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Containing the Containment: Using Art. 16 ASR to Overcome Accountability Gaps in Delegated Migration Control

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Abstract

When the European Court of Human Rights found Italy responsible for push-backs on the high seas in *Hirsi Jamaa* based on Italy's effective control over the individuals, it simultaneously solidified the concept of jurisdiction as a prerequisite of human rights obligations and provided States with deeper knowledge on how to avoid responsibility. Since then, instead of pushing the migrants back themselves, destination States increasingly delegate the task of migration control to third States. Under the guise of "capacity building", they fund, train, and equip third States to exercise containment measures and carry out pull-backs. By way of bilateral agreements, destination States remain in control of the migration flow while avoiding any direct contact with the migrants that would trigger their human rights obligations. One example for this is the Italian-Libyan cooperation under the 2017 *Memorandum of Understanding*, which was renewed in 2020.
Migrants intercepted by Libya are systematically detained in prisons under horrific conditions, which is in clear violation of their human rights. The present article explores ways to allocate responsibility on destination States for their involvement in those human rights violations notwithstanding the lack of jurisdiction. In particular, the article deals with the question whether the general international law of State responsibility is applicable alongside international human rights law. Responsibility for complicity, as lined out in Art. 16 of the *Articles on State Responsibility for Internationally Wrongful Acts*, is compared to the concept of due diligence obligations in international human rights law, dismissing the claim that the latter poses *lex specialis*. Subsequently, Art. 16 ASR's substantive requirements are applied to the case study in order to test the provision's capability to overcome the accountability gap.

A. Introduction

Current European migration policies seem to be motivated by the belief that migrants and refugees who are out of sight and out of control do not possess any claims of protection.[1] States are eager to *externalize* their borders, which involves the delegation of migration control to third States.[2] Destination States fund, train, and equip these third States to exercise containment measures and carry out pull-backs.[3] Legally, the minimalization of contact by the destination State serves to evade any jurisdictional link that would trigger its human rights obligations.[4] However, it seems untenable that a State could escape responsibility by "outsourcing or contracting out its obligations".[5] This work draws on the potential of Art. 16 of the International Law Commission's (ILC) *Articles on State Responsibility for Internationally Wrongful Acts* (ASR)[6] to cure this ill. Ultimately, it raises the question whether States should be held accountable for their involvement in containment measures beyond the scope of jurisdiction and, if so, whether Art. 16 ASR is a capable legal instrument to do so. In particular, it looks at the Italian contribution to selected human rights violations by Libya under the *International Covenant on Civil and Political Rights*

1 V. Moreno-Lax & M. Lemberg-Pedersen, 'Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization', 56 *Questions of International Law, Zoom-In* (2019), 5.

2 G. Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law', 4 *Italian Law Journal* (2018) 2, 489, 497; A. Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?', 20 *Human Rights Law Review* (2020) 2, 306, 323; M. Giuffré & V. Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows', in S. Juss (ed.), *Research Handbook on International Refugee Law* (2019), 84.

3 Ciliberto, *supra* note 2, 490.

4 Giuffré & Moreno-Lax, *supra* note 2, 85; J. C. Hathaway & T. Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence', 53 *Columbian Journal of Transnational Law* (2015) 2, 235, 244.

5 G. Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations', 9 *University of Technology Sydney Law Review* (2007), 26, 34.

6 *ILC Articles on the Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10, UN Doc. A/56/10, chap. IV.E.1, November 2001 [ASR].

(ICCPR)[7] as determined by the 2017 *Memorandum of Understanding* (MoU) between the two countries.[8]

First, this analysis sheds light on the role of jurisdiction when allocating responsibility for delegated migration control (A.). Next, it questions Art. 16 ASR's applicability to international human rights law (IHRL) (B.), explaining the concept of derived responsibility (I.), responsibility for disregard of due diligence in IHRL (II.), determining their overlap (III.), and then dismissing the claim that due diligence and its prerequisite of jurisdiction pose *lex specialis* to Art. 16 ASR (IV.). In a third step, the work applies Art. 16 ASR to Italy's support of Libya under the MoU (C.). It starts by presenting the cooperation's factual and legal background (I.) and identifies Libya's violation of Art. 7(1) and 10(1) ICCPR (II.). It then moves on to the substantial requirements of Art. 16 ASR (III.), namely the material element of aid and assistance, the mental element ranging from knowledge to intent, and the opposability of norms. As a conclusion, the article promotes the concept that allocating responsibility to delegating States is appropriate and desirable while also discussing courts' reluctance to do so (D.).

B. Irresponsibility of Destination States Absent Jurisdiction?

The relevance of the concept of jurisdiction stems from jurisdictional clauses such as Art. 2(1) ICCPR, which restricts the Covenant's applicability.[9] It determines that a State owes the obligations to "all individuals within its territory and subject to its jurisdiction". The Human Rights Committee (HRC) interpreted this as including all persons over whom a State exercises power or effective control, including extraterritorially.[10] The concept of extraterritorial

7 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR].

8 *Memorandum of Understanding on Cooperation in the Fields of Development, the Fight Against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders Between the State of Libya and the Italian Republic*, 2 February 2017, renewed on 2 February 2020, available at https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf (last visited 11 February 2024) [MoU].

9 D. Davitti, 'Beyond the Governance Gap: Accountability in Privatized Migration Control', 21 *German Law Journal* (2020) 3, 487, 501.

10 Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 10. [CCPR, *General Comment No. 31*].

jurisdiction is a developing field in human rights jurisprudence. While the HRC has shown willingness to explore a functional approach in the context of the right to life,[11] ultimately, some form of factual personal control remained necessary to establish jurisdiction.[12] Cooperation with third States in the form of funding, training, and equipment is appealing to destination States because it is explicitly designed to avoid such direct control.[13]

This reveals a major flaw of expanding jurisprudence on the concept of extraterritorial jurisdiction. When the European Court of Human Rights (ECtHR), for example, found Italy responsible for push-backs on the high seas in *Hirsi Jamaa* based on *de jure* and *de facto* control over the individuals,[14] it simultaneously solidified the concept of jurisdiction and provided States with deeper knowledge on how to avoid responsibility.[15] Rather than stopping human rights violations from taking place in the context of delegated migration control, explicit adjudication has enabled States to enter ostensible enforcement vacuums beyond courts' reach by aligning their cooperation along the set boundaries.[16] By this, such adjudication fosters the bifurcation of executive and judiciary, of policy and law, something Mann calls the "dialectic of transnationalism".[17] Running just below the jurisdictional threshold of human rights treaties, delegated migration control thus appears to fall within an accountability gap.[18]

11 Human Rights Commitee, *General Comment No. 36: Article 6 (The Right to Life)*, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 63; Human Rights Committee, *AS, DI, OI and GD v. Italy,* Communication No. 3042/2017, UN Doc. CCPR/C/130/D/3042/2017, 11 April 2021, para. 7.7 [*AS et al. v. Italy*]; Human Rights Committee, *Munaf v. Romania*, Communication No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006, 21 August 2009, para. 14.2.

