

## Italy and the Aquarius: A Migrant Crisis

Alexandra Larkin

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# ITALY AND THE *AQUARIUS*: A MIGRANT CRISIS

Alexandra Larkin\*

## ABSTRACT

Italian journalist Indro Montanelli once wrote, “[w]e Italians are tolerant and civil with all those who are different. Black, red, yellow. Especially when they are far away, at a telescopic distance from us.”<sup>1</sup> In recent years, Italy had a resurgence of nationalist and far-right political leaders, who have taken an anti-immigration stance.<sup>2</sup> Public interest in migration of refugees and asylum seekers is due both to media coverage of their stories<sup>3</sup> and to litigation<sup>4</sup> before international courts.<sup>5</sup> One high-profile story that made headlines in the

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\*Alexandra Larkin is Productions Editor of the Pace International Law Review at the Elisabeth Haub School of Law at Pace University.

<sup>1</sup> FONDAZIONE LEONE MORESSA, *II VALORE DELL’IMMIGRAZIONE* 144 (2015) (original in Italian: “Siamo tolleranti e civili, noi italiani, nei confronti di tutti i diversi. Neri, rossi, gialli. Specie quando si trovano lontano, a distanza telescopica da noi.”).

<sup>2</sup> Andrea Mammone, *Is fascism back on the rise in Italy?*, WASH. POST (Jan. 27, 2018), [https://www.washingtonpost.com/news/made-by-history/wp/2018/01/27/is-fascism-back-on-the-rise-in-italy/?utm\\_term=.4a4f366ca6d](https://www.washingtonpost.com/news/made-by-history/wp/2018/01/27/is-fascism-back-on-the-rise-in-italy/?utm_term=.4a4f366ca6d); see also Melissa Bell, Saskya Vandoorne & Lauren Said-Moorhouse, *Italy’s Matteo Salvini Says Being Called a Populist is ‘A Compliment’*, CNN WORLD (June 27, 2018), <https://edition.cnn.com/2018/06/27/europe/matteo-salvini-interview-intl/index.html> (noting that Italy’s Interior Minister Matteo Salvini said that “being called a populist was ‘a compliment’ and claimed recent elections that brought right-wing, anti-immigrant parties to power were a sign European liberalism had failed.”).

<sup>3</sup> See, e.g., Ian Urbina, *The Outlaw Ocean*, N.Y. TIMES (July 25, 2015), <https://www.nytimes.com/interactive/2015/07/24/world/the-outlaw-ocean.html> (referencing New York Times series that discusses crime and violence in international waters, which often goes unpunished).

<sup>4</sup> See, e.g., *M/V Saiga* (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 2 ILTOS Rep. 10. (being one of the first cases decided by the International Tribunal for the Law of the Sea [ITLOS], this case involved, among other issues, standard of treatment of people on board vessels during enforcement action).

<sup>5</sup> IRINI PAPANICOLOPULU, *INTERNATIONAL LAW AND PROTECTION OF PEOPLE AT SEA* 1 (2018) (discussing the rise in international law cases concerning the

summer of 2018 was Italy's treatment of the *Aquarius*, a rescue vessel operated by the German non-governmental organization SOS Méditerranée and Doctors Without Borders/Médecins Sans Frontières.<sup>6</sup>

This comment will focus on what the international community currently does to protect migrants at sea and what role international law has played and could play in the future. Part I will analyze whether Italy violated Article 33 of the United Nations High Commissioner for Refugees' (UNHCR) 1951 Refugee Convention. Part II will analyze whether Italy violated the European Convention on Human Rights (ECHR) Article 1. Finally, Part III will be a brief discussion of other legal avenues that might be available to refugees.

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contention surrounding the law of the sea).

<sup>6</sup> Ramzy Baroud & Romana Rubeo, *What is behind the Aquarius refugee ship crisis?*, AL JAZEERA (June 17, 2018), <https://www.aljazeera.com/indepth/opinion/aquarius-refugee-ship-crisis-180617091028528.html>.

## INTRODUCTION

On June 1, 2018, Italy refused to allow the *Aquarius* access to its ports and disembark its passengers.<sup>7</sup> The *Aquarius* was reported to have carried 123 unaccompanied minors and seven pregnant women.<sup>8</sup> Passengers endured waves up to four meters and winds up to thirty-five knots.<sup>9</sup> Many migrants on board suffered from seasickness and sought medical care from Doctors Without Borders, which operated alongside the boat.<sup>10</sup> Italy's Interior Minister at the time, Matteo Salvini, announced, “[f]rom today, Italy will start to say no to human trafficking, no to the business of illegal immigration.”<sup>11</sup> In August 2018, after Malta and Italy refused the *Aquarius*' requests to dock, Gibraltar revoked the *Aquarius*' flag.<sup>12</sup> Italian Transport Minister, Danilo Toninelli, urged the United Kingdom (UK) to “assume its responsibility”<sup>13</sup> for the migrants because the ship sailed under the flag of Gibraltar, a British territory.<sup>14</sup> The *Aquarius*' flag or registration was removed for a second time, in September 2018, by the Panama Maritime Authority due to “blatant economic and political pressure”<sup>15</sup> from the Italian government.<sup>16</sup> In response,

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<sup>7</sup> *Italy's Matteo Salvini shuts ports to migrant rescue ship*, BBC (June 11, 2018), <https://www.bbc.com/news/world-europe-44432056>.

<sup>8</sup> Baroud & Rubeo, *supra* note 6.

<sup>9</sup> @SOSMedGermany, TWITTER (June 13, 2018, 4:08 PM), <https://twitter.com/SOSMedGermany/status/1006991809699074050>.

<sup>10</sup> Gianluca Mezzofiore, Hilary Clarke & Laura Smith-Spark, *What it's like on board the migrant ship to Spain*, CNN WORLD (June 17, 2018, 6:02 AM), <https://www.cnn.com/2018/06/14/europe/migrant-ship-italy-spain-intl/index.html>.

<sup>11</sup> Baroud & Rubeo, *supra* note 6.

<sup>12</sup> Jessie Yeung, *Gibraltar ship stripped of flag amid dispute over migrants stranded at sea*, CNN WORLD (Aug. 14, 2018, 5:20 AM), <https://www.cnn.com/2018/08/14/europe/aquarius-migrants-stranded-intl/index.html>; *see infra* text accompanying notes 86–88 (discussing the ship's flag).

<sup>13</sup> Danilo Toninelli (@DaniloToninelli), TWITTER (Aug. 13, 2018, 12:50 AM), <https://twitter.com/DaniloToninelli/status/1028911651356127233>.

<sup>14</sup> Yeung, *supra* note 12.

<sup>15</sup> Matthew Weaver, *Charities plea for help after Aquarius migrant rescue ship's flag revoked*, THE GUARDIAN (Sept. 24, 2018, 7:00 AM), <https://www.theguardian.com/world/2018/sep/24/italy-blamed-after-aquarius-migrant-rescue-ships-flag-revoked>.

<sup>16</sup> *See* Stephen Jewkes, *Panama revokes registration of last migrant rescue ship in central Mediterranean*, REUTERS (Sept. 23, 2018, 2:03 PM), <https://www.reuters.com/article/us-italy-migration-aquarius-panama->

Italy's Interior Minister Salvini denied that Italy had put pressure on Panama and tweeted that he did not know the telephone area code for Panama.<sup>17</sup> Once a ship is de-flagged, it is not allowed to operate again unless it can find a new flag.<sup>18</sup>

In 2017, Italy received 128,850 asylum requests,<sup>19</sup> a significant increase from the 83,540 requests received in 2015.<sup>20</sup> Malta's Prime Minister, Joseph Muscat, tweeted about Italy's authorities on the night they refused the *Aquarius* stating that they "manifestly go against international rules" while simultaneously denying entry into Malta's port.<sup>21</sup> In response, Spanish Prime Minister, Pedro Sánchez, offered for the boat to dock in Valencia, Spain, on the following day.<sup>22</sup> Subsequently, on June 24, 2018, twenty-eight European leaders<sup>23</sup> met to discuss immigration at the European Union (EU) Commission headquarters in Brussels, Belgium.<sup>24</sup> These discussions

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idUSKCN1M30S9 (finding that the "SOS Mediterranean, one of the charities that operates the *Aquarius*, said in a statement it was reeling from news of the revocation, which it said followed pressure from the Italian government.").

<sup>17</sup> Matteo Salvini (@matteosalvinimi), TWITTER (Sept. 23, 2018, 11:54 AM), [https://twitter.com/matteosalvinimi/status/1043936716522967045?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1043936716522967045&ref\\_url=https%3A%2F%2F](https://twitter.com/matteosalvinimi/status/1043936716522967045?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1043936716522967045&ref_url=https%3A%2F%2F) (original tweet in Italian: "#Salvini: nessuna pressione su Panama per #Aquatius2, non so nemmeno che prefisso abbia Panama. #nonelarena").

<sup>18</sup> Jewkes, *supra* note 16.

<sup>19</sup> Statistical Office of the European Union Data, *Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data(rounded)*, EUROSTAT, [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_asyappctza&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en) (last visited Oct. 24, 2019).

<sup>20</sup> *Id.*

<sup>21</sup> Joseph Muscat (@JosephMuscat\_JM), TWITTER (June 10, 2018, 2:04 PM), [https://twitter.com/JosephMuscat\\_JM/status/1005918671297024002](https://twitter.com/JosephMuscat_JM/status/1005918671297024002).

<sup>22</sup> *Spain to offer "safe port" for 'Aquarius' migrant rescue ship in Valencia*, EL PAÍS (June 11, 2018, 4:57 PM), [https://elpais.com/elpais/2018/06/11/inenglish/1528720717\\_398244.html](https://elpais.com/elpais/2018/06/11/inenglish/1528720717_398244.html).

<sup>23</sup> Eur. Council, *Euro Summit* (June 28–29, 2018), <https://www.consilium.europa.eu/media/35918/list-participants-euco-june-2018.pdf> (listing the attendees and guests of the Euro Summit in Brussels).

