Is Italy internationally responsible for the gross human rights violations against migrants in Libya?

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1. *Introduction*

It is widely known that many migrants coming from Sub-Saharan Africa or the Middle East try to reach the European shores through Libya. It is also widely known that, before being able to set sail, many of them are halted and detained for a long time in Libya, where they suffer from gross human rights violations. In Libya migrants die of thirst, hunger or illnesses, some are tortured or beaten to death while working as slaves, others are just casually murdered or simply disappear. Rape and sexual assault are part of the migrants' daily routine. Detained migrants are often auctioned if their families do not pay a ransom for their release. All this is documented not only by NGOs, journals, and newspapers but also by the International Organisation for Migration and some other institutional international bodies, such as the UN High Commissioners for Human Rights and for Refugees or the Office of the Prosecutor of the ICC.[1]

In the next pages, I will try to shed some light on the role that Italy plays in said situation. Basically, the aim is to address the question as to

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[1] Three preliminary caveats apply. First, for reasons of fluency, I will use the term 'migrants' to encompass economic migrants, asylum seekers and in general all foreigners who are in Libya and whose aim is to set sail from Libya and land on European shores. Second, most of the documents mentioned in the text are well-known and very easily accessible online at the relevant official websites. When necessary, these documents will be considered and quoted in the following footnotes. Third, the information provided in this paper has been lastly updated in December 2018.

whether Italy is somehow internationally responsible for the gross human rights violations inflicted on migrants in Libya, namely while migrants are under Libyan jurisdiction. I will attempt to answer this question bearing in mind above all the general frame of the *Draft Articles on Responsibility of States for International Wrongful Acts* (DARSIWA) adopted in 2001 by the UN International Law Commission (ILC).[2]

The starting point of this paper will be the current Italian strategy to counter migration, founded on outsourcing border control to Libya. In the context of this strategy, while it is possible to assume the international responsibility of Libya for the perpetration of gross human rights violations to the detriment of migrants therein halted and detained, the role of Italy seems ambiguous. On the one hand, Italy only has a 'contactless control' of migration flows.[3] It means that Italy does not directly commit any human rights violation.[4] As a result, it may be difficult to

[2] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN Doc A/56/10 (2001).

[3] The expression 'contactless control' is employed by V Moreno-Lax and MG Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows', in S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar forthcoming) available at <www.ssrn.com> 1-26.

[4] It seems difficult that, in this context, Italy is held responsible because of the extraterritorial applicability of the ECHR, unless the ECtHR offers a broader interpretation of this legal concept. Indeed, that could happen in the coming months. In May 2018, a coalition consisting of NGOs and scholars filed an application concerning the alleged Italian responsibility for the deaths of twenty asylum seekers off the coast of Libya and the *refoulement* of many others to Libya in November 2017. The Italian Maritime Rescue Coordination Centre was somehow involved in the events. As an instance of strategic litigation, the aim of the application seems to have the ECtHR apply the *Kebe* precedent (*Kebe and Others v Ukraine* App no 12552/12 (ECtHR, 12 January 2017), notwithstanding the clear differences between the two cases. In particular, the ECtHR is expected to state that Italy has the 'jurisdiction to decide' whenever the Italian Maritime Rescue Coordination Centre keeps in touch with the Libyan coast guard in the context of rescue operations in the Mediterranean Sea and that Italy retains control over migrants also when it equips or trains the Libyan organs that concretely commit gross human rights violations against migrants. See F De Vittor, 'Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di "accordi" per il controllo extraterritoriale della migrazione' (2018) 12 Diritti umani e diritto internazionale 20-22; M Baumgärtel, 'High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan "Pullback" Polices to the European Court of Human Rights' (2018) EJIL: Talk!. According to another view, in the context here under examination, the doctrine of positive obligations (as developed in the case-law of the ECtHR) could be a useful tool to address the direct

consider the possibility that Italy and Libya are both internationally responsible for the same wrongful acts or other circumstances of shared international responsibility.[5] On the other hand, as observed hereinafter, it is a matter of fact that Italy renders its aid and assistance to the Libyan authorities that commit the abovementioned atrocities.

Therefore, one might be under the impression that Italy is internationally responsible for complicity with Libya. In order to confirm this impression, I will focus on the norm on State responsibility for complicity in the *commission* of an internationally wrongful act of another State as codified in Article 16 DARSIWA. In particular, I will verify whether the elements defining State responsibility for complicity come into consideration in the case here under discussion.

As I will explain, it is very likely that the aid and assistance provided by Italy also facilitate Libya in *maintaining* the situation created as a result of the gross human rights violations against migrants. That furthermore could entail the (at least implicit) recognition by Italy of that situation as lawful. Should that be the case, Italy would violate the obligations codified in Article 41(2) DARSIWA weighing on all States in the event of serious breaches by a State of peremptory norms of general international law. I will also dwell on that.

international responsibility of Italy in the ECHR system: see A Liguori, 'The Externalization of Border Controls and the Responsibility of Outsourcing States under the European Convention on Human Rights' (2018) 101 Rivista di diritto internazionale 4, 1228-1237. Be that as it may, it would not be an easy task for the ECtHR to find the direct responsibility of Italy by means of the doctrine of positive obligations referred to situations occurring exclusively in the Libyan territory, as those here described.

[5] Art 47 DARSIWA concerns the case of a plurality of responsible States for the same internationally wrongful acts. See ML Padelletti, *Pluralità di Stati nel fatto illecito internazionale* (Giuffré 1990). This concept has been developed and updated through the new notion of 'shared international responsibility'. On this notion, see the seminal book by A Nollkaemper, I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014).

2. *Italy and the strategy of outsourcing border control to Libya to counter migration flows in the central Mediterranean Sea*

As is well-known, since when Kaddafi's regime collapsed in Libya, there has been a migration crisis in the Central Mediterranean Sea.[6] Because of its geographical position, Italy is very often the first EU entry State for migrants coming from Libya. So, pursuant to the 'Dublin III' Regulation, Italy bears the heaviest legal and social burdens deriving from such a crisis.[7] Meanwhile, Italy is also subject to political and 'emotional' repercussions. Both big tragedies and local incidents connected with migration gain great visibility in the everyday debate. As a consequence, the control of migration flows in the Central Mediterranean Sea currently seems to have become the main political goal of Italy.

To achieve this goal according to international law, Italy cannot intercept migrants while they are on the high seas and push them back to their transit countries if, once there, they run the risk of suffering from gross human rights violations. As the ECtHR stated in its *Hirsi* judgment, Italy has to abide by the international obligation of *non-refoulement* whenever migrants are under its control, even on the high

[6] Before leaving for Europe, migrants usually converge around Libya not only to hopefully take advantage of the Libyan troubled political situation, but also for many other reasons, as explained in the report no 179 'How Libya's Fezzan Became Europe's New Border' issued by the NGO International Crisis Group.