12 Drawing on a 'special relationship of dependency', *AS et al. v. Italy, supra* note 11, para. 7.8; more generally M. den Heijer, *Europe and Extraterritorial Asylum* (2012), chap. 2 [den Heijer, *Extraterritorial Asylum*].

13 Pijnenburg, *supra* note 2, 323.

14 *Hirsi Jamaa and Others v. Italy*, ECtHR Application No. 27765/09, Judgment of 23 February 2012, paras 81-82 [*Hirsi*].

15 Pijnenburg, *supra* note 2, 310; T. Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law', 20 *European Journal of Migration and Law* (2018) 4, 373, 379. [Gammeltoft-Hansen, 'International Cooperation on Migration'].

16 I. Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013', 54 *Harvard International Law Journal* (2013) 2, 315, 372, 373.

17 *Ibid.*, 369.

18 Ciliberto, *supra* note 2, 491.

This gap could be filled by the concept of responsibility for complicity.[19] It derives responsibility from the principal's act.[20] Therefore, the jurisdictional hurdle must only be overcome to establish the wrongfulness of this principal act.[21] For the assisting State, it suffices that it knowingly rendered aid or assistance to the violation of a norm it is itself bound by.[22] Consequently, Art. 16 ASR's potential lies in the fact that it holds States accountable for facilitation, even when they did not exercise control over the principal act.[23] As such, it represents an alternative to current approaches to expanding the concept of extraterritorial jurisdiction. The argumentation proceeds on the presumption that Art. 16 ASR reflects custom.[24]

C. Abstract Applicability of Art. 16 ASR to the ICCPR

The first question that arises is whether Art. 16 ASR is at all applicable to breaches arising under the ICCPR. While the Commentary itself takes the applicability to human rights violations for granted,[25] this is not echoed in human rights adjudication. Instead, jurisprudence turns to due diligence to hold States responsible for acts connected to other States' human rights violations.[26] Both concepts will be presented before we explore their interrelation.

19 The term will be used interchangeably for aid or assistance.

20 M. Fink, 'A "Blind Spot" in the Framework of International Responsibility? Third-Party Responsibility for Human Rights Violations: The Case of Frontex', in T. Gammeltoft-Hansen & J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (2017), 277 [Fink, 'Blind Spot'].

21 *Ibid.*, 284.

22 V. Lanovoy, 'Complicity', *Max Planck Encyclopedias of International Law* (2015), para. 17 [Lanovoy, 'Complicity', *MPIL*].

23 K. Nahapetian, 'Confronting State Complicity in International Law', 7 *UCLA Journal of International Law and Foreign Affairs* (2002) 1, 99, 101.

24 Indicated by ASR Commentary, Yearbook of the International Law Commission (2001), Vol. II, Part Two, Art. 16 [7], 66 [ASR Commentary]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, para. 420 [*Bosnian Genocide*]; H. P. Aust, *Complicity and the Law of State Responsibility* (2011), chap 4.

25 ASR Commentary, *supra* note 24, Art. 16 [9].

26 B.III.1. below; M. den Heijer, 'Shared Responsibility Before The European Court of Human Rights', 60 *Netherlands International Law Review* (2013) 3, 411, 422 [den Heijer, 'Shared Responsibility'].

I. Responsibility for Complicity Under Art. 16 ASR

Art. 16 ASR reads:

> 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.

The provision establishes a State's responsibility for the contribution to the internationally wrongful act of another State.[27] Responsibility is *derivative* insofar as the conduct in itself may be lawful.[28] Wrongfulness only accrues after another State has committed a violation, to which the contribution was linked.[29] Then, however, contribution becomes an autonomous wrongful act of itself triggering responsibility.[30]

For delegated migration control, this means that the exerting third State retains primary responsibility; the sponsoring destination State additionally incurs responsibility for its aid or assistance.[31] The concept is driven by the idea that a State may not do by another what it cannot do by itself and thereby explicitly tackles the tactic behind indirect delegation.[32]

II. Responsibility for Disregard of Due Diligence

Responsibility for the behavior towards other States' wrongful acts can also follow from the failure to adhere to due diligence.[33] The duty to carry out due

27 J. Crawford, *State Responsibility: The General Part* (2013), 399.

28 V. Lanovoy, 'Complicity in an Internationally Wrongful Act', in A. Nollkaemper & I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014), 144 [Lanovoy, 'Complicity', *Principles of Shared Responsibility*].

29 Fink, 'Blind Spot', *supra* note 20, 277.

30 Lanovoy, 'Complicity', *MPIL*, *supra* note 22, para. 5.

31 Pijnenburg, *supra* note 2, 318.

32 A. Dastyari & A. Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy', 19 *Human Rights Law Review* (2019) 3, 435, 438.

33 A. A. D. Brown, 'To Complicity… and Beyond! Passive Assistance and Positive Obligations in International Law', 27 *Hague Yearbook of International Law* (2014), 133,

diligence entails the obligation to take all reasonably available means to prevent harm if a State knows or ought to have known of risks.[34] It is driven by the idea that, to an appropriate degree, States should carry responsibility for spheres under their control, resulting in the threefold criteria of foreseeability, capacity, and reasonableness.[35] In the human rights context, responsibility for the failure to adhere to due diligence was first imposed in the landmark decision Velásquez Rodríguez before the Inter-American Court of Human Rights (IACtHR).[36] Drawing on the obligation to *ensure* the rights of individuals within a State's jurisdiction in Art. 2(1), the HRC also recognized due diligence obligations under the ICCPR.[37] As for all human rights under the treaty, jurisdiction is indispensable for the obligation to arise.[38]

III. Overlap

In conceptual distinction from complicity, disregard of due diligence leads to *independent* responsibility,[39] arising from conduct that precedes the principal act.[40] Either way, the case constellations in which complicity and due diligence obligations are relevant significantly overlap. One prominent example is the *Bosnian Genocide* case, which dealt with Serbia's responsibility for the Srebrenica genocide.[41] Absent actual knowledge, the International Court of Justice (ICJ) could not establish complicity analogous to Art. 16 ASR.[42] It did find, however, that Serbia had breached its positive obligation to prevent the genocide.[43] For

149.

34 M. Monnheimer, *Due Diligence Obligations in International Human Rights Law* (2021), 117.

35 *Ibid.*, 267.

36 *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, IACtHR Series C, No. 4, para. 172.

37 CCPR, *General Comment No 31*, *supra* note 10, para. 8.

38 S. Kim, 'Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context', 30 *Leiden Journal of International Law* (2017) 1, 49, 67.