<sup>24</sup> Gabriela Baczynska & Robert-Jan Bartunek, *Merkel presses over migration as 'European solution' fails*, REUTERS (June 23, 2018, 7:26 PM), <https://www.reuters.com/article/us-europe-migrants-summit/divided-eu-leaders-convene-for-emergency-talks-on-migration-idUSKBN1JJ176>.

reflected an ongoing debate among states about how to handle the large number of refugees seeking asylum. On June 28, 2018, EU leaders, including Italy, signed off on a migration deal, aimed at easing the burden on countries like Italy.<sup>25</sup> One of the main topics discussed at the conference was the feasibility of building migrant processing centers in North Africa, as an attempt to deter migrants from making “life-threatening journeys to Europe across the Mediterranean.”<sup>26</sup> While the published agreement did not specify how these centers would be operated and how asylum procedures would be followed, it marks a recognition of the current migrant crisis and steps to alleviate it.

Due to its location, Italy is among several “front-line” countries that have an unequal burden in receiving migrants and refugees trying to immigrate to Europe.<sup>27</sup> This issue is further compounded by “a relief scheme led by Frontex, the EU’s Border and Coast Guard Agency, which [made] Italy the headquarters of all sea operations, and consequently a magnet for all rescued refugee boats.”<sup>28</sup> Moreover, in 2003, the EU passed a law called the Dublin Regulation that determines which member nation is responsible for processing asylum applications.<sup>29</sup> The Dublin Regulation established a fingerprinting database called the Eurodac.<sup>30</sup> Generally, the first EU country entered is responsible for registering the

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<sup>25</sup> Eur. Council, *supra* note 23.

<sup>26</sup> Jennifer Rankin & Jon Henley, *EU to consider plans for migrant processing centres in north Africa*, THE GUARDIAN (June 19, 2018, 10:05 AM), <https://www.theguardian.com/world/2018/jun/19/eu-migrant-processing-centres-north-africa-refugees>.

<sup>27</sup> Sylvia Poggioli, *Ascendant ‘Italians First’ Politician Vows Mass Deportations And Challenges EU*, NATIONAL PUBLIC RADIO (June 29, 2018, 12:28 PM), <https://www.npr.org/2018/06/29/623926340/ascendant-italians-first-politician-vows-mass-deportations-and-challenges-eu>.

<sup>28</sup> Silvia Marchetti, *Italy is Pleading With Europe to Help Deal with a Record Influx of Refugees*, TIME (July 11, 2017), <http://time.com/4850999/italy-europe-refugees-frontex-boats-rome-ports-ngos/>.

<sup>29</sup> Council Regulation (EU) No. 604/2013 of 26 June 2013, 2013 O.J. (L 180) 31 (noting the criteria and mechanisms for determining the Member State responsible for examining an application for internal protection lodged in one of the Member States by a third-country national or a stateless person).

<sup>30</sup> European Comm’n, *Identification of applicants (EURODAC)*, [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants_en) (last visited Oct. 24, 2019).

asylum application and taking fingerprints.<sup>31</sup> Because of the overwhelming influx of migrants as a result of these initiatives, Italy's solution to the migrant crisis has been to outsource its border security.

In 2017, Italy supplied the Libyan coast guard with vessels and anti-smuggling training.<sup>32</sup> The agreement promised €285 million over several years to Libyan agents, who would intercept migrants crossing the Mediterranean Sea and return them to Libyan detention centers.<sup>33</sup> On November 14, 2017, United Nations (U.N.) Human Rights Chief, Zeid Ra'ad Al Hussein, publicly criticized the EU's migration policy towards Libya.<sup>34</sup> However, Sicilian prosecutor, Carmelo Zuccaro, reported that an investigation revealed evidence of direct contacts between some non-governmental organizations and human traffickers in Libya.<sup>35</sup> According to the Missing Migrants Project, during the period from February 2, 2017, until the end of January 2019, 5,389 people died or went missing in the entire Mediterranean Sea (Central, Western and Eastern routes).<sup>36</sup> In response, Oxfam International, along with over fifty other organizations and platforms, signed an open letter to EU governments, "calling on them to support search and rescue operations in the Mediterranean, adopt timely and predictable disembarkation arrangements for migrants arriving to European shores, and

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<sup>31</sup> *Id.*

<sup>32</sup> Fayez Mustafa Serraj & Paolo Gentiloni, *Migranti: accordo Italia-Libia, il testo del memorandum*, LA REPUBBLICA (Feb. 2, 2017), [https://www.repubblica.it/esteri/2017/02/02/news/migranti\\_accordo\\_italia-libia\\_ecco\\_cosa\\_contiene\\_in\\_memorandum-157464439/?refresh\\_ce](https://www.repubblica.it/esteri/2017/02/02/news/migranti_accordo_italia-libia_ecco_cosa_contiene_in_memorandum-157464439/?refresh_ce).

<sup>33</sup> Nikolaj Nielsen, *EU and Italy put aside €285M to boost Libyan coast guard*, EUOBSERVER (Nov. 29, 2017, 7:45 AM), <https://euobserver.com/migration/140067>.

<sup>34</sup> Nikolaj Nielsen, *UN criticises EU policy in Libya as 'inhuman'*, EUOBSERVER (Nov. 15, 2017, 9:17 AM), <https://euobserver.com/migration/139881>.

<sup>35</sup> Maurizio Molinari & Fabio Albanese, *"Abbiamo le prove dei contatti tra scafisti e alcuni soccorritori"*, LA STAMPA (Apr. 23, 2017), <https://www.lastampa.it/2017/04/23/italia/cronache/abbiamo-le-prove-dei-contatti-tra-scafisti-e-alcuni-soccorritori-3fCnqLKWRRHBVUiygHv65K/pagina.html>.

<sup>36</sup> INTERNATIONAL ORGANIZATION FOR MIGRATION, *Missing Migrants: Tracking Deaths Along Migratory Routes*, <https://missingmigrants.iom.int/> (last visited Sept. 1, 2019).

end returns to Libya.”<sup>37</sup>

These statistics indicate it’s the “*deadliest* sea in the world.”<sup>38</sup> In 2018, the Libyan coast guard reported that it intercepted 15,000 migrants trying to reach Italy by sea.<sup>39</sup> However, the U.N. Libya mission reported that 29,000 migrants were intercepted or rescued from January to September 2018.<sup>40</sup> From August 2018 to January 2019, approximately 6,400 people were being held in twenty-six official prisons operated by the Ministry of Justice [in Libya], of whom an estimated seventy-five to eighty percent were in pretrial detention.<sup>41</sup> According to a U.N. Support Mission in Libya report, “thousands of others [migrants] were being held in facilities nominally under the control of the Ministry of the Interior or the Ministry of Defence, as well as facilities directly run by armed groups.”<sup>42</sup> Detained migrants had little opportunity to challenge the legality of their detention or seek redress for violations suffered.<sup>43</sup> In 2017, CNN released a video showing intercepted migrants being sold as slaves at auction.<sup>44</sup> Additionally, Oxfam released a report detailing the experiences of migrants intercepted in Libya who were raped, tortured and sold into slave labor.<sup>45</sup>

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<sup>37</sup> Letter from Oxfam Int’l, *Timely and Predictable European Arrangements for Disembarkation*, to EU governments (Jan. 30, 2019).

<sup>38</sup> Press Release, Oxfam Int’l, *Libya Migration Deal: Two Years on, Thousands Drowned in the Mediterranean and Sent Back to Human Rights Abuses* (Feb. 1, 2019) (emphasis added).

<sup>39</sup> Ulf Laessing & Ahmed Elumami, *Libyan coast guard says it has intercepted 15,000 migrants in 2018*, REUTERS (Dec. 20, 2018, 11:20 AM), <https://uk.reuters.com/article/uk-europe-migrants-un/libyan-coast-guard-says-it-has-intercepted-15000-migrants-in-2018-idUKKCN10J273>; see also UNHCR, *Libya: Activities at Disembarkation*, monthly update (Dec. 2018), <https://data2.unhcr.org/en/documents/download/67499> (UNHCR’s 2018 study showing how Libya has continued to be a transit point for departure from North Africa towards Europe).

<sup>40</sup> U.N. High Comm’r, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya*, (Dec. 20, 2018) <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>.

<sup>41</sup> U.N. Secretary-General, *Report of the Secretary-General on the United Nations Support Mission in Libya*, ¶ 30, U.N. Doc. S/2019/19 (Jan. 7, 2019).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Nima Elbagir, Raja Razek, Alex Platt & Bryony Jones, *People for Sale: Where lives are auctioned for \$400*, CNN: WORLD (Nov. 15, 2017), <https://www.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>.

<sup>45</sup> OXFAM, OXFAM MEDIA BRIEFING 3–5 (Aug. 9, 2017),



I. DID ITALY VIOLATE ARTICLE 33 OF THE UNITED NATIONS  
HIGH COMMISSIONER FOR REFUGEES' 1951 REFUGEE  
CONVENTION?

The UNCHR was created in 1950—in the aftermath of the Second World War—to help millions of people who had fled or lost their homes.<sup>46</sup> Subsequently, the 1967 Protocol Relating to the Status of Refugees (the 1967 Protocol) defined a refugee as:

[One who has a] well-founded fear of being persecuted for reason 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.<sup>47</sup>

This definition was expanded from the initial 1951 Convention to reflect the geo-political context of the post-war world.<sup>48</sup> No formal determination of refugee status by a state or international organization is required.<sup>49</sup>

Before a refugee arrives at a state, the respective “state’s obligations are immediately reduced to a few core rights under the Convention for which no particular level of attachment is specified.”<sup>50</sup> Most of the entitlements benefit those already in

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[https://d1tn3vj7xz9fdh.cloudfront.net/s3fs-public/file\\_attachments/mb-migrants-libya-europe-090817-en.pdf](https://d1tn3vj7xz9fdh.cloudfront.net/s3fs-public/file_attachments/mb-migrants-libya-europe-090817-en.pdf).

<sup>46</sup> U.N. High Comm’r for Refugees, *History of UNCHR*, <http://www.unhcr.org/en-us/history-of-unhcr.html> (last visited Apr. 7, 2019).

