had effective control over the operation and as a result exercised jurisdiction. It is obvious that the country of origin or transit officially has effective control. This removes the country of destination from their legal responsibility.

(vi) Direct migration control

Direct migration control coming from countries of destination means having authorities from the state of transit or origin on board a vessel that flies under a European flag and carries out interception activities on the territorial water of the latter state. [122] In the context of the cooperation between Italy and Libya, this would mean that Libyan authorities are on board an Italian ship that is inside Libya's territory. In this scenario, individuals are often pushed back without having had their protection claims assessed. This means that the principle of *non-refoulment* was violated even though European law obliges member states to respect the principle.[123] This concept of states performing border control functions outside their own territory is also understood as "extra-territorialization".[124] Migration officials are present, or even exercise the effective control over the border control activities when the ship is situated in international waters or in the third state's territory.[125] However, a ship belongs to the territory under whose flag it flies.[126]

(vii) Establishing of international agencies

International agencies are tasked by developed states with the responsibility to intercept refugees and other would-be migrants, while they are still under the jurisdiction of countries of

[120] Ibid at 254.
[121] Nora Markard 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 *The European Journal of International Law* 611.
[122] Gammeltoft-Hansen & Hathaway op cit note 27 at 255.
[123] Ibid.
[124] Del Valle-Gálvez op cit note 61 at 118.
[125] Ibid.
[126] *S.S. Lotus (France v. Turkey)*, 7 September 1927, Judgement No. 9, Permanent Court of International Justice Series at 65.

origin and transit. Frontex, for instance, is the European border and coast guard agency, and acts as an umbrella organization for the member states. It allows them to 'carry out joint operations at the external borders of the Union and internationally'.[127] The organization is obliged to respect the fundamental rights of migrants and refugees, especially the right to asylum and the principle of *non-refoulment*. This is outlined in the regulations regarding the European migration policy which also established Frontex as the border control surveillance. The EU aimed to establish an 'integrated border management ensuring a uniform and high level of control and surveillance'.[128] The agency is operating to ensure that the EU's external borders are secured and is coordinating joint operations as well as deploying teams of border guards.[129] The cooperation between Frontex and countries of origin and transit is an important part of the agency's tasks. It is able to 'launch and finance projects of technical assistance and to deploy liaison officers in third countries in cooperation with the competent authorities of those countries'.[130] It is even outlined that Frontex 'may itself initiate and carry out joint operations and pilot projects'.[131] With this in mind, the question arises of the responsibility and accountability of Frontex as an international organization when violations of migrants' and refugees' rights occur. In general, human rights law and, in this case, more importantly international refugee law, is only applicable to states. Therefore, it is problematic to establish accountability for actions when Frontex is undertaking operations concerning the deterrence of refugees and other migration in other countries.[132]

To sum up, the seven cooperation-based *non-entrée* variants above are not an exclusive list of measures that can be implemented.[133] Many states put together a bundle of incentives that work best for achieving their goals concerning border management. The main problem within the cooperation-based *non-entrée* methods is the question of responsibility. Who is accountable for violations of human rights? Is it the EU, the member state, the agency, the country in which the operation takes place, or are all actors equally accountable?

[127] Gammeltoft-Hansen & Hathaway op cit note 27 at 255.
[128] Regulation (EU) No 1168/2011 of the European Parliament And Of The Council of 25 October 2011, L 304/1, (2).
[129] Ibid at (13).
[130] Ibid at (22).
[131] Ibid at Article 3 (1).
[132] Gammeltoft-Hansen & Hathaway op cit note 27 at 256.
[133] Ibid.

In general, most incentives show the lack of interest to implement measures that respect migrants' and refugees' rights.[134] It seems that states that externalize their borders primarily chose the migration control measures that prevent migration towards the EU most effectively; little thought is given to the protection of migrants' and refugees' human rights. States prioritize state security and are only secondarily concerned about human rights.[135] Nevertheless, the promotion of human rights should not be forgotten, regardless of the control measures chosen by states. In the Guidelines on Human Rights at international borders it is outlined that states 'should cooperate across borders to promote human rights-based, equitable, dignified, lawful and evidence-based migration and border governance measures'.[136] They also recommend three principles that should be considered: first, the primacy of human rights; secondly, non-discrimination; and thirdly, assistance and protection from harm.[137]

(d) Conclusion

To sum up, the border externalization measures changed over the years. States of destination are getting more creative with their migration control measures and are always on the lookout to avoid state responsibility. Due to the changing law regarding that subject, states need to develop more advanced measures that are first, effective in keeping migrants and refugees away from Europe and secondly, do not impose any legal threat to the state itself. Many co-operations happen between states of origin or transit that already have poor human rights' records. Therefore, it is not surprising that those countries are also failing to comply with human rights' standards when intercepting and handling migrants and refugees. It could also be argued that migration control related incentives are impacting the political and economic relationship between the country of origin or transit and, for instance, a European country of destination. To not have a negative impact on that relationship, countries are more likely to obey even controversial requests related to migration control.

[134] Bosso op cit note 113 at 4.
[135] Ibid at 2.
[136] UN Human Rights Office of the High Commissioner 'Recommended Principles and Guidelines on Human Rights at International Borders' (2014) available at *https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf*, accessed on 30 November 2020.
[137] Ibid at iv.

III. CHAPTER 3: HOW DOES THE EXTERNALIZATION OF BORDERS AFFECT THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES?

Border externalization shifts the streaming of migrants to third countries. This also shifts the responsibility for their protection under international law. Due to this effect, externalization puts the legal obligations, that the country of destination would generally carry, onto the third country.[138] This is not a coincidence but the desired effect. Destination states want to prevent migrants from entering their state territory where those individuals would fall under their jurisdiction.[139] Often, migrants will end up in third countries that have no or only ineffective protection of migrant rights. For instance, some third countries are not party to the 1951 Refugee Convention which means that migrants and refugees do not have the benefit of the Convention's protection with its core principle of *non-refoulment*.[140] Moreover, most third countries do not have the same financial means to grant migrants the same access to asylum as well as other protection rights.[141] Asylum seekers and migrants rights are often violated due to the border externalization efforts of the destination countries. In this context, the question of state responsibility arises which will be discussed in Chapter 4.

Migrants can encounter direct or indirect rights' violations. Also, depending on their location, migrants' fundamental rights can be abused throughout the migration process resulting from the border externalization practices.[142] The violation of rights can happen anywhere and anytime – during the journey, in the transit country, on the sea or on the land, as well as in the detention centres, whilst in the ongoing process of being expelled or deported.[143]

Amnesty suggests that two factors need to be considered when assessing the potential human rights risks of external migration policies. To start with, states often have legitimate goals that they aim to fulfil by externalizing their border control which include the saving of lives because of the danger of irregular border crossings. Thousands of people die in such crossings per annum.[144] Another aim is the protection of individuals from being victims of criminal networks. Asylum seekers and refugees are likely to be abused by criminal gangs.[145]

[138] Frelick, Kysel & Podkul op cit note 2 at 196.
[139] Ibid at 197.
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] Amnesty op cite note 64 at 6.
[145] Ibid.

If a state would aim at keeping migrants safe and protecting them when moving across national borders and the burden of the global refugee crisis would be shared equally it could be seen as a desirable goal.[146] However, the primary aim of states is to reduce the number of asylum-seekers and refugees in their own territory.[147]

Secondly, the actions that are taken to achieve those goals must be considered.[148] Positive incentives are welcome because they can create an environment that allows individuals to cross borders safely and legally. Also, they can improve the living conditions of migrants in the country of transit or origin by supporting refugee camps or the establishment of legal systems that respect asylum seekers rights.[149] Negative incentives, which are also seen as punitive or preventive measures, on the other hand, pose a risk to the individual's human rights. Especially problematic are incentives that are politically, financially and technically pursued in countries that already have a poor human rights' record.[150]

In the following, the chapter addresses the effects of border externalization measures on migrants' and refugees' human rights. To begin with, the political situation in Libya as well as its legal system is explained. Both act as driving factors for the human rights violations which are outlined in the third section of the chapter. The last part of the chapter points out the human rights violations in migration-related detention in Libya *en detail*.

(a) Why is Libya the gateway to Europe?

One reason why Libya is a transit country for migrants and refugees who are fleeing war, persecution or poverty is the country's geographic location. Libya has extensive sea borders and is also bordering six countries, many of which are politically unstable and are experiencing conflict.[151] Another reason why Libya is a major transit point for migrants and refugees who are aiming for Europe is the political situation in the country. When dictator Muammar Gaddafi was toppled, the country was facing political turmoil which led to a power vacuum. This was

[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] UN High Commissioner for Refugees, UNHCR Submission for the Universal Periodic Review – Libya – UPR 36th Session (2019), October 2019 at 2 available at *https://www.refworld.org/docid/5e1749392.html*, accessed on 30 November 2020.

filled by rivalling parties vying over the political power of the country.[152] Due to the political chaos and because of the lucrative market that suddenly opened up, smuggling networks started to thrive. The smugglers trade humans 'like other goods and commodities' and financially profit off that.[153] The coast of Libya is mostly an open border – no state monitoring system exists – which makes it easy for smugglers to put hundreds of migrants in unsafe dinghies that embark to Italy.[154] Since 2011, Libya has been experiencing different levels of conflict; and this lead to an increasing division of ethnicities and tribes that are living in the country.[155]

Migrants that are intercepted or rescued at sea by the LCG are brought back to the country and, most of the time, they are arrested and put in detention centres right immediately on setting foot on Libyan soil. They are mainly held in condemned detention centres without being formally charged.[156] Libyan immigration laws do not contain provisions that protect refugees or asylum-seekers, nor does it respect the principle of *non-refoulment*.[157] Detained migrants are only released when they are leaving Libya and returning to their country of origin, or when they are evacuated or resettled to third countries.[158] Refugees and asylum-seekers are facing abuse and are exploited by human smugglers, traffickers, or any other group that is part of the human smuggling business. Even state authorities are involved in the addressed human rights violations.[159]

In 2019, the number of migrants arriving via the Central Mediterranean route was 6 126 which was a reduction of about 69% compared with 2018.[160] The number of people departing from Libya decreased similarly.[161] Another figure that needs to be pointed out is the number of arrivals from Libya in Italy because it is substantial. In 2017, Italy had over 107 000 arrivals, but a year later the number of migrants arriving dropped to around 13 000. Moreover, this number decreased further, to around 1 100 arrivals in 2019.[162] The International Organization

[152] Amanda Sakuma 'Damned for Trying' MSNBC available at *http://www.msnbc.com/specials/migrant-crisis/libya*, accessed on 30 November 2020.
[153] Ibid.
[154] Ibid.
[155] UNHCR, UPR op cit note 151 at 1.
[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] President of the Council of Europe 'Libya and the surrounding area: current situation and need for immediate action' Doc 11538/19, 4 September 2019 at 2.
[161] Ibid.
[162] Ibid.

for Migration (hereafter 'IOM') estimated that there are at least 625 638 migrants present in Libya.[163]

The ongoing conflict in Libya and the developments in the smuggling and trafficking economy have worsened the situation for migrants and refugees recently.[164] In fact, most of the individuals who aimed for Italy stated that they were using smugglers. Given the gravity of the situation, it is necessary to tackle the networks that keep the migrant-smuggling business alive. Only by limiting the scope of their power, can the migratory situation in Libya be made manageable.[165] In the previous years, the smuggling networks were run by several groups along the Libyan coast, but the dynamics between those groups changed.[166] Most smuggling activities are now operated underground because they lost the protection of the armed groups that they had received previously.[167] This has led to a decrease in individuals leaving Libya. However, the risk of abuse that migrants and refugees are exposed to, increased.[168]

Due to the published reports by human rights organization, there is no doubt that European officials have been aware of the situation in Libya and the human rights violations that refugees and migrants experience. As a matter of fact, in 2017, the former EU Commissioner of Migration and Home Affairs, Dimitri Avramopoulos, said that 'we are all conscious of the appalling and degrading conditions in which some migrants are held in Libya.'[169]

(b) Libya's legal system

All individuals, regardless of their migration or asylum status, are protected by international human rights law.[170] Nevertheless, Libya signed and ratified international Conventions which are discussed in this part. The migration-related international law is explained as well as the Libyan national laws concerning migration.

[163] Estimate from the beginning of this year, International Organization for Migration, Libya's Migrant Report Round 30 March-April 2020.
[164] President of the Council of Europe op cit note 155 at 2.
[165] Ibid at 4.
[166] Ibid
[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] UN, Global Issues, Human Rights available at *https://www.un.org/en/sections/issues-depth/human-rights/*, accessed on 30 November 2020.