39 H. P. Aust & P. Feihle, 'Due Diligence in the History of the Codification of the Law of State Responsibility', in H. Krieger, A. Peters & L. Kreuzer (eds), *Due diligence in the International Legal Order* (2020), 55.

40 H. Moynihan, 'Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission's Articles on State Responsibility', 67 *International and Comparative Law Quarterly* (2018) 2, 455, 463 [Moynihan, 'Mental Element'].

41 *Bosnian Genocide*, *supra* note 24, 377-378.

42 *Ibid.,* 422-423.

43 *Ibid.,* 428-438.

this, it relied on the same factual arguments that would have been important under Art. 16 ASR, namely the political, military, and financial links between the Federal Republic of Yugoslavia and the Republika Srpska.[44] Thus, the ruling uses obligations to prevent as a functional alternative to establish responsibility for involvement in other States' wrongful acts.[45] Posing a lower threshold than Art. 16 ASR, duties of due diligence seemed to be the preferable option.[46] Den Heijer even proposes that human rights due diligence already contains the prohibition to facilitate assistance, rendering Art. 16 ASR useless under human rights law.[47]

1. Cases of Complicity in Extraordinary Rendition

The ECtHR's jurisprudence on extraordinary rendition cases seemingly approves this suggestion. Comparison is warranted because the *European Convention of Human Rights* (ECHR)[48] and the ICCPR grant similar substantive protection pending on jurisdiction.[49]

El-Masri dealt with Macedonia's participation in a terror suspect's ill-treatment, torture, and subsequent detention predominantly carried out at the hands of the Central Intelligence Agency (CIA) of the United States. In a departure from the general rules on attribution,[50] the Court held the ill-treatment at Skopje Airport to be "imputable" to Macedonia based on the "acquiescence or connivance" of the present Macedonian authorities and the fact that the actions took place within its jurisdiction.[51] Direct responsibility also resulted from the combination of positive obligations and facilitation despite

44 *Ibid.,* 422, 434; Aust, *supra* note 24, 402.

45 Aust, *supra* note 24, 403.

46 A. Liguori, Migration Law and the Externalization of Border Controls: European State Responsibility (2019), 34.

47 den Heijer, *Extraterritorial Asylum, supra* note 12, 103, 108.

48 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 [ECHR].

49 D. McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee', 65 *International and Comparative Law Quarterly* (2016) 1, 21, 42.

50 M. Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction', 27 *European Journal of International Law* (2016) 3, 817, 820.

51 *El-Masri v. the Former Yugoslav Republic of Macedonia,* ECtHR Application No. 39630/09, Judgment of 13 December 2012, para. 206 [*El-Masri*]; see also Human Rights Committee, *Mohammed Alzery v. Sweden,* Communication No. 1416/2005 UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006, para. 11.6 [*Mohammed Alzery*].

constructive knowledge.[52] The Court held on to this approach in *Al Nashiri,*[53] *Husayn,*[54] *Nasr*,[55] and *Abu Zubaydah.*[56] Although Art. 16 ASR was listed as relevant law in all cases, the Court did not assess the facilitation in terms of derived responsibility.[57] Instead, it framed questions of facilitation essentially as breaches of States' positive human rights obligations.[58]

2. Cases of Extraterritorial Complicity

However, the perception of Art. 16 ASR as expendable erodes once a case deals with aid or assistance rendered beyond jurisdictional borders. One of the rare examples is *Tugar* which concerned the illegal sale of anti-personnel mines from Italy to Iraq and their usage in human rights violations.[59] The former European Commission on Human Rights dismissed the case as inadmissible, referring to the lack of an "immediate relationship" between supply and violations. In contrast to extradition that posed an act of jurisdiction, Italy's failure to regulate the arms transfers had been "too remote to attract the Italian

52 *El-Masri*, *supra* note 51, paras 211, 239.

53 *Al Nashiri v. Poland*, ECtHR Application No. 28761/11, Judgment of 24 July 2014, paras 452, 517; *Al Nashiri v. Romania*, ECtHR Application No. 33234/12, Judgment of 31 May 2018, para. 595 [*Al Nashiri*].

54 *Husayn (Abu Zubaydah) v. Poland*, ECtHR Application No. 7511/13, Judgement of 24 July 2014, para. 512 [*Husayn*].

55 *Nasr and Ghali v. Italy*, ECtHR Application No 44883/09, Judgment of 23 Febuary 2016, para. 243 [*Nasr*].

56 *Abu Zubaydah v. Lithuania*, ECtHR Application No. 46454/11, Judgment of 31 May 2018, para. 582 [*Abu Zubaydah*].

57 *El-Masri*, *supra* note 51, para. 97; *Al Nashiri*, *supra* note 53, para. 207; *Al Nashiri v. Romania, supra* note 53, para. 210; *Husayn*, *supra* note 54, para. 201; *Nars, supra* note 55, para. 185; *Abu Zubaydah, supra* note 56, para. 232.

58 J. Crawford & A. Keene, 'The Structure of State Responsibility Under the European Convention on Human Rights', in A. van Aaken & I. Motoc (eds), *The European Convention on Human Rights and General International Law*, Vol. 1 (2018), 189; H. Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (2016), Chathamhouse Research Paper, para. 91, available at https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf (last visited 11 February 2024); A. Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?' (21 December 2012), EJIL: Talk!, available at https://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/ (last visited 11 February 2024).

59 European Commission of Human Rights, *Application No. 22869/93, Tugar v. Italy* (1995), 83-A DR 26.

responsibility". The Commission only discussed the positive obligations of Italy, which, in the absence of a link establishing jurisdiction, were not triggered. Derived responsibility under Art. 16 ASR, on the other hand, rests on the precise idea that it is possible to rely on another State's conduct being the "decisive cause"[60] when links are too remote to establish *direct* responsibility of the assisting State.[61] It provides for a mechanism that holds States responsible even for *indirect* involvement in wrongful acts if this is deemed appropriate in view of the significance of their actions.[62]

IV. Dismissal of the Lex Specialis Claim

Thus, it is crucial to establish that Art. 16 ASR complements due diligence obligations. Particularly, this article advocates the opinion that due diligence does not replace Art. 16 ASR as *lex specialis*. In the context of State responsibility, the doctrine of *lex specialis*[63] has found expression in Art. 55 ASR. Within this provision, the ASR foresee the possibility of being suspended by special secondary rules contained in specific instruments.[64] For the principle to apply, the opposing norms must deal with the same subject matter[65] and conflict with one another.[66] The Commentary defines such conflict as "actual inconsistency […] or else a discernible intention that one provision is to exclude the other".[67] Beyond instances of contradiction,[68] conflicts can thus also arise when interpretation suggests that the special rule is intended to apply autonomously.[69]

60 *Ibid*.
61 den Heijer, *Extraterritorial Asylum*, *supra* note 12, 109.
62 *Ibid.,* 111.
63 *Report of the Study Group of the International Law Commission to the Fifty-Eighth Session*, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, para. 102.
64 ASR Commentary, *supra* note 24, Art. 55 [2]; B. Simma & D. Pukolwski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', 17 *European Journal of International Law* (2006) 3, 483, 486.
65 G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points', 33 *British Yearbook of International Law* (1957), 203, 237.
66 A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis', 74 *Nordic Journal of International Law* (2005) 1, 27, 44.
67 ASR Commentary, *supra* note 24, Art. 55 [4].
68 Lindroos, *supra* note 66, 45.
69 ASR Commentary, *supra* note 24, Art. 55 [4].