[7] The first EU Member State entered by a migrant shall examine the relevant application for international protection pursuant to art 13 of Regulation (EU) no 604/2013 'Dublin III'. This provision clearly entails a structural imbalance among EU Member States whose borders coincide with the EU external borders and the other EU Member States. For in-depth studies of this subject, mostly developed with regard to art 80 TFEU, concerning the solidarity principle among EU Member States in the migration field, see MI Papa, 'Crisi dei rifugiati e principio di solidarietà ed equa ripartizione delle responsabilità tra gli Stati membri dell'UE' (2016) 14 Costituzionalismo.it 286-324, and G Morgese, *La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo* (Cacucci 2018). A recast of the 'Dublin III' Regulation is now under examination: see *Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)* COM/2016/0270 final (4 May 2016). The European Parliament expressed its position on 6 November 2017. If adopted, it would not include the rule of the 'first entry State'.

seas.[8] Moreover, Italy cannot close its harbours to vessels carrying migrants saved from shipwrecks. Regardless of the current political propaganda, Italy must respect its relevant international obligations.[9]

Thus, since approximately 2014, Italy has been strengthening an alternative strategy against migrants, consisting in outsourcing (or externalising) the control of Italian borders to Libya[10]. The result of this strategy is that the Libyan Government (and the many actors who hold local power in Libya and are also associated in this strategy)[11] acts to stop migrants trying to set sail towards the European shores and to bring them into Libyan reception centres, mostly managed by the Department to Counter Illegal Migration (DCIM) of the Libyan Ministry of Interior.[12] In return, Italy sends military instructors to train the Liby-

[8] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

[9] As known, since 1 June 2018, when the current Government took office, Italy has been preventing rescue vessels from entering Italian harbours and disembarking the migrants that they have saved from shipwrecks. This situation contrasts with many international obligations. For a list and an assessment of said international obligations, see P De Sena, F De Vittor, 'La "minaccia" italiana di "bloccare" gli sbarchi di migranti e il diritto internazionale' (2017) SIDI Blog, whose considerations can be applied to the current frame, although stemming from previous events. For different views, see M Fink, K Gombeer, 'The Aquarius Incident: Navigating the Turbulent Waters of International Law' (2018) EJIL: Talk!, whose legal analysis of the well-known Aquarius incident could be referred also to the following similar cases.

[10] The Italian strategy of outsourcing border control is shaped on the Australian model. See interestingly F Mussi, N Feith Tan, 'Comparing Cooperation on Migration Control. Italy-Libya and Australia-Indonesia' (2015) 10 Irish YB Intl L 87-108. For a discussion on the origin, meaning and functioning of the Italian strategy of outsourcing border control, see G Pascale, 'Esternalizzazione delle frontiere in chiave antimigratoria e responsabilità internazionale dell'Italia e dell'UE per complicità nelle *gross violations* commesse in Libia' (2018) 13 Studi sull'integrazione europea 413-422, and the bibliography therein. For a political and philosophical analysis, also see G Campesi, 'Italy and the Militarization of Euro-Mediterranean Border Control Policies' in E Borroughs, K Williams (eds), *Contemporary Boat Migration. Data, Geopolitics and Discourses* (Rowman & Littlefield forthcoming) available at <www.academia.edu> 1-24.

[11] At present, as known, many militias dispute the control over the Libyan territories, while the official Government rules only over a small part of Tripolitania. See online the 'Libya Country Profile' of BBC or the 'World Report 2018: Libya' of Human Rights Watch.

[12] The Libyan reception centres have been instituted under Decree no 145/2012, *Adopting the Organisational Structure and Powers of the Interior Ministry and the Organisation of its Administrative Units*, and confirmed with Decree no 386/2014, *Establishing the Anti-Illegal Immigration Agency*. The Libyan legislation can be read in English at

an coast guard and border guard; gives assistance to complete the Libyan border control system; finances the Libyan reception centres and the training of the personnel thereof. In short, Italy has so far tried to elude any international responsibility, severing any direct 'contact' with migration flows coming from Libya. This strategy is consistent with EU migration policies.[13]

The main instrument of the Italian strategy of outsourcing border control to Libya is the 2017 Memorandum of Understanding (MoU).[14] This is a bilateral agreement, stipulated by Italy and Libya pursuant to a simplified procedure and entered into force at the moment of signing.[15] In brief, according to the MoU, Libya commits to turning itself into a gatekeeper to prevent migrants from leaving for Europe, while Italy undertakes to support Libya to this end and to steer additional funds to Libya, mainly through the Italian Fund for Africa.[16]

At Libya's request, Italy has also deployed a support mission to the Libyan coast guard in charge of countering irregular migration and

<www.security-legislation.ly>. The map of the Libyan reception centres is periodically updated by the International Organisation for Migration at its official website.

[13] Many studies deal with EU migration policies. See F Cherubini (ed), *Le migrazioni in Europa. UE, Stati terzi e* migration outsourcing (Bordeaux 2015), and V Moreno-Lax, *Accessing Asylum in Europe. Extraterritorial Border Control and Refugee Rights under EU Law* (OUP 2017). See also Human Rights Watch, 'No Escape from Hell. EU Policies Contribute to Abuse of Migrants in Libya' (21 January 2019).

[14] *Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana*, signed in Rome on 2 February 2017 by the Italian Prime Minister and the Chairman of the Presidential Council of the Government of National Accord of Libya. The official text is available in Italian and Arabic at the online treaties archive (ATRIO) of the Italian Ministry of Foreign Affairs. Many unofficial translations in English are available online.

[15] The MoU is an international agreement of both political and financial character. As such, it should have been stipulated following the solemn procedure enshrined in art 80 of the Italian Constitution, namely with a parliamentary authorization to the presidential ratification. Since the Government did not involve the Parliament in the stipulation process, four members of the Camera dei Deputati complained of a conflict between the legislative and the executive powers before the Corte Costituzionale. The petition has recently been dismissed on procedural grounds. In particular, the Corte Costituzionale has underlined that the whole Camera dei deputati (not some of its members) should have filed the petition. See ordinanza no 163 (19 July 2018).

[16] The Italian Fund for Africa has been instituted by virtue of art 1(621), Legge no 232/2016 (budget law 2017). It is managed by the Ministry of Foreign Affairs. Italy undertakes to steer funds to Libya also through the sponsorship of private investments.

human trafficking and smuggling at sea.[17] Moreover, it is well-known that the current Italian Minister of Interior is strongly 'fighting' all NGOs seeking to operate in the Central Mediterranean Sea and has not repudiated the Code of Conduct (adopted under the aegis of his predecessor) that indirectly limits interventions of NGO vessels in the same area: it seems that the aim is to foster the role of the Libyan coast guard in situations of migrants shipwrecking in order to let Italy escape any contact with migrants.[18] Furthermore, Italy takes a part in some EU operations to counter human trafficking and smuggling in the Mediterranean Sea.[19] Since Italy started strengthening its strategy of outsourcing border control to Libya, the number of migrants arrived from Libya has decreased.[20]

[17] See the Stenographic Records of the sessions of the Camera dei Deputati (at 48) and of the Senato della Repubblica (at 71), both held on 2 August 2017, concerning the debate on the deployment of the support mission to the Libyan coast guard and its authorization.