(i) International laws

To begin with, Libya has not ratified the 1951 Refugee Convention and is therefore not a party to the Convention.[171] The country has, however, ratified the 1969 Organisation of African Unity (hereafter 'OAU') Convention.[172] Both Conventions as well as the Refugee Convention's 1967 Protocol have the same refugee definition.[173] Even though Libya has ratified the OAU Convention, it still has to implement it by adopting legislation or procedures related to asylum.[174] The International Covenant on Civil and Political Rights (hereafter 'ICCPR'), to which Libya is a party to, includes provisions that the country might be in breach of.[175] Another Convention that Libya is a party is to and that is most likely violated is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter 'CAT').[176]

Generally, the principle of *non-refoulment* has to be respected by Libya because it is established as customary law or *jus cogens*. International and national human rights bodies and courts, as well as regular national courts, interpreted the principle as a non-derogable right. It flows from the guarantee to respect, protect and fulfil human rights.[177] It is a fundamental part of international human rights and refugee law. Worrying is also the human smuggling network activities although they are not subject to human rights law as such.[178] Libya has an obligation to prevent such criminal activities and to investigate and prosecute the human smugglers and traffickers as well as provide legal support, in form of financial remedies, to the victims of such networks.[179]

[171] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951.
[172] Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969.
[173] Article 1 (1) OAU & Article 1 (2) Refugee Convention say that 'every person who, 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'.
[174] UNHCR, UPR op cit note 151 at 2.
[175] UN General Assembly, *International Covenant on Civil and Political Rights*.
[176] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984.
[177] UNHCR, Support Mission Libya op cit note 37 at 24.
[178] Ibid.
[179] Ibid.

(ii) National laws

The Constitutional Declaration of Libya outlines in Article 10 that 'the State shall guarantee the right of asylum by virtue of the law' and that 'the extradition of political refugees shall be prohibited'.[180] Nevertheless, Libya has neither implemented any asylum legislation nor asylum related procedures.[181] Currently, Libyan law does not differentiate between foreigners, refugees and asylum-seekers. Individuals of those groups, regardless of their legal status, fall under Libyan immigration laws.[182] The United Nations High Commissioner for Refugees (hereafter 'UNHCR') pointed out that under Libyan law, asylum-seekers and refugees are seen as illegal migrants.[183] Individuals who enter, stay or exit Libya irregularly fall under criminal law.[184] Even victims of human trafficking fall under the national immigration law which does not foresee any special protection.[185] Even though the Ministry of Justice worked on a draft law on human trafficking in 2013, which included the protection of victims of human trafficking, the law has not been adopted yet.[186]

In 2010, Law No. 19 on combatting illegal immigration was released. Article 1 defines an illegal immigrant as 'anyone who enters the territory (…) or resides therein without permission or authorization from the competent bodies, with the intent to settle therein or cross to another country'.[187] Additionally, Article 6 outlines the penalty for staying in the country illegally.[188] Article 10 states that the authorities 'shall treat them in a humanitarian manner that

[180] The Constitutional Declaration of Libya of 2011, Article 10 available at *https://www.ndi.org/sites/default/files/Handout%204%20-%20Libya%20Draft%20Interim%20Constitution.pdf*, accessed on 30 November 2020.
[181] UNHCR, UPR op cit note 151 at 2.
[182] Ibid.
[183] Ibid at 1.
[184] Article 19 b) of Law No. (6) of 1987on organizing the entry, residence, and exit of foreigners in Libya states that 'anyone who enters, resides in, or exits the country without a valid visa issued by the competent authorities in accordance with the provisions of this Law'. Individuals face imprisonment and/or fines when not obeying the law (available at *https://security-legislation.ly/sites/default/files/lois/1214-Law%20No.%20(6)%20of%201987_EN.pdf*, accessed on 30 November 2020). Law No. 6 was amended by Law No. (2) of 2004 (available at *https://security-legislation.ly/sites/default/files/lois/841-Law%20No.%20%282%29%20of%202004_EN.pdf*, accessed on 30 November 2020). Article 2 of Law No. (2) implemented harsher penalties for 'smuggling by any means'. Individuals who 'produce, provide, or possess travel documents or fake identity' and 'organize or direct other persons to commit any of the acts stipulated in this article' are penalized in the same way.
[185] UNHCR, UPR op cit note 151 at 2.
[186] UNHCR, Support Mission Libya op cit note 37 at 24.
[187] Law No. (19) of 2010 on combatting illegal immigration, Article 1 available at *https://security-legislation.ly/node/32174*, accessed on 30 November 2020.
[188] Ibid at Article 6.

preserves their dignity and rights and that does not violate their money or moveable property'.[189]

The Libyan law shows the theoretical will to respect human rights. Nevertheless, there has not been any practical implementation. Libya needs to do more than establishing laws; enforcing the law is more important and will have a positive impact on the migrants' and refugees' situation. The High Commissioner also pointed out that '[i]n practice, the overwhelming majority of migrants and refugees are placed in indefinite detention pending deportation without being charged, tried or sentenced under applicable Libyan laws'.[190] The UNHCR said that they still do not have a Memorandum of Understanding with the current Libyan government. The MoU generally clarifies the UNHCR's mandate in a country which is seen as a standard procedure.[191] This means that the UNHCR cannot provide help and support to refugees and migrants that they need. The Libyan government does not seem willing to change that status.[192]

To sum up, Libya is party to many Conventions that also focus on the protection of human rights. However, the country does not seem to take the responsibilities following from the provisions too seriously. The same applies on the national level. Implementations move slowly or are stagnating due to the political disorder in the country. This is why the human rights violations are occurring and why Libya is an easy target for human trafficking networks as well as European member states that are pursuing dubious migration policies.

(c) What human rights are violated?

To show the impact of the implemented migration policies on individuals, the following section points out the most likely human rights which are violated by border externalization measures. These human rights violations do not happen solely in Libya but also in other countries where European member states embedded extraterritorial policies. Therefore, this section is not exclusive to Libya, but it will comment on the situation in the country.

[189] Ibid at Article 10.
[190] UNHCR, Support Mission Libya op cit note 37 at 25.
[191] Human Rights Watch 'No Escape from Hell EU Policies Contribute to Abuse of Migrants in Libya' (2019) at 31 available at *https://www.hrw.org/sites/default/files/report_pdf/eu0119_web2.pdf*, accessed on 30 November 2020.
[192] Ibid.

(i) The right to life

The right to life can be violated. Article 6 ICCPR addresses the protection of the right to life which is particularly in danger in the context of the externalization measures implemented by the EU. The right to life is in the centre of the ECHR and it is one of the values that fundamentally define the democratic societies of the European member States.[193] The UN Human Rights Committee stated that the right to life must also protect 'individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea'.[194] Furthermore, the Committee states that a state needs to 'respect and protect the right to life of all individuals arrested or detained by them'.[195] Given that the deprivation of liberty brings a person within a state's effective control, states' parties must respect and protect the right to life of all individuals arrested or detained by them.[196] The agreement between the EU and Libya includes the patrolling of the LCG on the Mediterranean. Several incidents are known where the LCG's interference lead to the death of migrants.[197] In July, for instance, the Libyan authorities killed three migrants after they intercepted and returned them to the Libyan territory.[198] Generally, the Libyan authorities detain intercepted migrants, often arbitrarily, and under inhuman conditions.[199] The run down detention facilities are often life threatening to the detainees. In the beginning of the year, for instance, a fire broke out in a detention centre killing a man. Unfortunately, this is not a single occurrence.[200]

[193] Committee of Ministers 'International obligations of Council of Europe member States: to protect life at sea' Reply to Recommendation Doc. 14831, 14 February 2019 available at *http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=26448&lang=en,* accessed on 30 November 2020.
[194] Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018 at para 63 available at *https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf,* accessed on 30 November 2020.
[195] Ibid at 66.
[196] Ibid.
[197] As outlined in the *S.S. and others v. Italy.*
[198] The Libyan authorities shot dead three Sudanese migrants because they tried to escape after the y were returned to Libya by the LCG.; IOM UN Migration 'IOM Deplores Killing of Two Migrants Returned from Sea to Libya, Press Release' 28 July 2020 available at *https://www.iom.int/news/iom-deplores-killing-two-migrants-returned-sea-libya,* accessed on 30 November 2020.
[199] This will be addressed in detail on page 36.
[200] Doctors Without Borders 'Libya: Asylum seeker dies in detention centre fire' 2 March 2020 available at *https://www.doctorswithoutborders.ca/article/libya-asylum-seeker-dies-detention-centre-fire,* accessed on 30 November 2020.

(ii) Right to seek and enjoy asylum

The Universal Declaration of Human Rights says in Article 14 (1) that 'everyone has the right to seek and enjoy asylum from persecution in other countries'.[201] To be able to seek asylum an individual has to leave their country of origin and enter another country.[202] Externalization measures are implemented to restrict people from seeking asylum, therefore the right is at risk. Restricting people from entering a different state territory can be done either by restricting them from leaving or entering a country.[203] In the context of European migration policies, the arrangement between Italy and Libya denies asylum seekers the option to reach the European territory and the right to seek asylum in the EU. This means that they are deprived of international protection because Libya itself does not offer a system for asylum procedures.[204]

(iii) Principle of non-refoulment

The principle of *non-refoulment* prohibits the 'the forcible transfer of an individual to a place where they would be at real risk of serious human rights violations'.[205] Article 33 of the Refugee Convention outlines the principle as well as Article 3 of the CAT.[206] The principle is the core of international refugee law.[207] It does not exclusively apply to refugees but also migrants. Nobody should be transferred to a country where they face torture or other inhuman and degrading treatment.[208] The principle obliges states to not return any person to a country where they may be subject to serious harm and inhuman treatment.[209]

The externalization of the EU's borders concerns the principle of *non-refoulment* because the pullbacks by the LCG violate the principle. Libya is preventing the migrants and

[201] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948 at Article 14.
[202] UN Human Rights Office of the High Commissioner, Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 14 available at *https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23923&LangID=E,* accessed on 30 November 2020.
[203] Ibid.
[204] Amnesty op cit note 64 at 7.
[205] Ibid.
[206] Article 33 of the Refugee Convention says that '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' (see supra note 171). Article 3 CAT states that 'no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.
[207] Moreno-Lax & Giuffré op cit note 58 at 11.
[208] Amnesty op cit note 64 at 7.
[209] Moreno-Lax & Giuffré op cit note 58 at 11.

refugees from coming to Europe which is 'strongly supported and encouraged' by the EU.[210] Even though the EU's official goal is to save lives at the Mediterranean and to disrupt the human smugglers and traffickers, the

> real intention appears to be supporting the interception and disembarkation in Libya of refugees and migrants crossing the central Mediterranean, regardless of the real risk of harm these people are exposed to once they are arbitrarily detained in centres notorious for systematic ill-treatment[211]

Even though international organizations are present in Libya and in the detention centres, there is, in general, not enough staff to ensure adequate protection of all detainee's human rights. There is a lack of individual assessment of protection claims as well as any vulnerabilities which generally requires an increased standard of care from state authorities.[212]

Additionally, the "voluntary humanitarian program", which was established by the IOM and returns detainees to their countries of origins, can be seen as a violation of the principle of *non-refoulment*. If the decision to be repatriated is made voluntarily is doubtful.[213] HRW stated that

> while the program can be valuable in assisting people without protection needs who wish to return home safely, it cannot be described as truly voluntary as long as the only alternatives are the prospect of indefinite abusive detention in Libya or a dangerous and expensive journey across the Mediterranean.[214]

The voluntary humanitarian programme is often the only option detainees have to escape the inhumane conditions and treatment in the centres. Nevertheless, the IOM Libya says that the voluntary humanitarian programme is "absolutely voluntary in nature" and further argues that the IOM staff is ensuring that the leaving individuals 'make informed decisions about their return, which includes that they have no fear of persecution upon returning'.[215] On the other hand, HRW quoted a humanitarian worker in Libya who said that

[210] Amnesty op cit note 64 at 8.
[211] Ibid; in his 2018 report, the Special Rapporteur outlined that 'the well-documented reality is that intercepted migrants are generally returned to their port of departure, where they are routinely detained or further deported to unsafe third States and, in both cases, exposed to a substantial risk of torture and ill-treatment, or even death, without access to an assessment of their protection needs or any other legal remedy' UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 23 November 2018 at para 57, available at *https://undocs.org/en/A/HRC/37/50*, accessed on 30 November 2020.
[212] UNHCR, Support Mission Libya op cit note 37 at 41.
[213] HRW op cit note 191 at 32.
[214] Ibid.
[215] Ibid at 33.