The principle of *lex specialis* ranges from fully self-contained regimes that ban any recourse to general rules of international law[70] to weaker special regimes containing *lex specialis* only for singular norms.[71] IHRL constitutes the latter. Human rights bodies frequently rely on principles codified in the ASR.[72] Nevertheless, to justify individual departures from the ASR,[73] reference has been made to human rights' special character.[74] It must therefore be assessed whether the application of Art. 16 ASR is compatible with this special character.

1. Divergence From Standard Secondary Rules

Primary rules are those which establish the rights and obligations of States and define wrongful conduct.[75] Secondary rules, which the ILC intended to constrain the ASR to,[76] elaborate on the legal consequences of breaches of primary rules.[77] Operating on distinct levels, it has been argued that primary and secondary rules do not relate to the same subject matter.[78] Thus, there is some appeal to the argument that substantive due diligence obligations under IHRL as primary rules cannot, as a matter of principle, be *lex specialis* to the rules on State responsibility.[79] However, the Commentary itself recognizes that instances of derived responsibility cross the artificial border between primary

70 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, para. 86; D. M. Banaszewska, 'Lex Specialis', Max Planck Encyclopedias of International Law (2015), para. 21; Simma & Pukolwski, *supra* note 64, 493.

71 ASR Commentary, *supra* note 24, Art. 55 [5]; Banaszewska, *supra* note 70, para. 6.

72 Report of the Secretary-General, *Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies*, UN Doc. A/71/80/Add.1, 20 June 2017, counting a total of 65 references from 2001 to 2016.

73 E.g. *Mohammed Alzery*, *supra* note 51, para. 11.6.

74 *Mapiripan Massacre v. Colombia,* Judgment of 15 September 2005, IACtHR Series C, No. 134, para. 107; *Banković and Others v. Belgium and Others,* ECtHR Application No. 52207/99, Judgment of 12 December 2001, para. 57.

75 E. David, 'Primary and Secondary Rules', in J. Crawford (ed.), *The Law of International Responsibility* (2010), 27.

76 *Report of the International Law Commission on the Work of its Thirts-Second Session*, UN Doc. A/35/10 27, 5 May-25 July 1980, para. 23.

77 *Second Report on State Responsibility of Special Rapporteur Roberto Ago*, UN Doc. A/CN.4/233, 20 April 1970, para. 11.

78 A. Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System', 22 *European Journal of International Law* (2011) 4, 993, 1020.

79 Aust, *supra* note 24, 417.

and secondary rules.[80] Beyond outlining the consequences of a wrongful act, complicity expands responsibility for conduct that would otherwise be lawful to States which would otherwise not bear responsibility.[81] Therefore, it is most plausible to assume with Lanovoy and Aust that its nature lies somewhere between a primary and a secondary rule.[82] In light of this, the *lex specialis* claim cannot be generally precluded.[83] Rather, the described overlap indicates relation to the same subject matter, fulfilling the first criteria of *lex specialis*. To dismiss the *lex specialis* claim, it is therefore necessary to show that the two concepts are not in conflict.

2. Dispensability of Due Diligence's Precondition of Jurisdiction

The crucial question is whether due diligence obligations, hinging on jurisdiction, are intended to apply autonomously. Put differently, is jurisdiction of the assisting State indispensable to establish its responsibility for contributing to human rights violations?[84]

First of all, an explanation for the case law's reliance on due diligence instead of Art. 16 ASR is that it enables courts to circumvent rulings on the responsibility of the principal actor.[85] In the ECtHR cases, this was useful because the US was not a party to the ECHR, and therefore the court had no jurisdiction over its actions. However, this is a question of procedure, not of responsibility as such.[86] It does not allow conclusions as to the *lex specialis* character.

Secondly, one could consider that functionally, jurisdictional clauses impose a limitation on responsibility that competes with the general rules of State responsibility.[87] In the human rights context, the notion of jurisdiction departs from its traditional function to determine a State's legal competencies.

80 ASR Commentary, *supra* note 24, chap. IV [7].
81 Aust, *supra* note 24, 188-189.
82 Lanovoy, 'Complicity', *Principles of Shared Responsibility*, *supra* note 28, 139; Aust, *supra* note 24, 417.
83 *Ibid.*
84 Monnheimer, *supra* note 34, 265.
85 Cf. *Abu Zubaydah*, *supra* note 56, para. 584.
86 ASR Commentary, *supra* note 24, Art. 16 [11].
87 A. Klug & T. Howe, 'The Concept Of State Jurisdiction And The Applicability Of The Non-Refoulement Principle To Extraterritorial Interception Measures', in B. Ryan & V. Mitsilegas (eds), *Extraterritorial Immigration Control* (2010), 98.

Instead, it depicts direct links between the individual and the operating State.[88] The jurisdictional clause confines the reach of human rights obligations along those lines.[89] However, reading Art. 2(1) ICCPR as an exhaustive limitation would not align with a purpose-oriented interpretation following Art. 31(1) of the *Vienna Convention on the Law of Treaties* (VCLT):[90] The Covenant seeks to hold States accountable for human rights-violating conduct within their sphere of influence. Especially new forms of "contactless control"[91] such as funding, training, and equipping pose in the scale of their present occurrence risks not envisaged when the system was created.[92] This proves that jurisdiction alone is no longer a workable criterion to serve its purpose.[93] In *Soering*, the ECtHR argued that the nature of human rights treaties dictates an interpretation that renders the guaranteed rights effective.[94] The ruling has been read by some as pointing towards a general principle according to which a State must "refrain from any act that may facilitate human rights violations by other actors, even if it does not exercise effective control in that particular situation."[95] In sum, States must also be bound beyond their jurisdiction "when this would be reasonable in light of the specific facts of a case".[96]

88 Den Heijer, *Extraterritorial Asylum, supra* note 12, 111; F. Baxewanos, 'Relinking Power and Responsibility in Extraterritorial Immigration Control: The Case of Immigration Liaison Officers', in Gammeltoft-Hansen & Vedsted-Hansen, *supra* note 20, 199; Aust, *supra* note 24, 408.