[18] As regards the action of the current Minister, see above (n 9) and the corresponding text. The Code of Conduct, adopted on 31 July 2017, whose official name is *Codice di condotta per le ONG impegnate nelle operazioni di salvataggio dei migranti in mare*, is available in Italian at the website of the Italian Ministry of Interior. For the sake of precision, I underline that the limitation of the action of NGOs in the Mediterranean Sea is to some extent an indirect effect and not a stated objective of the Code of Conduct. For details on different problems arising from the Code of Conduct, see F Mussi, 'Sulla controversa natura giuridica del codice di condotta del Governo italiano relativo alle operazioni di salvataggio dei migranti in mare svolte da organizzazioni non governative' (2017) 10 Osservatorio sulle fonti 3, 1-10, and F Ferri, 'Il Codice di condotta per le ONG e i diritti dei migranti: fra diritto internazionale e politiche europee' (2018) 12 Diritti umani e diritto internazionale 1, 189-198.

[19] In particular, Italy chairs EUNAVFOR MED Operation Sophia (see the zoom-in 'EUNAVFOR MED Operation Sophia One Year After: An Effective Measure to Tackle Human Trafficking and Migrant Smuggling Networks?' edited by F De Vittor, F Mussi and published in this Journal in August 2016). The role of Italy in this operation has been very recently criticised by some of the other actors involved, eg Germany and the EU Commission.

[20] Suffice it to have a look at the comparative data periodically published on the website of the Italian Ministry of Interior, section 'Dati e statistiche degli sbarchi e dell'accoglienza dei migranti', confirmed by the 'EU Regular Overviews on Migration-Related Fundamental Rights Concerns', available at the website of the EU Fundamental Rights Agency.

3. *International responsibility of Libya for the gross human rights violations against migrants therein halted and detained and the ambiguous role of Italy*

As already pointed out in the introduction, migrants halted and detained in Libya suffer from gross human rights violations. It is not difficult to prove that Libya is internationally responsible for that.

Firstly, the human rights violations perpetrated against migrants in Libya are to be attributed to Libya. Indeed, said violations are committed by members of the coast guard and border guard and by the DCIM personnel, namely Libyan state organs that operate on behalf of Libya. Even if one assumed that these organs act *ultra vires* whenever they violate the human rights of migrants, Libya would be internationally responsible anyway, since the norm codified in Article 7 DARSIWA would apply.

Secondly, Libya complies with neither the customary international norm generally prohibiting gross human rights violations nor those protecting specific human rights, such as the right not to be enslaved and the right not to be tortured. Libyan authorities also violate some human rights conventions that the former Libyan Government ratified and that are still binding on Libya notwithstanding the regime change which occurred during the Arab Spring.[21]

Italy refuses to take any responsibility for the gross human rights violations inflicted on migrants in Libya. In the opinion of the Italian Government, such violations do not take place under Italian jurisdiction or as a consequence of any Italian decision to push migrants back to Libya. Italian authorities emphasise that Libyan state organs halt irregular migrants, bring them into the Libyan reception centres and *maybe* violate their human rights. In any case, they argue that Libya is entitled to prohibit irregular migrants from freely circulating in its terri-

[21] See the 1926 *Convention to Suppress the Slave Trade and Slavery* (as amended in 1952 under the auspices of the UN); the 1966 *UN Covenant on Civil and Political Rights*; the 1981 *African Charter on Human and Peoples Rights*; the 1984 *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the 2000 *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*; the 2004 *Arab Charter on Human Rights*. The applicability of said treaties to Libya, notwithstanding the regime change after the Arab Spring, is explained by C Focarelli, *Trattato di diritto internazionale* (UTET 2015) 425-431.

tory due to the unlawfulness of their entrance and presence in the Country. As specifically regards the strategy of outsourcing border control to Libya, Italy denies that such a strategy supports Libyan authorities that perpetrate atrocities against migrants. On the contrary, Italy stresses that the main instrument of this strategy, namely the 2017 MoU, contributes to strengthening the protection of the human rights of migrants in Libya, since under Article 5 Libya commits to respecting any international obligation on the protection of human rights.[22]

Although, at a first glance, the Italian arguments seem plausible, one also has to consider the critical reports that several international institutions, NGOs, and newspapers have recently published concerning the Italian migration policies. Such reports aim at denouncing the aid and assistance with which Italy supplies Libya in order to implement its strategy of outsourcing border control. In some documents, it is clearly argued that Italy is internationally responsible, as this strategy contributes to the human rights violations that Libya perpetrates to the detriment of migrants.[23]

[22] As for the position of the former Italian Government, see 'Italian Minister Defends Method That Led to 87% Drop in Migrants from Libya' The Guardian (7 September 2017); 'Italy's Libyan Vision Pays off as Migrant Flows Drop' Politico (8 October 2017). Even if the current Italian Government lets the media pay attention mainly to its policy of preventing NGO vessels from disembarking shipwrecked migrants on Italian shores, it concretely shares the position of the former Government and continues with the outsourcing partnership with Libya. See 'In the Hands of the Libyan Coast Guard: Pushback by Proxy' Open Migration (28 June 2018); 'Salvini e Di Maio corteggiano l'uomo forte di Tripoli' Huffington Post (5 July 2018); 'Fewer Migrants Are Making It to Europe. Here's Why' Washington Post (23 July 2018).

[23] For instance, see the Final Report of the Panel of Experts on Libya Established by the UN Security Council pursuant to Resolution 1973 (2011) UN Doc S/2017/466 (1 June 2017); the Letter by the Commissioner for Human Rights of the Council of Europe to the Italian Ministry of Interior, CommHR/INM/sf0345-2017 (28 September 2017); the Report of the UN High Commissioner for Human Rights, 'UN Human Rights Chief: Suffering of Migrants in Libya Outrage to Conscience of Humanity' (14 November 2017); the Fifteenth Report of the Prosecutor of the ICC on Libya (9 May 2018). Furthermore, see significantly Oxfam, 'You Aren't Human Any More' (9 August 2017); Doctors without Borders, 'Libya: Open Letter – European Governments Are Feeding the Business of Suffering' (6 September 2017); Amnesty International, 'Libya's Dark Web of Collusion' (11 December 2017); Human Rights Watch (n 13). Then, see 'Perché l'accordo tra Italia e Libia sui migranti è sotto accusa' Internazionale (29 November 2017); 'Giochi pericolosi: delocalizzare in Africa le frontiere UE' Left (7 August 2018).