> IOM is essentially deporting people on behalf of the Libyan authorities, free of charge. These returns and UNHCR evacuations (…) are not real long-term solutions and are not working to empty detention centres given the rate of interceptions followed by automatic detention.[216]

The programme is significantly supported by the EU and its member states.[217] Detainees, who could apply for asylum, are often drawn to participate in the voluntary humanitarian repatriation program because it is faster to leave the detention centres with the programme than registering with UNHCR and wait for them to evacuate the centre.[218]

(iv) Freedom from torture and other ill-treatment

Additionally, the right to not be 'subjected to torture or to cruel, inhuman or degrading treatment or punishment', which is outlined in Article 7 of the ICCPR, can be violated.[219] This right is also issued in Article 2 of the CAT which even goes further by stating that states 'shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.[220] The cooperation between the EU and Libya poses the risk of torture to migrants and refugee that are intercepted by the LCG. Many reports regarding that matter have been published and show that violence and ill-treatment of migrants and refugees are very apparent in Libya.[221]

(v) The right to leave/ right to liberty

An individual has the right to leave their own country. This is part of the principle of *non-refoulment* and complements it as an active part, so that the individual has also the right to flee and leave their country for seeking a better life or asylum.[222] This is outlined in Article 12 ICCPR and was the first legally-binding codification.[223] The right to liberty is codified in Article 9 of the ICCPR[224] as well as in Article 2 of Protocol No. 4 to the ECHR.[225] The

[216] Ibid at 32.
[217] Ibid at 31.
[218] Ibid at 33.
[219] ICCPR supra note 175 at Article 7.
[220] CAT supra note 176 at Article 2.
[221] Amnesty op cit note 64 at 11; this will be addressed in detailed in the next part.
[222] Moreno-Lax & Giuffré op cit note 58 at 12-3.
[223] Ibid; ICCPR supra note 175 at Article 12- Paragraph 2 of the Article says that 'everyone shall be free to leave any country, including his own'.
[224] Ibid at Article 9 which says that 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his or her liberty except on such grounds and by such procedure as are established by law'.
[225] Article 2 contains the freedom of movement (Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963).

provisions only entitle individuals to leave but there is no right to enter other countries besides one's own.[226] Moreno-Lax and Giuffré say that consensual containment measures interfere directly with the right to leave.[227]

Nevertheless, limitations on the right to liberty/right to leave can be justified. Detaining individuals during the process of detecting their identity for immigration control purposes is not in itself arbitrary as long as the detention is justified. Detention must be a 'reasonable, necessary and proportionate' measure with regard to the circumstances. The High Commissioner points out that those individuals are only allowed to be in detention for a short time while their entry is documented, their claims recorded and they are identified, especially when their identity is unclear.[228] A reassessment – case by case and considering all relevant factors – is necessary if the period of detention exceeds.[229]

Moreover, if detention is necessary, it 'should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons'.[230] Concerning, the irregular entry or stay within the country, the High Commissioners considers that it should not be categorized as a criminal offence because 'the individual has not committed a crime *per se* against persons, property or national security'.[231] Detention is arbitrary when it is 'automatic, mandatory or indefinite'.[232] The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment reports that

> detention based solely on migration-status, as such, can also amount to torture, most notably where it is being intentionally imposed or perpetuated for purposes such as deterring, intimidating, or punishing irregular migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, agreeing to voluntary repatriation, providing information or fingerprints, or with a view to extorting money or sexual acts, or for reasons based on discrimination of any kind, including discrimination based on immigration status[233]

The Libyan authorities violate the migrants' and refugees' rights to leave and the right to liberty. This is irreconcilable with the values of the ICCPR and ECHR.[234] Intercepted migrants

[226] Ibid.
[227] Ibid.
[228] Ibid.
[229] UNHCR, Support Mission Libya op cit note 37 at 24.
[230] Ibid at 23.
[231] Ibid.
[232] Ibid.
[233] Report of the Special Rapporteur on torture, etc. op cit note 211 at para 29.
[234] Moreno-Lax & Giuffré op cit note 58 at 14.

are often detained unlawfully and indefinitely, often in unofficial detention centres where grave abuses happen.[235]

(vi) Right to remedy

Another right that is likely to be violated by externalization measures, is the right to remedy which is outlined in Article 2 of the ICCPR and shall 'ensure that any person whose rights or freedoms as herein recognized are violated (…) have an effective remedy'.[236] The difficulty that comes with border externalization is the question of which state is responsible for human rights violations.[237] It also leads to the problem of which state is responsible to provide the remedy. Whenever the challenge of state responsibility is solved, the practicality of exercising the right is an insurmountable problem because often it is unclear in which jurisdiction the individual can ask for a remedy.[238] Another challenge is that many externalization measures are put into effect by arrangements that often lack transparency. The negotiation process, as well as the content of the measures and the way they are implemented are opaque. [239]

(d) Human rights' violations in migration-related detention in Libya

There are at least 26 detention centres in Libya that function and fall under the control of the Minister of the Interior. Nevertheless, most of the detention centres are controlled and were established by armed groups even though the Ministry of Interior established the Department of Combatting Illegal Migration (hereafter 'DCIM') in 2012 which was responsible for the management of immigration detention centres, which are also called "sheltering centres".[240] The armed groups that effectively control the detention centres have their own "command-and-control structures".[241] Unfortunately, the human rights' situation in the detention centres is devastating. Although the director of the DCIM has demanded humane treatment of detainees and ordered closure of detention centres that were known for grave human rights violations, corruption and other inhuman conditions.[242] He did, however, not manage to get control over the centres. The reason for this is that the armed groups were not interested in giving up their

[235] Amnesty op cit note 64 at 9.
[236] ICCPR supra note 175 at Article 2.
[237] Ibid at 10; State responsibility will be addressed in Chapter 4.
[238] Ibid.
[239] Ibid; sometimes the precise legal status of the arrangements is unclear, the obligations of each state's authorities are not made public, or there is a deliberate policy of concealment.
[240] Ibid at 38.
[241] Ibid at 39.
[242] Ibid.

power over the centres, or in complying with the demanded rules and in handing over their detainees.[243]

The following outlines the conditions under which individuals have to live as well as some of the human rights violations committed in the Libyan detention centres, including arbitrary and indefinite detention, torture and ill-treatment, as well as sexual violence and forced labour.

(i) Detention conditions

To start with, the conditions in the DCIM detention centres across Libya are inhuman and do generally not follow the international human rights' standards. Most of the centres are overcrowded and detainees are 'crammed into hangars or other structures unfit for human habitation'.[244] The detention facilities neither have good hygiene facilities nor proper lighting and ventilation.[245] The DCIM does not provide enough cleaning products as well as other necessities, such as sanitary pads and diapers. Many refugees and migrants suffer from malnutrition because they are not given adequate food and drinking water. Furthermore, they often have limited access to medical treatment which is mainly provided by international human rights' organizations. Hospitals often refuse to treat them.[246] This is even more severe for pregnant detainees who have to deliver their babies in the centres due to the staff's refusal to let them give birth in a hospital.[247] Women and men are separated from each other; however, the detention facilities do not conform with international guidelines on conditions and treatment of women in detention.[248] Many detainees struggle with their mental health due to the inhuman living conditions. Even though some humanitarian organizations provide psychological support, it is insufficient compared to the overwhelming number of people needing support.[249]

[243] Ibid.
[244] Ibid at 42.
[245] Ibid.
[246] Ibid at 43.
[247] Ibid.
[248] HRW op cit note 191 at 35.
[249] Ibid.

(ii) Arbitrary and indefinite detention

Due to the lack of an official registration process, it is difficult to estimate the precise number of individuals in migration-related detention. More so, because the amount of detainees fluctuates due to the corrupt authorities and armed groups that often release the detainees discreetly after coercing them into paying a ransom.[250] In July 2018, there were approximately between 8 000 and 10 000 detainees in official detention centres.[251] Most individuals at the DCIM centres have been arbitrarily detained without having had proper access to the judicial system. Most cases have not been brought to court even though it is outlined in the Libyan immigration legislation.[252]

The number of migrants who end up in detention has increased due to the increase of rescue and interception activities by the LCG at sea.[253] Other than that migrants and refugees are taken from their homes 'without warrants, during raids in neighbourhoods with heavy migrant concentrations or (…) from checkpoints or the streets'.[254] During the arrests, the individuals frequently experience violence and the authorities confiscate all of their personal belongings without having them returned.[255] Most migrants and refugees are detained for an indefinite period, sometimes only for a few days but often up to months. As addressed above, the detainees have no possibility to legally challenge their grounds for detention.[256]

(iii) Torture and ill-treatment

The detainees experience violence in various forms. The High Commissioner pointed out that 'migrants and refugees detained at DCIM facilities are systematically subjected to torture and

[250] Mixed Migration Centre 'What makes refugees and migrants vulnerable to detention in Libya? A microlevel study of the determinants of detention' MMC Research Report, December 2019, 6 available at *https://reliefweb.int/sites/reliefweb.int/files/resources/082_determinants_of_detention.pdf, accessed* on 30 November 2020.
[251] In April 2018 it was only 5200; HRW op cit note 191 at 6.
[252] UNHCR, Support Mission Libya op cit note 37 at 39.
[253] At least 953 migrants have been returned to Libyas in the beginning of 2020; all were taken to detention centres, see: IOM Press Release 'Nearly 1,000 Migrants Returned to Libya in the First Two Weeks of 2020' 14 January 2020 available at *https://www.iom.int/news/nearly-1000-migrants-returned-libya-first-two-weeks-2020-iom,* accessed on 30 November 2020.
[254] UNHCR, Support Mission Libya op cit note 37 at 39-40.
[255] Ibid at 40.
[256] Ibid.

other ill-treatment'. This information was collected during interviews with detainees.[257] The former detainees explained that the most commonly used methods of torture are:

> beatings with various objects (such as water pipes, metal bars, rifle butts and sticks); forcing detainees into uncomfortable positions, such as squatting, for prolonged periods; punching and kicking; and eclectic shocks[258]

Whereas it is men who mostly experience such violence, women and children are not excluded from the abuse.[259] The facilities were described as 'grossly incompatible with international standards for the treatment of prisoners, to inflict undue pain and suffering on migrants, and to be inconsistent with the prohibition of torture and other ill-treatment' by the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.[260]

(iv) Rape and other sexual and gender-based violence

There is only one detention facility with female guards; every other detention centre only employs male guards.[261] As mentioned above, this is violating international guidelines and often results to sexual abuse of detainees.[262] Women consistently report that they are 'strip-searched by or in front of male guards', 'subjected to intrusive cavity searches' including 'having their breast and buttock fondled during searches'. Male guards repeatedly disturbed the female detainees' privacy in cells as well as washing and sanitation facilities.[263]

Rape and other forms of sexual violence are reported regularly, often committed by the guards who have effective control over the detention facility.[264] After raising concerns regarding the safety situation of women in one particular detention centre, it was closed, but not all women were transferred by the authorities. It is unknown where these women are located, and the perpetrators were not charged.[265] Many women who refuse to comply with their perpetrators experience physical violence as a "punishment".[266] The High Commissioner concludes that due to the

[257] Ibid at 44.
[258] Ibid.
[259] Ibid.
[260] Ibid.
[261] Ibid at 45.
[262] Ibid.
[263] Ibid.
[264] Ibid at 46.
[265] Ibid.
[266] Ibid at 47.

> the climate of impunity for rape and other sexual violence against migrant and refugee women and girls, coupled with the lack of female guards or safeguards, including regular independent unannounced monitoring or compliance mechanisms (…) an environment where women and girls in detention are vulnerable to sexual violence and exploitation [is created].[267]

Those women have neither access to the justice system nor adequate sexual and reproductive health services.[268]

(v) Forced labour

Many detainees are forced to work on farms and construction sites, for instance. This labour is added to the work they are forced to do inside the detention centre which includes cleaning, cooking, offloading heavy items, and washing the vehicles of DCIM officials.[269] The forced labour is mostly unpaid, or rewarded with only a small amount. It is reported that all migrants and refugees stated that they could not decide whether they wanted to work or not because if they refuse to work, they are severely beaten.[270]

(e) Conclusion

Border externalization measures tend to violate migrants' and refugees' human right. The human rights' violations are extensive and severe. From the violation of the principle of *non-refoulment* to the breach of the right to life, migrants and refugee's well-being are threatened as a result of the merciless migration control policies of states. Even though there are national and international laws in place that are supposed to protect migrants and refugee, they are, in reality, not enforced. Neither do migrants and refugees have access to the judicial system to claim their rights. The political situation in Libya is chaotic and a major contributor to the tragic events happening in the country. What is questionable is if there are any consequences for the migration policies implemented by the EU (and especially Italy) that are impacting the negative situation in Libya further.

[267] Ibid at 47.
[268] Ibid.
[269] Ibid.
[270] Ibid.

IV. CHAPTER 4: HOW CAN THE EU AND ITS MEMBER STATES BE HELD RESPONSIBLE?

This chapter focuses on the state responsibility of the European member states, especially that of Italy and Libya. First, the chapter addresses the state responsibility under various Articles on Responsibility of States for Internationally Wrongful Acts and secondly, it outlines the responsibility under Article 3 of the ECHR.

(a) State responsibility under the ARSIWA

State responsibility is outlined in the ARSIWA. Article 2 states that a conduct consisting of an action or omission can be attributed to a state when it constitutes a breach of an international obligation which triggers state responsibility.[271] In the present case, the European member states, above all Italy, and also Libya can be held responsible under various Articles. However, the focus will be on Italy's responsibility.

Moreno-Lax and Giuffré outline three possibilities of "contactless responsibility" which is a result of the design and the operation of strategies of "contactless control".[272] They list three possibilities that could create accountability. First, responsibility could derive from Article 16 which outlines situations of complicity. Secondly, states could be held responsible under Article 17 which addresses the direction and control of third countries and thirdly, they point out the independent responsibility through actions that are directly attributed to the state.[273]

(i) Article 16 ARSIWA: complicity

To begin with, the ILC Articles are not binding formally.[274] Nevertheless, Article 16 ARSIWA is widely recognized as state practice and *opinio juris*.[275] In the Bosnian Genocide case, the International Court of Justice (hereafter 'ICJ') considered Article 16 ARSIWA as customary international law.[276] Article 16 outlines that

[271] ARSIWA supra note 68 at Article 2.
[272] Moreno-Lax & Giuffré op cit note 58 at 19.
[273] Ibid.
[274] Gammeltoft-Hansen & Hathaway op cit note 27 at 277.
[275] Ibid.
[276] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, ICJ, 11 July 1996 at 43.