89 Monnheimer, *supra* note 34, 265; Ciliberto, *supra* note 2, 521; resisting on jurisdiction as prerequisite for responsibility: S. Besson, 'The Sources of International Human Rights Law: How General Is General International Law?', in S. Besson & J. D'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (2018), 867; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), 125; Kim, *supra* note 38, 67.

90 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT].

91 Giuffré & Moreno-Lax, *supra* note 2.

92 Monnheimer, *supra* note 34, 320.

93 Baxewanos, *supra* note 88, 200; O. De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', 6 *Baltic Yearbook of International Law* (2006), 183, 245.

94 *Soering v. the United Kingdom,* ECtHR Application No. 1/1989/161/217, Judgment of 7 July 1989, para. 87 [*Soering*].

95 Baxewanos, *supra* note 88, 201; similarly, T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2013), 203 [Gammeltorf-Hansen, *Access to Asylum*]; however, such interpretation can be criticized for being too extensive as *Soering* dealt with an extradition situation where the individual had been present on the State's territory.

96 R. Jorritsma, 'Unravelling Attribution, Control and Jurisdiction: Some Reflections on the Case Law of the European Court of Human Rights', in H. Ruiz Fabri (ed.), *International*

Finally, the limitation to jurisdiction is motivated by the attempt to prevent excessive liability.[97] In principle, this endeavor is reasonable. It acknowledges the autonomy of sovereign States and resists the temptation to hold States with high human rights standards liable for all violations happening around the world. Without such limitation, States were likely to refrain also from desirable forms of cooperation, fearing that they would be held accountable for their partners' poor human rights records.[98] Hence, the problem is not the limitation of responsibility itself. The problem is the basis on which the concept of jurisdiction makes this limitation. Since Art. 16 ASR focuses on the factual contribution to human rights violations, rather than the executing actor, the argument this paper advances is that proliferation which discourages any form of cooperation can be more appropriately contained by a narrow scope of Art. 16 ASR than by general exclusion.[99] To conclude, interpretation suggests that a complementary application of Art. 16 ASR, besides due diligence responsibility conditional on jurisdiction, serves the ICCPR's purpose of counter-balanced human rights protection.[100] Hence, Art. 16 ASR is not replaced by *lex specialis*.[101]

D. Concrete Applicability of Art. 16 ASR to Italy's Contribution

Having established that Art. 16 ASR is applicable to violations of the ICCPR, the analysis will test whether it is capable of establishing responsibility for delegated migration control, using the example of Italian-Libyan cooperation under the MoU.

Law and Litigation (2019), 672.

97 Monnheimer, *supra* note 34, 266.

98 Aust, *supra* note 24, 266; G. Nolte & P. Aust, 'Equivocal Helpers - Complicit States, Mixed Messages and International Law', 58 *International and Comparative Law Quarterly* (2009) 1, 1, 15.

99 Aust, *supra* note 24, 266-267.

100 A. Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?', 60 *German Yearbook of International Law* (2018), 667, 705.

101 Straightforwardly applying Art. 16 ASR to human rights violations: Pijnenburg, *supra* note 2, 327, 329; Giuffré & Moreno-Lax, *supra* note 2, 102; Dastyari & Hirsch; *supra* note 32, 435; M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (2018), 167 [Fink, *Frontex*].

I. Cooperation of Italy and Libya Under the *Memorandum of Understanding*

For several years, Libya was a destination country for migrants and refugees. However, in 2000, a shift in labor policies and regime-fueled racist riots caused increasing movement towards Europe.[102] Given its geographical position and the Dublin system, this affected Italy the most.[103] In response, it arranged multiple bilateral agreements with Libya to reduce the migration flow.[104] The latest of those agreements is the non-binding MoU signed in 2017 with the Government of National Accord and renewed in 2020.[105] It aims to resume and extend cooperation practiced before the fall of the Gaddafi regime in 2011, particularly as laid down in the 2008 *Treaty of Friendship*.[106]

The objective of the cooperation is expressly to "stem illegal migration flows".[107] For this purpose, Italy commits to provide "technical and technological" support to Libyan institutions in charge of migration, particularly the Libyan Coast and Border Guard as well as the Department for Combating Illegal Migration (DCIM).[108] Provisions have taken the form of military patrol boats donated by Italy, training, knowledge sharing, and capacity-building.[109] The MoU assigns the financing of all listed measures to Italy.[110] It also identifies Italian and EU funds as resources to facilitate the "reception centers",[111] by which the DCIM detention centers are meant.[112] Both States commit to train the reception personnel "to face the illegal immigrants' conditions".[113] Although the Memorandum dictates the observance of international obligations and human

102 C. Heller & L. Pezzani, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration across the Mediterranean' (2018), Forensic Oceanography, 21, available at https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf (last visited 11 February 2024).

103 G. Pascale, 'Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?', 56 *Questions of International Law* (2019), 35, 38.

104 Dastyari & Hirsch, *supra* note 32, 446.

105 MoU, *supra* note 8.

106 *Ibid.,* Preamble.

107 *Ibid.,* Art. 1.

108 *Ibid.*, Art. 1(c).

109 Ciliberto, *supra* note 2, 499.

110 MoU, *supra* note 8, Art. 4.

111 *Ibid.,* Art. 2(2).

112 M. Mancini, 'Italy's New Migration Control Policy: Stemming the Flow of Migrants From Libya Without Regard for Their Human Rights', 27 *Italian Yearbook of International Law Online* (2018), 259, 262.

113 MoU, *supra* note 8, Art. 2(3).

rights,[114] cooperation is not made conditional upon such compliance. The entire document does not differentiate between refugees and other migrants.[115] This is particularly precarious because Libya is neither a party to the 1951 *Refugee Convention*[116] nor has it a domestic asylum system in place.[117] In essence, the MoU sets the framework for an exhange of funding, training, and equipment against the containment of people on the move.[118]

II. Ill-Treatment Upon Detention in Libya

As a precondition, Art. 16 ASR requires the internationally wrongful act of another State.[119] When it comes to Libya's treatment of migrants and refugees, there is a wide range of human rights under attack.[120] Besides the violation of the right to leave,[121] return is regularly accompanied by exposure to severe harm. For this article, the ill-treatment migrants and refugees experience in DCIM detention centers upon return shall be of particular interest. Focus is placed on State-run centers because those scenarios pose no problems of attribution.[122] Violations of the prohibition of torture are omitted because its *jus cogens* nature warrants special consequences of responsibility under Art. 41(2) ASR.[123] Accordingly, the relevant norm is the prohibition of ill-treatment under Art. 7(1) ICCPR which reads, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." It is supplemented by Art. 10(1) ICCPR, according to which "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[124] States are regularly in breach of Art. 7(1) ICCPR when detainees

114 *Ibid.,* Art. 5.