In wider terms, in the view of the destination Country, the strategy of outsourcing border control does not seem in itself to conflict with international law, at least when it is implemented in cooperation with a 'safe' transit Country.[24] The concept of 'safe' transit Country is legally controversial.[25] However, according to the majority view in literature, a Country can be considered 'safe' if it examines asylum claims, does not violate the obligation of *non-refoulement* and respects the human rights of migrants.[26] Without any doubt, Libya is not a 'safe' transit Country, since it does not comply with the abovementioned requirements. As already said, migrants who are halted in Libya suffer from human rights violations committed by public organs. In addition, Libya does not recognise any right to asylum claim and is not a party to the 1951 Geneva *Convention on the Status of Refugee*. Moreover, Libya qualifies irregular entrance into its territory as a crime to be punished with imprisonment.[27] In its *Hirsi* judgment, while declaring the responsibility of Italy *inter alia* for the breach of the obligation of *non-refoulement*, the ECtHR expressly stated that Libya is not a 'safe' Country.[28]

As a matter of fact, when Italy aids and assists Libya with the aim of implementing its strategy of outsourcing border control, it is cooperating in the migration field with a transit Country that is not 'safe'. That seemingly entails the *complicity* of Italy with the Libyan authorities that

[24] See F De Vittor, 'Il diritto di traversare il Mediterraneo … o quantomeno di provarci' (2014) 8 Diritti umani e diritto internazionale 76-80.

[25] The adoption of a Regulation providing more accurate criteria to define the concept of 'safe third Country' is currently under debate among EU Member States: see arts 36 and 45, *Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU*, COM(2016) 467 final (13 July 2016). Interestingly, according to the French Conseil d'État, opinion of 16 May 2018, available at <www.gisti.org>, the Regulation would be inconsistent with the French Constitution.

[26] See M Hunt, 'The Safe Country of Origin Concept in European Asylum Law. Past, Present and Future' (2014) 26 Intl J Refugee Law 500-535; MT Gil-Bazo, 'The Safe Third Country Concept in International Agreements on Refugee Protection. Assessing State Practice' (2015) 33 Netherlands Quarterly of Human Rights 42-77; G Cellamare, 'In tema di Paese "sicuro" nel Sistema europeo di asilo', in E Triggiani, F Cherubini, I Ingravallo, E Nalin, R Virzo (eds), *Dialoghi con Ugo Villani* vol I (Cacucci 2017) 417-424.

[27] See Decree no 247/1989, *Executive Regulation of Law no. 6/1987 on Organising the Entry, Residence, and Exit of Foreigners in Libya*.

[28] *Hirsi Jamaa and Others v Italy* (n 8) paras 97-138.

violate the human rights of migrants.[29] In order to clarify from a legal viewpoint the role and the possible international responsibility of Italy in such situation, it is now time to pay attention to the relevant international norms.

4. *Notion of State Responsibility for complicity in the commission of an internationally wrongful act*

In many domestic orders, criminal law defines complicity as a form of participation or involvement in the crime of others. As a matter of principle, the act of the person abetting the crime does not amount to a crime itself. This act entails criminal consequences only inasmuch as it is linked to the crime of others.[30] A similar rationale is at the basis of the international norm concerning State responsibility for complicity.[31] A State is internationally responsible for complicity when it carries out an act that, albeit lawful, represents a form of aid or assistance in the commission of a wrongful act by another State. Such rationale shapes international responsibility for complicity as 'derivative' or 'ancillary', since that depends on the 'main' or 'direct' international responsibility.[32]

[29] A similar perspective was suggested by T Gammeltoft-Hansen, 'The Externalisation of European Migration Control and the Reach of International Refugee Law', in E Guild, P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff Publishers 2012) 291-297, taking the cue from the 2008 *Trattato di amicizia, partenariato e cooperazione tra Italia e Libia* (also known as Benghazi Treaty), which now constitutes the basis of the 2017 MoU according to the preamble of the latter.

[30] See for instance J Gardner, 'Complicity and Causality' (2007) 1 Criminal L and Philosophy 127-141.

[31] DARSIWA (n 2), Introductory Comment to Chapter Four, 64-65. On international responsibility for complicity, see extensively HP Aust, *Complicity and the Law of State Responsibility* (CUP 2011); M Jackson, *Complicity in International Law* (OUP 2015); V Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Hart Publishing 2016); G Puma, *Complicità di Stati nell'illecito internazionale* (Giappichelli 2018). For further elaboration, see E de Wet, 'Complicity in the Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request' (2018) 67 ICLQ 287-313.

[32] See C Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 281-289; V Lanovoy, 'Complicity in an International Wrongful Act' in A Nollkaemper, I Plakokefalos (n 5) 134-168.

The ILC has included the international norm on State responsibility for complicity in Article 16 DARSIWA.[33] Pursuant to this provision, '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'. According to the ILC, Article 16 would apply for instance in the case of a State that makes its military bases available to another State to prepare airstrikes against a third State in breach of international law.[34] By the same token, Article 16 would be relevant when the territorial State supports the foreign State agents abducting a third State citizen, as usually happens in the practice of extraordinary renditions.[35] In these examples, the State providing the military bases and the territorial State would both be responsible for complicity in the wrongful acts of other States. Such responsibility can arise for any kind of aid or assistance (commercial, financial, logistic, military or political), even when granted by means of treaties concluded to support the wrongdoer.[36] Instead, it is not clear whether a State is responsible for complicity when its aid or assistance depend on an omission.[37]

Article 16 finds its roots in a draft provision submitted for the first time in the seventh report of Special Rapporteur Roberto Ago with the ambition

[33] Art 16 is included in DARSIWA, Part One, Chapter Four (articles 16-19), concerning the responsibility of a State in connection with the wrongful acts of another State. Arts 17 and 18 deal with the responsibility of a State respectively for direction and control and for coercion exercised over the State that commits an internationally wrongful act. These articles do not apply *prima facie* to the case here under examination. Art 19 states that Chapter Four is without prejudice to international responsibility under other DARSIWA provisions.

[34] DARSIWA (n 2) Comment to art 16, 66-67 para 8.

[35] This example is drawn from P Pustorino, 'Responsabilità internazionale degli Stati', *Enciclopedia del diritto – Annali VII* (2014) 915. Also see *El-Masri v Former Yugoslavian Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012) para 97 *et passim*, and *Nasr et Ghali c Italie* App no 44883/09 (ECtHR, 23 February 2016) para 185 *et passim*.

[36] See B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 Revue belge de droit international 374.

[37] But see AAD Brown, 'To Complicity… and Beyond! Passive Assistance and Positive Obligations in International Law' (2016) 27 Hague YB Intl L, 133-152: this author tries to show that State responsibility for complicity depends not only on omissions, but also on passive assistance, namely assistance given unknowingly.

to apply the concept of 'complicity', as borrowed from domestic criminal law, in international law.[38] Although Ago suggested this draft provision only as an encouragement to the progressive development of a correspondent customary norm,[39] some doubts arose during the debate in the ILC with regard to the possibility of properly including the concept of 'complicity' in international law.[40] Eventually, instead of the word 'complicity', the ILC preferred the locution 'aid or assistance',[41] which Special Rapporteur James Crawford confirmed in 2001 in final Article 16 DARSIWA.[42]

[38] R Ago, 'Seventh Report on State Responsibility' (1978) YB Intl L Commission, vol I, 53-60. Art 16 corresponds to the then draft art 25, entitled 'Complicity of a State in the Internationally Wrongful Act of Another State'.