> 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 knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State[277]

The Article entails two requirements. First, the state must have knowledge of the circumstances of the wrongful act and secondly, the act must be internationally wrongful. There is no definition of each term to be found in the article itself. The commentary to the ARSIWA states that 'if the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility'.[278] With regard to the actions taken by the EU member states, they must have a clear link to the wrongful conduct.[279] The aid or assistance of the member states must have significantly contributed to the internationally wrongful act, but it must not have been essential to it.[280]

The first requirement is that a state must act with knowledge of the international wrongful act. It is also referred to as the mental element and it is a highly debated issue.[281] This is because a state is an entity that is not able to express decisions consciously.[282] A state can, for instance, provide 'material or financial assistance'[283] as well as 'training, economic assistance, the provision of confidential information, (…) political or legal aid, even in the form of treaties employed to facilitate the performance of the illicit act'.[284] The scope of actions under Article 16 is wide which is why the interpretation of the mental element is restrictive.[285]

The aiding and assisting state must be aware of the circumstances. Moreover, the commentary mentions that a state must give the aid or assistance "with a view to facilitating" an internationally wrongful act[286] whereas in the following, it states that an intention is necessary.[287] The Article could either refer to the 'knowledge of the unlawfulness of the assisted conduct' or it could relate to 'knowledge of the factual circumstances making it

[277] ARSIWA supra note 68 at Article 16.
[278] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) Article 16 para 4 available at *https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf*, accessed on 30 November 2020.
[279] Ibid at para 5.
[280] Ibid.
[281] Liguori op cit note 66 at 22 states that it is the 'most debated aspect of the concept of complicity'; Moreno-Lax & Giuffré op cit note 58 at 20 say that it is 'still remains a hotly debated issue'.
[282] Moreno-Lax & Giuffré op cit note 58 at 20.
[283] ARSIWA commentary op cit note 278 at 66.
[284] Moreno-Lax & Giuffré op cit note 58 at 20.
[285] Ibid.
[286] ARSIWA commentary op cit note 278 at Article 16 para 1.
[287] Ibid para 5.

unlawful'.[288] Additionally, it is questionable 'whether "actual or near certain knowledge" is mandatory or [whether] it is sufficient for there to [be] a constructive knowledge'.[289] It is also unclear whether an intent must be existent.[290] Following the international criminal law interpretation, intent indicates the awareness of a state that in the 'ordinary course of events' a wrongful act could happen.[291]

The interpretation of the terms should not exclude typical forms of international cooperation because many of them 'have more beneficial than adverse effects'.[292] However, the term "wrongful intent"[293] should be interpreted in a way that it does not allow states to deny their state responsibility for complicity.[294] Other scholars have argued that

> an intent requirement would make Article 16 unworkable – because it would be difficult to determine the frame of mind of a State – and that the assisting State seldom has a specific desire to aid the receiving State in committing a wrongful act, in particular, human rights violations[295]

Additionally, the commentary only says, "knowledge of" and not "intent". The internationally accepted rules of interpretation must be followed, therefore, Article 16 ARSIWA does not require intent.[296] In the Bosnian Genocide case, the ICJ also referred to Article 16 ARSIWA and stated that 'there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator (…) cannot be treated as complicity (…) unless at the least that organ or person acted knowingly'.[297] The ICJ only concluded that to be responsible for complicity, the mental element of knowledge is necessary.

It is questionable whether the provision applies to the present case which is why the next part outlines the situation in Libya and if the EU member states aid or assist the country. In the Malta Declaration, the member states agreed on supporting Libya to fight the human smuggling networks which are operating around Libya's land and sea borders.[298] In the Draft

[288] Liguori op cit note 66 at 22.
[289] Ibid.
[290] Ibid.
[291] Ibid at 26.
[292] Georg Nolte & Helmut Philipp Aust 'Equivocal Helpers- Complicit States, Mixed Messages and International Law' (2009) 58 *International & Comparative Law Quarterly* at 15.
[293] Ibid, Nolte and Aust suggest interpreting the mental element as "wrongful intent".
[294] Ibid.
[295] Liguori op cit note 66 at 23.
[296] Moreno-Lax and Giuffré op cit note 58 at 20 argue that even though no intent is needed, the threshold would be met because the capacity-building activities delivered by the EU member states to Libya are for the explicit purpose of avoiding migrants to enter the EU territory.
[297] *Bosnia-Herzegovina v. Yugoslavia* supra note 271 at 421.
[298] Malta Declaration op cit note 47 at para 4.

Malta Declaration, it was pointed out that the member states are 'determined to take additional action to stem migratory flows along the Central Mediterranean route'[299] whereas in the final Declaration they added their aim to '*significantly* reduce migratory flows'.[300] The support includes 'training, equipment and support to the Libyan national coast guard and other relevant agencies'[301] which is given to hinder individuals from leaving or return them to Libya (in case they departed via the Mediterranean).[302] The support given to the LCG is substantial for intercepting migrants and refugees.[303] Especially Italy's contribution was significant to the human rights violations committed in the country, and sometimes, it was even the essential financial, technological and logistic aid.[304] Due to Libya's economic situation, the country does not have the financial means as well as the will to carry out the interception and return of migrants.[305]

The EU member states and especially Italy must have had knowledge about the situation in Libya. Due to the vast amount of publicized information[306], in combination with the aim of the EU to stop irregular migration, Moreno-Lax and Giuffré state that it 'reach[es] the mark of required knowledge'.[307] Liguori adds that the fact that an investigation has been opened in 2011 that involves crimes against humanity might be another argument for the positive knowledge of the human rights situation in Libya.[308] The UN Security Council also stated, for instance, that an assessment of the viability of a case related to the migrants rights

[299] Ibid at para 1.
[300] Ibid at para 3; highlight added.
[301] Ibid at para 6 a).
[302] Ibid at para 6 j).
[303] HRW op cit note 191 at 60.
[304] Liguori op cit note 66 at 25.
[305] Ibid.
[306] Doctors for Human Rights released a report titled "The Torture Factory" this year. It includes the results of a study which concludes that 85 percent of the migrants and refugees who came from Libya to Italy had been subjected to torture, violence, and inhumane and degrading treatment, available at *https://mediciperidirittiumani.org/medu/wp-content/uploads/2020/03/report_medu_2020_ing_web.pdf*, accessed on 30 November 2020.
[307] Moreno-Lax & Giuffré op cit note 63 at 21; Liguori agrees on that and Italy is well aware of the circumstances that render Libya's conduct internationally wrongful given that several reports have clearly demonstrated the risks for migrants in that country (Liguori op cit note 66 at 25)
[308] Liguori op cit note 66 at 24.

violations was opened up before the ICC.[309] Moreover, the ECtHR already held that Italy committed the same violations in Hirsi.[310]

If an "intent" would be needed, even though it was shown above that this is not the case, Liguori argues that the Italian authorities acted with intent because they knew that the support given to Libya results in various human rights' violations in the normal course of events.[311] The aid provided was also not given in good faith and was misused by the Libyan authorities. The orders were explicitly directed to the hindering of the migration flow towards Europe.[312] Italy had, therefore, at least constructive knowledge. Scott also mentions the wilful blindness test in this scenario. Referring to state responsibility for complicity, he defines it 'as a state consciously turning a blind eye to credible information that points to wrongful conduct of another state to which it is aiding or assisting'.[313] The wilful blindness test can be applied additionally to the knowledge test when a member state claims to not having had knowledge about the human rights violations.[314] To sum up, Italy, as well as other member states had and have knowledge about the human rights violations in Libya. Therefore, the first requirement of Article 16 is fulfilled.

In addition, the second requirement of Article 16 must be fulfilled. Opposability 'requires a commonality of obligations between both cooperating parties for complicity to be established'.[315] Problematic is that both states need to be bound by the obligation; the commentary to Article 16 says that 'a State cannot do by another what it cannot do by itself'

[309] Office of the Prosecutor, Statement to the UN Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) 6 November 2019 available at *https://www.icc-cpi.int/Pages/item.aspx?name=191106-stat-icc-otp-UNSC-libya,* accessed on 30 November 2020.
[310] Ibid; even though Italy argued that it 'had no reason to believe that Libya would evade its commitments' (*Hirsi* supra note 41 at 98). The Court rejected the argument and outlined that 'the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities (…) The Court notes again that [this] situation was well known and easy to verify on the basis of multiple sources. It therefore considers that when the applicants were removed, the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country', see *Hirsi* supra note 41 at 128, 131.
[311] Liguori op cit note 66 at 26.
[312] Ibid; Gammeltoft-Hansen & Hathaway op cit note 27 at 280.
[313] Richard Mackenzie-Gray Scott 'Torture in Libya and Questions of EU Member State Complicity' *EJIL Talk! Blog of the European Journal of International Law* 11 January 2018 available at *https://www.ejiltalk.org/torture-in-libya-and-questions-of-eu-member-state-complicity/* accessed 6 September 2020.
[314] Ibid, highlight and word added.
[315] Moreno-Lax & Giuffré op cit note 63 at 21.

and further points out that it must be one of the assisting state's international obligations.[316] The question is whether the provision means that the exact same obligation must be violated or whether a similar obligation with a different source is sufficient.[317] The latter creates 'the possibility of liability for aiding or assisting where the act in question is unlawful for both the principal and sponsoring states, albeit on the basis of distinct legal norms'.[318]

Libya is neither party to the Refugee Convention nor to the ECHR. However, it is party to the ICCPR, and so are the EU member states. That means that as long as duties of the ICCPR are violated, an international wrong is established. The same counts for breaches of customary international law/jus cogens.[319] Hathaway and Gammeltoft-Hansen stress that '[s]tates that believe that the more diffuse forms of *non-entrée* involving no exercise of jurisdiction are thus necessarily immune from legal liability are thus proceeding with false confidence'.[320]

In conclusion, the requirements of Article 16 seem to be fulfilled and there are strong implications for Italy's complicity. Therefore, the country should be held responsible indirectly, and additionally to Libya's direct responsibility.[321] However, Italy's responsibility needs to be established first[322] Unfortunately, the legal responsibility is complex, but what can be said is that the member states have moral and political complicity in the human rights violations because they are intentionally closing their eyes towards these breaches.[323]

(ii) Article 17 ARSIWA: direction and control

The EU member states could also be held responsible under Article 17 ASR which considers the responsibility of

> a state which directs and controls another state in the commission of an internationally wrongful act [if] (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State[324]

[316] ARSIWA commentary op cit note 278 at Article 16 para 6.
[317] Liguori op cit note 66 at 25.
[318] Gammeltoft-Hansen & Hathaway op cit note 27 at 281.
[319] Moreno-Lax & Giuffré op cit note 63 at 21.
[320] Gammeltoft-Hansen & Hathaway op cit note 27 at 282.
[321] Liguori op cit note 66 at 27.
[322] Mackenzie-Gray Scott supra note 313 at 41.
[323] Ibid.
[324] ARSIWA supra note 68 at Article 17.

The state that is directing and controlling is responsible if it executed the entire control and direction of the act.[325] Article 17 ARSIWA attributes the responsibility to both states.[326]

The first requirement is the knowledge of the directing and controlling state. Secondly, the perpetrated act must be an internationally wrongful one. To begin with, a state has control when it dominates the commission of wrongful conduct which is more than simply exercising oversight. Directing is more than suggesting a direction but rather entails the 'actual direction of an operative kind'.[327] The state must direct *and* control in order to be responsible for the wrongful conduct.[328] The control must be "effective control"[329] which must be detailed and with special relation to the internationally wrongful act.[330] Due to those conditions, it is difficult to apply the direction and control paradigms in practice.[331] However, the dominant state does not have to have "complete power".[332] General instructions are sufficient. Regarding the cooperation between the EU and Libya, the agreement contains several general instructions, for instance to "pull back" the migrants and refugees.[333] Even though the EU member states do not 'exert minute control over the activities carried out by its Mediterranean partner on the ground, the *de facto* binding nature of reciprocal commitments does significantly restrict the discretion available to (…) Libya to fulfil their pledges in the terms mutually agreed' in ways that no violation occurs.

The commentary mentions that the direction and control can also result out of a treat.[334] This can be transferred to the cooperation agreement between Italy and Libya. The agreement is binding and entails a form of direction for Italy.[335] In addition, the ECtHR already established in *Hirsi* that returning intercepted migrants and refugees to Libya violates Italy's obligations under the ECHR.[336] The reasoning for Article 16 ASR also counts here; the EU and its member

[325] ARSIWA commentary op cit note 278 at Article 17 para 1.
[326] Annick Pijnenburg 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi* 2.0 in the Making in Strasbourg?' *European Journal of Migration and Law* 20 (2018) 424.
[327] ARSIWA commentary op cit note 278 at Article 17 para 7.
[328] Ibid.
[329] Military and Paramilitary Activities in und against Nicaragua (*Nicaragua v. United States of America*), ICJ 27 June 1986, para 115.
[330] Moreno-Lax & Giuffré op cit note 63 at 22.
[331] Ibid.
[332] ARSIWA commentary op cit note 278 at Article 17 para 7.
[333] Moreno-Lax & Giuffré op cit note 63 at 22.
[334] ARSIWA commentary op cit note 278 at Article 17 para 5.
[335] Moreno-Lax & Giuffré op cit note 63 at 23.
[336] *Hirsi* supra note 41 at 138; the Court concluded that Article 3 of the Convention was violated.

states must have had knowledge about the human rights violations that come with their pullbacks of migrants. Therefore, the conditions of Article 17 ASR are met.