<sup>47</sup> G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees, art. 1(2) (Dec. 16, 1966).

<sup>48</sup> RAFIQU L ISLAM & JAHID HOSSAIN BHUIYAN, AN INTRODUCTION TO INTERNATIONAL REFUGEE LAW 360 (2013).

<sup>49</sup> U.N. High Comm’r, *Report of the United Nations High Commissioner for Refugees*, ¶¶ 22–23, U.N. Doc. E/1985/62 (1985); U.N.H.R.C., *Report on the Twenty-eighth Session of the Executive Committee of the High Commissioner’s Programme*, ¶ 53(4)(c), UN Doc. A/AC.96/549 (1977).

<sup>50</sup> THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL 101–102 (James Crawford et al. eds., 2011).

the state or with a connection or to the host state.<sup>51</sup> A state may be considered in violation of its duty of *non-refoulement* without even considering who is at fault if its officials omitted to act or acted erroneously or if the state's legal and administrative systems failed to offer a remedy to the refugee—a guarantee of which is necessitated by an applicable international standard.<sup>52</sup> There are a few exceptions to the principle of *non-refoulement*, such as instances where a person or persons poses a reasonable danger to the security of the country or is convicted by a final judgment of serious crime, constituting a danger to the community of that country.<sup>53</sup>

The UNHCR's 1951 Convention established obligations for states who receive refugees; however, "at the enforcement level the provisions are commonly ignored by States and other actors as a disproportionate amount of energy and resources tends to be focused on determining *who* is a refugee."<sup>54</sup> Refugees and asylum seekers are protected under the right to *non-refoulement* and the 1951 Refugee Convention.<sup>55</sup> In contrast, migrants are protected by international human rights treaties.<sup>56</sup> While the convention acknowledges that granting asylum "may place unduly heavy burdens on certain countries," its intent was "that all States . . . will do everything within their power to prevent this problem from becoming a cause of tension between States."<sup>57</sup>

"[P]rincipal UN human rights treaties,"<sup>58</sup> such as the 1948 Universal Declaration of Human Rights<sup>59</sup> and two 1966 International Covenants on Civil and Political Rights<sup>60</sup> and

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<sup>51</sup> *Id.*

<sup>52</sup> Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897, 902 (1986); see *infra* text accompanying nn. 52–55 (defining *non-refoulement*).

<sup>53</sup> G.A. Res. 2198 (XXI), *supra* note 47, art. 33(2).

<sup>54</sup> ISLAM & BHUIYAN, *supra* note 48, at 249 (emphasis in original).

<sup>55</sup> PAPANICOLOPULU, *supra* note 5, at 22.

<sup>56</sup> *Id.*

<sup>57</sup> G.A. Res. 2198 (XXI), *supra* note 47, at 15.

<sup>58</sup> ISLAM & BHUIYAN, *supra* note 48, at 249.

<sup>59</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>60</sup> International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

Economic, Social and Cultural Rights,<sup>61</sup> “play a supervisory and enforcement role in ensuring compliance by state parties with the treaty provisions.”<sup>62</sup> Compliance is achieved through “periodic state party reports by the human rights treaty body,”<sup>63</sup> a “committee established under [the] authority of a particular treaty which is made up of an independent group of experts”; or, depending on the provisions of the agreement, a treaty body may respond to “inter-state and individual complaints and conduct field investigations on . . . human rights.”<sup>64</sup> Other factors, such as offshore migration versus an asylum seeker at the host state, affect access to human rights institutions.<sup>65</sup> In situations where migration control is in the ocean and asylum authorities are on land, access to translators and asylum authorities is more difficult.<sup>66</sup> Moreover, for those turned away at sea, particularly those without access to help from organizations, “the likelihood that any national human rights institutions will even know about the incident is greatly reduced.”<sup>67</sup>

Two thirds of the nations in the world are parties to the 1951 Refugee Convention and its 1967 Protocol.<sup>68</sup> Italy was a signatory of both conventions.<sup>69</sup> The principle of *non-refoulement*, which prohibits returning people to a country where they run the risk of human rights abuses, was established in Article 33 United Nations High Commissioner for Refugees’ (UNHCR) 1951 Refugee Convention.<sup>70</sup> There is no record of official or unofficial objections to the principles of *non-refoulement*.<sup>71</sup> Some scholars have argued that “the principle of

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<sup>61</sup> International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

<sup>62</sup> ISLAM & BHUIYAN, *supra* note 48, at 249.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> GAMMELTOFT-HANSEN, *supra* note 50, at 214.

<sup>66</sup> *Id.* at 215.

<sup>67</sup> *Id.* at 216–17.

<sup>68</sup> ISLAM & BHUIYAN, *supra* note 48, at 248.

<sup>69</sup> See generally U.N. High Comm’r, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, (Jan. 31, 1967) (showing the signatories to the 1951 Refugee Convention and its 1967 Protocol).

<sup>70</sup> U.N. High Comm’r, *Note on Non-Refoulement*, ¶ 3, U.N. Doc. EC/SCP/2 (Aug. 23, 1977).

<sup>71</sup> GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN*

*non-refoulement* is widely considered to be an international customary law,” requiring states, “regardless of their stand on human rights and/or the refugee conventions” to comply.<sup>72</sup> Others have challenged this notion, arguing that “[t]he reality of state interests militates against complete coverage for humanitarian refugees.”<sup>73</sup> Under the UNHCR’s 1951 Refugee Convention, *non-refoulement* also includes:

Prohibition on forced return from a potential asylum country at its frontiers. . . freedom of association with non-political and non-profit-making associations and trade unions (Article 15) . . . free access to courts of law (Article 16) . . . and (iv) administrative assistance by the Contracting State authority to allow a refugee to exercise a right under the Convention (Article 25).<sup>74</sup>

Moreover, Article 5 of the UNHCR’s 1951 Refugee Convention states that “[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this [UNHCR’s 1951 Refugee] Convention.”<sup>75</sup> These doctrines can be found in international human rights treaties, such as the 1966 International Covenant on Civil and Political Rights;<sup>76</sup> the 1966 International Covenant on Social, Economic and Cultural Rights;<sup>77</sup> the 1984 Convention against Torture;<sup>78</sup> and the 1989 Convention on the Rights of the Child.<sup>79</sup>

One of the main issues with the *Aquarius* incident is that at the time, no state had assumed *de jure* responsibility for the

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INTERNATIONAL LAW 134 (3d ed.1996).

<sup>72</sup> ISLAM & BHUIYAN, *supra* note 48, at 115.

<sup>73</sup> Kay Hailbronner, *Non-Refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT’L L. 857, 858 (1986).

<sup>74</sup> ISLAM & BHUIYAN, *supra* note 48, at 248.

<sup>75</sup> G.A. Res. 2198 (XXI), *supra* note 47 art. 5.

<sup>76</sup> ICCPR, *supra* note 60.

<sup>77</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>78</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, ¶ 2, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>79</sup> ISLAM & BHUIYAN, *supra* note 48, at 248; Convention on the Rights of the Child art. 41, Nov. 20, 1989, 1577 U.N.T.S. 3.

coordination of search and rescue. The closest state to the boat, Libya, had not established a Search and Rescue Region and relied on neighboring countries, like Italy, to handle migrants.<sup>80</sup> Libya officially accepted the existing International Convention on Search and Rescue (SAR) obligation in July 2017, but has not yet signed the SAR Convention and thus remains unable to independently conduct effective operations.<sup>81</sup> As a result, Italy's responsibility under SAR would be to take the lead in finding a port for disembarkation for ships like the *Aquarius*. Under this rule, Italy has no obligation to allow disembarkation on its own territory.

However, there may be a duty if non-rescued persons fall within the jurisdiction of any state while they are in distress at sea. Dr. Seline Trevisanut, Assistant Professor at the Netherlands Institute for the Law of the Sea, argued that this creates *de facto* duty:

It can be argued that the distress call creates a 'relation' between the state, which receives it, and the persons who send it . . . Their lives are submitted to the discretion of that state, in the case mentioned above the lives of the migrants depended on the Italian authorities and there [sic] capacity to activate SAR services.<sup>82</sup>

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<sup>80</sup> Alice Cuddy, *Prompted by EU, Libya quietly claims right to order rescuers to return fleeing migrants*, EURONEWS (July 8, 2018), <https://www.euronews.com/2018/07/06/prompted-by-eu-libya-quietly-claims-right-to-order-rescuers-to-return-fleeing-migrants>.

<sup>81</sup> International Convention on Maritime Search and Rescue, 1979 (with annex) ¶ 1.3.13, Apr. 27, 1949, 1405 U.N.T.S. 109 [hereinafter SAR Convention]; Int'l Maritime Org., Reso. MSC. 155/78 Adoption of Amendments to the Int'l Convention on Maritime Search and Rescue, ch. 3.1.9., MSC 78/26/Add.1 (May 20, 2004), <https://www.refworld.org/docid/432acad44.html> (amending the SAR Convention) [hereinafter SAR]; see also U.N. International Convention on Maritime Search and Rescue details page, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d43b3> (last visited Oct. 19, 2019) (listing all up-to-date signatories of the SAR Convention and discussing how the International Maritime Organization (IMO) organized the International Convention on Maritime Search and Rescue in 1979, also known as the Search and Rescue Convention (SAR Convention), and coastal states to establish search and rescue services, also discussing how an amendment was added to the SAR Convention in 2004, which clarified a duty of states to assist in disembarkation of those in distress at sea).