[39] R Ago (n 38) 56.

[40] As already outlined, the concept of 'complicity' belongs to domestic criminal law and is not a term of art in public international law. It might be used in its original meaning in criminal international law but – notwithstanding its inspirational rationale – it cannot fully describe a relationship among States in the law of international responsibility. This is the reason why eventually the ILC preferred using the locution 'aid or assistance' in art 16. In any case, above all for reasons of fluency, scholars usually speak about 'international responsibility for complicity' instead of 'international responsibility for aiding and assisting'. For further explanations, see HP Aust (n 31) 9-10; A Bufalini, 'La responsabilità internazionale dello Stato per atti di genocidio: un regime in cerca di autonomia' (2015) 9 Diritti umani e diritto internazionale 574-579; G Puma (n 31) 14-16.

[41] (1978) YB Intl L Commission, vol II, 98-105. At first glance, the locution 'aid or assistance' seems to indicate two different links between the States involved, one (aid) stronger than the other (assistance). Yet, it is not clear if there is any real difference. No explanation is found in the ILC *travaux préparatoires* or in State positions before the ILC, the only exception being the uncertainties of the UK: see (2001), 'State Responsibility. Comments and Observations Received from Governments' UN Doc A/CN.4/515, 52. The same locution is used in art 41(2) DARSIWA without any clear explanation, too.

[42] J Crawford, 'Second Report on State Responsibility' (1999) YB Intl L Commission, vol II, 49-54. For a historical approach to art 16, see N Schrijver, 'Regarding "Complicity in the Law of International Responsibility" from Bernard Graefrath (1996-II): The Evolution of Complicity in International Law (2015) 48 Revue belge de droit international 444-451. It is noteworthy that, even after the final adoption of DARSIWA in 2001, art 16 continues drawing criticism. In particular, in the view of some scholars, art 16 would describe situations already regulated in international law by primary rules. They argue that the notions of 'due diligence', 'good faith', or 'reasonableness' are almost always capable of explaining the precedents contemplated from the standpoint of complicity. See O Corten, 'La "complicité" dans le droit de la responsabilité internationale: un concept inutile?' (2011) 57 Annuaire français de droit international 57-84; O Corten, P Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the *Corfu Channel* Case' in K Bannelier, T Christakis, S Heathcote (eds), *The ICJ and the Evolution of International Law* (Routledge 2011) 314-334. In this con-

Despite the abovementioned initial idea of Special Rapporteur Roberto Ago, it seems that the norm in Article 16 is nowadays gaining a customary status.[43] It is true that few States had expressed this belief before the ILC, and that the ILC therefore decided not to adopt a clear position on this point.[44] Nevertheless, subsequently, in its *Genocide* judgment, the ICJ declared that the provision enshrined in Article 16 corresponds to a customary international norm.[45]

Although limited, the current State practice reflects the ICJ position. The customary character of the norm on State responsibility for complicity has been quoted by the Mucyo Commission, instituted by the Rwandan Parliament to investigate the alleged international responsibility of France in the 1994 Rwandan genocide.[46] Moreover, some States (Austria, Turkey, UK, US) have alluded to the customary status of the norm codified in Article 16 to suggest that other States (first of all, Iran and Russia) supporting the combatants in the ongoing Syrian conflict are internationally responsible for complicity in the violations of humanitarian international law committed in that context.[47] In the end, it is also worth noting that the German Bundesverfassungsgericht had

text, also see A Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?' (2018) 60 German YB Intl L (forthcoming) available at <www.ssrn.com> 8-19. In addition, with specific regard to the case here under discussion, see the suggested application of the doctrine of positive obligations: A Liguori (n 4) 1228-1237.

[43] Many scholars currently share the opinion that the norm in art 16 DARSIWA has already acquired a customary status. See HP Aust (n 31) Chapter Four. Also see G Nolte, HP Aust, 'Equivocal Helpers – Complicit States, Mixed Messages, and International Law' (2009) 58 ICLQ 1, 7-10; V Lanovoy (n 32) 135; M Jackson (n 31) 147-173; G Puma (n 31) 29-59; E de Wet (n 31) 289-290.

[44] DARSIWA (n 2), Comment to art 16, 66 para 2. The list of States that admitted before the ILC the customary nature of the norm being codified in art 16 can be read in HP Aust (n 31) 173-174.

[45] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 paras 419-420.

[46] Commission nationale indépendante chargée de rassembler les éléments de prévue montrant l'implication de l'État français dans la préparation et l'exécution du génocide perpétré au Rwanda en 1994, Rapport conclusif (5 August 2008) available only in French at <www.lanuitrwandaise.org>.

[47] Austria: 'Austrian Position on Arms Embargo in Syria' The Guardian (15 May 2013); Turkey: 'Turkey Accuses Russia of Supplying Syria with Munitions' The Guardian (11 October 2012); UK and US: UN Doc S/PV.7777 (25 September 2016) 5-9. Also see E de Wet (n 31) 294-295.

already ascertained in 2003 the customary nature of the norm in Article 16.[48]

5. *Elements of State Responsibility for complicity in the commission of an internationally wrongful act*

The *connection* between the lawful act of the assisting State and the wrongful act of the assisted State is the first and preliminary element of the international responsibility for complicity. The lawful act of the assisting State is to be intended as a 'significant facilitation' in the commission by the assisted State of the wrongful act. Should the assistance be essential to implement the wrongful act, the assisting State would be directly responsible, as would the assisted State. The ILC highlights this point.[49]

The *opposability* of the breached international obligation is the second element of State responsibility for complicity. Article 16(b) precisely states that such form of responsibility will arise only if the assisted State and the assisting State are both bound by the same international norm the violation of which is ascertained.[50]

The *knowledge* of supporting an international wrongful act is the third element of State responsibility for complicity. More to the point, under Article 16(a), this kind of responsibility can be invoked only if it is proved that the assisting State has knowingly facilitated the assisted

[48] *Al-M* (5 November 2003) 2 BVerfGE 1506/3 [47]. The official English translation can be found at the website of the German Bundesverfassungsgericht. For comments on this case, see A Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 AJIL 780; M Jackson (n 31) 151; E de Wet (n 31) 4.

[49] See DARSIWA (n 2), Comment to art 16, 66 para 5. Also see the even more accurate declaration of ILC Member N Ushakov (1978) YB Intl L Commission, vol I, 239, para 11: 'while participation must necessarily be of an active and direct character, [complicity] must not be too direct, because then the participant […] becomes a co-author of the offence, and that goes beyond complicity'.

[50] The element of opposability draws criticism. Some authors argue that it does not belong to the customary international norm on State responsibility for complicity and that its inclusion in art 16 could work as a safety clause to the benefit of the complicit State. For specifications, see extensively G Puma (n 31) 120-145. Also see the declaration of ILC Member CP Economides, (1999) YB Intl L Commission, vol I, 68, para 5. Special Rapporteur James Crawford anyway confirmed this element, which he connected to the rule *pacta tertiis neque nocent neque iuvant*: J Crawford (n 42) 51.