115 E. Vari, 'Italy-Libya Memorandum of Understanding Italy's International Obligations', 43 *Hastings International and Comparative Law Review* (2020) 1, 105, 113; Liguori, *supra* note 46, 10; Mancini, *supra* note 112, 263.

116 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 [*Refugee Convention*].

117 Vari, *supra* note 115, 116; Liguori, *supra* note 46, 12.

118 Pascale, *supra* note 103, 39.

119 ASR, *supra* note 6, Art. 2.

120 For an overview see Dastyari & Hirsch, *supra* note 32, 456-457.

121 N. Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', 27 *European Journal of International Law* (2016) 3, 591.

122 Liguori, *supra* note 46, 34.

123 Lanovoy, 'Complicity', *MPIL*, *supra* note 22, para. 4.

124 Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 2;

experience violent treatment upon detention,[125] whereas general poor conditions are addressed under Art. 10(1) ICCPR.[126] Often, however, the HRC finds a combination of both norms.[127]

In Libya, there is no asylum system in place, and irregular entry and stay are criminalized.[128] Consequently, most of those disembarked in Libya are captured in detention centers.[129] Those centers are vastly overcrowded. More than 4,300 migrants and refugees are confirmed to be detained in DCIM centers, although the number of unreported cases is significantly higher.[130] Detainees suffer from malnutrition and medical care is not ensured.[131] Human

Human Rights Committee, *General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, para. 3.

125 S. Joseph & M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed. (2014), para. 9.135; Human Rights Committee, *Wilson v. Philippines,* Communication No. 868/1999, UN Doc. CCPR/C/79/D/868/1999, 11 November 2003, para. 7.3.

126 Joseph & Castan, *supra* note 125, para. 9.134; Human Rights Committee, *Griffin v. Spain,* Communication No. 493/1992, UN Doc. CCPR/C/53/D/493/1992, 5 April 1995, para. 3.1; Human Rights Committee, *Kennedy v. Trinidad and Tobago,* Communication No. 845/1998, UN Doc. CCPR/C/74/D/845/1998, 26 March 2002, paras 7.7-7.8.

127 Human Rights Committee, *Portorreal v. Dominican Republic,* Communication No. 188/1984, UN Doc. CCPR/C/31/D/188/1984, 5 November 1987, paras 9.2, 11; Human Rights Committee, *Linton v Jamaica,* Communication No. 255/1987, UN Doc. CCPR/C/46/D/255/1987, 2 November 1992, para. 8.5; Human Rights Committee, *Brown v. Jamaica,* Communication No. 775/1997, UN Doc. CCPR/C/65/D/775/1997, 23 March 1999, para. 6.13; *Wilson v. Philippines*, *supra* note 125, para. 7.3.

128 *Report of the Secretary-General Pursuant to Security Council Resolution 2491 (2019)*, UN Doc. S/2020/876, 6 April 2020, para. 12.

129 *Ibid.,* 10, 13; United Nations Support Mission in Libya & Office of the United Nations High Commissioner for Human Rights, *"Detained and Dehumanised": Report on Human Rights Abuses Against Migrants in Libya* (13 December 2016), 19-20, available at https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf (last visited 11 February 2024) [UNSMIL & UNOHCHR]; Amnesty International, *Libya's Dark Web of Collusion. Abuses Against Europe-Bound Refugees and Migrants*' (2017), 28, 40, available at https://www.amnesty.org/en/documents/mde19/7561/2017/en/ (last visited 11 February 2024) [Amnesty, *Libya's Dark Web of Collusion*].

130 *Report of the Secretary-General on United Nations Support Mission in Libya*, UN Doc. S/2021/451, 11 May 2021, para. 55.

131 Amnesty International, *"Between Life and Death": Refugees and Migrants Trapped in Libya's Cycle of Abuse* (24 September 2020), 28-30, available at https://www.amnesty.org/en/documents/mde19/3084/2020/en/ (last visited 11 February 2024) [Amnesty, *Between Life and Death*]; UNSMIL & UNOHCHR, *supra* note 129, 15-17; *Report of the Secretary-General Pursuant to Security Council Resolution 2312 (2016)*, UN Doc. S/2017/761, 7 September 2017, paras 40-42.

rights reports testify that detainees regularly face severe beatings by officers for extortion[132] and sexual violence for humiliation.[133] In light of this, Libya violates Art. 7(1) and Art. 10(1) ICCPR.[134]

III. Substantial Requirements of Art. 16 ASR

Art. 16 ASR demands aid and assistance furnished in the possession of a mental element and the opposability of norms.

1. Material Element: Broadness of Aid or Assistance

The contribution must constitute aid or assistance in the sense of Art. 16 ASR.[135] Neither the ASR nor the Commentary give an abstract definition of what "aid or assistance means".[136] Complicity is discussed for *inter alia* permission to use territory, supply of economic aid or intelligence, and training of personnel.[137] It covers a wide range of activities.[138] *Crawford* points to this when he says: "no limitation is placed on the precise form of the aid or assistance in question – all that is required is a causative contribution to the illegal act."[139]

To establish such a causal nexus, attention must be paid to the impact rather than the type of conduct.[140] For this reason, the classification does not draw on a numerated list of activities but relies on a case-by-case assessment.[141] However, the precise threshold for such a link between the aid or assistance and the principal act is unsettled.[142] The Commentary stipulates that aid or

132 Amnesty, *Between Life and Death*, *supra* note 131, 28; Amnesty, *Libya's Dark Web of Collusion*, *supra* note 129, 22, 30-31.

133 *Report of the Secretary-General Pursuant to Security Council Resolution 2491 (2019)*, *supra* note 128, para. 15.

134 *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Libya*, UN Doc. A/HRC/37/46, 21 February 2018, para. 43.

135 Since the expressions are indistinguishable, they may be used interchangeably, see Aust, *supra* note 24, 197.

136 *Ibid*., 195; V. Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (2016), 165 [Lanovoy, *Complicity and Its Limits*].

137 Special Rapporteur J. Crawford, *Second Report on State Responsibility*, UN Doc. A/CN.4/498, 19 July 1999, 50, fn 349.