<sup>82</sup> Seline Trevisanut, *Law of the Sea Symposium: Search and Rescue Operations at Sea – Who is in Charge? Who is Responsible?*, OPINIOJURIS (May 28, 2013), <http://opiniojuris.org/2013/05/28/law-of-the-sea-symposium-search->

This duty would be *de jure* if the recipient state were in a SAR zone because under UNCLOS 98, the state would have an obligation to establish adequate and effective search and rescue. The SAR Annex defines distress phase as a situation where there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.<sup>83</sup>

UNCLOS<sup>84</sup> and SOLAS<sup>85</sup> provide that flag States have an obligation to rescue by adopting domestic legislation that creates penalties for shipmasters who violate the duty to rescue or provide assistance.<sup>86</sup> Jurisdictions are broken down by maritime zones and flag flown by a rescuing ship. UNCLOS outlines maritime zones whereby states can determine jurisdiction.<sup>87</sup> In determining jurisdiction, UNCLOS takes into account practical considerations, such as how fast coast guard or other rescue vessels can reach a particular location.<sup>88</sup> The European Union's FRONTEX mission brings together vessels from a number of European Union member states and aims to ease the migrant burden on coastal states.<sup>89</sup> UNCLOS 98(2) "promote[s] the establishment, operation and maintenance of adequate and effective" SAR operations.<sup>90</sup>

Moreover, Regulation 2(1)(10) of the Annex expressly mandates assistance to any persons regardless of their status.<sup>91</sup> SALVAGE Article 11 "ensure[s] efficient and successful

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and-rescue-operations-at-sea-who-is-in-charge-who-is-responsible/.

<sup>83</sup> SAR Convention, *supra* note 81, ¶ 1.3.11.

<sup>84</sup> U.N. Convention on the Law of the Sea, art. 98(1), Dec. 10, 1932, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>85</sup> Int'l Maritime Org. [IMO], ch. V, Regs. 7, 10, and 33, *Safety of Life at Sea*, (1974 as amended), [http://library.arcticportal.org/1696/1/SOLAS\\_consolidated\\_edition2004.pdf](http://library.arcticportal.org/1696/1/SOLAS_consolidated_edition2004.pdf) [hereinafter SOLAS].

<sup>86</sup> SAR Convention, *supra* note 81, ¶ 2.1.10.

<sup>87</sup> UNCLOS, *supra* note 84, arts. 35, 86.

<sup>88</sup> Stefan Kirchner, Katarzyna Geler-Noch & Vanessa Frese, *Coastal State Obligations in the Context of Refugees at Sea Under the European Convention on Human Rights*, 20 OCEAN & COASTAL L.J. 57, 77 (2015).

<sup>89</sup> *European Border and Coast Guard Agency (Frontex)*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/agencies/frontex\\_en](https://europa.eu/european-union/about-eu/agencies/frontex_en).

<sup>90</sup> UNCLOS, *supra* note 84, art. 98(2).

<sup>91</sup> SAR Convention, *supra* note 81, ¶¶ 2.1.1, 2.1.10.

performance of salvage operations for the purpose of saving a life or property in danger.”<sup>92</sup> SAR’s scope of duty to rescue provides for initial medical and other needs to deliver persons to a place of safety.<sup>93</sup> How States and seafarers should cooperate with persons rescued at sea was clarified by IMO’s amendments to SAR and SOLAS Conventions. In 2003, the IMO Maritime and Safety Committee approved Resolution A.920(22).<sup>94</sup> These amendments were entered into force on July 1, 2006. In 2004, the MSC Committee adopted Guides on the Treatment of Persons Rescued at Sea, coordinating and assisting the ship Master towards delivery of persons to a place of safety.<sup>95</sup> Recent amendments to the SAR Convention have further clarified the definitions of persons in distress,<sup>96</sup> cooperation between states relating to the assistance of delivering persons rescued at sea to a place of safety,<sup>97</sup> and the disembarking process for persons found in distress at sea.<sup>98</sup> These new amendments focus on the responsibility of State parties to coordinate actions and assist the ship to deliver persons to a place of safety.<sup>99</sup>

In the case of the *Aquarius*, Italy would likely argue that principle of *non-refoulement* creates an incentive for those migrants willing to take a risk in the hope that they will be rescued and receive protection by a state they wish to reside in.

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<sup>92</sup> Int’l Maritime Org. [IMO], art. 11, *International Convention on Salvage* (Apr. 4, 1989), <https://www.jus.uio.no/lm/imo.salvage.convention.1989/doc.html>.

<sup>93</sup> Int’l Maritime Org. [IMO], ch. 1.3.2, *Adoption of Amendments to the International Convention on Maritime Search and Rescue* (May 18, 1998), [http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-\(MSC\)/Documents/MSC.70\(69\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-(MSC)/Documents/MSC.70(69).pdf).

<sup>94</sup> Int’l Maritime Org. [IMO], Res. A.920(22), *Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea* (Nov. 29, 2001), [http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20A.920\(22\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20A.920(22).pdf).

<sup>95</sup> Int’l Maritime Org. [IMO], ch. 3, Res. MSC.167(78), *Adoption of Amendments to the Int’l Convention on Maritime* (May 20, 2004) [hereinafter *Adoption of Amendments*].

<sup>96</sup> *Id.* ¶ 2.3; see also Int’l Maritime Org. [IMO], at 2, *IMO Feature: SOLAS and SAR Amendments to Strengthen International Rescue Regime* (July 1, 2006), [https://www.steamshipmutual.com/SAR\\_SOLAS\\_IMOFeature.pdf](https://www.steamshipmutual.com/SAR_SOLAS_IMOFeature.pdf) (outlining the amendments made to SOLAS and SAR Convention).

<sup>97</sup> *Adoption of Amendments*, *supra* note 95, ¶¶ 1.2, 2.1.2, 6.5.3.

<sup>98</sup> *Id.* ¶¶ 6.5.2, 6.6, 6.14.

<sup>99</sup> U.N. Secretary-General, *Oceans and the Law of the Sea*, ¶ 314, U.N. Doc. A/59/62Add.1 (Aug. 18, 2004).

Moreover, it would argue that interceptions are necessary to combat illegal immigration; smuggling and trafficking activity;<sup>100</sup> and to deter undocumented asylum-seekers acting as “irregular movers,” by continuing to seek protection after it has been secured by a country.<sup>101</sup> However, within the European Court of Human Rights, the emerging practice is to hold states to a *non-refoulement* obligation in extraterritorial migration cases.<sup>102</sup>

Critics argue that UNHCR’s protections for refugees are unsatisfactory and require reforms.<sup>103</sup> According to scholar Matteo Tondini, former military legal adviser to the Italian Navy General Staff in the Office of Legal Affairs, “one should also observe that the interception of migrants on the high seas can only be considered a short-term measure, unfit to control large migration flows. Addressing the roots of migration in the countries of origin and departure appears to be the only feasible solution in this respect.”<sup>104</sup> Moreover, politicians and press in Western democracies have “demonized”<sup>105</sup> those fleeing conflicts in Africa, Asia, and the Middle East, suggesting “that the asylum system is a loophole permitting economic migration.”<sup>106</sup> Critics note the “UNHCR has not put Article 35 . . . to full effect, whereby Contracting States undertake to provide the UNHCR relevant information and statistical data on *inter alia* the implementation of the Convention.”<sup>107</sup> Furthermore, some have argued that “[t]here exists no system of review of country practices through the public examination of state party reports”<sup>108</sup> and “the extent of UNHCR involvement largely

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<sup>100</sup> U.N. High Comm’r, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, ¶¶ 3, 14, U.N. Doc. EC/50/SC/CRP.17 (June 9, 2000).

<sup>101</sup> *Id.* ¶ 15.

<sup>102</sup> *See infra* Part II.

<sup>103</sup> ISLAM & BHUIYAN, *supra* note 48, at 249.

<sup>104</sup> Matteo Tondini, *The Legality of Intercepting Boat People Under Search and Rescue and Border Control Operations: With Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the Hirsi Case*, 18 J. INT’L MAR. L. 59, 74 (2012).

<sup>105</sup> CHRISTOPHER BERTRAM, DO STATES HAVE THE RIGHT TO EXCLUDE IMMIGRANTS? 41 (2018).

<sup>106</sup> *Id.*

<sup>107</sup> ISLAM & BHUIYAN, *supra* note 48, at 250.

<sup>108</sup> *Id.*



depends on the scope of permission granted to the UNHCR by the receiving country as well as the resources available.”<sup>109</sup> Situations such as fear of private militias or criminal gangs and displacement caused by natural disasters or climate change are not protected by UNHCR.<sup>110</sup>

## II. DID ITALY VIOLATE ARTICLE 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

The ECHR, signed in 1950, aimed to have “the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights].”<sup>111</sup> Italy joined the EU in 1958,<sup>112</sup> and thus is bound by international law and its respective obligations.<sup>113</sup> The ECHR and the Law of the Sea intersect “mainly on the high seas.”<sup>114</sup> Part VII of the U.N. Convention on the Law of the Sea<sup>115</sup> regulates the high seas.<sup>116</sup> The fundamental principle *mare liberum* means that “the high seas are common to all States and that no State may purport to subject any part of them to its territorial sovereignty.”<sup>117</sup> Article 1 of the ECHR regards state responsibility for civil and political rights in terms of a

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<sup>109</sup> *Id.*

<sup>110</sup> BERTRAM, *supra* note 105, at 42.

<sup>111</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; *see also* G.A. Res. 217A (III), Universal Declaration of Human Rights, (1948) (referring to adopted rules in 1948, which focused on the protection of human rights by rule of law).

<sup>112</sup> *EU Member Countries in Brief*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/countries/member-countries\\_en](https://europa.eu/european-union/about-eu/countries/member-countries_en) (last visited Apr. 7, 2019).

<sup>113</sup> *See, e.g.*, Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (a treaty concerning the international law on treaties between states themselves and within an intergovernmental organization).

<sup>114</sup> Efthymios Papastavridis, *European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?*, in *THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS: LEGAL AND PRACTICAL IMPLICATIONS* 115, 120 (Malgosia Fitzmaurice & Panos Merkouris eds., 2012).

<sup>115</sup> UNCLOS, *supra* note 84.

<sup>116</sup> Papastavridis, *supra* note 114, at 120.