State in its wrongdoing.[51] The interpretation of Article 16(a) is not clear, since the degree of the required knowledge is not defined.[52] In its *Genocide* judgment, the ICJ interpreted this element as 'full' knowledge with the aim of determining whether a case of international complicity had occurred.[53] However, Article 16 DARSIWA was not directly relevant to that case and was taken into account only for comparative purposes. Given that the ICJ was examining the assistance that a foreign State had allegedly granted to some individuals in order to perpetrate the international crime of genocide, it assessed the element of knowledge with regard to Article III(e) of the 1948 *Convention on the Prevention and Punishment of Genocide* prohibiting complicity in genocide.[54] Perhaps, in other cases, where a specific norm was not at stake, the element of knowledge could be proved even in the event that the assisting State should have reasonably known that its lawful act was facilitating the wrongful act of the assisted State. This interpretation would help avoid the very common situations of 'wilful blindness', that is to say the deliberate efforts by the assisting State to escape the clear knowledge of the international wrongfulness on the part of the assisted State.

Eventually, in its comment to Article 16 the ILC lists *intention* among the elements determining international responsibility for complicity. In order to apply Article 16, the ILC states that 'the aid or assistance must be given *with a view* to facilitating the commission of the wrongful act', adding that 'a State is not responsible for aid or assistance under Article 16 unless the relevant State organ *intended*, by the

[51] According to A Seibert-Fohr (n 42) 3-8, 19-22, when a State contributes without knowledge to violations of international law by another State, responsibility for participation in the wrongful acts arises anyway. It would be more a matter of international responsibility for violation of the obligation of due diligence than a matter of international responsibility for complicity. In other words, whereas due diligence is usually considered in terms of the obligation to take action in order to prevent others from committing wrongful acts, Seibert-Fohr argues that it is also applicable to indirect forms of participation, such as contributions to a violation without knowledge.

[52] For instance, according to HP Aust (n 31) 235, art 16(a) requires a level of knowledge 'approaching wrongful intent'. Instead, T Gammeltoft-Hansen, JC Hathaway, '*Non-refoulement* in a World of Cooperative Deterrence' (2014) 53 Columbia J Transnational L 280, suggest a broader reading of this element, interpreted as only requiring a 'constructive knowledge' on the part of the assisting State.

[53] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 45) para 432.

[54] ibid paragrahs 419-420.

aid or assistance given, to facilitate the occurrence of the wrongful conduct'.[55] Nevertheless, there is no trace of the element of intention in the text of Article 16. In view of the discrepancy between the text of Article 16 and the ILC comment to this same article, a problem emerges as to the alleged role of intention in international responsibility for complicity.[56]

The reference to the element of intention in the ILC comment to Article 16 but not in the text of Article 16 probably stems from a 'compromise'. Indeed, looking at the *travaux préparatoires* of DARSIWA, one infers that States' positions on this element diverged. For instance, while the representatives of the UK and the US argued that the element of intention had to be mentioned in the text of Article 16,[57] Dutch diplomats believed that the contiguous element of knowledge was enough.[58] The agents of Denmark and South Korea promoted some in-

[55] DARSIWA (n 2) Comment to art 16, 66 paras 3 and 5. Emphasis added.

[56] According to JB Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 British YB Intl L 113, there is no real difference between intention and knowledge when speaking about State responsibility for complicity. In a very similar view, H Moynihan, 'Aiding and Assisting: The Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility' (2018) 67 ICLQ 455-471, has recently claimed that the difference between these two elements is in practice more apparent than real. On the contrary, B Graefrath (n 36) 378, argues that intention and knowledge are autonomous concepts both to be met in the event of State responsibility for complicity, the only exception being complicity in the commission of a wrongful act affecting the International Community as a whole, where intention does not matter since a stronger rule about complicity would work. A solution akin to the one just mentioned is that of HP Aust (n 31) 235-249, who ultimately considers intention among the elements of State responsibility for complicity. Also see G Nolte and HP Aust (n 43) 16-18, who suggest that art 41(2) DARSIWA provides for separate obligations of non-assistance and non-recognition when a *ius cogens* norm is at stake. According to Nolte and Aust, intention is not required in art 41(2), in contrast to art 16, since a stronger rule about complicity is needed as far as serious breaches of peremptory norms of general international law are concerned. For further discussion on art 41(2) see section 7 of this paper. Albeit with reference to the specific case of complicity in genocide, P Palchetti, 'State Responsibility for Complicity in Genocide' in P Gaeta (ed), *The UN Genocide Convention – A Commentary* (OUP 2009) 389, believes that the sentence 'with the view to facilitating' in the ILC Comment to art 16 indicates the deliberate nature of the assistance given. For a critical and updated analysis of other doctrinal positions on the element of intention, see G Puma (n 31) 101-120, in whose opinion intention is not among the elements of State responsibility for complicity.

[57] (1998) YB Intl L Commission, vol II, pt 1, 129.

[58] (2001) YB Intl L Commission, vol II, pt 1, 52.

termediate solutions,[59] one of which was the abovementioned 'compromise' ultimately adopted.

In a nutshell, it seems that the customary international norm on State responsibility for complicity does not include the element of intention. In its *Genocide* judgment, the ICJ declared that the text of Article 16 as such corresponds to a customary international norm, without mentioning the element of intention.[60] Furthermore, the following Draft Articles on Responsibility of International Organisations (DARIO) do not consider the element of intention as regards the responsibility of international organisations for complicity.[61] What is more, as a former ILC member underlines, when discrepancies arise between Draft Articles and the relevant Commentaries in the context of the ILC works, greater attention should be paid to the former.[62]

6. *Yes, Italy is internationally responsible for complicity with Libya in the perpetration of gross human rights violations against migrants…*

Bearing in mind the Italian strategy of outsourcing border control to Libya in order to hinder the migration flows in the Central Mediterranean Sea,[63] it is now possible to demonstrate that Italy is internationally responsible for complicity with Libya in the perpetration of gross hu-

[59] ibid. Denmark advanced its position on behalf of the group of Scandinavian States.

[60] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 45) paras 419-420.

[61] *Draft Articles on Responsibility of International Organisations, with Commentaries*, UN Doc A/66/10 (2011). Art 14 deals with the responsibility of international organisations for complicity in the commission of an internationally wrongful act by a State or by another international organisation, while art 58 governs the situation of State responsibility for complicity in the perpetration of an internationally wrongful act by an international organisation. With regard to these two articles, Special Rapporteur Giorgio Gaja acknowledged how discordant the positions about the element of intention were. Thus, he chose not to focus on the topic. See G Gaja, 'Eighth Report on Responsibility of International Organisations' (2011) YB Intl L Commission, vol II, pt 1, 95-96, paras 45-49.

[62] See G Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2014) 85 British YB Intl L 10-20.