138 Giuffré & Moreno-Lax, *supra* note 2, 101.

139 Crawford, *supra* note 27, 402.

140 Fink, 'Blink Spot', *supra* note 20, 280.

141 Aust, *supra* note 24, 209; Lanovoy, *Complicity and Its Limits*, *supra* note 136, 184.

142 Crawford, *supra* note 27, 402-403; M. Jackson, *Complicity in International Law* (2015), 156-157 [Jackson, *Complicity*].

assistance must not be "essential" but must have "significantly" facilitated the commission of the internationally wrongful act.[143] To borrow the words of the Irish High Court, complicity is "a matter of substance and degree".[144] Despite the Commentary's dubious referral to assistance having "only incidental factors",[145] it is assumed that contribution must at least overcome a *de minimis* threshold.[146] On the other hand, the contribution must also not be too direct, as the State would then become a co-perpetrator incurring direct responsibility.[147]

Italy's funding, training, and equipping under the terms of the MoU poses aid or assistance of a sufficiently causal link.[148] Upon cooperation, interceptions by the Libyan Coast Guard, primarily deploying maritime patrol boats provided by Italy,[149] have significantly increased.[150] 2021 constituted a peak with over 32,000 returns. In 2022, nearly 25,000 people were returned.[151] The rise in numbers further worsens detention conditions.[152] Although Italy is framing its funding as humanitarian aid,[153] those centers would inoperable without its aid.[154] Scholars, therefore, agree that Italy's activities satisfy the material element under Art. 16 ASR.[155]

143 ASR Commentary, *supra* note 24, Art. 16 [5].

144 *Edward Horgan v. An Taoiseach and Others*, Irish High Court, Application Declaratory Relief (2003), IEHC 64, para. 174.

145 ASR Commentary, *supra* note 24, Art. 16 [10].

146 Nolte & Aust, *supra* note 98, 10; Lanovoy, *Complicity and Its Limits*, *supra* note 136, 185; Jackson, *Complicity*, *supra* note 142, 158.

147 *Report of the International Law Commission on the work of Its Thirtieth Session,* UN Doc A/33/10, 8 May-28 July 1978, 99, para. 2; Aust, *supra* note 24, 212; Pascale, *supra* note 103, 49.

148 Liguori, *supra* note 46, 25.

149 Heller & Pezzani, *supra* note 102, 44.

150 *Ibid.,* 54.

151 See International Organization for Migration, *IOM Libya's Maritime Update on Twitter*, https://twitter.com/IOM_Libya/status/1610263422125461505 (last visited 11 February 2024).

152 Heller & Pezzani, *supra* note 102, 85; Mancini, *supra* note 112, 260, 274.

153 Pascale, *supra* note 103, 43.

154 *Ibid.,* 53; Dastyari & Hirsch, *supra* note 32, 450.

155 Among others: Hathaway & Gammeltoft-Hansen, *supra* note 4, 279; Pijnenburg, *supra* note 2, 329; Vari, *supra* note 115, 130; Ciliberto, *supra* note 2, 523.

2. Mental Element: Ranging From Knowledge to Intent

The mental element under Art. 16(a) ASR is designed to narrow the scope of application given the broadness of the material element.[156] Its specific content is subject to heated debate fueled by the discrepancy between the wording and the Commentary. The former requires "knowledge of the circumstances of the internationally wrongful act". In contrast, the latter instructs that aid must be given "with a view to facilitating" the act.[157] The word "view" suggests that merely an awareness rather than a planned purpose is required.[158] Shortly afterward, however, the Commentary stipulates that a State should not be responsible unless it "intended [...] to facilitate the occurrence of the wrongful conduct".[159]

The current state of debate ranges between knowledge versus intent. Many scholars propose that actual knowledge or virtual certainty would suffice to satisfy the mental element.[160] This view seemingly finds support in the *Bosnian Genocide* case, where the ICJ explained that complicity requires "at the least knowledge".[161] Others even accept constructive knowledge arguing that a State should incur responsibility once it "should have known" of the unlawful use of its assistance.[162] Lowering the threshold so severely ignores that States must be able to assume in good faith that their aid is not misused. However, this cannot prevail in the face of profound evidence of illegality.[163] Therefore, it is argued that instances of willful blindness where States deliberately ignore illegality could be equated with actual knowledge.[164]

In the other extreme, one could interpret Art. 16 ASR as requiring actual intent in the sense of purpose.[165] This contradicts the general rule of State responsibility, according to which, in the absence of a mental requirement within

156 B. Graefrath, 'Complicity in the Law of International Responsibility', 29 *Revue Belge de Droit International* (1996) 2, 370, 376.

157 ASR Commentary, *supra* note 24, Art. 16 [5].

158 Nahapetian, *supra* note 23, 108.

159 ASR Commentary, *supra* note 24, Art. 16 [5].

160 Jackson, *Complicity, supra* note 142, 161; Lanovoy, 'Complicity', *Principles of Shared Responsibility*, *supra* note 28, 156; Moynihan, 'Mental Element', *supra* note 40, 455.

161 *Bosnian Genocide*, *supra* note 24, para. 421, however, the ICJ only referred to Art. 16 ASR for comparison. Essentially, it dealt with a primary rule of complicity under Art. III Genocide Convention.

162 Hathaway & Gammeltoft-Hansen, *supra* note 4, 281.

163 Moynihan, 'Mental Element', *supra* note 40, 462-463; Aust, *supra* note 24, 248; Lanovoy, *Complicity and Its Limits*, *supra* note 136, 234-235.

164 Hathaway & Gammeltoft-Hansen, *supra* note 4, 281; Ciliberto, *supra* note 2, 524.

165 Aust, *supra* note 24, 237.

the primary obligation, only the act of the State matters.[166] Critics, particularly Graefrath, suggest that a requirement of intent would render the norm practically "unworkable".[167] It would pose a threshold that States would hardly ever surpass.[168] Moreover, proving a State's inner motives would be complicated. For one, intent could not be inferred from an individual official's state of mind. Meanwhile, public declarations would not disclose actual motives but paint the image a State wants to convey.[169] Most importantly, a strict understanding of intent would exclude the multitude of cases in which States accept the resulting violations while rendering assistance mainly for their own purposes.[170] However, such deliberate indifference is crucial for constellations, in which powerful States cooperate with States with weaker human rights records.

The core of the conflict is that responsibility must be reasonably limited without rendering the whole provision useless.[171] As has been argued, limitation is necessary from a legal-policy perspective to not deter States from desirable international cooperation.[172] Added to that, Art. 16 ASR engages responsibility for behavior that is per se lawful.[173] Drawing thereon, Aust argues that, doctrinally, additional intent as an element of fault is essential to justify responsibility.[174] On the other hand, Art. 16 ASR is only effective if it also covers cases where States calculate the wrongful act as an incidental cost of their personal motives[175] and if it excludes the possibility to escape from responsibility unilaterally.[176] Alongside

166 ASR Commentary, *supra* note 24, Art. 2 [10]; Lanovoy, 'Complicity', *Principles of Shared Responsibility*, *supra* note 28, 152; Aust, *supra* note 24, 232.

167 Graefrath, *supra* note 156, 375; similarly, J. Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57 *British Yearbook of International Law* (1987), 77, 111; Giuffré & Moreno-Lax, *supra* note 2, 102.

168 M. den Heijer, 'Europe Beyond Its Borders: Refugee And Human Rights Protection In Extraterritorial Immigration Control', in B. Ryan & V. Mitsilegas (eds), *Extraterritorial Immigration Control* (2010), 195; M. Gibney, K. Tomasevski & J. Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights', 12 *Harvard Human Rights Journal* (1999), 267, 294; Giuffré & Moreno-Lax, *supra* note 2, 102.