<sup>117</sup> *Id.*

State's jurisdiction.<sup>118</sup> Therefore, a state must acknowledge its responsibilities to refugees within its jurisdiction, pertaining to a refugee's basic legal and fundamental rights.<sup>119</sup> This mandates a state's compliance with the Convention.<sup>120</sup> Article 1 of the ECHR also requires that nobody be considered outside the law.<sup>121</sup> The European Court of Human Rights (ECtHR) "is a treaty body established for the protection of what is traditionally considered civil and political rights as they are enumerated in the ECHR and its Protocols."<sup>122</sup>

Moreover, the ECHR has ruled that its prohibition was "already inherent in the general terms of Article 3,"<sup>123</sup> which requires contracting parties to protect individuals "within their jurisdiction" from inhuman treatment.<sup>124</sup> In the seminal decision *Soering v. United Kingdom*, the United Kingdom was held responsible because the ECtHR considered the intended extradition of a person to the United States incompatible with Article 3 of the ECHR, due to the threat of capital punishment.<sup>125</sup> This case reflects an expansion of the state's responsibility to individuals in returning an individual to a third country where said individual may face treatment in breach of the Refugee Convention.

Other recent court cases by the ECHR have established some level of enforcement for offshore migration, where domestic courts may not have jurisdiction.<sup>126</sup> Whether a state possesses extraterritorial jurisdiction is based on the level of a state's effective control over the relevant foreign person or territory.<sup>127</sup>

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<sup>118</sup> ECHR, *supra* note 111, art. 1.

<sup>119</sup> Kirchner, Geler-Noch & Frese, *supra* note 88, at 74.

<sup>120</sup> *Id.*

<sup>121</sup> ECHR, *supra* note 111, art. 1.

<sup>122</sup> IDA ELISABETH KOCH, HUMAN RIGHTS AS INDIVISIBLE RIGHTS: THE PROTECTION OF SOCIO-ECONOMIC DEMANDS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 9 (2009).

<sup>123</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 88 (1989); *see also Hirsi v. Italy*, 2012-II Eur. Ct. H.R. ¶¶ 113–14 (2012) (discussing generally the risk of a fugitive being subjected to inhumane treatment).

<sup>124</sup> *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. ¶¶ 65–67, (2004).

<sup>125</sup> *Soering*, 161 Eur. Ct. H.R. (ser. A), ¶ 219(6).

<sup>126</sup> *Id.*

<sup>127</sup> *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. Rep. 589 ¶¶ 130–49 (2011); *Banković v. Belgium*, App. No. 52207/99, 44 Eur. H.R.

In several cases, the ECtHR Grand Chamber has applied the effective control test in the maritime context to determine whether a European state possesses jurisdiction over persons whom the state encountered extraterritorially.<sup>128</sup> In *Hirsi*, the existence of effective control depended on the level of physical control the European state had over the individuals themselves or their vessels.<sup>129</sup> In that case, the applicants consisted of 200 Somali and Eritrean nationals who were part of three vessels that left Libya and were subsequently intercepted by Italian coastal authorities on the high seas.<sup>130</sup> The court reasoned that when a person is on a boat flying the flag of one State, it is under that State's jurisdiction.<sup>131</sup> Furthermore, when that boat is a boat of the State's coast guard, it is under the effective control of the State, which in itself is a basis for jurisdiction.<sup>132</sup> This is affirmed in UNCLOS Article 92.<sup>133</sup> The Italian coast guard returned the migrants to Libya to be repatriated to Somalia and Eritrea, violating both *non-refoulement* and the prohibition on collective expulsion.<sup>134</sup> Since these operations were conducted in the Mediterranean Sea and in the absence of any individual screening of intercepted migrants, their violation of the *non-refoulement* principle was deemed illegal *per se*.<sup>135</sup>

In *Hirsi*, the ECtHR held that the interception and return

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Rep. SE5 ¶¶ 70–71 (2007); *see generally* Marko Milanovic, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 118–66 (2011) (discussing generally the effective control test and both the personal and territorial models of jurisdiction).

<sup>128</sup> *Medvedyev v. France*, App. No. 3394/03, 51 Eur. Ct. H.R. ¶ 67 (2010); *see Hirsi*, 2012-II Eur. Ct. H.R., ¶¶ 66–67, 81.

<sup>129</sup> *See Hirsi*, 2012-II Eur. Ct. H.R., ¶¶ 66–67, 81 (discussing generally external border management and surveillance); *see also Medvedyev*, 51 Eur. Ct. H.R., ¶ 67 (discussing generally the right to board and inspect foreign vessels).

<sup>130</sup> *Hirsi*, 2012-II Eur. Ct. H.R., ¶¶ 9–12 (2012).

<sup>131</sup> *Id.* ¶¶ 67, 77.

<sup>132</sup> *Id.* ¶¶ 77–81.

<sup>133</sup> UNCLOS, *supra* note 84, art. 92.

<sup>134</sup> *Hirsi*, 2012-II Eur. Ct. H.R., ¶¶ 138, 186; *see also* Eur. Ct. H.R. Press Unit, Factsheet – Collective expulsions of aliens, (July 2019) [https://www.echr.coe.int/Documents/FS\\_Collective\\_expulsions\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf) (defining collective expulsion as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group).

<sup>135</sup> Tondini, *supra* note 104, at 74.

of the migrant vessels established “effective control.”<sup>136</sup> The court determined Italy to have “effective control” by taking into consideration the location of the migrants; the length of time during which the migrants were subject to Italian control; and the national composition of the crew.<sup>137</sup> In addition, the court specified that “the events [causing the human rights abuses] took place entirely on board ships of the Italian armed forces.”<sup>138</sup> Furthermore, the Italian vessel retained full control over the migrants for roughly ten hours without interruption.<sup>139</sup> The ECtHR has developed two effective control tests to determine extraterritoriality: control over a defined territory<sup>140</sup> and exercising state authority over an individual.<sup>141</sup> ECtHR case law is a “piecemeal approach that tries to tailor the notion of effective control to different situations without one clear definition.”<sup>142</sup> In 2011, ECtHR ruled on two cases: *Al-Skeini v. the United Kingdom*<sup>143</sup> and *Al-Jedda v. the United Kingdom*,<sup>144</sup> and in both cases held the United Kingdom legally responsible for the death of Iraqi civilians during the Iraq War. The ECtHR builds on previous case law in *Al-Jedda*; however, the court in *Al-Skeini* distinguishes three situations that trigger extraterritorial

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<sup>136</sup> *Hirsi*, 2012-II Eur. Ct. H.R., ¶¶ 9–14, 81–82.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* ¶ 81.

<sup>139</sup> *Id.* ¶¶ 66, 81 (underscoring the “continuous” nature of the interaction, citing to *Medvedyev* in which “uninterrupted control” by the Member State for a multiday period established jurisdiction); see *Medvedyev*, 3394/03, ¶¶ 66–67 (noting that the applicants were not placed on the French vessels themselves, but rather the French commando team possessed “exclusive” control over the vessel in which the team confined the applicants for thirteen days).

<sup>140</sup> See *Banković v. Belgium*, App. No. 52207/99, 44 Eur. H.R. Rep. ¶ 71–72 (2001) (stating that effective control can exist upon an evaluation of the nature and extent of such territorial control); see generally *Cyprus v. Turkey*, App. No. 25781/94 Eur. Ct. H.R. ¶¶ 75–76 (2001) (establishing the concept that action taken by a nation in another defined territory can result in effective control).

<sup>141</sup> Tom De Boer, *Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection*, 28 J. REFUGEE STUD. 118, 125 (2015); see *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. ¶ 54 (2005) (affirming the concept that an exercise of state authority within another territory can result in effective control).

<sup>142</sup> De Boer, *supra* note 141.

<sup>143</sup> *Al-Skeini v. the United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. Rep. 75–76 (2011).

<sup>144</sup> *Al-Jedda v. the United Kingdom*, App. No. 27021/08, Eur. Ct. H.R. Rep. 65–66 (2008).

jurisdiction.<sup>145</sup> In *Al-Skeini*, the court found that the following situations trigger extraterritorial jurisdiction:

First, when it concerns the acts of diplomatic and consular agents present on foreign territory . . . . Second, when a state, through consent, invitation or acquiescence of the Government of that territory, 'exercises all or some of the public powers normally to be exercised by that government' . . . . And third, when the use of force by state agents operating outside their territory 'bring[s] the individual . . . under the control of the State's authorities into the State's Article 1 jurisdiction.'<sup>146</sup>

Looking to the ECtHR's ruling in *Hirsi*, the court used a functional approach towards Article 4 of Protocol 4, regarding the question of expelling individuals who have not yet reached a state's territory.<sup>147</sup> In his concurring opinion, Judge Pinto de Albuquerque noted that "[a] state cannot evade its treaty obligations in respect of refugees by using the device of changing the place of determination of their status."<sup>148</sup> The importance of the ECtHR's functional approach provides legal recourse for individuals in push-back operations. At the height of the Libyan conflict, over 55,000 migrants and asylum seekers from Tunisia and Libya reached Lampedusa, an Italian island.<sup>149</sup> The migrants came from Tunisia and were fleeing the Arab Spring in 2011.<sup>150</sup> Some migrants were detained for nine to twelve days without administrative measures reviewable by a court.<sup>151</sup> Article 5 of the ECHR allows for the lawful detention of a person "to prevent his effecting an unauthori[z]ed entry into the country or of a person against whom action is being taken with a view to

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<sup>145</sup> De Boer, *supra* note 141, at 127.

<sup>146</sup> *Id.*; see also *Al-Skeini*, 55721/07, Eur. Ct. H.R. Rep. ¶¶ 134–36 (identifying three situations which may trigger extraterritorial jurisdiction).

<sup>147</sup> *Hirsi v. Italy*, 2012-II Eur. Ct. H.R. ¶¶ 201–07 (2012).

<sup>148</sup> *Id.* at 76 (De Albuquerque, J., concurring).

<sup>149</sup> EUR. PARL. ASS., *Report on the visit to Lampedusa*, AS/Mig/AhLarg (May 23–24, 2011); see also Rep. of the U.N. High Comm'r for Human rights, *The Situation of Migrants and Asylum-Seekers Fleeing Recent Events in North Africa*, A/HRC/18/54, GE.11-15605, at 3, 7–8 (2011) (discussing interception and deaths at sea of migrants and asylum seekers, specifically those who attempted to migrate to Lampedusa).