[63] See above, mainly sections 2 and 3.

man rights violations against the migrants therein halted and detained.[64] All the elements listed in Article 16 occur in this case.

Firstly, there is a connection between the conduct of Italy and the wrongdoing of Libya. More precisely, Italian authorities cooperate with the Libyan coast guard and border guard by sending them equipment, funding, trainers. It is then the Libyan coast guard and border guard that usually intercept migrants and violate their human rights. Furthermore, the building and the administration of the Libyan reception centres, as well as the training and payment of the personnel therein employed rely for the most part on resources coming from Italy. As a matter of fact, migrants are very often confined in these centres, which are actually internment camps. In these ways, Italy obtains that migrants wishing to set sail towards European shores are held in Libya, consistently with its strategy of outsourcing border control. However, at the same time, by way of its aid and assistance, Italy also significantly abets the Libyan state organs (namely the coast guard, the border guard, and the DCIM personnel) that inflict gross human rights violations on migrants.

Secondly, the element of opposability is also proved: the conduct of Libya entails the violation of customary and conventional international norms binding Italy too. Of course, both Italy and Libya are bound by the customary international norms prohibiting gross human rights violations and banning slavery and torture. Moreover, both States are parties at least to the following treaties: the 1926 *Convention to Suppress the Slave Trade and Slavery* (as amended in 1952); the 1966 *UN Covenant on Civil and Political Rights*; the 1984 *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the

[64] As sketched out above, section 2, Italy implements its strategy of outsourcing border control to Libya in concert with EU migration policies. The EU legal position is not assessed here, although the EU too is seemingly responsible for aiding and assisting Libya in the commission of human rights violations against migrants. In addition to the bibliography already cited above (n 13), see N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 Eur J Intl L 591-616; F De Vittor (n 4) 5-27; R Palladino, 'Nuovo quadro di partenariato dell'Unione europea per la migrazione e profili di responsabilità dell'Italia (e dell'Unione europea) in riferimento al caso libico' (2018) 2 Freedom, Security & Justice: European L Studies 124-128; G Pascale (n 10) 438-440; A Skordas, 'A "Blind Spot" in the Migration Debate? International Responsibility of the EU and Its Member States for Cooperating with the Libyan Coast Guard and Militias' (2018) EU Immigration and Asylum L and Policy <http://eumigrationlawblog.eu/>; V Moreno-Lax, MG Giuffré (n 3) 19-25.

2000 *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*.

Thirdly, Italy acts with knowledge of the circumstances while aiding and assisting Libya to stop migrants and to lead them into the Libyan reception centres with the aim of implementing its strategy of outsourcing border control to Libya. In a nutshell, Italy is aware of abetting Libya in the perpetration of gross human rights violations against migrants. After all, Italy has known that Libya is not a 'safe' transit Country since at least the date when the ECtHR delivered its *Hirsi* judgment.[65] Furthermore, in addition to the frequent and numerous journalistic inquiries, NGO reports, and documents of international organisations, even an Italian domestic court has recently ascertained that the DCIM personnel of the Libyan reception centres usually torture and enslave the migrants hosted there.[66]

Finally, there is no need to demonstrate the intention of Italy to facilitate Libya in the commission of atrocities against migrants.[67] As argued in the previous section, intention is not among the elements to be proved in order to determine the State responsibility for complicity.

7. *…and yes, Italy is also internationally responsible for aiding and assisting Libya in maintaining the situation resultantly created and for recognising that situation*

In the frame of DARSIWA, in addition to Article 16, Article 41(2) is also relevant in order to answer the question of whether Italy is some-

[65] See above, final part of section 3. In his concurring opinion to the *Hirsi* judgement, Judge Pinto de Albuquerque not only confirmed the responsibility of Italy in the frame of the ECHR, but also made reference to the possibility of an 'additional' international responsibility of Italy for complicity with Libya in the commission of gross human rights violations against the migrants pushed back to Libya. See *Hirsi Jamaa and Others v Italy* (n 8) Concurring Opinion of Judge Paulo Pinto de Albuquerque, 12-13.

[66] Corte d'Assise di Milano, sentenza no 10/17 (10 October 2017) available in (2018) Diritto penale contemporaneo <www.penalecontemporaneo.it>, with a comment by S Bernardi 'Una condanna della Corte d'Assise di Milano svela gli orrori dei "centri di raccolta e transito" dei migranti in Libia' 207-210.

[67] On the contrary, at least in this specific case, the element of intention should be proved or is someway proved according to F De Vittor (n 4) 26; R Palladino (n 64) 127-128; A Skordas (n 64).

how internationally responsible for the perpetration of gross human rights violations against migrants in Libya. The Italian strategy of outsourcing border control to Libya to hinder migration flows in the Central Mediterranean Sea not only entails that Italy is internationally responsible for complicity with Libya in the atrocities inflicted on migrants. It could also imply that Italy is internationally responsible for aiding and assisting Libya in maintaining the situation resultantly created and for recognising (at least implicitly) that situation as lawful.

Article 41(2) precisely states that 'no State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation'.[68] A preliminary caveat applies. Article 41(2) does not deal with State responsibility for complicity and does not concern the ancillary role of a State in the commission by another State of a serious wrongful act.[69] Article 41(2) just enumerates two obligations coming into consideration 'after the

[68] Art 41 is part of DARSIWA, Part Two, Chapter Three, entitled to *Serious Breaches of Obligations under Peremptory Norms of General International Law*. Art 41(1) enshrines the positive obligation of States to cooperate in order to bring to an end through lawful means any serious breach of a peremptory norm of general international law. Italy seemingly fulfils this (vague) obligation, being among the main sponsors of political and social stability in Libya. Art 41(3) underlines that the foregoing obligations are without prejudice to any other consequence of State responsibility included in DARSIWA Part Two or otherwise arising under international law. For insightful comments on art 41, see A Gattini, 'A Return Ticket to "Communitarisme", Please' (2002) 13 Eur J Intl L 1185-1195; A Gianelli, 'Le conseguenze delle gravi violazioni di obblighi posti da norme imperative tra norme primarie e norme secondarie' in M Spinedi, A Gianelli, ML Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti. Problemi e spunti di riflessione* (Giuffré 2006) 273-289; MI Papa, 'Autodeterminazione dei popoli e Stati terzi' in M Distefano (ed), *Il principio di autodeterminazione dei popoli alla prova del terzo millennio* (Wolters Kluwer/CEDAM 2014) 63-80. For specific comments on the two obligations of abstention in art 41(2), see M Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in J Crawford, A Pellet, S Olleson (n 32) 677-686, and NHB Jørgensen, 'The Obligation of Non-Assistance to the Responsible State' in J Crawford, A Pellet, S Olleson (n 32) 687-693. Jørgensen also examines the legal history of art 41(2) in the ILC long drafting process.