169 Nahapetian, *supra* note 23, 110, 126; Quigley, *supra* note 167, 111; Fink, 'Blind Spot', *supra* note 20, 280.

170 Giuffré & Moreno-Lax, *supra* note 2, 102; Nahapetian, *supra* note 23, 126; Quigley, *supra* note 167, 111.

171 Cf. B.IV.2.

172 Aust, *supra* note 24, 266; Nolte & Aust, *supra* note 98, 15.

173 Special Rapporteur Roberto Ago, *Seventh Report on State Responsibility*, UN Doc. A/CN.4/307, 29 March, 17 April, 4 July 1978, para. 72.

174 Aust, *supra* note 24, 238-239.

175 Nahapetian, *supra* note 23, 126-127.

176 Moynihan, 'Mental Element', *supra* note 40, 466; Nolte & Aust, *supra* note 98, 15.

Crawford, reconciliation may be found in adopting an intent element that can be imputed by actual knowledge.[177] It is argued that assistance in the face of actual knowledge would demonstrate intent because anticipated consequences could always be conceived as intended.[178] This interpretation, which is supplemented by a comparative reading of Art. 30(2)b *Rome Statute*,[179] understands intent as intentional conduct rather than volitional desire.[180] This approach is in line with the explanations accompanying the drafting process of Art. 16 ASR. As early as 1978, Special Rapporteur Ago indicated that knowledge could be used to establish intent.[181] In 1999, when the ILC adopted the final wording, Special Rapporteur Crawford noted that the mental element would "retain the element of intent, which can be demonstrated by proof of rendering aid or assistance with knowledge of the circumstances".[182]

According to the MoU, the purpose of the cooperation is to stem the migration flow. Thus, Italy directly aimed for the containment of asylum seekers but not for the subsequent ill-treatment in detention centers.[183] Nevertheless, applying the previous findings, intent can be assumed because Italy had positive knowledge of the detention conditions. Its interaction with the Committee against Torture testifies to this.[184] In light of the numerous reports publicly declaring the human rights risks upon containment and the consequences of cooperation, Italy can also be found to have had actual knowledge of the contributing factor of its assistance.[185]

177 Crawford, *supra* note 27, 408; Jackson, *Complicity, supra* note 142, 160; Nolte & Aust, *supra* note 98, 15; Fink, *Frontex, supra* note 101, 164; Moynihan, 'Mental Element', *supra* note 40, 468.

178 V. Lowe, 'Responsibility for the Conduct of Other States', 101 *Journal of International Law and Diplomacy* (2002) 1, 1, 8; R. Mackenzie-Gray Scott, 'State Responsibility for Complicity in the Internationally Wrongful Acts of Non-State Armed Groups', 24 *Journal of Conflict and Security Law* (2019) 2, 373, 398.

179 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 [Rome Statute]; Mackenzie-Gray Scott, *supra* note 178, 399.

180 Fink, 'Blind Spot', *supra* note 20, 281.

181 Special Rapporteur Ago, *Seventh Report on State Responsibility*, *supra* note 173, para. 72.

182 Special Rapporteur Ago, *Second Report on State Responsibility*, *supra* note 173, para. 188, fn. 362.

183 Ciliberto, *supra* note 2, 524.

184 Committee Against Torture, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy*', CAT/C/ITA/CO/5-6, 18 December 2017, para. 22; Vari, *supra* note 115, 130.

185 Ciliberto, *supra* note 2, 524; s above, particularly Amnesty, *Libya's Dark Web of Collusion*, *supra* note 129, 56-58.

3. Opposability of Norms

Finally, Art. 16(b) ASR requires that the aided and aiding State are bound by the same obligation.[186] Regardless of the discussion whether non-identical human rights obligations of the same content are sufficient,[187] opposability is certainly given because Italy and Libya are both parties to the ICCPR and thus subject to the obligations under Art. 7(1) and 10(1). For these reasons, Italy does incur responsibility under Art. 16 ASR for contributing to the ill-treatment of migrants and refugees in Libyan detention centers.

E. Conclusion

The underlying question this article has addressed is to what extent it is *appropriate* to hold destination States responsible for their involvement in containment and the resulting human rights violations. Despite human rights' theoretically universal nature, human rights treaties rest on the presumption that the observance of their compliance can reasonably be assigned only to the State, which stands in a relationship to the individual.[188] Problematically, the concept of jurisdiction proves incapable of detecting indirect links within the modern nets of cooperation and the multiplication of actors.[189] Delegated migration control serves to naturalize the containment of migration flows in distant States and makes the phenomenon appear both physically and ethically distant from destination States.[190] Art. 16 ASR serves as a remedy for this defect because it is capable of additionally assigning responsibility to initiating destination States. The article has proven that it is not replaced by *lex specialis*. Given its mental threshold and the appraisal of individual facts, its application also does not lead to the dreaded human rights imperialism.

Against this background, why is it that the provision is still highly underused by courts?[191] Prima facie, the answer is that courts hold on to the rebutted perception that Art. 16 ASR is displaced by the jurisdictional clauses

186 ASR Commentary, *supra* note 24, Art. 16 [6] drawing on the *pacta tertiis* rule codified in Art. 34, 35 VCLT.

187 Lanovoy, 'Complicity', *Principles of Shared Responsibility, supra* note 28, 159.

188 S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To', 25 *Leiden Journal of International Law* (2012) 4, 857, 860.

189 Baxewanos, *supra* note 88, 200.

190 Moreno-Lax & Lemberg-Pedersen, *supra* note 1, 8.

191 Monnheimer, *supra* note 34, 48; Gammeltoft-Hansen, 'International Cooperation on Migration' *supra* note 15, 382.

in Art. 2(1) ICCPR. Below this lays the submission to a political reality,[192] which demonstrates a general skepticism towards migration and legitimizes protectionism over Europe.[193] Rather than risking political backlash to progressive rulings, courts pursue a gradual approach that governments are more willing to go along with. However, the progress achieved this way remains insignificant: instead of setting an end to the practice itself, expanding notions of jurisdiction are answered by adjusted migration control.

It remains to be hoped that the authority of the existing law will be restored and that both the courts and the public will condemn the practice of delegating migration control to actors who disregard human rights for what it is: an act of complicity under Art. 16 ASR, by which destination States themselves incur responsibility for severe human rights violations.

192 Cf. M Blauberger *et al.*, 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence', 25 *Journal of European Public Policy* (2018) 10, 1422, 1429.

193 A. Pijnenburg & K. van der Pas, 'Strategic Litigation Against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route', 24 *European Journal of Migration and Law* (2022) 3, 401, 426.