<sup>150</sup> Olly Lambert, *Italy's Lampedusa left in crisis after Arab Spring*, BBC (June 14, 2011), <https://www.bbc.com/news/world-europe-13747558>.

<sup>151</sup> *Khlaifia v. Italy*, App. No. 16483/12, Eur. Ct. H.R. ¶ 62 (2016).

deportation or extradition.”<sup>152</sup> However, this detention must “be decided speedily by a court and his release ordered if the detention is not lawful.”<sup>153</sup> The court in *Hirsi* found Italy to be in violation of Article 3, which establish the right to a speedy trial on lawfulness of detention.<sup>154</sup>

The ECtHR also ruled in *Xhavara v. Italy*, that the ECHR applies when the SAR operation is performed on the basis of an international agreement and there is contact between the rescuing unit and the vessel in distress.<sup>155</sup> In this case, an Italian naval corvette collided with and a sunk Albanian boat transporting undocumented immigrants thirty-five nautical miles off the Italian coast in international waters.<sup>156</sup> The ECtHR held that applicants were under Italian territorial jurisdiction, per Article 1 of the ECHR, and Italy had an obligation to take necessary and precautionary measures to protect the lives of persons under its jurisdiction.<sup>157</sup> Likewise, the ECtHR ruled in *Al-Skeini* that there is an assumption of authority the coastal state exercises in a SAR zone.<sup>158</sup> In sum, the loss of lives may entail violation of the right to life.

In the case of the *Aquarius*, a case could be made for the presence of “effective control.” Here, Italian personnel and vessels themselves are *not* exerting any direct physical control, for any length of time, over migrant persons. The *non-refoulement* principle specified in Article 33 of the Refugee Convention<sup>159</sup> is also binding upon European states under the ECHR, despite an absence of the provision. Italy’s practice in migrant control on the high seas reflects an effort to “[circumvent] basic human rights obligations, either because they are not applicable extraterritorially or when private actors carry out controls, or because these rights are simply not

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<sup>152</sup> ECHR, *supra* note 111, art. 5.

<sup>153</sup> *Id.*

<sup>154</sup> *Hirsi v. Italy*, 2012-II Eur. Ct. H.R. ¶ 56–58 (2012).

<sup>155</sup> *Xhavara v. Italy*, App. No. 39473/98, Eur. Ct. H.R. Rep. (2001).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. Rep. (2011).

<sup>159</sup> *See supra* Part I.

realised.”<sup>160</sup> Italy could also be held in violation of Article 16 of the Articles on State Responsibility,<sup>161</sup> which deals with aiding and abetting the internationally wrongful act of another State. It provides that:

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.<sup>162</sup>

Here, Italy's actions in the *Aquarius* case presented possible liabilities. Italy, in making a deal with Libya regarding the *Aquarius*, is at a minimum level aware of the human rights abuses in the state, making it a violation of *non-refoulement*. Italy's instruction to intercept and avoid rescuing the migrants at sea can be viewed as facilitating a wrongful act. Moreover, Italy's return of the ship would be an internationally wrongful act, if committed by Italy.

### III. THE FUTURE OF MIGRANTS IN ITALY

To date, the European Union has failed in its response to the flow of migrants and asylum seekers landing at its shores in search of security and a better life. Italy's response is typical. Since 1986, proposals have been presented by various Member States to manage the sharp increases in incoming migration flows. States like Denmark,<sup>163</sup> the United Kingdom,<sup>164</sup> and Italy,<sup>165</sup> as well as organizations like the UNHCR,<sup>166</sup> have all put

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<sup>160</sup> GAMMELTOFT-HANSEN, *supra* note 50, at 3.

<sup>161</sup> Int'l Law Comm'n, Responsibility of States for internationally wrongful acts, art. 16, A/56/10 (2001).

<sup>162</sup> *Id.*

<sup>163</sup> Summary Record, G.A., Summary record of the Forty-First meeting, U.N. Doc. A/C.3/41/L.51 (Nov. 12, 1986).

<sup>164</sup> UK Government, New Vision for Refugees, 2003, at 1–5 (UK), [http://archiv.proasyl.de/texte/europe/union/2003/UK\\_NewVision.pdf](http://archiv.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf).

<sup>165</sup> Italian Government, Migration Compact: Contribution to an EU strategy for external action on migration, at 1–4, [http://www.governo.it/sites/governo.it/files/immigrazione\\_0.pdf](http://www.governo.it/sites/governo.it/files/immigrazione_0.pdf).

<sup>166</sup> U.N. High Comm'r for Refugees, *UNCHR Working Paper: "UNHCR's Three-Pronged Proposal"* (June 26, 2003).

forward proposals aimed at identifying ‘new’ extraterritorial approaches to refugee protection.<sup>167</sup> In sum, these proposals call for the creation of third-country processing centers (also known as offshore processing centers) and/or of regional protection areas. The former are centers outside of the EU to which migrants are transferred and effectively detained while their asylum claim is processed. In theory, if the claim is successful, the individual can then be resettled in a Member State or in an alternative safe country. If the claim is unsuccessful, they can be returned to their country of origin. The latter, on the other hand, aims to provide temporary protection to refugees within their region of origin.<sup>168</sup>

In July 2017, Vincent Cochetel, UNHCR Special Envoy to the Central Mediterranean, also announced his support for “screening systems for EU-bound migrants in countries en route to Libya, such as Mali, Niger, Burkina Faso, Ethiopia, Chad and Sudan.”<sup>169</sup> This followed a proposal by African and European ministers in Tunis discussed earlier that month. Cochetel said, “Italy also needs to be able to process claimants so the economic migrants are returned much more quickly, or else there will be no deterrent to travel to Italy. Only a third of the migrants reaching Italy are found to need international protection.”<sup>170</sup>

As Italy and other countries shift towards establishing an offshore asylum mechanism, the question becomes who bears responsibility in scenarios of extraterritorial complicity? Is it the European Union and Member States, third countries (Niger or Chad which sent migrants through Libya) and/or the UN organizations, IOM and UNHCR?<sup>171</sup> In regard to claims within

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<sup>167</sup> Daria Davitti & Marlene Fries, *Offshore Processing and Complicity in Current EU Migration Policies (Part 1)*, BLOG EUR. J. INT’L L. (Oct. 10, 2017), <https://www.ejiltalk.org/offshore-processing-and-complicity-in-current-eu-migration-policies-part-1/>.

<sup>168</sup> *Id.*

<sup>169</sup> Patrick Wintour, *European and African ministers discuss plan to tackle flow of refugees*, THE GUARDIAN (July 24, 2017, 12:00 AM), <https://www.theguardian.com/world/2017/jul/24/european-african-ministers-discuss-plan-refugees-tunis>.

<sup>170</sup> *Id.*

<sup>171</sup> Daria Davitti & Marlene Fries, *Offshore Processing and Complicity in Current EU Migration Policies (Part 2)*, BLOG EUR. J. INT’L L. (Oct. 10, 2017), <https://www.ejiltalk.org/offshore-processing-and-complicity-in-current-eu->



the ECtHR, Italy could be found in violation of Article 13. Italy's offshore process refused migrants and circumvented the "Dublin transfers," since responsibility and protection for asylum claims lies with the country of first arrival.<sup>172</sup> In the case of the *Aquarius*, migrants were returned to Libya, resulting in human trafficking and detention.

Moreover, there have been significant backlogs in processing asylum claims and inability of individuals to access procedures offshore.<sup>173</sup> In May 2015, the European Commission introduced a "hot spot" approach to frontline countries like Italy, who face "disproportionate migratory pressures at the EU's external borders."<sup>174</sup> This approach provided assistance from the European Asylum Support Office (EASO), EU Border Agency (Frontex), EU Police Cooperation Agency (Europol), and EU Judicial Cooperation Agency (Eurojust) to help Italy fulfill its obligations under EU law by identifying, registering, and fingerprinting incoming migrants.<sup>175</sup> The "hot spot" approach further requires that migrants receive the appropriate follow-up procedures, such as a national asylum application, relocation to another Member State or repatriation.<sup>176</sup> Four ports identified as "hot spot" locations were Pozzallo, Porto Empedocle, Trapani in Sicily, and Lampedusa.<sup>177</sup> Yet, a study published in 2017 by

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migration-policies-part-2/.

<sup>172</sup> Catherine Woollard, *Weekly Editorial: Conditions in Hotspots are chilling*, ECRE (Apr. 28, 2017), <https://www.ecre.org/conditions-in-hotspots-is-chilling/>; see also *Italy inks deal with Libya neighbours to stem migrant flow*, EURACTIV (May 23, 2017), <https://www.euractiv.com/section/justice-home-affairs/news/italy-inks-deal-with-libya-neighbours-to-stem-migrant-flow/> (stating that Italy has signed a deal with Libya, Chad, and Niger in order to stem the flow of migrants across the Mediterranean through beefed up border controls and new reception centers in the African nations).

<sup>173</sup> Eur. Ct. of Auditors [ECA], EU response to the refugee crisis: the 'hotspot' approach, Special Report No. 06/2017 5–7, (Apr. 25, 2017), [https://www.eca.europa.eu/Lists/ECADocuments/SR17\\_6/SR\\_MIGRATION\\_HOTSPOTS\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR17_6/SR_MIGRATION_HOTSPOTS_EN.pdf) [hereinafter ECA Rep. 06/2017]; *N.D. v. Spain*, App. No. 8675/15 & 8697/15, Eur. Ct. H.R. Rep. 30 (2017).