(iii) Article 47 ARSIWA: plurality of responsible States

The EU member states could also be held independently responsible for their own acts because the requirements of Article 47 may be fulfilled. Article 47 refers to the plurality of responsible states and outlines the general principle in international law. It says that in the case of several states being responsible for a conduct, every state is responsible for its own conduct. Holding one state responsible does not mean that the other will be freed from its own responsibility.[337] Liguori points out that it can be practically difficult to distinguish between joint responsibility and complicity; it depends on the 'degree and extent of collaboration'.[338] That is why the principle of independent responsibility is used when determining cases of collaborative conduct.[339]

In earlier years, it would have been implausible for two or more states to be held responsible.[340] Gammeltoft-Hansen and Hathaway address that the possibility of shared jurisdiction allows the liability of more than one state regardless of the liability of the other state. They argue that it 'is an important bulwark against cooperation-based forms of *non-entrée* that purport to leave partner states holding the ball for the *refoulment* of refugees'.[341]

The member states are also not freed from their own responsibility because an agreement was made between the EU and Libya. As it was addressed in *Hirsi*, a state 'cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya'. It was considered that the member state's responsibility 'continues even after having entered into treaty commitments subsequent to the entry into force of the Convention'.[342]

[337] ARSIWA commentary op cit note 278 at Article 47 para 1.
[338] Liguori op cit note 66 at 21.
[339] ARSIWA commentary op cit note 278 at p. 64 para 5.
[340] Gammeltoft-Hansen & Hathaway op cit note 27 at 272; jurisdiction was seen as the basis of responsibility and it followed that shared responsibility for the breach of human rights obligations would be implausible. This "all or nothing" view was largely rejected.
[341] Ibid at 276.
[342] *Hirsi* supra note 41 at 129.

Moreno-Lax and Giuffré argue that the member states are responsible for their "consensual containment" actions. [343] Furthermore, they compare the situation of the agreements between the EU and Libya with the approach that was taken in the ECtHR cases *Illascu* and *Catan*.[344]. They further address that the support given by the EU to the Libyan authorities is a form of "decisive influence" which played a major role in *Illascu* and *Catan*.[345] In *Ilascu*, the Court held that due to the political, economic, financial and military support, there was 'a continuous and uninterrupted link of responsibility on the part of the Russian Federation'.[346] Having "decisive influence" means having 'a form of indirect but nonetheless effective control that amounts to "jurisdiction" under Article 1 ECHR, thus triggering the responsibility of Member States under the Convention in case of human rights violations'.[347] The EU does not have any military control over or direct control over Libya. However, the European influence is 'decisive enough to determine the course of events to the extent that' Libya 'would not stop migrants on their way to the EU (to the EU's advantage), as was precisely the case in the past'.[348] Whether the EU and its member states are responsible for violations of provisions of the ECHR will be outlined in the second part of this chapter.

(iv) Article 41(2) ARSIWA

Pascale also considers Article 41(2) to be violated (in addition to Article 16). By outsourcing its border control to Libya, Italy could also be 'internationally responsible for aiding and assisting Libya in maintaining the situation resultantly created and for recognising (at least implicitly) that situation as lawful'.[349] Article 41(2) says that 'no State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation'.[350]

The commentary to Article 41(2) states that the provision 'deals with conduct "after the fact" which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of

[343] Moreno-Lax & Giuffré op cit note 63 at 23.
[344] Ibid; Russia sponsored the violations perpetrated by the local authorities of the separatist regime of Transnistria.
[345] Ibid at 24.
[346] *Ilascu and Others v Moldova and Russia*, Application no. 48787/99, European Court of Human Rights, 8 July 2004, para 392.
[347] Moreno-Lax & Giuffré op cit note 63 at 24.
[348] Ibid.
[349] Pascale op cit note 71 at 55.
[350] ARSIWA supra note 68 Article 41(2).

international law".[351] The provision does not refer to state responsibility for complicity as Article 16 is the only one in the ARSIWA that does.[352] The two Articles must be read in connection though.[353] Article 41(2) 'extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one'.[354] With regard to Article 40, a breach is serious if it 'involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question'.[355] The situation in Libya falls within the serious breach of Article 40.[356] The Libyan government fails grossly and systematically because it is not able or willing to fulfil their international obligations. The breach is gross because severe human rights violations are happening in the country which are not prevented by the Libyan government and sometimes even carried out by them.[357] Furthermore, it is a systematic failure because 'it relies on a large-scale and generalized practice, meets a consolidated scheme and consists of actions against targeted persons'.[358] Therefore, he argues that Article 41(2) ARSIWA is applicable.

The provision entails two requirements binding all states.[359] First, states should not recognize situations that were created by serious breaches as lawful. Secondly, states should not maintain that situation with their aid or assistance.[360] With regard to Italy, the country does not act accordingly to Article 41(2) ARSIWA because it maintains the gross and systematic human rights violations in Libya.[361] Pascale points out that the arguments used in the context of Article 16 ARSIWA showing that Italy is complicit with Libya in the perpetration of human rights violations against migrants can also be used in the current situation. Italy is also aiding and assisting in the maintenance of the serious breaches in Libya.[362] Therefore, Italy *de facto* recognizes the situation in Libya as lawful.[363] Pascale concludes that by holding Italy

[351] ARSIWA commentary op cit note 278 at Article 41 para 11.
[352] Pascale op cit note 71 at 56.
[353] ARSIWA commentary op cit note 278 at Article 41 para 11.
[354] Ibid.
[355] Ibid at Article 40 para 7.
[356] Pascale op cit note 71 at 56.
[357] Ibid.
[358] Ibid.
[359] Ibid at 57; ARSIWA commentary op cit note 278 at Article 41 para 4.
[360] Ibid.
[361] Pascale op cit note 71 at 57.
[362] Ibid at 57-8.
[363] Ibid.

responsible for Article 16 ARSIWA creates the possibility to furthermore show the country's responsibility coming from Article 41(2) ARSIWA.[364]

(b) State responsibility under the ECHR

This section addresses the state responsibility under the ECHR focusing on Article 3 ECHR. Whereas the ARISWA falls under international law and can therefore hold European member states as well as Libya accountable, the ECHR is only applicable to EU member states. That is why the coming section will only outline Italy's responsibility.

(i) Article 3 ECHR

One problem with the responsibility under the ARSIWA is that bodies that monitor human rights treaty violations have not acknowledged the ARSIWA widely.[365] It is possible to apply the ARSIWA when human rights are violated as was shown above.[366] Nevertheless, the ECtHR and other human rights bodies in general, used to prefer the "theory of positive obligations" for holding member states accountable for human rights violations committed by a state.[367] That is why this part is going to show the state responsibility under the ECHR and especially under Article 3 of the Convention that inhibits the prohibition of torture.[368] Article 3 ECHR says that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[369] It holds a positive obligation for the member states to prevent human rights violations.

The responsibility from the ILC Articles and the ECHR can overlap. In the present case, Italy and other member states can, therefore, be held responsible for violating the positive obligations inherent in Article 3 as well as the violation of the ARSIWA.[370] Liguori points out that the member states are, *inter alia*, obligated to actively prevent and avoid violations of

[364] Ibid.
[365] Maarten den Heijer 'Europe and extraterritorial asylum' (2011) at 107 available at *https://openaccess.leidenuniv.nl/bitstream/handle/1887/16699/000-Heijer-07-03-2011.pdf?sequence=1.*, accessed on 30 November 2020.
[366] In the commentary, it is stated that 'where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct'; ARSIWA commentary op cit note 278 at p. 67 para. 9.
[367] Liguori op cit note 66 at 28.
[368] ECHR supra note 260 at Article 3.
[369] Ibid.
[370] Liguori op cit note 66 at 32.

human rights that are guaranteed by the ECHR.[371] The reason why Italy is supporting Libya is to have migrants and refugees intercepted by the Libyan authorities and returned to Libyan territory. This violates the positive obligations stemming from Article 3 ECHR because the migrants are subjected to torture and ill-treatment in Libya.[372] In *E v. United Kingdom*, the ECtHR decided that 'a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State'.[373] As various reports of humanitarian organizations show, migrants and refugees that were returned to Libya experience indefinite detention and are subject to other abuses and violations. They also face the risk of indirect *refoulment*.[374] The responsibility that derives from Article 3 ECHR is an alternative for the state responsibility of complicity of Article 16 ARSIWA.[375] Due to the positive obligations, the ECtHR only has to consider the conduct of one country; in that case Italy's and not the conduct of Libya. It is easier for the Court to consider if positive obligations were violated. In addition, positive obligations "only" require that the State "know or ought to know". In comparison, Article 16 ARS requires the knowledge of the state which is harder to prove.[376] Moreover, it might be easier to establish jurisdiction under the ECHR due to the amount of case law referring to positive obligations. Therefore, it is less challenging to hold states that externalize their border control accountable as well as to find an effective remedy.[377]

(ii) Jurisdiction under Article 1 ECHR

The ECtHR needs to have jurisdiction to be able to assist with claims concerning the violation of the Convention. This is seen as the "major hurdle" in cases that deal with state responsibility before an international human rights court.[378]Article 1 of the ECHR says that the Contracting Parties 'shall secure to everyone within their jurisdiction the rights and freedoms' that are outlined in the Convention. In the *Bankovic* case, the ECtHR considered that a state having jurisdiction outside its territory is an exception and requires 'special justification in the

[371] Ibid at 32-3.
[372] Ibid.
[373] *Case of E. and Others v United Kingdom*, European Court of Human Rights, Application no. 33218/96, 26 November 2002 at 99.
[374] Liguori op cit note 66 at 33.
[375] Ibid.
[376] Ibid.
[377] Ibid.
[378] Ibid.

particular circumstances of each case'.[379] In comparison to the ICJ decision, this decision sews some confusion.[380] In *Bankovic* the meaning of jurisdiction was expressed very open-endedly.[381] However, in recent years, the judgements of the ECtHR aligned with the meaning of jurisdiction adopted by the Human Rights Committee and the ICJ.[382] With regard to the ICCPR, the Human Rights Committee outlined the meaning of jurisdiction in international human rights law. It was determined that being within a state's territory and being subject to the state's jurisdiction means 'that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party'.[383] The ICJ affirmed the Committee's approach.[384] In the *Ilaşcu* case, the Court also assessed the concept of jurisdiction and stated that it is necessary for a state to have exercised jurisdiction in order to be held accountable.[385]

With regard to human rights violations perpetrated by third countries that are financially supported or equipped by member states, it is questionable if victims whose human rights were violated fall under the Court's jurisdiction which is a necessity to have the entitlement of the Convention's protection.[386] Judge Albuquerque tried to answer that question in his concurring opinion in *Hirsi* and pointed out that

> immigration and border control [are] primary State function[s] and all forms of [these] control[s] result in the exercise of the State's jurisdiction. Thus, all forms of immigration and border control of a State party to the European Convention on Human Rights are subject to the human rights standard established in it and the scrutiny of the Court, regardless of which personnel are used to perform the operations and the place where they take place[387]

He further outlined that everyone who is 'acting pursuant to statutory authority who perform the function of border control on behalf of a Contracting Party are bound by the Convention standard'.[388] Moreover, he concludes that 'State jurisdiction over immigration and border

[379] *Bankovic and Others v. Belgium and 16 Other States*, Application no. 52207/99, European Court of Human Rights, 12 December 2001 at para 61.
[380] Gammeltoft-Hansen & Hathaway op cit note 27 at 260.
[381] Ibid.
[382] Ibid.
[383] UN Human Rights Committee 'General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add.13 26 May 2004 available at *https://undocs.org/CCPR/C/21/Rev.1/Add.13*, accessed on 30 November 2020.
[384] In the *Israel Wall* decision it was held that the drafters of the ICCPR did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, 9 July 2004, para 109.
[385] *Ilaşcu* supra note 346 at 311.
[386] Bosso op cit note 113 at 15.
[387] *Hirsi* supra note 41 at page 75,6.
[388] Ibid at 76.

control naturally implies State liability for any human rights violations occurring during the performance of this control'.[389] Bosso implies that the judge's conclusion is correct. Nevertheless, he claims that 'his pronouncement appears to be based on the "wrong" notion of "jurisdiction"'.[390] Ryngaert, for instance, considers that there is a difference between jurisdiction in general international law and human rights law. Jurisdiction relating to human rights law aims to depict the group of individuals who the state has to protect whereas in general international law, jurisdictions means to "delimit" state competences.[391] He further states that each concept serves their own function. Therefore, it is questionable if concepts built on general international law can be transferred to human rights law.[392]

With regard to the present case, Liguori compares the agreement between Libya and Italy to the *Ilascu* case. She points out that Italy had decisive influence over the pullbacks. Libya organized the return of migrants; however, it was only possible due to Italy's technical, economic, financial and political support.[393] The cooperation between Italy and Libya includes the maintenance and repair of military vessels which Italy also provided. Furthermore, the Italian Maritime Coordination Centre also gives commands to the LCG when they are patrolling on the Mediterranean. This happens with the knowledge of the fate of the migrants that get intercepted and returned to inhuman conditions.[394] It was also reported that the Italian officials were interfering with rescue operations. In 2018, the incident involved a Spanish rescue ship that was told to stay away because the Libyan coastguards would carry out the rescue operation following the distress call from the sinking boat. This led to the death of 100 migrants.[395] Liguori points out that

> the possibility of finding a jurisdictional link in keeping with the jurisprudence of the Strasbourg Court based on "effective control" becomes easier in all those cases in which Italy is not only supporting the LCG with financial aid and means, but is directly involved in search and rescue operations, the coordination of which is "operated in practice by the Italian Coast Guard, with its own vessels and with those provided to Libya"[396]

[389] Ibid at 77.
[390] Bosso op cit note 113 at 15.
[391] Cedric Ryngaert 'Jurisdiction- Towards a Reasonableness Test' in Malcolm Langford, Wouter Vandenhole, Martin Scheinin, Willem van Genugten (ed) *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2012) PAGE?????
[392] Ibid.
[393] Liguori op cit note 66 at 41.
[394] Ibid at 44-5.
[395] Spanish rescuers 'told by Italy to stay away from dinghy in distress' *The Guardian* 29 June 2018 available at: *https://www.theguardian.com/world/2018/jun/29/italy-and-libya-accused-after-migrant-deaths-in-dinghy-sinking*, accessed on 30 November 2020
[396] Liguori op cit note 66 at 45.