[69] Some scholars argue that articles 16 and 41(2) both deal with State responsibility for complicity. According to them, while art 16 would concern complicity only in 'ordinary' wrongful acts, art 41(2) would work as a sort of *lex specialis* focusing on complicity in serious breaches of obligations arising under peremptory norms of general international law. See G Nolte, HP Aust (n 43) 16-18; HP Aust (n 31) 326, 336-338; V Lanovoy (n 31) 106-109.

fact',[70] namely after a serious wrongful act has been committed and when a new situation prevails. The inclusion of this provision in DARSIWA Part Two, focusing on the content of State responsibility, confirms said interpretation. Hence, Article 16 is the only DARSIWA provision on State responsibility for complicity, to be applied regardless of the 'ordinary' or 'special' nature of a wrongful act.[71]

The occurrence of a 'serious breach within the meaning of Article 40' is the prerequisite for the application of Article 41(2). Pursuant to Article 40, a breach is *serious* if it involves a gross or systematic failure by the responsible State to fulfil an obligation[72]. It is furthermore widely known that Article 40 deals with (breaches of) obligations arising under peremptory norms of general international law.[73]

In the case here under discussion, it is almost self-evident that Libya is committing a serious breach within the meaning of Article 40. First and foremost, the breach by Libya of its international obligations is serious inasmuch it is both gross (Libya performs human rights violations of a flagrant nature and with intensive and prolonged effects) and systematic (it relies on a large-scale and generalised practice, meets a consolidated scheme and consists of actions against targeted persons)[74]. Secondly, suffice it to point out that Libya is failing to fulfil the obligation not to commit gross human rights violations that clearly arises under a peremptory norm of general international law.[75] Hence, Article 41(2) applies in this case.

[70] DARSIWA (n 2) Comment to art 41, 115 para 11.

[71] For in-depth discussion on the different functions of articles 16 and 41(2), see G Puma (n 31) 147-166. For a comparative analysis of articles 16 and 41(2), see A Gattini (n 68) 1191-1192, who highlights some coordination problems between the two provisions.

[72] On the notion of 'serious breach' in art 40, see DARSIWA (n 2), Comment to art 40, 113, paras 7-8. Also see A Gianelli (n 68) 247-248, 252-255.

[73] It is known that the expression 'obligations arising under peremptory norms of general international law', standing for *ius cogens*, has replaced the previous one 'obligations owed to the international community as a whole', referring to obligations *erga omnes*. This replacement draws strong criticism according to P Picone, 'Obblighi *erga omnes* e codificazione della responsabilità degli Stati' (2005) 88 Rivista di diritto internazionale 938-943.

[74] Suffice it to bear in mind the information given above, sections 1 and 3, and the many reports issued by international organisations, NGOs, and newspapers.

[75] It might be submitted that the customary international norms prohibiting slavery and torture have also, to a certain extent, a peremptory status. In any case, the

This provision encompasses two obligations of abstention binding all States. In its comment to Article 41(2), the ILC highlights that the obligation of collective non-recognition of a situation arising from a serious breach of a peremptory norm of general international law refers both to formal recognition and to any act implying a *de facto* recognition.[76] With regard to the prohibition of rendering aid and assistance in maintaining such a situation, after comparing the notion of 'aid and assistance' in Article 41(2) with the similar one in Article 16, the ILC makes it clear that Article 41(2) takes for granted the scrutiny of the elements of opposability and knowledge, the demonstration of which is instead required by Article 16.[77] According to the ILC, the two obligations of abstention enshrined in Article 41(2) would also stem from customary international law.[78] The ICJ has seemingly confirmed this idea in its 2004 advisory opinion on the *Wall in the Palestinian Territory*.[79]

Italy does not abide by Article 41(2) in the context of the serious breach by Libya of the obligation not to commit gross human rights violations. It is here submitted that the same factual circumstances discussed above to illustrate the complicity of Italy with Libya in *perpetrating* gross human rights violations against migrants can be now taken in-

peremptory norm prohibiting gross human rights violations encompasses them. On this topic, see LF Damrosch, 'Gross and Systematic Human Rights Violations' (2011) Max Planck Encyclopaedia of Public International Law.

[76] DARSIWA (n 2), Comment to art 41, 114-115 paras 4-10.

[77] ibid paras 11-12. In particular, with regard to the element of knowledge, the ILC underlines that it would be inconceivable that a State had no news of a serious breach perpetrated by another State.

[78] ibid paras 6-8 and 12, where the ILC gives proof of the international practice surrounding both the obligation of non-recognition and the prohibition of rendering aid and assistance in cases of serious breaches within the meaning of art 40.

[79] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 paras 155-160. In particular, in para 159, the ICJ writes that '[g]iven the character and the importance of the rights and obligations involved, [...] all States are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction'. The wording and meaning of para 159 seem to indicate the tendency of the ICJ to support the customary nature of the obligations in art 41(2), even if a direct reference to this provision lacks. Express references to art 41(2) are found in the Separate Opinion of Judge Pieter Kooijmans [2004] ICJ Rep 231 paras 40-49. Also see A Gattini (n 68) 1189; A Gianelli (n 68) 275; NHB Jørgensen (n 68) 691-692.

to account again to demonstrate that Italy is also aiding and assisting Libya in *maintaining* the situation thus created.[80] Should Italy not provide aid and assistance to Libya also in order to maintain that situation, its strategy of outsourcing border control to Libya to counter migration flows in the Central Mediterranean Sea would not achieve successful outcomes. It goes without saying that, while aiding and assisting Libya in maintaining that situation, Italy *de facto* recognises that same situation as lawful.[81] In short, the conduct proving that Italy is internationally responsible pursuant to Article 16 unsurprisingly makes it possible to show that Italy is also internationally responsible according to Article 41(2).

[80] It could be objected that the serious breach by Libya of the obligation not to commit gross human rights violations has a continuous character. In this case, the aid and assistance given by Italy would have a continuous character too and would not precisely concern the maintaining of a situation already created. Nevertheless, the ILC makes it clear that the continuous character of a serious breach does not matter in order to apply art 41(2): see DARSIWA (n 2), Comment to art 41, 115 para 11.

[81] ibid para 12, from where it is possible to infer this conclusion inasmuch as the ILC states that the obligation not to render aid and assistance in maintaining a situation stemming from a serious breach within the meaning of art 40 is 'a logical extension' of the obligation not to recognise that situation: these two obligations are intertwined. It is true that, with regard to non-territorial situations, the meaning of the obligation of non-recognition is not immediately clear. It is also true that in the scholarly debate and seemingly in State practice, non-recognition is essentially thought of for the territorial effects of a serious breach of a peremptory norm of general international law (see for instance MI Papa (n 68) 66-71). However, the fact alone that the State practice on the application of the obligation of non-recognition that is usually quoted concerns territorial situations does not necessarily negate that this obligation may also cover non-territorial situations: what seems decisive is not the 'territorial element' but that the unlawful situation flowing from a serious breach of a peremptory norm of general international law leads to a legal claim by the wrongdoing State which is capable of being denied by other States (see more accurately M Dawidowicz (n 68) 683-684).