<sup>174</sup> *The Hotspot Approach to Managing Exceptional Migratory Flows*, EUR. COMM'N, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

the European Court of Auditors found that only “four out of six planned hot spots were operational in March 2016, and two additional hotspots were still in the process of being set up but not yet operational at the end of February 2017.”<sup>178</sup> The report further found that at the end of 2016, the reception facilities in Italy were not sufficient to receive the number of migrants arriving.<sup>179</sup> Furthermore, the European Commission’s 10th Report on Relocation and Resettlement explained that the lack of pledges of Member States, and more specifically, the lack of a dedicated procedure for the relocation of unaccompanied minors or specific requirements for security interviews, is the reason Italy remains behind in implementation of the emergency relocation of migrants.<sup>180</sup>

Yet, despite Member States’ current challenges with high migratory pressure, the ECtHR has continued to uphold EU law and guarantee the rights of migrants and refugees, opposing pushback operations. In *Khlaifia v. Italy*, the justices wrote “[t]he Court has also taken note of the ‘new challenges’ facing European States in terms of immigration control as a result of the economic crisis [and] recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East.”<sup>181</sup> Moreover, in the ECtHR case of *N.D. v. Spain*, a group of Sub-Saharan migrants tried to enter Spain on August 13, 2014 through the Melilla border crossing, consisting of three consecutive barriers.<sup>182</sup> The migrants were apprehended by Spanish guards at the third barrier and subsequently returned to Morocco without an identification check, an interpreter, or opportunity to receive legal and medical assistance.<sup>183</sup> *N.D. v. Spain* addresses Spain’s pushback operations and the court’s confirmation that the use of force by state agents at a land border triggers a State’s jurisdiction under

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<sup>178</sup> ECA Rep. 06/2017, *supra* note 173, at 5.

<sup>179</sup> *Id.*

<sup>180</sup> European Comm’n, *Tenth report on relocation and resettlement*, 3–4, COM (2017) 202 final (Feb. 3, 2017), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302\\_tenth\\_report\\_on\\_relocation\\_and\\_resettlement\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_tenth_report_on_relocation_and_resettlement_en.pdf).

<sup>181</sup> *Khlaifia v. Italy*, App. No. 16483/12, Eur. Ct. H.R. Rep. ¶ 241 (2016).

<sup>182</sup> *N.D. v. Spain*, App. Nos. 8675/15 & 8697/15, Eur. Ct. H.R. Rep. ¶ 12 (2017).

<sup>183</sup> *Id.*

## Article 1 ECHR.

Pushback operations include “[the lack of accessibility to] the UNHCR, refugee-assisting NGOs, national human rights institutions or lawyers of the state carrying out control.”<sup>184</sup> It also includes Member States’ noncompliance in relocating<sup>185</sup> and resettling<sup>186</sup> people from these centers, even once their claims for international protection are established. In addition to compensation to victims, the EU and international community should consider burden-sharing elements that might help states like Italy cope with disembarkations; ideas include a flexible list of safe ports along the European coastline of cities willing to accept disembarkations of migrants, and an updated Dublin system, which has currently put an unequal burden on coastal states.

The *Aquarius* incident presents an issue of jurisdiction under Article 1 of the ECHR. The traditional approach to jurisdiction stemming from a state’s effective control over a person or territory does not apply here as there is no such control over the place where the detention and processing will be conducted. Scholar Miles Jackson argues that the court’s ruling in *Soering* can be extended to cases of extraterritorial state complicity, leading to a ban on facilitation of acts of torture at home or abroad under Article 3 ECHR.<sup>187</sup> Perhaps similar arguments can be made against Italy for violations of Articles 3, 5, and 13 ECHR. Moreover, scholar Marko Milanovic argues for a territorially unlimited approach for any state to refrain from assisting third states or individuals in violating human rights.<sup>188</sup>

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<sup>184</sup> GAMMELTOFT-HANSEN, *supra* note 50, at 214–15.

<sup>185</sup> *EU Countries Have Fulfilled Less Than a Third of Their Asylum Relocation Promises*, AMNESTY INT’L (Sept. 25, 2017, 1:58 AM), <https://www.amnesty.ie/eu-countries-fulfilled-less-third-asylum-relocation-promises/>.

<sup>186</sup> See, e.g., Izza Leghtas, *The Anniversary of the EU-Turkey Agreement*, REFUGEES INT’L (Mar. 13, 2017), <https://www.refugeesinternational.org/blog/eu-turkey-agreement> (EU-Turkey agreement in 2016 that provides that for every Syrian who traveled irregularly from Turkey to a Greek island, another Syrian would be resettled to the EU).

<sup>187</sup> Miles Jackson, *Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction*, 27 EUR. J. INT’L L. 817, 818 (2016).

<sup>188</sup> Marko Milanovic, *Extraterritoriality and Human Rights: Prospects and Challenges*, in HUMAN RIGHTS AND THE DARK SIDE OF GLOBALISATION:

Jackson has put forth five arguments, which may be used to establish jurisdiction in cases of extraterritorial complicity.<sup>189</sup> His first argument is that *Soering* interpreted the ECHR as a “living instrument,”<sup>190</sup> that “must be interpreted in the light of present-day conditions.”<sup>191</sup> Applying this logic, one could argue for a more expansive interpretation of jurisdiction under Article 1. The migration policies of Italy and fellow Member States have relied on extraterritorial measures to circumvent human rights obligations. In this interpretation, Italy’s offshore activities would be considered to be within the scope of the ECHR as well as attempts to circumvent existing obligations of the Member States. Jackson’s second argument focuses on the nature of the violations, specifically Articles 2, 3, and 6 and of ECHR’s prohibition against torture, which is linked to Article 3’s *non-refoulement* regulation.<sup>192</sup> Third, Jackson argues that “overcoming the jurisdictional gap would render states’ obligations under the ECHR consistent with their other international obligations.”<sup>193</sup> In *Soering*, the ECtHR used the reasoning in Article 3 of the Convention against Torture thus creating consistency between the two.<sup>194</sup>

Fourth, he argues the court in *Soering* established state responsibility for the “foreseeable consequences of extradition suffered outside their jurisdiction,”<sup>195</sup> demanding “states take

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TRANSNATIONAL LAW ENFORCEMENT AND MIGRATION CONTROL 53 (Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen eds., 2016).

<sup>189</sup> *Id.*

<sup>190</sup> *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R. Rep. 9 (1978) (Initially established in ECtHR).

<sup>191</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 102 (1989); Jackson, *supra* note 187, at 825.

<sup>192</sup> Jackson, *supra* note 187.

<sup>193</sup> *Id.* at 826–27.

<sup>194</sup> *See also* *Al Nashiri v. Poland*, App. No. 28761/11, Eur. Ct. H.R. (2014); *see generally* *Husayn v. Poland*, App. No. 7511/13, Eur. Ct. H.R. Rep (2014) (holding in both cases that Poland was in violation of art. 3 for U.S.’ inhumane treatment of the applicants while they were detained on U.S. soil, whether they were aware of it or not); *see generally* *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09, Eur. Ct. H.R. Rep. (2012) (asserting that territorial state complicity in acts of torture by agents of a foreign state is sufficient to attribute the conduct of those agents to the complicit state).

<sup>195</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 86 (1989); *see also* *N. v. United Kingdom*, App. No. 26565/05, Eur. Ct. H.R. Rep. (2008)

responsibility for wrongdoing they facilitate.”<sup>196</sup> Forms of facilitation may include leading or supporting offshore mechanisms, putting pressure on other countries either financially or otherwise for migration control measures and training and equipping the authorities of a third country to execute migration control. Lastly, the “inconsistency and lack of coherence” of the ECtHR’s interpretation of Article 1 has in effect facilitated violations abroad, which would otherwise be impermissible in the home state. Thus, allowing states to offshore, outsource and buy their way out of the obligations vested upon them, flies in the face of the principle of universality of rights.<sup>197</sup> An enhanced interpretation would prevent “absurd results and the universality of rights.”<sup>198</sup> Therefore, the ECtHR should broaden its interpretation of an Article 1 jurisdiction.

Shortly after the *Aquarius*’ refusal, Italy refused another ship in August 2018.<sup>199</sup> The *Ubaldo Diciotti*, an Italian coast guard ship, which carried 177 migrants and was unable to disembark in Sicily for five days.<sup>200</sup> The ship picked up 190 migrants—a majority of which were from Eritrea, with some people from Bangladesh, Syria, and Egypt—on August 15 from an overcrowded boat seventeen miles off Lampedusa after they were refused entry to Malta.<sup>201</sup> The boat was allowed to disembark after an agreement with the European Union to relocate the migrants.<sup>202</sup> According to CNN, “[t]he European

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(holding that article 3 only applied in medical situations where there were exceptional circumstances, such as when a person is on their deathbed and will have no one to care for them in their home country).

<sup>196</sup> Jackson, *supra* note 187, at 827.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 828.

<sup>199</sup> *Migrant rescue ship docks in Spain again after Italy refusal*, THE LOCAL (Aug. 9, 2018, 10:36 PM), <https://www.thelocal.es/20180809/migrant-rescue-ship-docks-in-spain-again-after-italy-refusal>.

<sup>200</sup> Lorenzo Tondo, *Standoff in Italian port as Salvini refuses to let refugees disembark*, THE GUARDIAN (Aug. 21, 2018, 8:01 AM), <https://www.theguardian.com/world/2018/aug/21/italy-refugees-salvini-refuses-coastguard-ship-docks-diciotti>.

<sup>201</sup> Gianluca Mezzofiore, *Italy bars its own Coast Guard ship from allowing migrants to disembark*, CNN WORLD (Aug. 21, 2018, 10:35 AM), <https://www.cnn.com/2018/08/21/europe/diciotti-italy-coast-guard-ship-migrants-standoff-intl/index.html>.

<sup>202</sup> *Diciotti, i 27 minori sbarcano dalla nave. Aperta indagine per sequestro di persona. Salvini: “Indagatemi”. Poi attacca Fico*, IL FATTO

Commission confirmed it has been contacted by Italian authorities regarding the ship but stated it cannot solve the standoff because “it’s a matter for national authorities.” [The Commission further stated] “[w]e don’t have competence to coordinate search-and-rescue operations or to indicate places for disembarkation . . . it started contacting member states about the matter.”<sup>203</sup>

In summer 2018, Italy maintained its position that it would not accept additional migrants.<sup>204</sup> It held this position despite immense scrutiny by the international community and the press. Italy’s refusal of the *Ubaldo Diciotti* highlighted the need for a new approach and a better international enforcement mechanism. The June 28<sup>th</sup> migration deal proposing feasibility of building migrant processing centers in North Africa reflects Italy’s and the European Council’s tough approach to immigration.<sup>205</sup> On the other hand, “African nations have been reluctant to host what the EU calls ‘disembarkation platforms,’ fearing they could become magnets for crowds of migrants seeking asylum in Europe as well as targets for jihadist groups.”<sup>206</sup> An African Union position paper leaked to *The Guardian* argued that with such platforms, “migrants, after they have been rescued (or a fortiori after they have been brought back on to European Union territory), could not be sent to platforms outside of the European Union without being granted access to the EU asylum procedures and without being granted the possibility to wait for the complete examination of

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QUOTIDIANO (Aug. 22, 2018), <https://www.ilfattoquotidiano.it/2018/08/22/diciotti-i-27-minori-sbarcano-dalla-nave-aperta-indagine-per-sequestro-di-persona-salvini-indagatemi-poi-attacca-fico/4575022/>.