(c) Case law of the European Court of Human Rights

The Hirsi ruling of 2012 is seen as a "historic" judgement of the ECtHR regarding the protection of migrants' rights. To completely understand the scope of the decision, it is necessary to outline the EU's border externalization strategies prior to the judgement. This will be done in the following. Concerning the new approaches of border externalization, the case *S.S. and Others v. Italy* contains and criticizes the new measures taken by European states, in particular by Italy. The case is demonstrated in the second part of the section.

(i) Hirsi Jamaa and other v Italy

In the years before the Court decided the case, the EU assumed that human rights standards were not applicable when performing migration control activities, including 'extraterritorial border and push-back operations in the Central Mediterranean'.[397] In 2005, the German interior minister suggested to establish reception centres for migrants and refugees on the African continent, mainly in the Northern African states because their borders face the Mediterranean. Those centres were supposed to assist refugees with their claims before reaching the EU territory. One of the reasons for the establishment of such places was to identify individuals in need at an early stage and to prevent them from starting the dangerous journey to the European mainland. It was suggested that the EU should create more partnerships with the North African states to improve the rescue actions on the sea.[398] Moreover, it was expressed that international law does not protect refugees on the high seas, meaning they can be returned to third countries when intercepted on the Mediterranean.[399].

However, the legal situation changed with the *Hirsi* judgement in 2012. The ECtHR decided that EU member states have to 'observe their obligations under the ECtHR even if they were conducting extraterritorial border operations'[400] The case was filed by a group of individuals 'who left Libya aboard three vessels with the aim of reaching the Italian coast'.[401] The applicants were intercepted by the Italian coastguards and returned to Libya. Neither the

[397] Müller & Slominski op cit note 14 at 8.
[398] Bundesministers des Innern 'Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration- Überlegungen des Bundesministers des Innern zur Errichtung einer EU-Aufnahmeeinrichtung in Nordafrika' available at *http://docplayer.org/75924380-Ueberlegungen-des-bundesministers-des-innern-zur-errichtung-einer-eu-aufnahmeeinrichtung-in-nordafrika.html,* accessed on 30 November 2020.
[399] Müller & Slominski op cit note 14 at 8.
[400] Ibid.
[401] *Hirsi* supra note 41 at 9.

Italian nor the Libyan authorities assessed the individuals' protection claims.[402] The push-back action of the Italian authorities was a result of the bilateral agreements between Italy and Libya which allowed the Italian coastguards to intercept irregular migrants on the high seas and transfer them back to Libya.[403]

First of all, the Court had to assess whether Italy had jurisdiction resulting of Article 1 ECHR.[404] Generally, a state has jurisdiction on its territory. Only in exceptional cases has the Court accepted that acts outside the state's territory constitute an exercise of jurisdiction.[405] To confirm if exceptional circumstances exist, the particular facts must be addressed.[406] In *Al-Skeini* case, the Court decided that

> whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual.[407]

Concerning other case law of the ECtHR, where extraterritorial jurisdiction was exercised, involved activities of 'diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State'.[408] In those cases, the Court recognized the jurisdiction by the particular state and based that decision on customary international law and treaty provisions.[409]

The incident occurred on the high seas on board of a vessel flying under the Italian flag. The law of the seas states that a ship belongs exclusively to the jurisdiction of the state under which flag it is flying.[410] The Court observed that it is *de jure* control when one state is controlling another which is a principle of international law.[411] The interception of the applicants happened on board of an Italian ship and the crew, which was operating the vessels, was exclusively Italian military personnel. That is why the Court held that migrants on board the vessel were 'under the continuous and exclusive *de jure* and *de facto* control of the Italian

[402] Ibid at 10-1.
[403] Ibid at 13.
[404] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 1.
[405] *Hirsi* supra note 41 at 71-2.
[406] Ibid at 73.
[407] Ibid at 74; *Al-Skeini and Others v the United Kingdom*, Application no. 55721/07, European Court of Human Rights, 7 July 2011 at para 136-7.
[408] Ibid at 75.
[409] Ibid.
[410] Ibid at 77.
[411] Ibid.

authorities'.[412] Therefore, the Court decided that Italy exercised jurisdiction within the meaning of Article 1 ECHR.[413]

The applicants claimed the violation of Article 3 ECHR which says that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[414] By returning them to Libya, they were at risk of torture and other inhuman or degrading treatment by the Libyan authorities.[415] On that matter, the Court assessed two different aspects of Article 3 ECHR. First, the ECtHR made an assessment of the danger of inhuman and degrading treatment in the country. Secondly, they addressed the risk of being returned to their home countries.[416]

Concerning the first aspect, the applicants claimed that by being returned to Libya without even knowing where they were headed, they had been the 'victims of an arbitrary *refoulment'.*[417] The Italian authorities on the vessels neither identified the intercepted migrants, nor processed any formal request for asylum.[418] The Court had to assess whether there was 'substantial grounds for believing that the parties concerned ran a real risk of being subjected to torture or inhuman or degrading treatment after having been pushed back'.[419] According to observations made by the UNHCR office as well as HRW and other international organisations, the Court stated that Libya failed to comply with international law regarding the protection of irregular migrants. Therefore, Italy cannot claim Libya as a "safe" country.

Furthermore, the Court stated that the Italian authorities had or should have had knowledge about the treatment migrants were facing in Libya and that this is a violation of the ECHR because the country does not have a proper protection system for migrants.[420] As a result, the push-back of the applicants was not justified and Article 3 ECHR was, therefore, violated.[421]

[412] Ibid at 81.
[413] Ibid at 82.
[414] ECHR supra note 260 at Article 3.
[415] *Hirsi* supra note 41 at 83.
[416] Ibid at 84.
[417] Ibid at 85.
[418] Ibid at 87.
[419] Ibid at 111.
[420] Ibid at 131.
[421] Ibid at 138.

The importance of the case is embedded in that it is the first of its kind. The ECtHR has never before found that a European State has violated human rights of migrants and refugees intercepted on the high seas by returning them to a third country 'in the absence of any procedural safeguards'.[422] With its judgement, the Court ruled that European States have to ensure that intercepted individuals have the possibility to access protection.[423] The Court held that 'the special nature of the maritime environment cannot justify an area outside the law'.[424] Additionally, the judges pointed out that 'problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention'.[425] Therefore, the decision is viewed as a "landmark judgement" and could guide states 'within or outside the Council of Europe in order to re-modulate their interdiction operations along the lines and in consonance with the standards of refugee and human rights law'.[426]

(ii) S.S. and Others v. Italy

The case was brought before the ECtHR by the Global Legal Action Network (GLAN) in May 2018. On behalf of 22 individuals, GLAN filed complaint about Italy's cooperation with Libyan authorities. Due to the Italian Coast Guard's coordination with the LCG migrants got intercepted and returned to Libya.[427] The Search and Rescue operation, which is the centre of the case, was performed in November 2017 by the LCG. They acted in accordance with prior communication with the Italian Maritime Rescue Coordination Centre (hereafter 'MRCC') which received a call from a sinking boat in distress which had 150 migrants on board.[428] The patrol vessel of the Libyan authorities caused a strong water movement whereupon people fell into the water. At least 20 individuals drowned. The LCG also intervened in the rescue operations of a Sea Watch patrol boat by 'throwing objects, as well as hitting and threatening the migrants with rope and weapons, without providing life jackets to those who were in the

[422] Tom Dannenbaum 'Watered-Down Rights on the High Seas: Hirsi Jamaa and other v Italy (2012)' (2012) 61 *International and Comparative Law Quarterly* 729; the Court held unanimously that there has been a violation of Article 3 of the Convention on account of the fact that the applicants were exposed to the risk of being subjected to ill-treatment in Libya (*Hirsi* supra note 41 page 57 no. 6).
[423] Ibid.
[424] *Hirsi* supra note 41 at 178.
[425] Ibid at 179.
[426] Dannenbaum op cit note 423 at 729.
[427] GLAN, etc complaint op cit note 31.
[428] Andreina de Leo 'S.S. and others v. Italy: Sharing responsibility for migrant abuses in Libya' PILPG: A Global Pro Bono Law Firm 6 January 2020 available at *https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya,* accessed on 30 November 2020.

water'.[429] The individuals who survived that incident were returned to Libya and detained upon arrival facing serious human rights violations and other abuses. Some of the individuals were 'sold to a captor who tortured them'.[430]

The question is how Italy was involved and if Italy can be held responsible for a violation of the Convention. For that to be the case, Italy must have had jurisdiction over the conduct in question as outlined in Article 1 ECHR.[431]

In *Hirsi*, the ECtHR 'employed the notion of effective control giving rise to extraterritorial jurisdiction in the context of migrant's interception on the high seas.[432] As shown above, the Court decided that Italy exercised jurisdiction extraterritorially and that it had effective control over migrants because they were present on the Italian military ship before the LCG took them over.[433] However, this case is different to *Hirsi* because in the latter the Italian authorities directly interfered with the migrants and their return to Libya because they handed them over to the LCG. In the current case, the Italian authorities "only" supported the Libyans financially and practically, without being physically present.[434] Italy is not intercepting migrants and the country is, insofar, only coordinating the intervention.[435] Nevertheless, the EU is in general more substantially involved with regard to the currently implemented migration policies than they were at the time of the *Hirsi* decision.[436] This creates difficulties with arguing Italy's responsibility.[437]

The difference between the two cases also changes the approach to demonstrating whether Italy had effective control over the operation or not and whether the Court has jurisdiction as a consequence.[438] Additionally, the Court considered the extraterritorial jurisdiction of the Russian Federation and held that there was 'a continuous and uninterrupted link of responsibility' regarding the applicants' fate. Russia failed to establish any actions that would have ended, or would have prevented, the violations which were committed by its

[429] Ibid.
[430] Ibid.
[431] Ibid; ECHR supra note 260 at Article 1.
[432] De Leo op cit note 429.
[433] Ibid.
[434] Ibid.
[435] Pijnenburg op cit note 326 at 406.
[436] Ibid.
[437] Ibid; the case has only been brought against Italy and not against any other member state.
[438] De Leo op cit note 429.

agents.[439] Even though there was no direct participation of the Russian agents, the Court decided that Russia had "effective authority" or "decisive influence".[440] That is why the Court concluded that Russia exercised jurisdiction under Article 1 of the Convention.[441]

It is sufficient to fall under Article 1 ECHR when a state does not prevent or put an end to human rights' violations. The duty to prevent activities that are violating human rights is originating from the influence of the state. Financial support can be a way of how a state exercises influence.[442] This means that

> if a State has the power to prevent human rights violations and does not act on it, its conduct could trigger the applicability of Article 1 ECHR, thus engaging its responsibility, even in circumstances in which the violations occurred extraterritoriality and the Contracting State did not exercise effective control[443]

With regard to *SS. and others v. Italy,* the Italian authorities did not have effective control over the actions that happened which resulted in the death of several individuals. This means that Italy would not have exercised jurisdiction under Article 1 ECHR regardless of involvement in the operation of the Italian authorities. The question is whether this case is an exception to the territoriality principle, meaning that Italy exercised jurisdiction outside its own territory. This must be determined while referencing the particular facts.[444] In *Al-Skeini,* the Court stated that 'as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory'.[445] The ECtHR guidelines to Article 1 of the Convention consider two ways on how state jurisdiction outside the state's territory can primarily be established. First, jurisdiction can be established 'on the basis of the power (or control) actually exercised over the *person* of the applicant (*ratione personae*). Secondly, it can be determined 'on the basis of control actually exercised over the foreign territory in question (*ratione loci*).[446]

[439] Ibid at 393.
[440] Ibid at 392.
[441] Ibid at 393-94.
[442] De Leo op cit note 429.
[443] Ibid.
[444] As it was outlined in *Al-Skeini* supra note 407 at 132.
[445] Ibid at 133.
[446] European Court of Human Rights 'Guide on Article 1 of the European Convention on Human Rights; Obligation to respect human rights- Concepts of "jurisdiction" and imputability' 31 December 2019 available at *https://www.echr.coe.int/documents/guide_art_1_eng.pdf,* accessed on the 30 November 2020.

The recent case-law of the Court shows that decisive influence over state's policies and practices can attract state's jurisdiction under the Convention.[447] That means that 'even in the absence of physical occupation of a territory, states may nonetheless control areas of policy of third party entities'.[448] Amnesty and HRW act as interveners in the case and state that the Court's argument in *Catan and others v. Moldova and Russia* can be reversed. In that case, the Court decided that 'where the fact of such domination over the territory is established, it is not necessary to determine whether the [MS] exercises detailed control over the policies and actions of the subordinate local administration'.[449] Therefore, the interveners argue that where the portrayed domination is lacing 'other forms of control and influence should be sufficient to bring a situation within a State's jurisdiction for the purpose of Article 1 ECHR'.[450] Thus, to completely understand the actions that were taken by Italy that could establish the state's jurisdiction, the involvement of the Italian authorities must be outlined. Amnesty and HRW considered several aspects that are relevant in order for the Italian authorities to exercise jurisdiction under Article 1 standards. After the *Hirsi* judgement, the tactics regarding the extraterritorial border control changed. Italy was no longer involved in the interception and return of irregular migrants. Nevertheless, the Italian authorities 'used the resumption of cooperation with Libya and the funding, political and material support that came with it to outsource migration control to Libya, while maintaining power to decide on its practical aspects'.[451]

(d) Conclusion

After the *Hirsi* judgement, the EU member states changed their tactics regarding the externalization measures. There was no critical assessment or evaluation of the migration policies. If one would have happened, if the respect for migrants' and refugees' human rights had been in the forefront, it would have led in earlier years to the end of the border externalization activities. However, the EU and its member states decided to rather save

[447] Amnesty International & Human Rights Watch, Written submissions on behalf of the interveners to Application no. 21660/18 at 3 available at *https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf*, accessed on 30 November 2020.
[448] Ibid at 4.
[449] *Catan and others v. Moldova and Russia,* Applications nos. 43370/04, 8252/05 and 18454/06, European Court of Human Rights, 19 October 2012 at 106.
[450] Amnesty & HRW op cit note 449 at 4
[451] Ibid at 5.

themselves from state responsibility instead of saving migrants' and refugees' lives and sparing them from violence and abuse in Libya.

SS. and others v. Italy is interesting because its outcome is not clear yet. The Court could follow the *Hirsi* decision and hold that Italy violated its obligations under the ECHR. However, it could also find that Italy is not responsible for any violation. There are several scenarios of possible outcomes depending on what path the Court is going to follow. The main issue is going to be showing that Italy exercised jurisdiction.[452] To conclude, it is to be seen how the Court will decide and what impact its judgement will have on the future of migration policies in the EU.

V. CHAPTER 5: CONCLUSION

In summation, the externalization of border control is a tool commonly used by the EU and its member states to prevent migrants and refugees from coming to the EU's territory. The EU wants to avoid the arrival of these individuals. This is because, if these individuals were to enter the EU's territory, it would make the EU arrival-state legally responsible for assessing their protection claims. The EU and its member states also aim to prevent responsibility for violating international and European law. That is why they externalize the border control, and enter cooperation agreements with states that have bad human rights records – such as Libya – to do the job. As was outlined in chapter 2, the migration policies have changed in the past because the early *non-entrée* practices were legally challenged, and did not protect European states from legal accountability. Therefore, new measures were imposed that mainly take place in the territory of third countries. Most of the new generation measures (as described in chapter 2) are cooperation-based *non-entrée* policies that consist of an agreement with a country of origin or transit. In the case of the Italy-Libya agreement, the two countries set up a MoU that is supposed to fight illegal migration. In addition to the Italy-Libya cooperation, is the matter of the EU funding the LCG to prevent migrants and refugees from entering EU territory – and with that, the EU jurisdiction. In general, financial incentives (direct or indirect) are the preferred tool, because they create possibilities for the EU and its member states to influence border control in the third state. Also, it is an effective way to prevent migrants and refugees from entering the EU territory, which helps the EU and its member states to achieve their goals.

[452] Pijnenburg op cit note 326 at 409.

Unfortunately, the migration measures are undertaken without an assessment of their human rights impact. As was shown above, the human rights violations are severe, and many individuals suffer from abuse and violence. Migrants' and refugees' human rights, such as: the right to life; the right to liberty; as well as the principle of *non-refoulmen*t are violated; and the access to the judicial system is barred. Therefore, the victims' rights to remedy are also obstructed. The situation in Libya's detention centres is especially dramatic and is well documented by several humanitarian organizations. Therefore, the question of state responsibility arises: how can states be held responsible for the violations occurring due to migration control activities? Italy's and other member state's responsibilities could derive from Article 16, 17 and 41 ARSIWA. All in all, state responsibility results from the collaboration between Italy and Libya, and not just from one state acting alone. Therefore, Italy is responsible for aiding or assisting Libya in its human rights violations as outlined in Article 16 ARSIWA. Italy can also be held responsible for the violation of Article 17 ARSIWA which addresses the direction and control of an internationally wrongful act. Furthermore, by sustaining the situation in Libya, Italy and the European member states are violating Article 41 ARSIWA. Additionally, the states can be held responsible for violating Article 3 ECHR. Regarding Article 3 ECHR, the main requirement is to show that Italy exercised jurisdiction under Article 1 ECHR. Only then will the ECtHR assess the possible breaches. This means that the migration control activities implemented by the EU and its member states that impact the migrants' and refugees' human rights negatively have consequences. In *Hirsi*, the ECtHR granted the applicants compensation from Article 41 ECHR which creates hope for individuals whose human rights are violated.[453] The future will show how the Court is going to decide in the pending case *S.S. and others v Italy.* The interveners in the case argue that Italy aided or assisted Libya in the wrongful conduct because it provided the LCG with funding, training and other necessary material goods.[454] Italy's goal was to strengthen the LCG's capacity to intercept individuals on the Mediterranean, refugees who are in need of international protection included.[455] They argue that the return is in these cases 'particularly grave' because the human rights situation and serious violations in Libya are well-known.[456] In their opinion, the requirements of Article 16 ARSIWA are fulfilled. Moreover, the intervener's opinion is that

[453] *Hirsi* supra note 41 at 212-8; the applicants each claimed 15.000 euros plus costs and expenses.
[454] *S.S. and Others v. Italy*, Written submissions on behalf of the interveners, 10 available at *https://www.icj.org/wp-content/uploads/2019/11/ECtHR-SS_v_Italy_final-JointTPI-ICJECREAIREDCR-English-2019.pdf*, accessed on 30 November 2020.
[455] Ibid.
[456] Ibid.

'the right to life imposes positive obligation on States to take adequate measures to prevent avoidable deaths'.[457]

The ECtHR does not explicitly base its decisions on the ARSIWA. In general, the Court applies Article 3 ECHR which entails the rule of *non-refoulment* in cases of complicity.[458] The ECtHR mainly analyses whether positive obligations resulting from the Convention have been violated.[459] With regard to Italy's responsibility as a consequence of the externalization of their border control in front of the ECtHR, the main challenge is to show that the Court has jurisdiction under Article 1 ECHR.[460] It can be argued though, that 'jurisdiction may arise due to the complicity of an ECHR Member State in breaches committed by a third state'.[461] This would mean that Italy's complicity to the human rights violations and in particular to the breach of Article 3 ECHR would outline the Court's jurisdiction. By establishing external border control, the EU and its member states are systematically circumventing state responsibility and their human rights obligations.[462] Therefore, it is 'reasonable to argue for an evolutionary interpretation of the ECHR which includes a more expansive understanding of jurisdiction under Article 1 [ECHR]'.[463] For the ECtHR to still be relevant in the future, it is suggested that the interpretation of the term jurisdiction is expanded, especially because it would lead to unacceptable outcomes in which member states would not face any consequences for their wrongdoings in situations of extraterritorial complicity.[464] Article 3 ECHR inhibits the prohibition of torture and inhuman or degrading treatment and is an absolute right which is also a core provision of the ECHR.[465] Therefore, states that are facilitating situations should be held responsible. It would not make sense if member states would be prohibited to 'refoul people or to detain them in inhuman conditions within their territory, yet allowing them to facilitate a third country'.[466] It is also preferable for the individual to have access to the ECtHR because it 'establishes a robust system of individual petition allied with reasonably consistent

[457] Ibid at 8.
[458] Daria Davitti & Marlene Fries 'Offshore Processing and Complicity in Current EU Migration Policies (Part 2)' EJIL:Talk! available at *https://www.ejiltalk.org/offshore-processing-and-complicity-in-current-eu-migration-policies-part-2/*, accessed on 30 November 2020.
[459] Ibid.
[460] Ibid.
[461] Ibid.
[462] Ibid.
[463] Ibid.
[464] Ibid; Miles Jackson 'Freeing *Soering*: The ECHR State Complicity in Torture and Jurisdiction' (2016) 27 *The European Journal of International Law* 823.
[465] Ibid at 826.
[466] Davitti op cit note 460.

remedial compliance'.[467] Therefore, the extension of jurisdiction in the case of complicity is also preferred from a policy perspective.[468] Victims should have access to remedies in extraterritorial migration control scenarios.

Another thing that is noteworthy in the end is the listing of the top hosting countries in 2020 which is led by Turkey, followed by Colombia, Pakistan, Uganda and Germany.[469] Even though Germany is on the fifth rank of the top refugee hosting country, most refugees are not hosted by European states, but by developing countries.[470] Germany, as the European country that hosts most refugees for instance, only accommodates 1.4 million of the 26 million refugees worldwide. Therefore, it is remarkable that European states such as Italy are so protective about migrants and refugees arriving in their territory because most individuals that are fleeing their homes are either internally displaced or settle in neighbouring countries and do not remain in Italy.

[467] Jackson op cit note at 466 at 822.
[468] Ibid.
[469] UNHCR 'Figures at a Glance' 18 June 2020 available at *https://www.unhcr.org/figures-at-a-glance.html*, accessed on 30 November 2020.
[470] Ibid, 85% of all refugees.

BIBLIOGRAPHY

Primary Sources

Cases

European:

Al-Skeini and Others v the United Kingdom, Application no. 55721/07, European Court of Human Rights, 7 July 2011.

Amuur v. France, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996.

Bankovic and Others v. Belgium and 16 Other States, Application no. 52207/99, European Court of Human Rights, 12 December 2001.

Case of E. and Others v United Kingdom, European Court of Human Rights, Application no. 33218/96, 26 November 2002.

Catan and others v. Moldova and Russia, Applications nos. 43370/04, 8252/05 and 18454/06, European Court of Human Rights, 19 October 2012.

Hirsi Jamaa and other v Italy, Application no. 27765/09, European Court of Human Rights, 23 February 2012.

Ilascu and Others v Moldova and Russia, Application no. 48787/99, European Court of Human Rights, 8 July 2004.

International:

Abdi and Another v Minister of Home Affairs and Others 2011 3 SA 37 (SCA).

Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice, 9 July 2004.

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), International Court of Justice, 11 July 1996.

Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America), International Court of Justice, 27 June 1986.

S.S. Lotus (France v. Turkey), Judgement No. 9, Permanent Court of International Justice, 7 September 1927.

Sale v Haitian Centers Council 1993 (509) U.S. 155.

Legislation

European:

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.

Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, as amended by Protocol No.11, 16 September 1963, European Treaty Series No. 46.

Council of the European Union, Draft Malta Declaration by the Members of the European Council on the external aspects of migration: addressing the Central Mediterranean route available at *https://www.statewatch.org/media/documents/news/2017/feb/eu-council-draft-malta-declaration.pdf.*

Council of the European Union, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017 available at *https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/.*

Regulation (EU) No 1168/2011 of the European Parliament And Of The Council of 25 October 2011, L 304/1, (2).

International:

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001.

International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) available at *https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.*

Law No. (19) of 2010 on combatting illegal immigration available at *https://security-legislation.ly/node/32174*.

Law No. (2) of 2004 amending certain provisions of Law No. (6) of 1987 on organising the entry and residence of foreigners in Libya available at *https://security-legislation.ly/sites/default/files/lois/841-Law%20No.%20%282%29%20of%202004_EN.pdf*.

Law No. (6) of 1987 on organising the entry, residence, and exit of foreigners in Libya available at *https://security-legislation.ly/sites/default/files/lois/1214-Law%20No.%20(6)%20of%201987_EN.pdf.*

Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45.

The Constitutional Declaration of Libya of 2011 available at *https://www.ndi.org/sites/default/files/Handout%204%20-%20Libya%20Draft%20Interim%20Constitution.pdf*.

United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series vol. 1465, p. 85.

United Nations General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series vol. 189, p. 137.

United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series vol. 999, p. 171.

United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948.

Secondary Sources

Amnesty International 'Italy: "Historic" European Court judgment upholds migrants' rights' 23 February 2012 available at *https://www.amnesty.org/en/latest/news/2012/02/italy-historic-european-court-judgment-upholds-migrants-rights.*

Amnesty International 'The Human Rights Risks of External Migration Policies' (2017) available at *https://www.refworld.org/pdfid/593fecfe4.pdf.*

Amnesty International & Human Rights Watch, Written submissions on behalf of the interveners to Application no. 21660/18 available at *https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf.*

Bosso, Francesco 'Cooperation-based Non-entrée- What prospects for legal accountability?' (2016) 6 *IFHV Working Paper/ Ruhr-Universität Bochum*.