<sup>203</sup> Mezzofiore, *supra* note 201.

<sup>204</sup> *Italy migrants: Matteo Salvini calls for end to Sicily ‘refugee camp’*, BBC (June 3, 2018), <https://www.bbc.com/news/world-europe-44346084>.

<sup>205</sup> Jennifer Rankin & Jon Henley, *EU to consider plans for migrant processing centres in north Africa*, THE GUARDIAN (June 19, 2018, 10:05 AM), <https://www.theguardian.com/world/2018/jun/19/eu-migrant-processing-centres-north-africa-refugees>.

<sup>206</sup> Bojan Pancevski & Valentina Pop, *Europe Shifts Toward Tougher Approach on Immigration*, WALL ST. J. (June 29, 2018, 5:31 PM), <https://www.wsj.com/articles/how-europes-new-immigration-measures-will-play-out-1530273474>.

their request.”<sup>207</sup>

In comparison, in 2013 Australia enacted a policy named Regional Resettlement Arrangement Between Australia and Papua New Guinea.<sup>208</sup> This policy aimed to discourage smuggling of migrants and transferred migrants arriving by boat to Manus Island in Papua New Guinea or Nauru.<sup>209</sup> The policy states that it upholds the *non-refoulement* principle in the UNHCR since regional processing centers are not a final destination for permanent resettlement.<sup>210</sup> According to Elizabeth Collett, Director of Migration Policy Institute Europe, despite “international outrage,” “the measures have curbed mass migration and prevented people from drowning at sea while trying to reach Australia.”<sup>211</sup> In 2018, “nearly 1,000 people lost their lives trying to cross the Mediterranean and reach Europe, according to the International Organization for Migration, a United Nations agency.”<sup>212</sup>

Setting up migration and resettlement centers outside of the European Union presents an issue of being out of sight and potentially out of mind of European countries. However, reducing deaths by sea and avoiding incidents such as the *Aquarius*, where migrants are trapped on board for days with limited food and medical care, is advantageous. Disembarkation platforms could permit a more controlled assessment of which migrants are entitled to legal protection by the EU before they get resettled. According to *The Wall Street Journal*, “Vincent Cochetel, special envoy of the UNHCR for the Central Mediterranean, tentatively endorsed the EU plans and said detaining immigrants was admissible under EU law.”<sup>213</sup> Mr.

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<sup>207</sup> Daniel Boffey, *African Union seeks to kill EU plan to process migrants in Africa*, THE GUARDIAN (Feb. 24, 2019, 7:33 AM), <https://www.theguardian.com/world/2019/feb/24/african-union-seeks-to-kill-eu-plan-to-process-migrants-in-africa>.

<sup>208</sup> Regional Resettlement Arrangement Between Australia and Papua New Guinea, July 19, 2013, <https://dfat.gov.au/geo/papua-new-guinea/Documents/regional-resettlement-arrangement-20130719.pdf>.

<sup>209</sup> *Id.* ¶ 3–4.

<sup>210</sup> *Id.* ¶ 6.

<sup>211</sup> Pancevski & Pop, *supra* note 206.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

Cochetel said, “[d]etention is not what we wish for the majority of people, but in some circumstances it would be necessary in order to repatriate some people.”<sup>214</sup> He further stated “more than 70% of asylum claims of people who have crossed the Mediterranean get rejected, but they don’t get returned after reaching Europe. Those who are not in need of protection should be encouraged to return, voluntarily or otherwise.”<sup>215</sup> Therefore, if migrants know that they will not be able to go onto European land without first proving their right to asylum, it is less likely that those who have no such right will fall for the human traffickers offering dangerous passages to Europe.

## CONCLUSION

As of July 2019, “about 19 sea rescue missions—involving nongovernmental ships but also commercial and military vessels—have been blocked from Italian ports, keeping ‘more than 2,500 people blocked at sea for an overall period of 165 days,’” according to Marco Bertotto of Doctors Without Borders Italy.<sup>216</sup> In March 2019, the European Commission announced on Twitter that “Europe is no longer experiencing the migration crisis of 2015, but structural problems remain.”<sup>217</sup> The European Commission later released “Progress report on the Implementation of the European Agenda on Migration” in June 2019.<sup>218</sup> The report stated that “[o]verall, 2018 saw a fall of 80% in irregular arrivals to Italy compared to 2017, and this trend has continued in 2019 to drop to pre-crisis levels.”<sup>219</sup> However, Italy was still a main country of first entry in 2018.<sup>220</sup> The report

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Elisabetta Povoledo, *Ship Captain Who Landed Migrants in Italy Sails Into Political Storm*, N.Y. TIMES (July 5, 2019), <https://www.nytimes.com/2019/07/05/world/europe/carola-rackete-italy-migrants.html>.

<sup>217</sup> European Commission (@EU\_Commission), TWITTER (Mar. 6, 2019, 3:21 AM), [https://twitter.com/EU\\_Commission/status/1103254203387047938](https://twitter.com/EU_Commission/status/1103254203387047938).

<sup>218</sup> European Comm’n, *Progress report on the Implementation of the European Agenda on Migration*, COM (2019) 126 final (June 3, 2019), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190306\\_com-2019-126-report\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190306_com-2019-126-report_en.pdf).

<sup>219</sup> *Id.* at 3.

<sup>220</sup> *Id.* at 4; *see supra* note 174.



also clarified that, “[t]he EU will maintain pressure to ensure unhindered and regular access for humanitarian organisations and UN agencies to improve conditions in detention centres, to increase alternatives to detention, and ultimately to put an end to the current system of detention.”<sup>221</sup>

Moreover, Italy replaced Interior Minister Salvini with Luciana Lamorgese in September 2019, marking the appearance of a shift in Italy’s anti-immigration policies.<sup>222</sup> Lamorgese was appointed after the formation of the new coalition government between the Five Star Movement and the Democratic Party.<sup>223</sup> However, in October 2019, a rescue ship called the Ocean Viking, carrying 104 migrants, was stuck at sea for 11 days until being allowed to disembark in Pozzallo, Italy.<sup>224</sup> The ship is run by the SOS Méditerranée and funded in partnership with Doctors Without Borders, the same groups that supported the *Aquarius*.<sup>225</sup> After initially refusing the ship, Italian authorities “only changed their position after the French, German and Italian governments agreed on a plan to resettle the migrants on board.”<sup>226</sup> According to Louise Guillaumat, deputy director of SOS Méditerranée, the NGO which operates the Ocean Viking, “[w]hen a relocation agreement is settled, Italy is willing to open its ports . . . . But there are few E.U. member states willing to welcome people into their territory and support the coastal states’ of Italy and Malta.”<sup>227</sup> Despite efforts by the European Commission to make reforms, clearer guidelines and better structure is needed to facilitate a safer and more streamlined immigration process in Italy.

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<sup>221</sup> See *supra* notes 41–45 and accompanying text.

<sup>222</sup> Megan Williams, *Italy changes course on immigration with new minister Luciana Lamorgese*, CBC NEWS (Sept. 16, 2019, 4:00 AM), <https://www.cbc.ca/news/world/luciana-lamorgese-italy-immigration-1.5284545>.

<sup>223</sup> *Id.*

<sup>224</sup> @SOSMedIntl, TWITTER (Oct. 29, 2019, 5:32 AM), <https://twitter.com/SOSMedIntl/status/1189158066283057152>.

<sup>225</sup> New migrant rescue ship launches from Marseille, THE LOCAL FR (Aug. 5, 2019), <https://www.thelocal.fr/20190805/new-migrant-rescue-ship-launches-from-marseille>.

<sup>226</sup> Billy Perrigo, *The Far Right Lost Power in Italy Two Months Ago. So Why Are Migrant Rescue Boats Still Being Refused Entry?*, TIME (Oct. 29, 2019), <https://time.com/5713279/italy-migrant-rescue-boats/>.

<sup>227</sup> *Id.*

In aiming towards a better solution to the migrant crisis in Italy and more broadly in Europe, it is important to distinguish “between unwilling and unable states in the context of shared responsibility.”<sup>228</sup> Some critics have proposed placing the burden on the host state to be individually responsible for providing protection as opposed to UNHCR and the international community at large.<sup>229</sup> One proposed idea is promoting shared responsibility between a host state and UNHCR, for states that are unable to host due “to limited resources or weak institutions.”<sup>230</sup> Another idea, which “often meets with very fierce opposition,”<sup>231</sup> is open borders. However, due to concerns regarding labor market competition, changes in cultural character, safety, and sustainability, it is unlikely this will prevail.<sup>232</sup> While some research has shown that open borders are beneficial to the economy, “[p]olitical opposition to free migration of labor is based to some extent on the prediction that immigration depresses real wages in the host country.”<sup>233</sup>

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<sup>228</sup> MAJA JANMYR, PROTECTING CIVILIANS IN REFUGEE CAMPS: UNABLE AND UNWILLING STATES, UNHCR AND INTERNATIONAL RESPONSIBILITY 345 (2013).

<sup>229</sup> *Id.* at 346.

<sup>230</sup> *Id.*

<sup>231</sup> BERTRAM, *supra* note 105, at 36.

<sup>232</sup> *Id.*

<sup>233</sup> John Kennan, *Open Borders in the European Union and Beyond: Migration Flows and Labor Market Implications* 26 (Nat'l Bureau of Econ. Research, Working Paper No. 23048, 2017).