Bundesminister des Inneren 'Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration- Überlegungen des Bundesministers des Innern zur Errichtung einer EU-Aufnahmeeinrichtung in Nordafrika' available at *http://docplayer.org/75924380-Ueberlegungen-des-bundesministers-des-innern-zur-errichtung-einer-eu-aufnahmeeinrichtung-in-nordafrika.html.*

Commissioner for Human Rights 'Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean' June 2019 available at *https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87.*

Commissioner for Human Rights 'Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights' 15 November 2019 available at *https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-app/168098dd4d*.

Commissioner for Human Rights, Statement 'Commissioner calls on the Italian government to suspend the co-operation activities in place with the Libyan Coast Guard that impact on the return of persons intercepted at sea to Libya' 31 January 2020 available at *https://www.coe.int/en/web/commissioner/-/ommissioner-calls-on-the-italian-government-to-suspend-the-co-operation-activities-in-place-with-the-libyan-coast-guard-that-impact-on-the-return-of-p*.

Committee of Ministers 'International obligations of Council of Europe member States: to protect life at sea' Reply to Recommendation Doc. 14831, 14 February 2019 available at *http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=26448&lang=en.*

Committee of Ministers, Reply to Recommendation 2137(2018) 'International obligations of Council of Europe member States: to protect life at sea' Doc. 14831, 14 February 2019 available at *http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=26448&lang=en.*

Dannenbaum, Tom 'Watered-Down Rights on the High Seas: Hirsi Jamaa and other v Italy (2012)' (2012) 61 *International and Comparative Law Quarterly* 728.

Davitti, Daria & Marlene Fries 'Offshore Processing and Complicity in Current EU Migration Policies (Part 2)' *EJIL:Talk! Blog of the European Journal of International Law* 11 October 2017 available at *https://www.ejiltalk.org/offshore-processing-and-complicity-in-current-eu-migration-policies-part-2/* accessed on 11. November 2020.

De Leo, Andreina 'S.S. and others v. Italy: Sharing responsibility for migrant abuses in Libya' PILPG: A Global Pro Bono Law Firm 6 January 2020 available at *https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya.*

Doctors Without Borders 'Libya: Asylum seeker dies in detention centre fire' 2 March 2020 available at *https://www.doctorswithoutborders.ca/article/libya-asylum-seeker-dies-detention-centre-fire*.

European Commission, EUTF 'Support to Integrated border and migration management in Libya- first phase' 27 July 2017 available at *https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-first-phase_en.*

European Council Press Release 'Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route' 3 February 2017 available at *https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/.*

European Court of Human Rights 'Guide on Article 1 of the European Convention on Human Rights; Obligation to respect human rights- Concepts of "jurisdiction" and imputability' 31

December 2019 available at *https://www.echr.coe.int/documents/guide_art_1_eng.pdf.*

European External Action Service 'EUBAM Libya Initial Mapping Report Executive Summary' EEAS (2017) 0109, 25 January 2017 available at https://www.statewatch.org/media/documents/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf.

Executive Committee of the High Commissioner's Programme 'General Conclusion on International Protection No. 87 (L)-1999' 50th session, 8 October1999 available at *https://www.unhcr.org/excom/exconc/3ae68c6ec/general-conclusion-international-protection.html.*

Executive Committee of the High Commissioner's Programme 'Refugees without an asylum country no.15 (XXX)-1979' 30th session, 16 November 1979 available at *https://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country.html.*

Frelick, Bill & Ian M. Kysel & Jennifer Podkul 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 *Journal on Migration and Human Security* 190.

Gammeltoft-Hansen, Thomas & James C. Hathaway 'Non-refoulement in a world of cooperative deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235.

Gauci, Jean-Pierre 'Back to Old Tricks? Italian Responsibility for Returning People to Libya' *EJIL: Talk! Blog of the European Journal of International Law* 6 June 2017 available at *https://www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/.*

Global Legal Action Network (GLAN), Association for Juridical Studies on Immigration (ASGI) and Italian Recreational and Cultural Association (ARCI) 'Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's "Support to Integrated Border and Migration Management in Libya" Programme' (2020) available at *https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2020-04/GLAN%20ASGI%20ARCI%20ECA%20Libya%20complaint%20%26%20expert%20opinion%20EMBARGOED.pdf.*

Heijer, Maarten den 'Europe and extraterritorial asylum' (2011) available at *https://openaccess.leidenuniv.nl/bitstream/handle/1887/16699/000-Heijer-07-03-2011.pdf?sequence=1.*

Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018 available at *https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf.*

Human Rights Watch 'Libya and International Human Rights Law' January 2006 available at *https://www.hrw.org/reports/2006/libya0106/13.htm.*

Human Rights Watch 'No Escape from Hell EU Policies Contribute to Abuse of Migrants in Libya' (2019) available at *https://www.hrw.org/sites/default/files/report_pdf/eu0119_web2.pdf.*

Hyndman, Jennifer & Alison Mountz 'Another Brick in the Wall? Neo-Refoulement and the Internalization of Asylum by Australia and Europe, Government and Opposition' (2008) 43 *Government and Opposition* 249.

International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts (2001) Volume II Part Two, Report of the Commission to the General Assembly on the work of its fifty-third session.

International Law Commission, Yearbook of the International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

International Organization for Migration 'IOM Deplores Killing of Two Migrants Returned from Sea to Libya' Press Release, 28 July 2020 available at *https://www.iom.int/news/iom-deplores-killing-two-migrants-returned-sea-libya.*

International Organization for Migration, Libya's Migrant Report Round 30, March-April 2020 available at *https://reliefweb.int/sites/reliefweb.int/files/resources/DTM_R30_Migrant_Report.pdf.*

International Organization for Migration Press Release 'Nearly 1,000 Migrants Returned to Libya in the First Two Weeks of 2020' 14 January 2020 available at *https://www.iom.int/news/nearly-1000-migrants-returned-libya-first-two-weeks-2020-iom.*

Jackson, Miles 'Freeing *Soering*: The ECHR State Complicity in Torture and Jurisdiction' (2016) 27 *The European Journal of International Law* 817.

Liguori, Anna *Migration Law and the Externalization of Border Controls European State Responsibility* (2019) Routledge, Abingdon, New York.

Mackenzie-Gray Scott, Richard 'Torture in Libya and Questions of EU Member State Complicity' *EJIL Talk! Blog of the European Journal of International Law* 11 January 2018 available at *https://www.ejiltalk.org/torture-in-libya-and-questions-of-eu-member-state-complicity/.*

Markard, Nora 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 *The European Journal of International Law* 591.

Medici Per I Diritti Umani (Doctors for Human Rights) 'The Torture Factory - Report on Human Rights Violations Against Migrants and Refugees in Libya (2014-2020)' March 2020 available at *https://mediciperidirittiumani.org/medu/wp-content/uploads/2020/03/report_medu_2020_ing_.*

Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic (English translation) available at *http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.*

Mixed Migration Centre 'What makes refugees and migrants vulnerable to detention in Libya? A microlevel study of the determinants of detention' MMC Research Report December 2019
available at *https://reliefweb.int/sites/reliefweb.int/files/resources/082_determinants_of_detention.pdf.*

Moreno-Lax, Violeta & Mariagiulia Giuffré 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibilty" for Forced Migration Flows' in: S. Juss (ed) *Research Handbook on International Refugee Law* (2019) Edward Elgar Publishing.

Moreno-Lax, Violeta & Martin Lemberg-Pedersen 'Border-induced displacement: The ethical and legal implications of distance-creation through externalization' (2019) 56 *Questions of International Law*.

Müller, Patrick & Peter Slominsk 'Breaking the legal link but not the law? The externalization of EU migration control through orchestration in the Central Mediterranean' (2020) *Journal of European Public Policy*.

Nagore Casas, Maria 'The Instruments of Pre-Border Control in the EU: A New Source of Vulnerability for Asylum Seekers?' (2019) 7 *Paix et sécurité internationals/ Journal of International Law and International Relations* 161.

Nolte, Georg & Helmut P. Aust 'Equivocal Helpers- Complicit States, Mixed Messages and International Law' (2009) 58 *International & Comparative Law Quarterly*.

Office of the Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) 6 November 2019 available at *https://www.icc-cpi.int/Pages/item.aspx?name=191106-stat-icc-otp-UNSC-libya.*

Palm, Anja 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?' *EU Immigration and Asylum Law and Policy* 2 October 2017, available at *https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/.*

Pascale, Giuseppe 'Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?' (2019) 56 *Questions of International Law* 35.

Pijnenburg, Annick 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi* 2.0 in the Making in Strasbourg?' *European Journal of Migration and Law* 20 (2018) 396.

President of the Council of Europe 'Libya and the surrounding area: current situation and need for immediate action' Doc 11538/19, 4 September 2019 available at *https://data.consilium.europa.eu/doc/document/ST-11538-2019-INIT/en/pdf.*

Ronzitti, Natalino ‘The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?‘ (2009) 1 *Bulletin of Italian Politics* 132.

Ryngaert, Cedric ‘Jurisdiction- Towards a Reasonableness Test’ in Malcolm Langford, Wouter Vandenhole, Martin Scheinin, Willem van Genugten (eds) *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2012) Cambridge University Press, Cambridge.

S.S. and Others v. Italy, Application No. 21660/18, Written submissions on behalf of the Aire Centre (Advice on Individual Rights in Europe), the Dutch Refugee Council (DCR), the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurist (ICJ)- Interveners, 11 November 2019 available at *https://www.icj.org/wp-content/uploads/2019/11/ECtHR-SS_v_Italy_final-JointTPI-ICJECREAIREDCR-English-2019.pdf*.

Sakuma, Amanda ‘Damned for Trying’ MSNBC available at *http://www.msnbc.com/specials/migrant-crisis/libya*.

Slominski, Peter ‘The Power of Legal Norms in the EU’s External Border Control’ (2013) 51 *International Migration* 41.

Spanish rescuers 'told by Italy to stay away from dinghy in distress' *The Guardian* 29 June 2018 available at: *https://www.theguardian.com/world/2018/jun/29/italy-and-libya-accused-after-migrant-deaths-in-dinghy-sinking.*

Stock, Inka & Ayşen Üstübici & Susanne U. Schultz ‘Externalization at work: responses to migration policies from the Global South’ (2019) 7 *Comparative Migration Studies*.

Stuurman, Paula & Joanna Pickering, Elise Lauriot Dit Prevost, Maxine Both, Matthew Abbey, Jeanette Trang, Milena Reig-Amette And Francesco Pinotti ‘Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute’ EU Migration Policies in the Central Mediterranean and Libya (2014-2019) available at https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf.

Terlizzi, Andrea ‘Border Management and Migration Controls in Italy’ June 2019 Research report, Working Papers Global Migration: Consequences and Responses Paper 2019/17, available at *http://uu.diva-portal.org/smash/get/diva2:1320888/FULLTEXT01.pdf*.

United Nations General Assembly Resolution no. A/RES/3449(XXX) ‘Measures to ensure the human rights and dignity of all migrants workers’ 2433rd plenary meeting 9 December 1975.

United Nations General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 23 November 2018 available at *https://undocs.org/en/A/HRC/37/50*.

United Nations High Commissioner for Refugees ‘Figures at a Glance’ 18 June 2020 available at *https://www.unhcr.org/figures-at-a-glance.html.*

United Nations High Commissioner for Refugees, Operational Portal Refugee Situation, Sea arrivals, available at *http://data2.unhcr.org/en/situations/mediterranean/location/5205*.

United Nations High Commissioner for Refugees, Submission for the Office of the High Commissioner for Human Rights' Compilation Report, Universal Periodic Review: Libya October 2014 available at *https://www.refworld.org/pdfid/553a052e4.pdf*.

United Nations High Commissioner for Refugees, UNHCR Submission for the Universal Periodic Review – Libya – UPR 36th Session (2019), October 2019 available at *https://www.refworld.org/docid/5e1749392.html.*

United Nations High Commissioner for Refugees & Mixed Migration Centre '"On this journey, no one cares if you live or die" Abuse, protection, and justice along routes between East and West Africa and Africa's Mediterranean coast' July 2020.

United Nations Human Rights Committee 'General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add.13 26 May 2004 available at *https://undocs.org/CCPR/C/21/Rev.1/Add.13.*

United Nations Human Rights Office of the High Commissioner 'Recommended Principles and Guidelines on Human Rights at International Borders' (2014) available at *https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.*

United Nations Human Rights Office of the High Commissioner, United Nations Support Mission in Libya 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' 20 December 2018 available at *https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf.*

United Nations Human Rights Office of the High Commissioner, Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 14 available at *https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23923&LangID=E.*

United Nations, Global Issues, Human Rights available at *https://www.un.org/en/sections/issues-depth/human-rights/.*

Valle-Gálvez, Alejandro Del 'Refugee crisis and migrations at the gates of Europe: Deterritoriality, extraterritoriality and externalization of border controls' (2019) 7 *Paix et sécurité internationals/ Journal of International Law and International Relations* 117.